NORTH CAROLINA REPORTS

VOL. 241

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1954

SPRING TERM, 1955

REPORTED BY

JOHN M. STRONG

RALEIGH
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1955

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1954—SPRING TERM, 1955.

CHIEF JUSTICE:

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ASSOCIATE JUSTICES:

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CARLISLE W. HIGGINS.

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†On recall from 7 March, 1955, through 30 April, 1955.

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OF THE

SUPERIOR COURTS OF NORTH CAROLINA

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Name	*District*	*Address*
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WALTER E. CRISSMAN	Twelfth	High Point.
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J. FRANK HUSKINS	Burnsville.

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WESTERN DIVISION

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HORACE R. KORNEGAY	Twelfth	Greensboro.
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SUPERIOR COURTS, SPRING TERM, 1955

Revised through 3 December, 1954.

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

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Judge Moore

Beaufort—Jan. 17*; Jan. 24; Feb. 21† (2); Mar. 21* (A); Apr. 11†; May 9† (2); June 27.

Camden—Mar. 14.

Chowan—Apr. 4; May 2†.

Currituck—Mar. 7.

Dare—May 30.

Gates—Mar. 28.

Hyde—May 23.

Pasquotank—Jan. 10†; Feb. 14†; Feb. 21* (A) (2); Mar. 21†; May 9† (A) (2); June 6*; June 13† (2).

Perquimans—Jan. 31†; Apr. 18.

Tyrrell—Feb. 7†; Apr. 25.

SECOND JUDICIAL DISTRICT

Judge Nimocks

Edgecombe—Jan. 24; Feb. 21* (S) (2); Mar. 7; Apr. 4† (2); June 6 (2).

Martin—Mar. 21 (2); Apr. 18† (A) (2); June 20.

Nash—Jan. 31; Feb. 21† (2); Mar. 14; Apr. 25† (2); May 30.

Washington—Jan. 10 (2); Apr. 18†.

Wilson—Feb. 7†; Feb. 14*; May 9* (2); May 23†; June 27†.

THIRD JUDICIAL DISTRICT

Judge Carr

Bertie—Feb. 14 (2); May 16 (2).

Halifax—Jan. 31 (2); Mar. 14†; Mar. 21‡; May 2; June 6†; June 13.

Hertford—Feb. 28; Apr. 18 (2).

Northampton—Apr. 4 (2).

Vance—Jan. 17*; Mar. 7*; Mar. 28†; June 20*; June 27†.

Warren—Jan. 10*; Jan. 24†; May. 9†; May 30*.

FOURTH JUDICIAL DISTRICT

Judge Morris

Chatham—Jan. 17; Mar. 7†; Mar. 21†; May 16.

Harnett—Jan. 10*; Feb. 7† (2); Mar. 21* (A); Apr. 4† (A) (2); May 9†; May 23*; June 13† (2).

Johnston—Jan. 10† (A) (2); Feb. 14 (A); Feb. 21† (2); Mar. 7 (A); Mar. 14; Apr. 18 (A); Apr. 25† (2); June 27*.

Lee—Jan. 31† (A); Feb. 7 (A); Mar. 28*; Apr. 4†; June 20† (A).

Wayne—Jan. 24; Jan. 31†; Feb. 7† (A); Mar. 7† (A) (2); Apr. 11; Apr. 18†; Apr. 25† (A); May 30; June 6†; June 13† (A).

FIFTH JUDICIAL DISTRICT

Judge Bone

Carteret—Mar. 14; June 13 (2).

Craven—Jan. 10; Jan. 31†; Feb. 7†; Feb. 14; Apr. 11; May 16†; June 6.

Greene—Feb. 28; Mar. 7; June 27.

Jones—Apr. 4.

Pamlico—May 2 (2).

Pitt—Jan. 17†; Jan. 24; Feb. 21†; Mar. 21; Mar. 28; Apr. 18 (2); May 9† (A); May 23†; May 30‡.

SIXTH JUDICIAL DISTRICT

Judge Parker

Onslow—Jan. 10 (A) (2); Mar. 7; May 30 (2).

Duplin—Jan. 10† (2); Jan. 31*; Mar. 14† (2); Apr. 11; Apr. 18†.

Lenoir—Jan. 24*; Feb. 21†; Feb. 28†; Mar. 21 (A); Apr. 25; May 16†; May 23†; June 13†; June 20†; June 27*.

Sampson—Feb. 7 (2); Mar. 28† (2); May 2; May 9†; June 13† (A) (2).

SEVENTH JUDICIAL DISTRICT

Judge Williams

Franklin—Jan. 24† (2); Feb. 14*; Apr. 18*; May 2† (2).

Wake—Jan. 10† (A) (2); Jan. 10*; Jan. 17†; Jan. 24† (A) (2); Feb. 7†; Feb. 14† (A); Feb. 21† (2); Mar. 7† (A) (2); Mar. 7* (2); Mar. 21† (2); Apr. 4† (A); Apr. 4*; Apr. 11†; Apr. 18† (A); Apr. 25†; May 2† (A); May 9* (A); May 16† (3); June 6† (A) (2); June 6* (2); June 20† (2).

EIGHTH JUDICIAL DISTRICT

Judge Frizzelle

Brunswick—Jan. 24; Feb. 14†; Apr. 11†; May 16.

Columbus—Jan. 10† (A); Jan. 31* (2); Feb. 21† (2); May 9*; June 20.

New Hanover—Jan. 17*; Feb. 7† (A) (2); Feb. 28* (A); Mar. 7*; Mar. 14† (2); Apr. 18† (2); May 23*; May 30† (2); June 13*.

Pender—Jan. 10; Mar. 28† (2); May 2.

NINTH JUDICIAL DISTRICT

Judge Stevens

Bladen—Jan. 10; Mar. 21*; May 2†.

Cumberland—Jan. 17*; Feb. 14† (2); Mar. 7* (A); Mar. 14*; Mar. 28† (2); May 2* (A); May 9† (2); June 6*.

Hoke—Jan. 24; Apr. 25.

Robeson—Jan. 17† (A) (2); Jan. 31* (2); Feb. 28† (2); Mar. 21* (A); Apr. 11* (2); Apr. 25† (A); May 9* (A) (2); May 23† (2); June 13†; June 20*.

TENTH JUDICIAL DISTRICT

Judge Bickett

Alamance—Jan. 24† (A); Jan. 31† (S); Feb. 28* (A); Mar. 7* (A); Mar. 28† (A); Apr. 4†; Apr. 18* (A); May 9* (A); May 23† (A); May 30†; June 13* (A).

Durham—Jan. 10*; Jan. 17† (2); Jan. 31 (A); Feb. 14* (A); Feb. 21*; Feb. 28† (3); Mar. 21 (A); Mar. 28*; Apr. 4* (A); Apr. 11† (A) (2); Apr. 25 (A); May 2† (2); May 16* (A); May 23*; May 30† (A); June 6†; June 13 (A); June 20* (A); June 27*.

Granville—Feb. 7 (2); Apr. 11 (2).

Orange—Mar. 21; May 16†; June 13; June 20†.

Person—Jan. 31; Feb. 7† (A); Apr. 25.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT
Judge Crissman

Ashe—Apr. 18*; May 30† (2).
Alleghany—Jan. 31 (A); May 2.
Forsyth—Jan. 10 (2); Jan. 17† (A); Jan. 24† (2); Feb. 7 (2); Feb. 21† (2); Mar. 7 (2); Mar. 14† (A); Mar. 21† (2); Apr. 4 (2); Apr. 18† (A); Apr. 25†; May 2† (A); May 9 (2); May 23†; May 30† (A) (2); June 13 (2); June 27† (2).

TWELFTH JUDICIAL DISTRICT
Judge Phillips

Davidson—Jan. 31; Feb. 21† (2); Apr. 11† (A) (2); May 9; May 30† (A) (2); June 27.
Guilford, Greensboro Division—Jan. 10*; Jan. 10† (A); Jan. 17† (2); Feb. 7† (A) (2); Feb. 7* (2); Mar. 7* (A); Mar. 7† (2); Mar. 21* (2); Apr. 4† (A) (2); Apr. 18† (2); Apr. 25*; May 2† (A) (2); May 16* (A) (2); June 6† (3); June 13* (A) (2).
Guilford, High Point Division—Jan. 17* (A) (2); Jan. 31† (A); Feb. 21* (A) (2); Mar. 14*; Mar. 21† (A) (2); Apr. 4* (2); May 2*; May 16† (2); May 30*; June 27† (A).

THIRTEENTH JUDICIAL DISTRICT
Judge Gwyn

Anson—Jan. 17*; Mar. 7†; Apr. 18 (2); June 13†.
Moore—Jan. 24*; Feb. 14†; Mar. 28†; May 23*; May 30†.
Richmond—Jan. 10*; Feb. 7† (A); Mar. 21†; Apr. 11*; May 30† (A); June 20† (2).
Scotland—Mar. 14; May 2†.
Stanly—Feb. 7†; Feb. 14† (A); Apr. 4; May 16†.
Union—Feb. 1 (2); May 9.

FOURTEENTH JUDICIAL DISTRICT
Judge Clarkson

Gaston—Jan. 17*; Jan. 24† (2); Mar. 14* (A); Mar. 21† (2); Apr. 25*; May 23† (A) (2); June 6*.
Mecklenburg—Jan. 10*; Jan. 10† (A) (2); Jan. 24* (A) (2); Jan. 24† (A) (2); Feb. 7† (A) (2); Feb. 7† (3); Feb. 21† (A) (2); Feb. 28*; Mar. 7† (2); Mar. 7† (A) (2); Mar. 21* (A) (2); Mar. 21† (A) (2); Apr. 4† (2); Apr. 4† (A) (2); Apr. 18* (A); Apr. 18†; Apr. 25† (A); May 2† (2); May 2† (A) (2); May 16*; May 16† (A) (2); May 23† (2); May 30† (A) (2); June 13*; June 13† (A) (2); June 20†; June 27* (2).

FIFTEENTH JUDICIAL DISTRICT
Judge Armstrong

Alexander—Feb. 7 (A) (2); Apr. 11 (A).
Cabarrus—Jan. 10 (2); Feb. 28†; Mar. 7† (A); Apr. 25 (2); June 13† (2).
Iredell—Jan. 31 (2); Mar. 14†; May 23 (2).
Montgomery—Jan. 24*; Apr. 11† (2).
Randolph—Jan. 31† (A) (2); Mar. 21† (2); Apr. 4*; June 27*.
Rowan—Feb. 14 (2); Mar. 7†; Mar. 14† (A); May 9 (2).

SIXTEENTH JUDICIAL DISTRICT
Judge Rudisill

Burke—Feb. 21; Mar. 14 (2); June 6 (3).
Caldwell—Jan. 10† (A) (2); Feb. 28 (2); May 2† (A); May 23 (2); June 6† (A) (2).
Catawba—Jan. 17† (2); Feb. 7 (2); Apr. 11 (2); May 9† (2).
Cleveland—Jan. 10; Feb. 7† (A) (2); Mar. 28 (2); May 23† (A) (2).
Lincoln—Jan. 24 (A); Jan. 31†; May 2.
Watauga—Apr. 25*; June 13† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT
Judge Rousseau

Avery—Apr. 18 (2).
Davie—Mar. 28; May 30†.
Mitchell—Apr. 4 (2).
Wilkes—Jan. 17† (3); Mar. 7 (3); May 2† (2); June 6 (2); June 20† (2).
Yadkin—Jan. 10; Feb. 7 (3); May 16.

EIGHTEENTH JUDICIAL DISTRICT
Judge Pless

Henderson—Jan. 10† (2); Mar. 7 (2); May 2† (2); May 30† (2).
McDowell—Jan. 17* (A); Feb. 14† (2); June 13 (2).
Polk—Jan. 31 (2).
Rutherford—Feb. 28†; Apr. 18† (2); May 16 (2); June 27† (2).
Transylvania—Apr. 4 (2).
Yancey—Jan. 24†; Mar. 21 (2).

NINETEENTH JUDICIAL DISTRICT
Judge Nettles

Buncombe—Jan. 10†* (2); Jan. 17 (A) (2); Jan. 24*†; Jan. 31; Feb. 7†* (2); Feb. 21*†; Feb. 21 (A) (2); Mar. 7†* (2); Mar. 21*†; Mar. 21 (A); Mar. 28; Apr. 4†* (2); Apr. 18*†; Apr. 18 (A); Apr. 25; May 2; May 9†* (2); May 23*†; May 23 (A) (2); June 6†* (2); June 20*†; June 20 (A) (2).
Madison—Jan. 31† (A); Feb. 28; Apr. 4 (A) (2); May 30; June 27.

TWENTIETH JUDICIAL DISTRICT
Judge Moore

Cherokee—Jan 24† (2); Apr. 4 (2); June 20† (2).
Clay—May 2.
Graham—Jan. 10† (A) (2); Mar. 21 (2); June 6† (2).
Haywood—Jan. 10† (2); Feb. 7 (2); May 9† (2).
Jackson—Feb. 21 (2); May 23 (2); June 13† (A).
Macon—Apr. 18 (2).
Swain—Jan. 17† (A) (2); Mar. 7 (2).

TWENTY-FIRST JUDICIAL DISTRICT
Judge Johnston

Caswell—Mar. 21*; Apr. 11† (A).
Rockingham—Jan. 24* (2); Mar. 7†; Mar. 14*; Apr. 18†; May 9† (2); May 23* (2); June 13† (2).
Stokes—Jan. 3*; Apr. 4*; Apr. 11†; June 27*.
Surry—Jan. 10; Jan. 17; Feb. 14; Feb. 21 (2); Apr. 25; May 2; June 6.

*For criminal cases.
†For civil cases.
‡For jail and civil cases.
(A) Judge to be assigned.
(S) Special term.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Elizabeth City, third Monday after the second Monday in March and September. 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. MRS. SALLIE B. EDWARDS, 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 MORISON, 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.
WILLIAM I. WARD, JR., Ass't U. S. Attorney, Charlotte, N. C.
ROY A. HARMON, United States Marshal, Asheville, N. C.
THOS. E. RHODES, Clerk, Asheville, N. C.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1954

BESSIE DEANS v. PENROSE DEANS.

(Filed 3 November, 1954.)

1. Trusts § 4b—

Where plaintiff and defendant agree to purchase land and to have deed made to them jointly, and unknown to plaintiff, conveyance is made to defendant alone, equity, upon defendant's repudiation of the contract, will declare that defendant holds title to one-half of the property for the benefit of plaintiff.

2. Same—

In an action to establish a parol trust in lands on the ground that plaintiff contributed money and labor toward the purchase price, plaintiff must allege the amount or value of her contribution, since her interest would be limited by the proportion of her contribution to the whole purchase price.

3. Betterments § 6—

In an action to recover for contributions made by plaintiff in money and labor toward the erection of a house on lands under the *bona fide* belief that plaintiff owned a one-half interest in the lands, plaintiff must allege the value of her contributions.

4. Venue § 2a—

Where, in an action to establish an interest in real property, the complaint fails to allege that the land or any part thereof lies within the county in which the action is instituted, the Superior Court of such county does not acquire jurisdiction, and such failure of the complaint cannot be supplied by a more definite description in the judgment.

5. Real Actions § 2—

Where, in an action to establish an interest in real property, the complaint describes the land only as a certain parcel of land purchased from a named person, upon which the parties had built a six-room residence, and there is no evidence upon the hearing identifying the land, the description is insufficient to enable the court to enter a valid judgment with respect to the realty.

6. Judgments § 10—

The clerk of the Superior Court has no jurisdiction to enter a judgment by default final declaring a trust in favor of the plaintiff in real property. G.S. 1-211; G.S. 1-212.

7. Clerk of Court § 3—

The clerk of the Superior Court has only such jurisdiction as is given him by statute.

8. Judgments § 27b—

A void judgment is a nullity and may be quashed *ex mero motu*, and it is error for the court to deny a motion in the cause to vacate such judgment.

APPEAL by defendant from *Parker, J.*, November Term, 1953, NORTHAMPTON Superior Court.

The plaintiff, after first obtaining leave to sue as a pauper, filed a complaint alleging in substance:

1. Plaintiff and defendant are residents of Northampton County, North Carolina.

2. That the parties were married in 1937 and lived together until their separation in November, 1949.

3. That on 6 April, 1945, the parties purchased "a vacant lot or parcel of land from J. M. Tayloe for $405.00," with the agreement and understanding the deed should be made to them jointly, each having a one-half interest.

4. That immediately after the purchase of the said lot of land in 1945 the parties built a six-room residence on said land, the plaintiff contributing money and labor to the building, "thinking she had and would always have a one-half interest in the property."

5. That the plaintiff labored long hours to the end she might have a home.

6. That the parties, after completing the building, lived in it until about 1948, when the defendant began associating with another woman.

7. That after beginning his association with another woman, defendant became abusive, cruel, assaulted the plaintiff and ordered her away from home; that he actually forced her to leave on 9 November, 1949.

8. That before the separation defendant did all he knew to make plaintiff's life miserable and intolerable.

9. That plaintiff from time to time has demanded since the separation a settlement for her interest in the home; that she thought she had a one-half interest in it until about six months before the institution of this suit, when she found out title was in the defendant.

10. That the defendant has refused either to give plaintiff title to the one-half interest in the home or to pay her the value thereof.

11. That the defendant, since the separation, has lived with another woman and now has four children by her, acknowledging them as his own.

12. That the plaintiff and defendant have no children; that the plaintiff is in destitute circumstances and broken in health.

13. That defendant refused to pay plaintiff one-half the value of the home, which is worth $3,000.

Plaintiff prays judgment:

(1) That the court declare plaintiff entitled to one-half interest in the residence and land; that defendant be declared to hold in trust one-half interest in same for the use and benefit of the plaintiff; that the court appoint a commissioner to sell said real estate for division and that the commissioner pay to the plaintiff one-half the net proceeds of the sale.

(2) If the court should hold the plaintiff is not entitled to a one-half interest in the real estate, that the plaintiff recover judgment for damages for willfully and maliciously turning her out of doors and failure to support her in the sum of $3,000.

Summons was issued 9 February, delivered to the sheriff on 10 February, and served by him on 17 February, all in 1953. No answer was filed and no extension of time given.

On 18 March, 1953, the Clerk of Superior Court of Northampton County, on motion for judgment by default, entered a judgment in which he recited the date of summons, the date of service, the failure to plead, and that the time to do so had expired; and that the cause of action was for recovery of real property. It was then ordered: "That the plaintiff be and she is hereby vested with the title for a one-half interest in and to that certain lot or parcel of land and residence situate thereon that was purchased from J. M. Tayloe and wife, Mary O. Tayloe, by deed dated April 6, 1945, and recorded in Book 317, p. 259, Northampton County Register of Deeds office, and that V. D. Strickland be, and he is hereby appointed by the court, Commissioner to sell said real estate for division at public auction, after first advertising the same as required by law, and report said sale to the court for confirmation and further order."

On 4 May, 1953, V. D. Strickland, Commissioner, filed a report reciting that on 2 May, 1953, he had sold the land described in the complaint when E. L. Timberlake became the last and highest bidder for $1,600.

On 14 May, 1953, the Clerk of the Superior Court entered an order confirming the sale, directing the commissioner to convey title to the pur-

chaser, and after paying costs, etc., to divide the balance of the purchase price, one-half to the plaintiff, and one-half to the defendant. On 23 May, 1953, the commissioner filed his report, reciting the collection of the purchase price of $1,600, and after paying specified items of cost incident to the sale, paid $720.01 to the plaintiff and $720.02 to the defendant.

On 21 August, 1953, the defendant, by counsel, filed before the clerk a motion in the cause to set aside the order of 18 March, 1953, for that:

(1) The plaintiff attempted to set up a parol trust, alleging she was the owner of a one-half interest in the house and lot conveyed by J. M. Tayloe.

(2) The complaint raises an issue of fact to be passed on by a jury, and that the clerk is without jurisdiction to try and determine the issues involved, and without authority to enter a final judgment.

(3) The plaintiff attempts to set up a parol trust involving the title to real estate and the clerk was without authority to enter judgment by default final, but only by default and inquiry.

(4) That the defendant has a meritorious defense and the judgment deprives him of his property without a jury trial.

(5) That the defendant is an illiterate person, unable to read or write, and was informed that the summons and copy of the complaint served on him were in an action for divorce and for that reason he did not file an answer.

(6) That the judgment of 18 March, 1953, is void for want of authority of the clerk to render it.

On 8 September, 1953, the plaintiff filed answer to defendant's motion of 21 August, alleging:

(1) That the defendant had full knowledge and information of the contents of the complaint and conferred with counsel before judgment was entered by default.

(2) That while the property was being advertised for sale, defendant had full information, conferred with the commissioner, made no objection, and before the ten days for advance bids had expired, demanded one-half the proceeds of sale.

(3) The judgment by default was entered as authorized by G.S. 1-211, was regular, and the defendant has no meritorious defense.

On 18 September, 1953, the defendant filed a reply, denying all allegations by plaintiff in her answer of 8 September, and renewed the prayer that the judgment be set aside as void.

On 29 October, 1953, the clerk, after hearing, entered an order in substance: The summons was duly issued and together with copy of the complaint was duly served on the defendant who failed to file answer or demurrer, "that the action was to have the defendant declared to hold title as trustee for the plaintiff to one-half undivided interest in the lands

described in the complaint, to have the lands sold for division and for alternative relief."

After repeating in substance plaintiff's allegation about the purchase of the lot, building of the house, agreement as to title, that the Court had previously rendered judgment by default ordering the sale which was made by the commissioner appointed in the original order, the purchase price collected, the deed executed to Timberlake, the purchaser, and that the defendant offered no evidence in support of his motion, the defendant's motion to vacate the judgment was denied.

The defendant excepted to the order and appealed to the Judge of the Superior Court. The appeal from the clerk was duly heard before Parker, J., of the Superior Court, *"de novo* and without a jury." V. D. Strickland, the commissioner, testified as to knowledge of the defendant of the subject matter of the action, the advertisement and sale of the property, the receipt of his share of the purchase price, and that at no time did he make any objection.

On 31 December, 1953, after hearing on the record and the evidence offered by the plaintiff, the court found as facts in substance: After reciting the issuance of the summons, filing of verified complaint, service on defendant and dates thereof, that defendant was informed of and knew the nature of the action, and failed to answer. That the clerk on 18 March, 1953, entered a default judgment that the plaintiff is the owner of a one-half undivided interest in the real estate described in the complaint, the appointment of the commissioner to sell for division, the sale, confirmation thereof; that the defendant knew of the advertisement and before sale permitted the time for advance bids to expire, and the sale to be confirmed without objection; received from the commissioner a check for one-half the net proceeds of the sale, which check was in the hands of the attorney for the defendant at the time of this hearing. That the purchaser is not a party to this action; that the defendant attempted to repudiate a transaction, the benefit of which he has accepted, that there is neither evidence of surprise on the part of the defendant, nor that he has a meritorious defense.

The motion to vacate the judgment was denied. The defendant excepted and appealed.

V. D. Strickland and Gay & Midyette for plaintiff, appellee.

Jones, Jones & Jones and John R. Jenkins, Jr., for defendant, appellant.

HIGGINS, J. The complaint in this case is a jumble containing some parts of different causes of action. It is drawn without regard to the requirement that each cause of action should be separately stated. First,

it is alleged that the plaintiff and defendant bought a vacant lot under an agreement that title should be taken in the names of both as joint and equal owners. Second, that under the belief she shared in the title, she contributed money and labor to the erection of a building on the lot under such circumstances as would amount to a trust for her benefit. Third, that the defendant maliciously turned her out of doors, drove her from her home, and failed to support her. In her prayer for relief, she asked the court to declare that she is entitled to a one-half interest in the land and that the title be declared held in trust for her benefit; that the court appoint a commissioner to sell the lands for division, and in the alternative, if the court should hold she is not entitled to one-half interest, that she recover $3,000 because of the defendant's failure to support her.

Upon failure of the defendant to file an answer, the clerk attempted to give the plaintiff the relief demanded in her complaint by decreeing "The plaintiff be and she is hereby vested with a title to a one-half (½) interest in and to that certain lot or parcel of land and residence situate thereon that was purchased from J. M. Tayloe and wife, Mary O. Tayloe, by deed dated April 6, 1945, and recorded in Book 317, page 259, Northampton County Register of Deeds office." This description, it may be noted, does not appear in the complaint.

The complaint alleges the plaintiff and defendant purchased a vacant lot for $405 "and it was agreed and understood at the time said purchase was made that the deed for said lot of land would be made to plaintiff and defendant jointly and that the plaintiff would have a one-half interest in said property." In a later paragraph it is alleged that unknown to her "title was vested in the defendant individually."

Liberally construed, the allegations would give rise to an express trust, that is, a trust arising on the contract to have the title conveyed to both. The plaintiff's remedy on repudiation or refusal to comply would be for breach of contract, and the equitable jurisdiction of the court could be invoked to declare the defendant held title to one-half the property for the benefit of the plaintiff.

In a later paragraph the complaint alleges the plaintiff "thinking at all times that she had and would always have a one-half interest in said property" contributed money and labor to the erection of a six-room dwelling thereon. She alleges her contribution would give rise to a resulting trust in her favor. "A trust of this character arises when a person becomes invested with a title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. Under such circumstances equity creates a trust in favor of such other person commensurate with his interest in the subject-matter. A trust of this sort does not arise from or depend upon any agreement between the parties. It results from the fact that one's money

has been invested in land and the conveyance taken in the name of another. It is a mere creature of equity." *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83.

The plaintiff's interest would be limited in proportion to her contribution to the whole purchase price. But nowhere does she allege the amount or value of her contribution. On failure to establish either an express or a resulting trust, she may be able to allege and prove sufficient facts to permit a recovery for improvements put upon the land under the mistaken belief she shared in the title.

What has been said thus far relates to the failure of the complaint adequately to state causes of action. Certainly not less serious is its failure properly to define the subject matter of the action with sufficient certainty to give the court jurisdiction. In order for the Superior Court of Northampton County to have jurisdiction, the complaint must allege the land, or at least some part thereof, is located in Northampton County. The description is contained in paragraph 3: "A vacant lot or parcel of land bought from J. M. Tayloe for $405." And in paragraph 4 it is alleged: "After the purchase of said lot of land in 1945 the plaintiff and defendant built a six-room residence on said land." Nothing else in the complaint adds to the description. Where is the lot? Is it in Northampton, Edgecombe, Cherokee, or Currituck? Is it in North Carolina or Virginia? True, there is a more definite description in the judgment by default signed by the clerk, but this judgment is no part of the complaint and cannot supply the defects of the complaint. Where or how the clerk came by the description does not appear. It did not come from the complaint. "The clerk of the Superior Court of Johnston County had no authority to allot dower in lands located in Wilson County. Hence, the proceeding was void *ab initio.*" *High v. Pearce,* 220 N.C. 266, 17 S.E. 2d 108.

Another hurdle is the sufficiency of the description. The description must identify the land, or it must refer to something that will identify it with certainty. Otherwise the description is void for uncertainty. Speaking to the question of the sufficiency of description in the case of *Johnston County v. Stewart,* 217 N.C. 334, 7 S.E. 2d 708, this Court said: "When the appellants were brought into the case by the service of summons it was their first opportunity to be heard and they had a right to set up any defense of which they were advised in the original proceeding. This they have done by demurring to the complaint on the ground the description of the property therein contained was too vague and indefinite to constitute the basis for a valid judgment. The only description of the property in the complaint is that 'there was listed in the name of J. D. Stewart 4 lots lying and being in Banner Township, Johnston County. It is apparent that the description is neither sufficient in itself

nor capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers.' *Harris v. Woodard,* 130 N.C. 580, 41 S.E. 790; *Rexford v. Phillips,* 159 N.C. 213, 74 S.E. 337; *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176; *Higdon v. Howell,* 167 N.C. 455, 83 S.E. 807; *Bissette v. Strickland,* 191 N.C. 260, 131 S.E. 655; *Bryson v. McCoy,* 194 N.C. 91, 138 S.E. 420; *Katz v. Daughtrey,* 198 N.C. 393, 151 S.E. 879; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889."

In the case of *Bissette v. Strickland,* 191 N.C. 260, 131 S.E. 655, the description in question was: "A certain piece or tract of land lying and being in Nash County, state aforesaid, in Bailey Township, and described and defined as follows: All of our lifetime interest in twenty acres of land, more or less, and being a part of the Mary A. J. Bissette estate, and joining the lands of F. R. Perry, John H. Griffin and others." F. R. Perry, one of the adjoining landowners, gave parol testimony to aid the description as follows: "that he also knew the particular piece of land containing twenty acres, more or less, described in the mortgage; that it joined his land and also joined the John H. Griffin land, and that E. J. Bissette, the grantor in said mortgage, lived on this particular piece of land for several years, and that so far as he knew, E. J. Bissette never owned any other land in the county." Another adjoining landowner testified that he knew the land described, "that he knew of no other piece of land containing twenty acres, more or less, which joined the land of F. R. Perry and John H. Griffin except the E. J. Bissette land, and that there is no other tract of land that fills the bill." Speaking of the description, *Justice Brogden* for the Court, said: "It cannot be said the mortgage contains no description of the land conveyed, because reference is made to adjoining owners and the land is further identified as being a part of the Mary A. J. Bissette estate. While the description is not complete, *and perhaps may stand upon the border line of legal sufficiency,* still it is within the principle announced in *Farmer v. Batts,* 83 N.C. 387, which principle has been firmly established, as settled law, by an increasing line of decisions reaffirming the soundness of that decision." (Emphasis supplied.)

In *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176, this Court said: "It is familiar learning, which was aptly stated by *Judge Gaston* in *Massey v. Belisle,* 24 N.C. 170, that every deed of conveyance (or contract) must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers . . . 'No decree, however, for specific performance can be granted the defendant unless "his land where he now lives" (the descriptive words of the receipt) is fully identified by competent testimony.'"

If it be conceded that enough appears in the complaint to permit the introduction of parol evidence to complete the description, the evidence

must be offered, and found to be sufficient before a valid decree can be entered.

In the case of *Boone v. Sparrow,* 235 N.C. 396, 70 S.E. 2d 204, this Court said: "Lack of jurisdiction or power in the court to enter the judgment always avoids the judgment. This is equally true when the court has not been given jurisdiction of the subject-matter or has failed to attain jurisdiction on account of lack of service of proper process."

The summons and copies of the verified complaint were served on the defendant on 17 February, 1953. The defendant did not answer. On 18 March, 1953, the clerk entered his judgment by default final, decreeing that the plaintiff be "vested with title for a one-half interest in and to that certain lot or parcel of land and residence situate thereon that was purchased from J. M. Tayloe and wife, Mary O. Tayloe, by deed dated April 16, 1945, and recorded in Book 317, at page 259, Northampton County Register of Deeds office . . ." In the clerk's order a commissioner was appointed to sell the land at public auction for division. The defendant argues with much earnestness that the default judgment was entered before the defendant's full thirty days in which to answer had expired. Since February in the year 1953 had 28 days, and excluding the day of service and including the day the judgment was signed, only 29 days had elapsed. The defendant contends the clerk signed the judgment one day too soon. In her brief the plaintiff admits the judgment was signed before the time for answering had expired, and that the judgment is irregular for that reason, but she contends it stands until set aside by a proper proceeding. E. L. Timberlake, who bid off the property at the sale, is not a party to this cause.

The defendant, by motion dated 21 August, 1953, moved to set aside the judgment by default final on the ground the clerk attempted to execute a parol trust and that his default final judgment is not authorized by G.S. 1-211, but at most he is authorized to enter a judgment by default and inquiry under G.S. 1-212.

In *McCauley v. McCauley,* 122 N.C. 288, 30 S.E. 344, this Court said: "But the clerk is a court of very limited jurisdiction—only having such jurisdiction as is given it by statute. It has no common-law jurisdiction nor does it have any equitable jurisdiction. . . . The clerk had no power to render a personal judgment against the defendant Williams and declare it a lien on her land. And such a judgment is absolutely void and may be so declared at any time. Freeman on Judgments, sec. 120. This is bound to be so upon principle. A judgment rendered by a court having no jurisdiction is no judgment. It is absolutely void, and any execution issued on it is void, and gives no force or validity to acts of the sheriff done thereunder."

And again quoting from *Boone v. Sparrow, supra,* "A void judgment is not a judgment and may always be treated as a nullity . . . it has no force whatever; it may be quashed *ex mero motu. Clark v. Homes,* 189 N.C. 703, 128 S.E. 20." And quoting from the latter, "A void judgment is not a judgment and may always be treated as a nullity. It lacks some essential element; it has no force whatever; it may be quashed *ex mero motu. Stallings v. Gully,* 48 N.C. 344; *McKee v. Angel,* 90 N.C. 60; *Carter v. Rountree,* 109 N.C. 29; *Mann v. Mann,* 176 N.C. 353; *Moore v. Packer,* 174 N.C. 665."

"Therefore, the clerk, having undertaken to enter a kind of judgment which she had no jurisdiction to enter, the judgment so entered is void and is a nullity, and may be so treated at all times." *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690.

"If the court has no jurisdiction over the subject-matter, or has not acquired jurisdiction over the person in some manner recognized by law, or if not authorized to grant the particular relief contained in the judgment, the judgment is void." McIntosh, North Carolina Practice and Procedure, p. 734, sec. 651.

The legal defects in this case began with the complaint. For that reason we have pointed out some of its deficiencies. When the case is returned to the Superior Court of Northampton County, the plaintiff may apply for leave to amend if she is so advised.

The authorities herein referred to force us to conclude:

1. The complaint fails to allege the house and lot are located within the jurisdiction of the Superior Court of Northampton County.

2. The description of the property is insufficient to enable the court to enter a valid judgment with respect to it.

3. The clerk of the Superior Court was without authority to enter judgment by default final declaring the defendant held one-half the property in trust for the plaintiff.

4. The judgment of the Superior Court of 31 December, 1953, denying defendant's motion to vacate and set aside the clerk's orders of 18 March, 1953, and 29 October, 1953, was improvidently entered.

The clerk's orders of 18 March, 1953, and 29 October, 1953, and the judge's order of 31 December, 1953, are set aside.

Reversed.

H. M. BOWEN AND WIFE, BESSIE RAY BOWEN; J. W. BOWEN AND WIFE, VERNA V. BOWEN; JOHN A. BOWEN AND WIFE, ANNIE MAY BOWEN; J. L. BOWEN AND WIFE, RUBY BOWEN; FANNIE MAE BOWEN HINES (WIDOW); T. A. BOWEN AND WIFE, LIZZIE MAE BOWEN; MACK BOWEN AND WIFE, CLARA BOWEN; D. G. BOWEN AND WIFE, EDITH BOWEN, AND PAULINE BOWEN v. HILDRED BOWEN DARDEN AND HUSBAND, GEORGE H. DARDEN, JR.; FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF GREENVILLE, NORTH CAROLINA, A CORPORATION, AND A. C. TADLOCK, TRUSTEE.

(Filed 3 November, 1954.)

1. Trusts § 3a—

An express trust, as distinguished from a trust by operation of law, is based upon a direct declaration or expression of intention, usually embodied in a contract.

2. Trusts §§ 4a, 5a—

A trust by operation of law is raised by rule or presumption of law based on acts or conduct, rather than on direct expression of intention.

3. Trusts § 4a—

The creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction. In such instance the law presumes or supposes the intention to create a trust.

4. Trusts § 5a—

A constructive trust ordinarily arises out of the existence of fraud, actual or presumptive, usually involving the violation of a confidential or fiduciary relation, and arises not only independent of any actual or presumed intention, but usually, contrary to the actual intention of the trustee.

5. Trusts § 4c—

In pleading a resulting trust it suffices to allege the ultimate facts as to who paid the consideration and to whom the conveyance was made.

6. Same—

Evidence of a conveyance to one person upon consideration furnished by another is ordinarily sufficient to make out a *prima facie* case for the jury in an action to establish a resulting trust.

7. Same—

Where a conveyance is made to a child on consideration moving from a parent, nothing else appearing, there is a rebuttable presumption that a gift or advancement was intended by the parent, and, in order for equity to declare the child a trustee of a resulting trust in such instance, there must be evidence sufficient to justify the inference that the parent had no intention of making a gift or advancement.

8. Same—

The evidence must be clear, strong, and convincing to establish a resulting trust.

9. Same—

Upon a motion to nonsuit in an action to establish a resulting trust, it is the function of the court to determine only whether there is any substantial evidence to support the plaintiff's case, it being the function of the jury upon proper instructions to decide whether the evidence establishes plaintiff's cause by clear, strong, and convincing proof.

10. Trial § 21—

Upon motion to nonsuit in an action in which the burden rests upon the plaintiff to prove his cause by clear, strong, and convincing proof, it is the function of the court to determine only whether there is any substantial evidence to support plaintiff's claim, and it is the function of the jury to determine whether the evidence meets the required intensity of proof.

11. Trusts § 4c—

In this action to establish a resulting trust, plaintiffs' evidence to the effect that their ancestor furnished the consideration for the deed to the lands in question, that the conveyance was made to the ancestor for life with remainder to one of her children, and that the ancestor thought the deed was made to her in fee and did not intend to make a gift or advancement of the remainder to the child, *is held* sufficient to overrule defendants' motion for judgment as of nonsuit.

12. Judgments § 33a—

A judgment of nonsuit will bar a subsequent action only when it is made to appear that the subsequent action is between the same parties or their privies, on the same cause of action, and upon substantially the same evidence.

13. Same—

Nonsuit in an action to establish an interest in land on the theory of a constructive trust will not bar a subsequent action between the parties or their privies in an action based upon the theory of a resulting trust.

14. Limitation of Actions § 9—

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. G.S. 1-52 (9); G.S. 1-56.

15. Limitation of Actions § 5d—

The statute of limitations does not run against a *cestui que trust* in possession.

APPEAL by plaintiffs from *Williams, J.*, at May Term, 1954, of PITT.

Civil action to establish a constructive or resulting trust in land.

The land in question, residential property in Greenville, North Carolina, originally belonged to Dr. M. B. Massey. By deed dated 23 October, 1946, Dr. Massey, for a consideration of $21,000, conveyed the land to Mrs. Fannie V. Bowen for life, remainder in fee simple to her daughter, the defendant Hildred Bowen Darden. Mrs. Bowen died intestate 6 December, 1952, being survived by ten children, nine of whom join as plain-

tiffs in this action, alleging that the purchase money was paid by their mother, and that their sister, Hildred Bowen Darden, holds title to the property impressed with a trust in favor of all ten of the children. The action was instituted 24 January, 1953. It is an aftermath of one instituted against the present defendants by Mrs. Fannie V. Bowen during her lifetime, wherein this Court at the Spring Term, 1951, affirmed the judgment as of nonsuit previously entered in the lower court. See *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285.

Voluminous evidence was offered by both sides. The pertinent part relied on by the plaintiffs is summarized in the opinion.

From judgment as of involuntary nonsuit entered at the conclusion of all the evidence, the plaintiffs appeal, assigning as error the entry of the judgment.

Jones, Reed & Griffin for plaintiffs, appellants.

Blount & Taft, James & Speight, and W. H. Watson for defendants, appellees.

JOHNSON, J. Trusts are classified in two main divisions: express trusts and trusts by operation of law. The cardinal distinction between the two classes is that an express trust is based upon a direct declaration or expression of intention, usually embodied in a contract; whereas a trust by operation of law is raised by rule or presumption of law based on acts or conduct, rather than on direct expression of intention. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83; 54 Am. Jur., Trusts, sections 186 and 187. See also 65 C.J., p. 220 *et seq.*

In the case at hand we are concerned only with trusts by operation of law. These are classified into resulting trusts and constructive trusts. The essential elements and distinguishing characteristics of these trusts are too well defined and delineated in former decisions of this Court and standard texts to require restatement here. See *Henderson v. Hoke,* 21 N.C. 119, p. 149; *Summers v. Moore,* 113 N.C. 394, 18 S.E. 712; *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775; *Norton v. McDevit,* 122 N.C. 755, 30 S.E. 24; *Harris v. Harris,* 178 N.C. 7, 100 S.E. 125; *Tire Co. v. Lester,* 190 N.C. 411, 130 S.E. 45; *Speight v. Trust Co.,* 209 N.C. 563, 183 S.E. 734; 54 Am. Jur., Trusts, sections 188, 193, 203, and 218.

It suffices for present purposes to bear in mind these distinguishing factors: that the creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction; whereas a constructive trust ordinarily arises out of the existence of fraud, actual or presumptive—usually involving the violation of a confidential or fiduciary relation—in view of which equity transfers the beneficial title to some person

other than the holder of the legal title. Also, a resulting trust involves a presumption or supposition of law of an intention to create a trust; whereas a constructive trust arises independent of any actual or presumed intention of the parties and is usually imposed contrary to the actual intention of the trustee. *Lefkowitz v. Silver,* 182 N.C. 339, pp. 347, 348, 109 S.E. 56; 54 Am. Jur., Trusts, section 188.

Decision here does not require us to determine whether the plaintiffs' allegations and proofs are sufficient to establish a constructive trust. This is so for the reason that our examination of the record leaves the impression that the plaintiff alleged facts sufficient to constitute a resulting trust and that the evidence on which they rely to establish such trust is sufficient to carry the case to the jury.

In pleading a resulting trust it suffices to allege the ultimate facts as to who paid the consideration and to whom the conveyance was made, *Vail v. Stone,* 222 N.C. 431, 23 S.E. 2d 329; 54 Am. Jur., Trusts, section 598; whereas ordinarily the burden of making out a *prima facie* case for the jury is sustained by the introduction of evidence of a conveyance to one person upon consideration furnished by another. *Summers v. Moore, supra; Harris v. Harris, supra;* 54 Am. Jur., Trusts, sections 193, 203, and 662. However, where, as here, the persons seeking to establish a resulting trust allege a conveyance made to a child on consideration moving from a parent, nothing else appearing, the relationship of parent and child gives rise to a rebuttable presumption that a gift or advancement was intended by the parent, and unless and until rebutted by affirmative evidence of a contrary intent, this presumption stays the hand of equity and prevents it from raising a trust in favor of the parent. Accordingly, when the relationship of parent and child obtains, in order to make out a *prima facie* case, the persons seeking to establish the trust must rebut the presumption raised by this relationship by offering evidence sufficient to justify the inference that the parent had no intention to create a gift or advancement. *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642; 54 Am. Jur., Trusts, section 205.

To establish a resulting trust, the rule is that the evidence must be clear, strong, and convincing. However, it is to be kept in mind that it is not the function of the presiding judge to apply this rule in the sense of passing upon the intensity of the proofs. That is a matter solely within the province of the jury. On motion for nonsuit, the question for the presiding judge to determine is whether there is any substantial evidence to support the plaintiff's case. If so, it then becomes the function of the jury, under proper instructions, to decide whether the evidence meets the intensity requirements of the rule. *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19; *Tire Co. v. Lester, supra; Avery v. Stewart, supra.*

The plaintiffs in their complaint allege in substance: (1) that for a number of years before purchasing the residential property in Greenville the defendants Hildred Bowen Darden and husband, George H. Darden, Jr., had lived in the home of Mrs. Fannie V. Bowen, located on a farm in Pitt County, and had "handled all her business affairs and transactions, including the operation of her farm . . ."; (2) that the property in Greenville was purchased with individual funds of Mrs. Bowen, with the defendants Hildred Bowen Darden and husband, George H. Darden, Jr., acting for her and making the "arrangements for the preparation of the deed . . ."; and (3) "that the taking of the title to the property in the name of Fannie V. Bowen for life, remainder in fee to Hildred B. Darden, without the knowledge, consent or acquiescence of Mrs. Bowen . . . constituted Hildred B. Darden the holder of the legal title to the remainder interest in the property in trust for the use and benefit of . . . Fannie V. Bowen, creating . . . a resulting trust," and entitling the plaintiffs to have the defendant Hildred B. Darden decreed the holder of the legal title to the premises in trust for the use and benefit of all the surviving children of Fannie V. Bowen, deceased.

The plaintiffs offered evidence tending to show that for a long period of years before the purchase of the Greenville property the defendants Hildred B. Darden and husband, George H. Darden, Jr., had lived in the home of Mrs. Fannie V. Bowen on her farm in Pitt County and had assisted her in handling her business affairs and transactions, "including operation of the farm, and . . . in making contracts relative to the cultivation of same . . ."; that prior to October, 1946, the defendant George H. Darden, Jr., had taken over the management and operation of the farm under the direction of Fannie V. Bowen, and from year to year looked after the purchasing of fertilizers, the planting, cultivation, and marketing of crops, and performed other duties incident to the successful operation of the farm.

The further evidence on which the plaintiffs rely includes excerpts from the transcription of the testimony of Mrs. Bowen at the first trial, which may be summarized as follows:

That when Mrs. Bowen went to the law office where the deed was prepared, she went with the defendants Darden; that all the purchase money of $21,000 was paid from funds belonging to or borrowed by Mrs. Bowen; that she borrowed from George H. Darden, Jr., $2,300 with which to complete the payment of the purchase price of $21,000; that George H. Darden, Jr., had the deed fixed; that he had it made like he wanted it; that Mrs. Bowen had confidence in him and did not read it; that she was disappointed when she later learned it was written so as to convey the remainder interest to Hildred B. Darden. As Mrs. Bowen put it: "when

I found out it was wrote like it was . . . it hurt me to my heart." She further testified:

"At the time George carried me to the lawyer's office, of course, it was my understanding that I was borrowing the money (the $2,300 portion of the purchase money paid from funds belonging to the defendant George H. Darden, Jr.). I wouldn't have took all that on me to pay (the $21,000 purchase price) and he just pay $2,300."

"BY THE COURT: When you got the deed did you agree with your son-in-law (George Darden) that if you were never able to pay back the $2,300 they (the defendants Darden) could have the place if they stayed and waited on you? A. I never agreed to that. He said, 'You need not hurry about paying me, if you die before it is paid—we are going to stay with you—are you willing for us to have the house?' I said, 'Yes, if you stay with me as long as I live,' and they left. . . . I told them all the time I was going to pay them back. . . . The day that deed was wrote up, George said, 'Miss Fannie, if you never pay me this, if you will leave it to us at your death.' I said, 'I'm going to pay you, but if I never pay it you are welcome to it,' and if they had stayed with me my lifetime and waited on me they would have been welcome. . . . I told him if he and Hildred stayed with me until I died I would leave them the property. I meant by that statement that if I happened to die before I paid him that $2,300. I meant I was going to make a will; I would have made a will if it had been necessary. I tried to do all I could for them. I had not agreed that George and them could have it in any event, whether they stayed with me or not; they had to stay with me my lifetime. (Other evidence discloses that Mrs. Bowen, along with the defendants Darden, moved into the Greenville residence in January, 1947, but that as a result of unhappy family differences the Dardens moved away during or about the year 1950 and did not return.) . . . I reckon it was six months or more before I found out the deed had this provision in it: 'This deed made this the 23rd day of October, 1946, by M. B. Massie and wife to Fannie V. Bowen and Hildred Bowen Darden, for and in consideration of....., said parties of the first part have bargained, sold and conveyed to Fannie V. Bowen for and during the term of her natural life, then to Hildred B. Darden, her heirs and assigns.' I did not agree that that be put in the deed when I paid my money at Mr. Taft's office, and I did not know that provision was in the deed and did not agree it could be written that way. . . . When I first found out it was in there differently I thought to myself when I paid that money back (the $2,300 of the purchase money she testified she borrowed from the defendant George H. Darden, Jr.) the court would give me a deed. . . . I had great dependence in him (George) and when I found out that deed was wrote like it was, I near 'bout had a heart attack."

The foregoing testimony, and other evidence corroborative thereof, when viewed with the liberality required on motion to nonsuit, is sufficient to justify, though not necessarily to impel, the inferences (1) that when Mrs. Bowen purchased the house and lot she did not intend to make a gift or advancement of the remainder interest to her daughter Hildred B. Darden, and (2) that a trust resulted in favor of Mrs. Bowen. This makes it a case for the jury.

We have not overlooked the defendants' contention that the nonsuit entered below should be sustained under their plea of *res judicata* based on the contention that the judgment in the former action of *Bowen v. Darden* is a bar to the present action. G.S. 1-25. As to this, the rule is that a former judgment of nonsuit is *res judicata* as to a second action when and only when it is made to appear that the second action is between the same parties or their privies, on the same cause of action, and upon substantially the same evidence. *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82, and cases there cited. In the case at hand, the plaintiffs have alleged and rested their right of recovery upon the theory of a resulting trust; whereas no such cause of action was alleged in the former case.

Nor is there merit in the defendants' contention that the instant action is barred by the statute of limitations of three years. G.S. 1-52 (9). A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year statute of limitations. G.S. 1-56. *Jarrett v. Green,* 230 N.C. 104, 52 S.E. 2d 223; *Teachey v. Gurley, supra; Creech v. Creech, supra; Norton v. McDevit, supra.* Moreover, it is established by authoritative decisions of this Court that the statute of limitations does not run against a *cestui que trust* in possession. *McAden v. Palmer,* 140 N.C. 258, 52 S.E. 1034; *Norton v. McDevit, supra; Stith v. McKee,* 87 N.C. 389; *Mask v. Tiller,* 89 N.C. 423. The record discloses that Fannie V. Bowen, under whom the plaintiffs claim, remained in possession of the property until her death in 1952.

Upon the record as presented, the plaintiffs' case appears to be one for the jury. Let the judgment as of nonsuit entered below be

Reversed.

THOMAS J. BILLINGS v. CHARLES B. RENEGAR.

(Filed 3 November, 1954.)

1. Negligence § 9—

Foreseeability of injury is a requisite of proximate cause, and if injury cannot be reasonably foreseen in the exercise of due care, defendant is not liable.

2. Automobiles §§ 7, 18b—

The doctrine of foreseeability applies even though the action is based on the violation of a motor vehicle regulation.

3. Negligence § 20—

Illustrations used by the court in its charge on the question of proximate cause *held* not prejudicial in this case.

4. Same: Negligence § 20—

The charge of the court in this case *held* not subject to the objection that the jury was instructed that it must find defendant guilty of all the acts of negligence complained of in order to support an affirmative answer to the issue of negligence, it appearing that the court correctly charged that if plaintiff proved any of the acts of negligence alleged and further proved that defendant's negligence in any one or more of these respects was the proximate cause of the collision, to answer the issue of negligence in the affirmative, and that the subsequent portion of the charge objected to could not have misled the jury on this aspect, construing the charge contextually.

5. Trial § 31d—

An instruction that if the jurors were unable to make up their "minds about how the thing occurred" to find for the defendant, though not approved, *held* not prejudicial when the charge is construed as a whole, the court having repeatedly charged that the burden was on plaintiff to prove his case by the greater weight of the evidence.

6. Automobiles § 18i—

The failure of the court to charge the law concerning the operation of an automobile while under the influence of intoxicating liquor *held* not error, there being neither allegation nor proof that defendant at the time was operating his car while under the influence of intoxicating liquor.

7. Trial § 31b—

In order for it to be incumbent upon the court to charge the law upon a particular aspect of law, there must be both allegation and proof in regard thereto.

8. Appeal and Error § 38—

The burden is on appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right.

APPEAL by plaintiff from *Pless, J.*, July Civil Term 1954 of WILKES.

Civil action to recover damages for personal injuries and damage to an automobile allegedly caused by the actionable negligence of the defendant.

The defendant answered denying any negligence on his part, and alleging that if it should be found that he was guilty of negligence, then the plaintiff was guilty of contributory negligence. The defendant in his further answer and counterclaim alleged that he was seriously injured and his automobile damaged by the actionable negligence of the plaintiff, and he seeks to recover damages.

The plaintiff filed a reply to defendant's further answer and counterclaim in which he alleges that if it should be found that he was guilty of negligence, then the defendant was guilty of contributory negligence.

The plaintiff and the defendant offered evidence tending to support the allegations in their pleadings. On the afternoon of 15 August 1953, the plaintiff was driving his Ford automobile in a westerly direction on N. C. Highway No. 268 in Wilkes County. At the same time the defendant was driving his Mercury automobile in an easterly direction on the same highway in Wilkes County. When the two automobiles met, they collided. Both plaintiff and defendant were seriously injured in the crash. The evidence offered by the plaintiff, and that offered by the defendant was in sharp conflict as to how the collision occurred.

Eight issues were submitted to the jury. The first issue: "Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint?", was answered by the jury "No." The fifth issue: "Was the defendant injured and damaged by the negligence of the plaintiff, as alleged in the counterclaim?", was answered "No."

The plaintiff appealed, assigning errors.

James C. Smathers and W. H. McElwee, Jr., for Plaintiff, Appellant.
Hayes & Hayes and James Randleman for Defendant, Appellee.

PARKER, J. The assignments of error brought forward by the plaintiff, and discussed in his brief, relate solely to the charge of the court on the first issue.

The trial court instructed the jury that the plaintiff alleges actionable negligence on defendant's part, and that consists of two elements: the first being negligence, and the other proximate cause. He then defined negligence in words unexcepted to by plaintiff, and followed it with this language, which the plaintiff assigns as error (assignment of error No. 2): "The law is made for all of us. It recognizes that we all have our frailties, and therefore it does not require that we will be able to foresee what is going to happen, but it does require that we so conduct ourselves that we have due regard for the rights of our fellowmen, and that we foresee what might reasonably be foreseen, although it does not require what is known as prevision." The next words of the charge are: "The other element, gentlemen, of actionable negligence is proximate cause which means, etc."

It is thoroughly established by our decisions that foreseeability of injury is a requisite of proximate cause. *Davis v. Light Co.*, 238 N.C. 106, 76 S.E. 2d 378, where the cases are cited.

"The law requires reasonable foresight and, when the result complained of is not reasonably foreseeable in the exercise of due care, the party

whose conduct is under investigation is not answerable therefore . . ." *Newell v. Darnell,* 209 N.C. 254, 183 S.E. 374; which excerpt is quoted with approval in *Roberson v. Taxi Service, Inc.,* 214 N.C. 624, 200 S.E. 363, and in *Whitley v. Jones,* 238 N.C. 332, 78 S.E. 2d 147.

After defining proximate cause the court then instructed the jury: "It is also the law, gentlemen of the jury, that where a person violates a law which has been enacted for the public safety, that that is negligence in itself; that is, gentlemen of the jury, a person violates a law, for instance, without brakes adequate to control his car under ordinary conditions and does so knowingly, that would be negligence. If that were the cause of a collision between him and another car, it would be what is known as actionable negligence." This quoted part of the charge is plaintiff's assignment of error No. 3.

The plaintiff makes these contentions: The violation of the safety statutes is negligence *per se,* and the element of foreseeability does not apply, if the violation of such statutes becomes a proximate cause of injury. That the plaintiff alleged and offered evidence tending to show that the defendant violated certain safety statutes regulating the operation of automobiles, thus causing plaintiff's injuries. That the use of the word knowingly by the court in its illustration dovetailed in with the definition of negligence used by the court in its charge; "this, of course, referring to the element of foreseeability." That the illustration used by the court was highly prejudicial.

The assignments of error Nos. 2 and 3 are not valid. *Barnhill, C. J.,* speaking for a unanimous Court said in *Aldridge v. Hasty,* 240 N.C. 353, p. 359, 82 S.E. 2d 331: "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."

Assignment of error No. 4 refers to this illustration used by the court in its charge: "Now, to show you, gentlemen of the jury, what I mean by the plaintiff having to establish both negligence and proximate cause, I give you this illustration: Suppose two cars have a head-on collision at midnight, both of them have the proper headlights, but one of them does not have any tail light. Well, the law says that a car has to have tail lights burning, and consequently the failure to have burning tail lights at midnight is negligence, but it would not be actionable negligence in the illustration we used, because whether he had tail lights or not did not have anything to do with the head-on collision. It has to be such negligence as directly or immediately brings about injury to another to constitute actionable negligence." In our opinion, the plaintiff has not shown that he was prejudiced by the use of the illustrations referred to in assignments of error Nos. 3 and 4 to the extent that the jury's verdict was

probably influenced thereby against him. *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194.

Assignment of error No. 9 refers to the following part of the charge: "The Court instructs you, gentlemen of the jury, that if the plaintiff has fulfilled the responsibility cast upon him by the law to the extent that his evidence, by its quality and convincing power, has satisfied you by the greater weight that the defendant was negligent, either in excessive speed under the time, place, and conditions existing, or was negligent in that he operated his automobile in a reckless, careless and heedless manner, without due regard for the rights and safety of others operating" (the word "on" is apparently omitted) "the highway, or if he has satisfied you that he violated the statute which provides that a person shall not operate his motor vehicle upon the left side of the highway, except under certain circumstances, which do not apply here, or if he has satisfied you by the greater weight of the evidence that the defendant failed to yield to him one-half portion of the highway, I say if he has proven any of those things, and proven them by the greater weight of the evidence, and has further proven that his negligence in any one or more of those regards not only exists, but the act was the direct, immediate cause of the collision between the cars, that is the cause without which the collision would never have resulted, causing damage to his car and injury to his person, I say, if the plaintiff has proven all of those things by the greater weight of the evidence, it would be your duty to answer this first issue in his favor, that is YES."

The plaintiff contends that the trial court in this part of its charge required the plaintiff to satisfy the jury by the greater weight of the evidence that the defendant was guilty of violating not one, but all, of the allegations of negligence alleged in his complaint and supported by evidence before the jury could answer the first issue in his favor. If such contention is tenable, it is not debatable that the plaintiff is entitled to a new trial.

Prior to this assailed part of its charge the court had charged the jury: "It is also the law, gentlemen of the jury, that where a person violates a law which has been enacted for the public safety that that is negligence in itself." Here in its application of the law to the facts the court clearly and accurately charged that if the plaintiff had satisfied the jury by the greater weight of the evidence that the defendant had violated *any one* of the statutes regulating the operation of automobiles, as alleged in plaintiff's complaint, taking them up separately and stating them in the alternative, then the defendant was guilty of negligence and, by way of emphasis, then charged if the plaintiff has proven *any* of those things, and has further proven that his negligence in *any one or more* of those regards not only exists, but the act was the direct, immediate cause of the

collision causing damage to plaintiff . . . Then come the words in the charge: "I say, if the plaintiff has proven all of those things." The court had already charged that actionable negligence consists of two elements: the first negligence and the other proximate cause. Considering the part of the charge challenged by assignment of error No. 9 in its proper setting in the charge as a whole, it seems to us, and we so hold, that the words "all of those things" clearly mean that the plaintiff must prove both negligence and proximate cause, and does not mean that the plaintiff had to satisfy the jury that the defendant was guilty of violating not one, but all, of the negligent acts stated by the court before the first issue could be answered in plaintiff's favor, and that it was so understood by the jury.

The plaintiff assigns as error No. 10 that part of the charge which immediately follows that part of the charge which he has challenged by his assignment of error No. 9, and which reads as follows: "On the other hand, gentlemen of the jury, if, after considering all the evidence, both for the plaintiff and for the defendant, if the plaintiff has not so satisfied you, if you are unable to make up your minds about how the thing occurred, or if the evidence of the defendant outweighs in the scales of your mind that of the plaintiff, or if the scales of your mind remain evenly balanced, are not tipped, to some degree at least, by the quality and convincing power of the plaintiff's evidence, then, under those circumstances, the defendant would be entitled to a favorable answer to that issue and you would answer it No."

The plaintiff contends that the use of the words, "if you are unable to make up your minds about how the thing occurred" is the error in this part of the charge. The sole authority he cites in his brief is the following sentence from 53 Am. Jur., Trial, p. 554: "It is error to charge the jury that the verdict must be for the defendant if the truth of the charge against him remains undetermined in their minds." Am. Jur. gives as authority for this sentence *Nelson v. Evans*, 338 Mo. 991, 93 S.W. 2d 691. The pertinent words in the charge in the *Nelson Case* are: "If, therefore, you find the evidence touching the charge of negligence against the defendant is evenly balanced, or the truth as to the charge of negligence as against the defendant *remains undetermined in your minds*, after fairly considering the evidence, then your verdict must be for the defendant." The italics are those of the Missouri Court. The above quoted words are only part of a longer portion of the charge which is assigned as error. The decision was rendered by the Supreme Court of Missouri, Division No. 2, and the opinion was written by *Westhues, Commissioner*, and adopted as the opinion of the Court. In respect to the words in italics the Court said: "Note, that the instruction told the jury that if the truth as to the charge of negligence remained undetermined in their minds, then

they should find for the defendant. Is it not sufficient if they determine the evidence introduced by a plaintiff to be more convincing to them and more worthy of belief than that offered by the defendant? In our opinion, a verdict for a plaintiff is justified if a jury has determined that the plaintiff has offered substantial evidence in support of his claim, which outweighs and is more convincing than the evidence offered by the defendant . . . A greater burden is cast upon a plaintiff by such an instruction than the law imposes."

In *Drena v. Travelers' Ins. Co.*, 183 N.Y.S. 439, 192 App. Div. 703, at the close of the charge the defendant requested a charge that: "If the jury should find the evidence evenly balanced, or unable to tell where the truth lies, then their verdict must be for the defendant." The Court said: "The request was proper, and it was error to refuse it, unless the jury had been otherwise charged to the same effect."

In *Willis v. R. R.*, 122 N.C. 905, 29 S.E. 941, the first prayer of the defendant for instruction was: "When the minds of the jury are in doubt (whether there was negligence or not) they must find for the defendant." This Court held that the lower court properly refused this prayer. This is much stronger language than that used in the instant case. In the *Willis Case* we said: "In every case, civil or criminal, where there is conflicting evidence, there is probably more or less doubt in the minds of the jury."

Reading the part of the charge challenged by assignment of error No. 10 in its entirety we find that His Honor had stated clearly and accurately three times in substance that if the plaintiff had not satisfied the jury by the greater weight of the evidence that the defendant was guilty of actionable negligence, then the jury should answer the first issue "No." His Honor certainly did not intend to strengthen, weaken or change what he had said by the use of the words, "if you are unable to make up your minds about how the thing occurred," and we do not think his language could have been so understood by the jury. It is not perceived that prejudicial error appears. However, we disapprove of the use of the words, "if you are unable to make up your minds about how the thing occurred," and similar expressions.

The plaintiff assigns as error No. 12 that the court in its charge failed "to charge the statute" concerning the operation of automobiles, while under the influence of intoxicating liquor, and to apply the law to the facts. The plaintiff did not allege as an act of negligence that the defendant was operating his automobile while under the influence of intoxicating liquor; in his complaint and reply there is not a word alleged as to the defendant drinking. If the plaintiff had alleged as an act of negligence that the defendant was operating his automobile while under the influence of intoxicating liquor, and had offered evidence tending to sup-

port such allegation, it would have been reversible error for the lower court in its charge not to have declared and explained this statute, and to state the evidence to the extent necessary to explain the application of this statute thereto. *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915; *Barnes v. Teer,* 219 N.C. 823, 15 S.E. 2d 379. The evidence favorable to the plaintiff tends to show these facts: After the crash a pint bottle half full of an unknown yellow liquid was taken out of defendant's car; about an hour and fifteen minutes after the wreck the defendant in the hospital had the odor of alcohol on his breath, and said he had drunk two bottles of beer that afternoon. The defendant's evidence tended to show that he was not under the influence of intoxicating liquor; that there was no intoxicating liquor in his car to his knowledge; that he had two bottles of beer at lunch, and no intoxicating liquor from then until after the crash; that Lionel Collins and his brother, Fred Renegar, were in his automobile at the time of the collision; his brother was killed. For the trial court to have charged as contended by the plaintiff, the plaintiff must have both *allegata* and *probata. Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911. He has neither. Assignment of error No. 12 is overruled.

We have examined the other assignments of error of plaintiff, and they are without merit.

The burden is on the appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657. This he has not done.

No error.

MISS CORA PERKINS v. F. L. CLARKE AND WIFE, MRS. F. L. CLARKE.

(Filed 3 November, 1954.)

1. Boundaries § 6—

Where all the evidence shows that the plaintiff is the owner and in possession of certain lands and that defendant is the owner and in possession of contiguous lands, and the only dispute between the parties is the location of the true dividing line between the respective tracts, title is not in dispute, and the court correctly refuses to submit an issue of title tendered by one of the parties.

2. Boundaries § 5f—

Where, in a processioning proceeding, there is no exception to the court's order appointing a surveyor to make a survey of the contentions of the parties, exceptions to the testimony of the surveyor because he set out on his map the disputed line as contended for by plaintiff as well as that contended for by defendant, is untenable.

3. Boundaries § 5d—

It is competent for witnesses to testify from their own knowledge as to the location of natural objects called for in the deeds admitted in evidence. The distinction is pointed out between testimony as to personal knowledge and testimony of declarations made by others, which declarations must be made *ante litem motam* by disinterested parties, since deceased.

4. Evidence § 19—

Testimony of declarations made by a witness to others, which declarations are in conflict with the testimony of the witness upon the trial, is competent for the sole purpose of impeaching the witness' credibility, even though such testimony would otherwise be incompetent as hearsay.

5. Appeal and Error § 39c—

The admission of technically incompetent testimony as to a collateral matter cannot justify a new trial when it is apparent that it could not have influenced the jury in its decision on the issue in dispute.

DEFENDANTS' appeal from *Fountain, S. J.*, April-May Term, 1954, CALDWELL.

This was a special proceeding brought before the clerk under the provisions of Chapter 38 of the General Statutes to establish a disputed boundary line between the lands of the parties. The plaintiff alleged in her petition that she was the owner of a certain described tract of land in Caldwell County; that there was a dispute as to the location of the boundary line between her lands and those of the defendant, F. L. Clarke. She alleged the true dividing line is as follows:

"Beginning at a stake on the west side of Rocky Branch, formerly the location of a beech tree, and above the forks of Rocky Branch, runs North 80 degrees East 15 poles; then North 43 degrees East 18 poles; North 62 degrees East 12 poles; North 82 degrees East 30 poles; North 65 degrees East 29 poles; South 85 degrees East 15 poles; South 65 degrees East 21 poles; North 75 degrees East 6 poles; North 35 degrees East 9 poles; North 65 degrees East 69 poles; South 53 degrees East 24 poles; South 75 degrees East 45 poles; to a mahogany."

The defendants answered, denying the plaintiff owned the land described in the petition and alleging "the true dividing line between the defendants and the petitioner is as follows:

"Beginning on a beech, William Carroll's corner near Rock House Branch; then running south 84½ degrees East 80 poles to a dogwood on top of ridge marked on the southeast side with three hacks; thence running East course with ridge to a rock near the spring 100 poles in all; thence South 40 degrees East 13 poles to a stake; thence East 30 poles to a mahogany gone now an iron stake on the West bank of Wilson Creek."

The defendants having denied plaintiff's title, the case was transferred to the civil issue docket. Plaintiff, with leave of the court, filed an

amended petition in which she stated the true boundary line between the lands of the parties is:

"Beginning at a beech in the forks of Rocky Branch and runs North 86 degrees East 260 poles to a mahogany tree, or, conversely, beginning at a mahogany tree and running South 86 degrees West 260 poles to a beech on Rocky Branch."

The defendants filed an answer to the amended petition, alleging the plaintiff had filed three different petitions, each alleging the dividing line at a different location. The defendants repeated their contentions as to the boundary line, except "Rock Hill" branch was substituted in the second answer for "Rock House" Branch in the first. It was stipulated the lands of the parties were derived from the same source, J. Thad Perkins.

The plaintiff introduced the following deeds:

(1) Deed dated 20 September, 1921, from J. Thad Perkins to Cora A. Perkins and Ernest L. Perkins. The pertinent call in this deed is: "Adjoining the lands of Robert H. Perkins, Samuel O. Perkins and Frank E. Perkins on the South."

(2) Deed dated 9 March, 1932, from Ernest L. Perkins to Cora Perkins, conveying his interest in the land described in deed No. 1.

(3) Deed dated 20 September, 1921, from J. Thad Perkins, to Robert H. Perkins, Samuel O. Perkins and Frank E. Perkins. The pertinent call in this deed is: "Beginning at the forks of Rocky Branch, William Carroll's corner in the Micheaux line, running an easterly course to a mahogany on Wilson's Creek."

(4) Deed dated 12 June, 1946, from Frank E. Perkins, Samuel O. Perkins and Robert H. Perkins and wives, to F. L. Clarke. This deed contains the same description as No. 3, and added: "The tract of land includes all the land owned by J. Thad Perkins south of Cora A. Perkins and Ernest L. Perkins."

The court appointed a surveyor with directions to survey the contentions of the parties, make the required number of plats, and report to the court. The surveyor made his survey, filed a map showing a red line from Point No. 1 to Point No. 2 as contended for by the plaintiff, and a purple line from Purple A to Purple B as contended for by the defendants. Mr. Isbell, the surveyor, testified in substance: He went to the fork of a branch shown to him by Miss Cora Perkins and found a branch there; "it was hard to determine where the fork is." The deed reads: "Beginning at the forks of Rocky Branch, William Carroll's corner in the Micheaux line." That is shown as Point No. 1 to Point No. 2 on the red line in his survey. He found the mahogany tree; it was located on the west bank of Wilson's Creek. "I ran the first call from Point 1 as shown on the map. That is shown on Point 1 to Point 2 on the red line.

At Point 2 on the red line in my survey, I found a mahogany tree. It was located on the west bank of Wilson's Creek . . . After close examination it showed to have two marks or bruises on the side next to the river."

The map shows a red line from Red 1 to Red 2 as running North 86 degrees East 260 poles. On cross-examination the surveyor testified: "In running the line from A to B, I followed the directions given me by Mr. Klutz. I found some marks along this line. The branch could be observed by anyone who will go there; and surveying from A on the map to B, I found marked trees on the ridge. I surveyed what was their (the defendants') contentions that were handed me and the line hit those marks. There is a line marked practically all the way across there." On re-direct examination, he testified that in his opinion the marks on the line from A to B had been made within two years of that time. The survey was made in October, 1951.

A number of witnesses for the plaintiff testified that they knew the location of the Micheaux Line and the forks of Rocky Branch in that line, and that the location was Red 2 on the map. Other witnesses testified as to the mahogany on Wilson's Creek, Point 1 on the map, including evidence that there was a beech tree at Red 1, but that it died and is not there now.

There was evidence that J. Thad Perkins died in 1932 and that Cora A. Perkins and Ernest L. Perkins had been in possession of the land north of the disputed line since 1921. There was evidence tending to show that the line as claimed by defendants ran between Cora's house and the barn, and between the house and the spring.

The summons was introduced, showing that this action was begun 22 May, 1951.

The defendant offered the following deeds:

(1) Deed dated 20 September, 1921, from J. Thad Perkins to Robert H. Perkins, Samuel O. Perkins, and Frank E. Perkins (the same as plaintiff's deed No. 3).

(2) Deed dated 12 June, 1946, from Frank E. Perkins and others to F. L. Clarke (the same as plaintiff's No. 4).

(3) Grant No. 5189 from the State of North Carolina to Alexander Perkins for "fifty acres of land on Rocky Branch on John's River, beginning at a post oak, fallen down opposite the bend of John's River, which being the southwest corner of said Perkins-Sherrill land on the bank of the river and on John Perkins line, and runs west with his line 56 poles to a beech on Rocky Branch, it being James Carroll's corner marked by Colonel William Davenport; then north with Carroll's line 160 poles to a pine, his corner in a line of his old Davenport survey; then east 56 poles to a stake in the said Carroll's line; then south with a line of Perkins-

Sherrill tract 160 poles to the beginning, entered the 3rd day of December, 1824, . . . Dated 3rd January 1926."

R. A. Kent testified that he had been a surveyor for 30 years, having studied at State College, that he had known the Perkins place for 45 years, that he had surveyed the line A to B and found a marked line, a dozen, maybe 15 or 20 marked trees on the line. In his opinion the marks were 25-30 years old.

Other evidence tending to establish the line as contended for by the defendants, including evidence that there had been a mahogany at or near Purple B, but that it had been washed away by flood waters. Defendants' evidence also tended to show a large beech located at Purple A.

The defendants tendered an issue as follows: "Is the plaintiff the owner of the lands described in the petition as owned by the plaintiff?" The court refused to submit the issue, and the defendants excepted. The court submitted the following issue: "1. Where is the true dividing line between the lands of the plaintiff and the lands of the defendants?" The jury answered the issue "One to Two." The court entered judgment in accordance with the verdict, from which the defendants appealed.

W. H. Strickland and Proctor & Dameron for plaintiff, appellee.

G. W. Klutz, A. R. Crisp, and Hal B. Adams for defendants, appellants.

HIGGINS, J. The evidence, both record and parol, discloses that J. Thad Perkins made deeds to his children on 20 September, 1921, conveying the southern portion of his farm to his sons, Robert H., Samuel O., and Frank E. Perkins. The first call in the description of this deed is the line in controversy: "Beginning at the forks of Rocky Branch, William Carroll's corner in the Micheaux line, running an easterly course to a mahogany tree on Wilson's Creek." This tract of land with the same calls was conveyed to the defendant, F. L. Clarke, on 19 January, 1946, by Robert H., Samuel O., and Frank E. Perkins.

On 20 September, 1921, J. Thad Perkins conveyed the northern portion of his farm to Cora A. Perkins, an unmarried daughter who is the plaintiff in this action, and to Ernest L. Perkins, an unmarried son. This tract contained the J. Thad Perkins home. This deed does not contain specific calls, but the description is as follows:

"Adjoining the lands of Robert H. Perkins, Samuel O. Perkins, and Frank E. Perkins on the South, George T. Perkins and wife on the North. Bounded upon the East by the A. W. Perkins tract; on the North by George T. Perkins and wife; and on the West by John Perry and others; and on the South by Robert H. Perkins, Samuel O. Perkins and Frank E. Perkins. This tract of land included all the land owned by J. Thad Perkins, lying on Wilson's Creek between George T. Perkins and wife

tract on the North, and the Robert H. Perkins, Samuel O. Perkins and Frank E. Perkins on the South."

On 9 March, 1932, Ernest L. Perkins conveyed his interest in the above described lands to Cora Perkins.

The defendants' answer sets up a dividing line between the lands of the parties. It is apparent, therefore, that the southern line of the Cora Perkins land and the northern line of the Clarke land are one and the same, and consequently the line in dispute.

Since the location of the line settles the dispute, the court, therefore, properly refused to submit the issue of title tendered by the defendants. A similar question was before this Court in the case of *Clark v. Dill,* 208 N.C. 421, 181 S.E. 281, and we quote from *Chief Justice Stacy's* opinion: "Upon the trial the defendant tendered issues of title as well as of boundary, and excepted to the refusal of the court to submit the former. The merit in appellant's exception is dissipated by the following statement in the case on appeal: 'From the testimony of both plaintiff and defendant, the title to the J. H. Dill land was never in dispute and the title to the Clark land was not brought into dispute except as to the question of where the true line should run between them.' The case was tried purely as a proceeding to establish the boundary line between the land admittedly occupied by the plaintiff and the adjoining land admittedly occupied by the defendant. It is provided by C.S. 362 that the 'occupation of land constitutes sufficient ownership for the purposes of this chapter.' *Williams v. Hughes,* 124 N.C. 3, 32 S.E. 325."

The deeds offered by the parties show the plaintiff is the owner, and all the evidence shows she is in possession of the lands immediately north of the defendants' northern boundary line; that the defendant F. L. Clarke is the owner and in possession of the lands immediately south of that line is likewise shown by all the evidence. The true location of the boundary line, therefore, is the question in dispute.

The map filed with the record shows the red line from Red 1, the forks of Rocky Branch, north 86 degrees east 260 poles to a mahogany on Wilson Creek, and Red 2 is a straight line. This represents plaintiff's contentions. The map shows the purple line beginning at Purple A, a large beech on Rocky Branch, running south 76 degrees east 94 poles to a dogwood, north 88½ degrees east 7 poles; south 75 degrees east 10 poles; south 55 degrees east 10 poles; south 82 degrees east 14 poles to a stone and spring; south 212 degrees east 12½ poles; north 82½ degrees east 33 poles to a bridge and stake on Wilson's Creek. This line represents defendants' contentions.

Exceptions were taken to the testimony of the surveyor because he surveyed and set out on his map the disputed line as contended for by the plaintiff. On cross-examination he also testified that he surveyed and

set out on the map the defendants' contentions. The court's order directed the surveyor to survey the contentions of the parties and there was no exception to that order.

One hundred three exceptions were taken during the trial. Sixty-nine assignments of error are discussed in the brief. Many of the exceptions were taken to the testimony of witnesses who stated that they knew, and had known for many years the location of objects called for in the deeds, such as the forks of Rocky Branch, the Carroll's corner, the Micheaux line, the mahogany on Wilson's Creek; and some of the witnesses related these objects to the points on the surveyor's map. This evidence was clearly competent. The witnesses were testifying from their own knowledge. Each testified that he knew the location of the objects about which he testified. Evidence from personal knowledge is not to be confused with evidence of declarations made by others. In the latter case, in order to make the declarations competent it would be necessary to show the declarations were made *ante litem motam* by a disinterested party, since deceased. The distinction is set forth in *Maynard v. Holder,* 219 N.C. 470, 472, 14 S.E. 2d 415.

Defendants' assignments of error Nos. 66, 75, and 85 relate to the admission of evidence for the limited purpose of impeaching the testimony of Ernest L. Perkins, a witness for the plaintiff who had testified that the red line between Red 1 and Red 2 was the correct dividing line. He was then asked on cross-examination if he had not made the statement in the presence of a number of witnesses to the effect he had pointed out to the defendant or his son a different line, at or near purple line A to B as the correct line. This Perkins denied. Witnesses were called by the defendants to testify that they had heard Perkins make the statements which he had denied making. This evidence was admitted for the purpose of impeachment only, and the jury was instructed not to consider it as substantive evidence. Undoubtedly, the ruling of the court was correct. Proof of what Perkins said in the hearing of others would violate the hearsay rule and could be admitted only under the exception which admits such hearsay evidence for the purpose of impeachment. In the case of *S. v. Wellmon,* 222 N.C. 215, 217, 22 S.E. 2d 437, the Court said: "It is well settled that the credit of a witness may be impeached by proof that he has made representations inconsistent with his present testimony." And in the case of *Pate v. Steamboat Co.,* 148 N.C. 571, 62 S.E. 614, this Court said: "Of course the declarations of the boathand made after their occurrence are incompetent for the purpose of proving the condition of the bateau, *Southerland v. R. R.,* 106 N.C. 100, but having been examined by the defendant as a witness as to the condition of the bateau, it was competent to impeach or contradict his evidence on that point by his

declarations on that subject to Glover. His Honor properly confined the scope and effect of the question to 'impeaching evidence.' "

A witness for plaintiff was asked as to the condition of Miss Cora's health. The question was objected to by the defendants, overruled, and the following answer given: "Her health has been failing right considerably for ten years and she can't hardly hear at all; we almost have to squall to get her to hear what we are saying and she can't understand a radio at all, and she has had her eyes examined twice in the last year and the doctor told her she had double cataracts and there is nothing they could do for her. She is about blind. She can't read her own letters. She sleeps very little at night." Obviously, the question was asked for the purpose of explaining the plaintiff's failure to take the stand and testify. The answer of the witness perhaps went further than was proper for that purpose, and perhaps further than was contemplated by the question. The defendant made no motion to strike. At any rate, in view of the rather compelling evidence disclosed by the record, the evidence objected to could not have influenced the jury in its decision on a clear cut question as to the location of the boundary line.

We have examined the other exceptions and assignments of error, including those taken to the charge. They are without substantial merit. The issue was one of fact. Much testimony was offered by both parties. Its probative force was for the jury. No reason appears why the verdict should be disturbed.

No error.

RAYMOND RALPH FOX, PETITIONER, v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, RESPONDENT.

(Filed 3 November, 1954.)

1. Automobiles § 34a: Constitutional Law § 13—

The operation of a motor vehicle on the highways of this State is a conditional privilege, and the General Assembly has full authority, in the exercise of the police power, to prescribe the conditions upon which licenses shall be issued and to designate the agency through which, and the conditions upon which, licenses shall be suspended or revoked.

2. Same—

The State Department of Motor Vehicles is vested with exclusive authority to issue, suspend, and revoke licenses to operate motor vehicles in this State.

3. Criminal Law § 17c—

The plea of *nolo contendere* is recognized in this jurisdiction, but such plea may not be entered as a matter of right, but only as a matter of grace.

4. Same—

A plea of *nolo contendere* offered by defendant and accepted by the State is equivalent to a plea of guilty for the purposes of the case in which it is entered, but does not establish the fact of guilt for any other purpose.

5. Automobiles § 34b—

Defendant entered a plea of *nolo contendere* to a charge of a second offense of operating an automobile while under the influence of intoxicating liquor, which plea was accepted by the court, and a record of the entering and the acceptance of the plea was forwarded to the Commissioner of Motor Vehicles. *Held:* Under G.S. 20-17, it was the mandatory duty of the Commissioner of Motor Vehicles to revoke defendant's license for a period in compliance with G.S. 20-19 (d), as a ministerial act performed in the same case in which the plea was entered, G.S. 20-24 (a) (c), and no appeal lies therefrom. G.S. 20-25.

APPEAL by respondent from *Rudisill, J.*, August Term 1954 of IREDELL. Reversed.

Petition to compel the respondent, Commissioner of Motor Vehicles, to restore the petitioner's automobile driver's license allegedly revoked for the commission of a second offense of operating an automobile, while under the influence of intoxicating liquor.

After the filing of a petition and answer, the petitioner and respondent stipulated and agreed as to the facts. The facts so agreed upon material for decision by us are substantially as follows:

One. On 28 September 1949 Fox, the petitioner, was convicted in the Statesville Recorder's Court of driving an automobile while under the influence of intoxicating liquor, and was fined; the respondent, upon receipt of the record of such conviction, revoked petitioner's operator's license for one year.

Two. After the expiration of said revocation period, the petitioner procured reissuance of his operator's license.

Three. At the November Term 1952 of the Superior Court of Iredell County petitioner entered a plea of *Nolo Contendere* to a charge of a second offense of operating an automobile while under the influence of intoxicating liquor, which plea was accepted by the court, and judgment was rendered. A record of the entering and acceptance of such plea was forwarded to the respondent, who thereupon served upon petitioner a notice of revocation of his operator's license for a period beginning 11 November 1952 and ending 11 November 1955.

Four. The sole reason the respondent refuses to issue an operator's license to the petitioner is because of his plea of *nolo contendere* to the charge at the November Term 1952 of Iredell Superior Court.

Five. On 31 May 1954 petitioner applied for an operator's license; the respondent refused the application; and 30 days thereafter petitioner filed his petition in court.

Judge Rudisill entered judgment that the petitioner is entitled to the return of his operator's license, and directed the respondent to return it.

Respondent excepted and appealed, assigning error.

Trivette, Holshouser & Mitchell for Petitioner, Appellee.

Harry McMullan, Attorney General, and Samuel Behrends, Jr., Member of Staff, for Respondent, Appellant.

PARKER, J. G. S. N. C. Sec. 20-138 provides that it shall be unlawful and punishable, as provided in G. S. N. C. Sec. 20-179, for any person who is under the influence of intoxicating liquor to drive any vehicle upon the highways within the State. G. S. N. C. Sec. 20-179 provides that every person who is convicted of violating Sec. 20-138 shall, for the first offense, be punished by a fine of not less than one hundred dollars or imprisoned for not less than thirty days, or by both, in the discretion of the court; and shall, for the second offense, be punished by a fine of not less than two hundred dollars or imprisonment for not less than six months, or by both, in the discretion of the court.

G. S. N. C. Sec. 20-24(a) provides: "WHEN COURT TO FORWARD LICENSE TO DEPARTMENT AND REPORT CONVICTIONS.—(a) Whenever any person is convicted of any violation of the motor vehicle laws of this State, a notation of such conviction shall be entered by the court upon the license of the person so convicted. Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's or chauffeur's license of such person by the Department, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeurs' licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Department." Subsection (c) provides that the term "conviction" shall mean a final conviction, and also that a forfeiture of bail to secure a defendant's presence in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

G. S. N. C. Sec. 20-17 reads: "MANDATORY REVOCATION OF LICENSE BY DEPARTMENT.—The Department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses, when such conviction has become final: . . . 2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug."

G. S. N. C. Sec. 20-16 is captioned: "AUTHORITY OF DEPARTMENT TO SUSPEND LICENSE." When the license of a person is suspended under this section, the Department is required immediately to notify the licensee in writing, and upon his request shall give him a hearing. The Department, when acting under this section, acts in its discretion, and its acts are

reviewable by the Superior Court. *Winesett v. Scheidt, Comr. of Motor Vehicles,* 239 N.C. 190, 79 S.E. 2d 501; G. S. N. C. Sec. 20-25. The review in the Superior Court "is a rehearing *de novo,* and the judge is not bound by the findings of fact or the conclusions of law made by the department." *In re Revocation of License of Wright,* 228 N.C. 301, 45 S.E. 2d 370.

G. S. N. C. 20-25, which gives the right of appeal, expressly excepts a right of appeal when such cancellation is mandatory. "No right accrues to a licensee who petitions for a review of the order of the Department when it acts under the terms of G. S. 20-17, for then its action is mandatory." *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696.

The General Assembly has full authority to prescribe the conditions upon which licenses to operate automobiles are issued, and to designate the agency through which, and the conditions upon which licenses, when issued shall be suspended or revoked. *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793. G. S. N. C. 20—Art. 2 vests exclusively in the State Department of Motor Vehicles the issuance, suspension and revocation of licenses to operate motor vehicles. *S. v. Warren,* 230 N.C. 299, 52 S.E. 2d 879.

"The right of a citizen to travel upon the public highways is a common right, but the exercise of that right may be regulated or controlled in the interest of public safety under the police power of the State. The operation of a motor vehicle on such highways is not a natural right. It is a conditional privilege, which may be suspended or revoked under the police power. The license or permit to so operate is not a contract or property right in a constitutional sense." *Commonwealth v. Ellett,* 174 Va. 403, 4 S.E. 2d 762.

For clarity of understanding it is desirable to state the nature and implications of a plea of *nolo contendere.* "A plea of *nolo contendere,* sometimes called also a plea of *non vult* or plea of *nolle contendere,* means in its literal translation 'I do not wish to contend,' and it has its origin in the early English common law." 152 A.L.R., p. 254. The plea was known to the English common law as early as the reign of Henry IV (1399-1413). 2 Hawkins, "A Treatise on the Pleas of the Crown." 8th Ed. 466. "No example of its use in the English Courts has been found since the case of *Reg. v. Templeman,* decided in 1702, 1 Salk. 55, 91 Eng. Reprint 54." *Hudson v. U. S.,* 272 U.S. 451, 71 L. Ed. 347. Its use has been continued in the United States, 152 A.L.R., pp. 254-5; and it has long been recognized in this jurisdiction. *Winesett v. Scheidt, Comr. of Motor Vehicles, supra.*

Recent years have brought about the renaissance of the plea of *nolo contendere* in criminal proceedings in the United States, especially in the

Federal Courts where, it is said, thousands of defendants have entered the plea to indictments and criminal informations charging them with violating the anti-trust and income tax laws, because of the attractiveness of certain of its features for the defendant. Lenvin and Meyers: *"Nolo Contendere:* Its Nature and Implications." 51 Yale Law Journal 1255.

The entry of the plea is not a matter of right, but of grace. *S. v. McIntyre,* 238 N.C. 305, 77 S.E. 2d 698. *Hudson v. U. S., supra.*

It seems to be the law in all the State Courts and in the Federal Courts that a plea of *nolo contendere* to an indictment good in form and substance, has all the effect of a plea of guilty for the purposes of that case only. *Winesett v. Scheidt, Comr. of Motor Vehicles, supra; S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *S. v. McIntyre, supra; S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525; *In re Stiers,* 204 N.C. 48, 167 S.E. 382; *U. S. v. Norris,* 281 U.S. 619, 74 L. Ed. 1076; *Hudson v. U. S., supra;* 152 A.L.R., p. 273, Note 125, where the cases are cited; 14 Am. Jur., Criminal Law, p. 954. ". . . It" (a plea of *nolo contendere*) "authorizes judgment as upon conviction by verdict or plea of guilty." *Winesett v. Scheidt, Comr. of Motor Vehicles, supra.*

"Like the implied confession this plea does not create an estoppel, but like the plea of guilty, it is an admission of guilt for the purpose of the case." *Hudson v. U. S., supra.*

Winborne, J., speaking for the Court says in *S. v. Thomas, supra:* ". . . (2) that in all decisions in point the legal effect of the plea of *nolo contendere,* after it has been offered by the defendant and accepted by the court, in respect to the case in which it is interposed, is that it becomes an implied confession of guilt, and for the purposes of the case only, equivalent to a plea of guilty."

The basic characteristic of the plea of *nolo contendere* which differentiates it from a guilty plea, as unanimously accepted by all the courts, is that while the plea of *nolo contendere* may be followed by a sentence, it does not establish the fact of guilt for any other purpose than that of the case to which it applies. *Winesett v. Scheidt, Comr. of Motor Vehicles, supra; S. v. Thomas, supra; In re Stiers, supra; S. v. Burnett,* 174 N.C. 796, 93 S.E. 473; 152 A.L.R. 280, *et seq.*

When Fox, the petitioner, entered a plea of *nolo contendere* to the charge of a second offense of operating an automobile upon the public highways of the State, while under the influence of intoxicating liquor, at the November Term 1952 of the Superior Court of Iredell County, which plea was accepted by the court, for the purposes of that case in that court, such plea was equivalent to a plea of guilty, or conviction by a jury, and G.S. 20-24, subsection (a) required that court *to enter a notation* of such conviction upon the license of Fox to operate an automobile in North Carolina, and *to compel the surrender* to it of such license then held by

Fox, and thereupon to *forward the license,* together with a record of the conviction to the Department of Motor Vehicles. G. S. N. C. 20-17 *mandatorily required* the Department of Motor Vehicles to revoke Fox's license upon receipt of the record from the Superior Court of Iredell County of his plea of *nolo contendere,* which in that case for the purposes of that case was equivalent to a conviction to the charge of driving a motor vehicle while under the influence of intoxicating liquor upon the public highways. The plea of *nolo contendere* tantamount to a conviction had become final, before the mandatory revocation was had, and the period of revocation was in compliance with G. S. N. C. 20-19(d).

It is to be noted that while petitioner's license to operate an automobile was revoked from 11 November 1952 for three years, he did not apply to the respondent for return of his license until 31 May 1954.

The respondent revoked the operator's license of petitioner under the mandatory provisions of G. S. N. C. 20-17—he had no discretion. Such mandatory revocation by the Department of Motor Vehicles was as much the performance of a ministerial duty in the petitioner's case in Iredell County as the Clerk of the Superior Court in that county entering the judgment of the court in the case in the Minutes of the Court. Like the Clerk, the Department of Motor Vehicles did a mechanical act for the purposes of the case in that particular case. The fact that the revocation took place in a central agency in Raleigh, as prescribed by Act of the General Assembly, makes no difference. The legislative purpose and intent is clear that in every case of a conviction—and a plea of *nolo contendere* is equivalent to a conviction by a jury for the purposes of that case—of driving a motor vehicle while under the influence of intoxicating liquor the driver shall be punished, and shall be prevented from operating motor vehicles upon the highways to the hazard of other citizens. The General Assembly meticulously specified that the trial court shall take up the defendant's license in court, and forward it to the Department. It is a continuous transaction in the same case. It is a well known fact that many juries are reluctant to convict drunken drivers, because such conviction carries a mandatory revocation of the operator's license; in practical effect then and there in open court by the court taking up the operator's license.

Winesett v. Scheidt, Comr. of Motor Vehicles, supra; S. v. Thomas, supra, and *In re Stiers, supra,* were correctly decided upon the facts of those cases, and what we decide here in no way modifies what was decided in those cases.

In the *Winesett Case* the Commissioner of Motor Vehicles was acting under G. S. 20-16. Winesett requested a hearing, which was granted, and on the hearing Scheidt acted solely on the record furnished him by the Pasquotank Recorder's Court—a different proceeding in a different

forum. In the *Thomas Case,* Thomas entered a plea of guilty to a charge of violating the prohibition law in the Recorder's Court of Edgecombe County, and was given a road sentence, which sentence was suspended and Thomas was placed on probation. Subsequently, Thomas entered a plea of *nolo contendere* to a criminal charge in a Recorder's Court in Pitt County. The Court properly held that the plea of *nolo contendere* entered in the court in Pitt County could not be used in the Recorder's Court of Edgecombe County to show a violation of Thomas' conditions of probation in the Edgecombe County Court—a different case, a different court. In the *Stiers Case,* Stiers entered a plea of *nolo contendere* in a Federal District Court to an indictment charging him with embezzlement. A disbarment proceeding, civil in its nature, was brought against Stiers in a State Court. Certainly Stiers' plea of *nolo contendere* did not establish his guilt of embezzlement in another court in a proceeding civil in its nature.

For the reasons stated above the judgment of the lower court is reversed, and it is so ordered.

Reversed.

LENA MAE SHIELDS, BY HER NEXT FRIEND, ROY SHIELDS, v. ROBERT CLEVELAND McKAY.

(Filed 3 November, 1954.)

Infants § 11: Parent and Child § 8—Parent may waive right to recover for loss of services of child and permit the infant to recover all damages.

Where action to recover for negligent injury to an infant is brought on behalf of the infant by her father as next friend, and the pleadings and theory of trial are based on the child's right to recover for loss of earning capacity and for medical expenses incurred before as well as after her majority, the father treats the child as emancipated so far as such elements of damage are concerned, and the father is thereafter estopped from claiming any such elements of damage in a separate suit. Therefore, in such action it is error for the court *ex mero motu* to limit the recovery to loss of earning capacity and medical expenses incurred after the infant's majority.

APPEAL by plaintiff from *Martin, S. J.,* at May-June Term, 1954, of RANDOLPH.

Civil action to recover damages for personal injuries sustained by plaintiff Lena Mae Shields in a collision on 30 May, 1953, 9:30 o'clock p.m., between defendant's automobile, in which she was riding, and an automobile parked off the highway,—allegedly the result of negligence of defendant.

Substantially in pertinent part these allegations are set out in the complaint of plaintiff:

1. That plaintiff Lena Mae Shields is "a minor under the age of 21 years"; and that on 18 September, 1953, "Roy Shields had been appointed by the Clerk of the Superior Court of Randolph County . . . to bring this suit against the defendant . . ." Moreover, the record shows that the appointment of him was upon his petition in which he asserts that he is "the father of said infant." And, upon the trial, Lena Mae Shields testified that she was "18" when she was hurt and that her father, her next friend, started this lawsuit on 17 September (the record shows that this was in 1953).

2. That as a result of negligence of defendant, in respects alleged, plaintiff suffered injuries in the manner and to the extent described, and was taken to a hospital for treatment, and there received hospital and medical care and attention from 30 May, 1953, to 2 June, 1953.

3. That after being discharged from the hospital she was forced to go home, and was unable to work for an extended period of time; that though she tried to go back to her old job, as a spinner in Robbins Mills, making $1.12 per hour, or approximately $50.00 per week, she was unable to work as a spinner; and that she has only completed the eighth grade in school, and is without education to follow any other activity.

(Upon the trial plaintiff testified in substantial accord with these allegations.)

4. That for treatment of the injuries received by her as alleged "the plaintiff has already incurred expenses amounting to $265.00 for doctor's bills, hospital bills, nurses and ambulance fees, medical traveling expenses, drugs, and other expenses, and . . . that she will have considerably more of these expenses before she has completely reached the maximum healing point in her physical condition." And "that by reason of the negligence of the defendant . . . the proximate cause of the injury suffered . . . plaintiff has been damaged . . . through disfigurement, loss of earnings, doctors, medical, hospital and medical traveling expenses and pain and suffering in the amount of $20,000" for which she prays judgment.

(And, upon the trial, plaintiff enumerated certain expenses incurred, and then testified that her father paid these, and that she hasn't paid any of these bills out of her own pocket.) Moreover, it is stated in the case on appeal that: "Plaintiff's next friend, Roy Shields, participated in the trial of the action during the entire course and plaintiff sued for damages as set out in the complaint. Plaintiff also sought damages for disfigurement during minority and majority. Evidence as to damages concerning medical bills paid by the father, loss of earnings during minority, dis-

figurement during minority were introduced with no objection on the part of the defendant.

"In the middle of argument by plaintiff's counsel to recover for damages, for medical expenses paid by the next friend father, Roy Shields, and for loss of earnings during minority, the court stopped the plaintiff's attorney from said argument and instructed the jury that no recovery could be had for these items." Plaintiff's Exception No. 7.

The case was submitted to the jury upon these issues which were answered as indicated.

"1. Was the plaintiff, Lena Mae Shields, injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. What amount, if any, is the plaintiff, Lena Mae Shields, entitled to recover of the defendant for personal injuries? Answer: $300.00."

And from judgment, in favor of plaintiff, in accordance with the verdict, plaintiff appeals to the Supreme Court and assigns error.

Ottway Burton for plaintiff, appellant.

G. E. Miller and Adam W. Beck for defendant, appellee.

WINBORNE, J. The assignments of error chiefly relied upon by plaintiff on her appeal are based upon exceptions to the ruling made by the trial court "in the middle of argument by plaintiff's counsel," and to the charge of the court that plaintiff, being a child under the age of twenty-one years, that is, a minor, is not entitled to recover for medical expenses, and for loss of time or diminished earning capacity during her minority. Ordinarily this ruling, and the charge would be proper. But in the light of the allegations of the complaint, and pertinent evidence offered by plaintiff upon the trial in Superior Court tested by decision in the case of *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534, this Court is constrained to hold that the ruling and the charge are erroneous.

In the *Pascal case, supra,* the defendant excepted to, and assigned as error the failure of the trial court to charge the jury that an unemancipated minor is not entitled to recover for loss of time or diminished earning capacity during minority. At the time the action was instituted plaintiff Renaldo Pascal was 20 years of age, and his father, J. H. Pascal, was duly appointed his next friend to prosecute the action. Plaintiff was earning $25.00 a week as a learner in a hosiery mill at the time he was injured. The Court, in opinion by *Denny, J.,* declining to sustain the assignment of error, had the following to say: "We concede the general rule to be under our decisions, that an unemancipated minor is not entitled to recover as an element of damages in an action for personal injuries, for loss of time and diminished earning capacity during minority, *Shipp v. Stage Lines, supra* (192 N.C. 475, 135 S.E. 339), but the father

of a minor may waive the right to recover for such loss and permit him to recover for his entire injury, including loss of wages and diminished earning capacity during minority. Although one who conducts a suit as the guardian or next friend of an infant is not a party of record, but the infant is the real party plaintiff, *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321, we see no reason why a parent who institutes an action as next friend in behalf of his minor child, and casts his pleadings and conducts the trial on the theory of the child's right to recover for loss of services and diminished earning capacity during minority as well as thereafter, should not be estopped from making a separate claim for such loss. This view is in accord with that expressed in 46 C.J., Sec. 115, p. 1301, and the authorities cited therein, where it is said: 'A parent may waive or be estopped to assert his right to recover for loss or services, etc., by reason of injury to his minor child, and permit the child to recover the full amount to which both would be entitled, as where the parent as next friend brings an action on behalf of the child for the entire injury, or permits the case to proceed on the theory of the child's right to recover for loss of services and earning capacity during minority. In such case the parent treats the child as emancipated in so far as recovery for such damage is concerned, and cannot thereafter be permitted to claim that he, and not the child, was entitled to recover therefor. There is no waiver, however, where the parent is not shown to be connected in any way with the child's action, or to have had notice thereof, beyond the fact that the child lived with him; nor does the parent waive his right of action by suing as next friend for the child's pain and suffering and permanent impairment of earning capacity after majority.'

"It is likewise said in 39 Am. Jur., Sec. 83, p. 728: 'Even where the parent has not emancipated the child prior to the injury, he may thereafter waive or relinquish in favor of the child his right to the latter's services, so as to permit the child to recover their value as part of his damages. In such a case, the child is entitled to recover the full amount to which both he and his parent would have been entitled if separate suits had been brought, and the parent is estopped from afterwards bringing any action in his own right.' It is further stated therein, that where a parent brings an action as next friend to recover for injuries to his child, and 'the parent claims damages for loss of time, diminished earning capacity, medical expenses, etc., he cannot make any claim for such items in a subsequent action brought in his own right, but rather, they are to be recovered by the child in the first action only.'

"Where a suit is brought on behalf of a minor, it is a simple matter to limit the recovery in the pleadings or by special prayer for instructions, to such loss of wages and diminished earning capacity as the minor may suffer after he attains his majority. But where the action is brought by

the father as next friend and no limitation on the minor's right to recover is pleaded and no request is made for such limitation during the trial of the case, and the charge of the court is sufficient to include the compensation for all injuries and damages sustained from and after the date of the injury, the father will be deemed to have waived his claims for loss of services and diminished earning capacity of the child during minority, in favor of such child. *Gaff v. Hubbard,* 217 Ky. 729, 290 S.W. 696, 50 A.L.R. 1382; *Carangelo v. Nutmeg Farm,* 115 Conn. 457, 162 A. 4, 82 A.L.R. 1320."

Applying these principles to case in hand, it is apparent that Roy Shields, the father of plaintiff, a minor, as her next friend, has cast his pleading, the complaint, and conducted the trial on the theory of the child's right to recover for loss of services and diminished earning capacity during her minority as well as after she attains her majority, and to recover for medical expenses, as detailed, incurred before she reaches her majority as well as afterwards. By so doing, the father treats the child as emancipated in so far as recovery for such elements of damage are concerned, and cannot claim that he, and not the child, is entitled to recover therefor; and, hence, she may recover the full amount to which both she and her father would have been entitled if separate suits had been brought.

It may be contended, however, that these principles do not apply since the trial judge limited plaintiff's right to recover for such loss of time and diminished earning capacity, and for medical expenses incurred after she attains her majority. Even so, it appears of record that the court acted *ex mero motu,* that is, of its own motion. And the answer is that this Court holds that a father may cast his pleading and conduct the trial on the theory of the child's right to recover for such loss of time and diminished earning capacity sustained, and for medical expenses incurred as a result of her injuries during her minority. And this is what Roy Shields the father, as next friend, has done, and thereby waived his right to recover therefor.

And, further, it may be contended that plaintiff testified that her father paid the expenses incurred. Indeed, it is alleged in the complaint that "the plaintiff has already incurred expenses . . . and that she will have considerably more of these expenses . . ."

For error in the respect indicated there must be a new trial in the light of this opinion and in accordance with applicable principles of law. Other assignments of error need not be considered as they may not then recur.

Let there be a

New trial.

W. A. VANDIFORD AND ARTHUR VANDIFORD v. H. G. VANDIFORD AND WIFE, MONTIE PEARL VANDIFORD.

(Filed 3 November, 1954.)

1. Quieting Title § 1—

An action to quiet title under G.S. 41-10 must be based upon plaintiffs' ownership of some title, estate, or interest in real property, and defendants' assertion of some claim adverse to plaintiffs' title, estate, or interest, which adverse claim must be presently determinable.

2. Same—Adverse claim held not presently determinable, and therefore plaintiff could not maintain action to quiet title.

Plaintiffs alleged that they are lessees in possession of the property in question under a lease giving them the right to a deed in fee simple upon the death of the survivor lessor if lessees continue to meet their obligations under the terms of the instrument, and that lessors had executed a paper writing purporting to make a testamentary disposition of the property to others. The lease also gave lessees the option to terminate the lease under certain conditions. *Held:* Lessors' demurrer to the complaint should have been sustained, since the paper writing is without legal significance either as a transfer of title or as a cloud thereon until probate, and since the right of survivor lessor to devise the land by will is dependent upon events now unknown and unforeseeable, and therefore, is not presently determinable.

3. Wills § 1—

A paper writing making testamentary disposition of property is without legal significance either as a transfer of title or as a cloud thereon during the lifetime of the person executing it, since a will takes effect only upon the death of the testator and the probate of the instrument. G.S. 31-39; G.S. 31-41.

APPEAL by defendants from *Frizzelle, J.*, Resident Judge of the Fifth Judicial District, heard 16 August, 1954, of GREENE.

Defendants' appeal is from judgment overruling demurrer to complaint.

The complaint, in substance, alleges:

1. Defendants, owners in fee simple of described farm lands and store buildings in Greene County, executed and delivered their indenture dated 11 September, 1946, recorded 20 September, 1946, Greene County Registry, a copy being attached as Exhibit A; and thereafter plaintiffs and defendants executed an agreement dated 5 February, 1953, a copy being attached as Exhibit B, which modified in specified particulars the provisions of Exhibit A.

2. Under Exhibit A, defendants "for and in consideration of the agreements and covenants hereinafter to be performed and fulfilled" by plaintiffs, "hereby demises, leases and farm-lets and rents to . . . W. A. Vandiford . . . and to Arthur Earl Vandiford . . . upon the terms and

conditions hereinafter imposed upon each of them respectively and the agreements on their part respectively," the said farm lands and store buildings.

3. Provisions of Exhibits A and B confer rights and impose liabilities upon plaintiffs and defendants, including the following:

(a) Plaintiffs agree to pay specified amounts to H. G. Vandiford, defendant, and to Montie Pearl Vandiford, his wife, should he predecease her, during life. If plaintiffs default in said payments, "this lease and contract shall thereupon immediately terminate," and defendants, or either of them, in such case, "may enter in and take possession of the said lands and premises, including the said stores and expel" the plaintiffs therefrom.

(b) If, during the lifetime of H. G. Vandiford, the gross income from the cultivation of the lands and the operation of the stores falls below a specified figure, then plaintiffs "may at their option terminate this lease and agreement during the lifetime of defendants. "then and in such event, liable for any further payments as herein provided for above."

(c) If plaintiffs "shall fail to keep said buildings on said lands in good shape and condition as herein provided, then upon such failure this lease and contract shall thereupon terminate at the option" of the defendants, or either of them, and upon such termination defendants or either of them may enter into and take possession of said lands and premises.

(d) If plaintiffs fully comply with their obligations under the lease and agreement during the lifetime of defendants, "then and in such event, if the said W. A. Vandiford . . . shall then be living," defendants "do hereby direct, fully empower and authorize their . . . personal representatives to execute a good and sufficient deed and deliver the same to the said W. A. Vandiford conveying to him in fee simple the lands and premises herein described and leased under this contract"; and if W. A. Vandiford predeceases defendants and Arthur Earl Vandiford carries out the provisions of the lease and agreement then the deed is to be made to him. In such case, either W. A. Vandiford, or Arthur Earl Vandiford, "shall have and is hereby given said lands in fee simple, to the same extent and in the same manner as if a fee simple deed had been drawn and placed in escrow to be delivered to them or either of them upon the death of both parties of the first part, and the said parties of the first part do hereby fully authorize and empower and direct their executor or administrator or personal representatives, upon the death of both of them to draw a deed or such instrument as may be necessary to put into effect the full intent and purpose of the said parties of the first part." (Defendants are designated "parties of the first part" in Exhibit A.)

4. Plaintiffs entered in possession of said lands and property on or about 11 September, 1946, under Exhibit A, and remained in possession thereof.

5. Plaintiffs have complied with the terms of the agreement contained in Exhibit A and Exhibit B except provisions waived by defendants, and plaintiffs "agreed, intended and expected" to comply with all conditions to be performed by them as provided.

6. "9. That, as these plaintiffs are informed and believe and, upon such information and belief, allege, the defendants H. G. Vandiford and Montie Pearl Vandiford wrongfully claim title to said lands in a manner adverse to the interest of these plaintiffs, and adverse to the interest of these plaintiffs as conveyed to these plaintiffs by the paper writing referred to as Exhibit A. That the defendants H. G. Vandiford and Montie Pearl Vandiford have stated to various parties that they have a right to make, and have made, a will devising the entire property to a person other than those to whom they are obligated to convey the property on the conditions provided by the paper writing described in Exhibit A."

7. "10. That, as these plaintiffs are informed and believe and, upon such information and belief, allege, H. G. Vandiford has stated, and states, that the defendants will not comply with the terms of the written Agreement afore described; and that the defendants intend to make a disposition of the lands and property contrary to the provisions of the written Agreement."

8. "11. That, as these plaintiffs are informed and believe and, upon such information and belief, allege, H. G. Vandiford and Montie Pearl Vandiford have executed a paper writing purporting to be a will that will affect the interest of these plaintiffs in the lands heretofore described; and that such act on the part of H. G. Vandiford and Montie Pearl Vandiford would create, and does create, a cloud upon the interest and title of these plaintiffs. That the existence of this purported will has been made known to various parties in a manner that will constitute a cloud on the title to the interest of these plaintiffs."

9. The plaintiffs, under Exhibit A as modified by Exhibit B, are the owners of and seized of such interest in said lands as entitle plaintiffs to institute under the provisions of G.S. 41-10 to quiet their title.

Plaintiffs' prayer for relief is that they "be declared entitled to such interest in the lands and property as described in Exhibit A, subject to the conditions described in Exhibit A."

Defendants demurred on the ground that the alleged facts are not such as to entitle plaintiffs to maintain an action to quiet title under G.S. 41-10.

J. Faison Thomson & Son and Walter G. Sheppard for plaintiffs, appellees.

Jones, Reed & Griffin for defendants, appellants.

BOBBITT, J. G.S. 41-10, in pertinent part, provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims."

As stated by *Denny, J.,* in *Ramsey v. Ramsey,* 224 N.C. 110, 29 S.E. 2d 340: "Ordinarily, any person claiming title to real estate, whether in or out of possession, may maintain an action to remove a cloud from title against one who claims an interest in the property adverse to the claimant, and is required to allege only that the defendant claims an interest in the land in controversy. *Plotkin v. Bank,* 188 N.C. 711, 125 S.E. 541; *Carolina-Tennessee Power Co. v. Hiawassee Power Co.,* 175 N.C. 668, 96 S.E. 99; *Satterwhite v. Gallagher,* 173 N.C. 525, 92 S.E. 369; *Rumbo v. Gay Mfg. Co.,* 129 N.C. 9, 39 S.E. 581; *Daniels v. Baxter,* 120 N.C. 14, 26 S.E. 635." The cases cited indicate the liberal construction placed upon this statute in order that the use and marketability of realty will not be hampered by unresolved conflicting claims thereto.

Appellees (plaintiffs) emphasize the language of *Hoke, J.* (later *C. J.*), in *Satterwhite v. Gallagher, supra,* and quoted in *Carolina-Tennessee Power Co. v. Hiawassee Power Co., supra,* to wit: "And it should and does extend to such adverse and wrongful claims, whether in writing or *parol,* whenever a claim by *parol,* if established, could create an interest or estate in the property, *as in case of a parol trust or a lease not required to be in writing.*" (Italics added.) While the quoted statement is significant as *dicta,* it is plain that the beloved and distinguished jurist had in mind instances where the adverse claim asserted by the defendant depends for its establishment upon parol, *e.g.,* a parol trust, an oral lease, etc. We have an entirely different situation in this case. Here the rights and liabilities of plaintiffs and of defendants, *inter se,* are governed by written contracts (Exhibits A and B), referred to in the complaint as the lease and agreement. Plaintiffs predicate their rights on these writings. Plaintiffs allege that defendants own the lands in fee subject to plaintiffs' rights under the lease and agreement.

The plaintiffs must own the real property in controversy, or have some estate or interest in it; and the defendants must assert some claim thereto adverse to the plaintiffs' title, estate or interest. These are essential elements of a statutory action to quiet title to realty. *Wells v. Clayton,* 236 N.C. 102 (107), 72 S.E. 2d 16. The express purpose of the statutory action being the determination of adverse claims, a controversy cognizable thereunder must be one *presently determinable.*

The gist of the complaint is that, assuming the present written contracts continue in effect, plaintiffs upon the death of the last surviving defendant will become entitled to a deed; and that the defendants claim

the right to will the lands to persons other than plaintiffs and in fact have executed a writing, in form a will, embodying such terms.

On the facts alleged, accepted as true on demurrer, plaintiffs are presently in possession and control of the lands, and defendants do not challenge the enjoyment by plaintiffs of rights to which they are presently entitled.

Whether plaintiffs' right to possession and control will continue through the lifetime of defendants will depend upon whether plaintiffs exercise the option given them under certain conditions to terminate the lease and agreement and upon whether plaintiffs continue to meet their obligations under its terms. Thus, the rights of plaintiffs hereafter will depend upon events now unknown and unforeseeable.

A will takes effect as of the death of the testator upon the probate thereof. G.S. 31-39; G.S. 31-41. Whether the defendants or either of them will die testate or intestate is unknown and unforeseeable. A paper writing, in form a will, executed by a person now living, is without legal significance either as a transfer of title or as a cloud thereon; for a person, having executed and revoked many such drafts, may die intestate. If the defendants or either of them should die leaving a will purporting to devise the lands to a person other than plaintiffs, the validity of such devise would depend upon the then existing rights and liabilities of the parties under the lease and agreement. If perchance plaintiffs should breach the contract, upon the death of the last surviving defendant the heirs at law could contest plaintiffs' claim to the lands just as effectively as could devisees under a will.

Assuming full performance by plaintiffs until the death of the last surviving defendant, plaintiffs are protected by their recorded contract against disposition of the lands by the defendants or either of them by will made in violation of plaintiffs' contract rights. *Clark v. Butts,* 240 N.C. 709, and cases cited. Compare: *Schmidt v. Steinbach,* 193 Mich. 640, 160 N.W. 448.

The action is not that of a vendee, the equitable owner under a contract to purchase realty, against a third party who claims also from the vendor or as a lien creditor of the vendor. 5 R.C.L., Cloud on Title, sec. 26; *Alfrey v. Richardson,* Oklahoma, 231 P. 2d 363. There is no allegation that defendants have conveyed or attempted to convey any interest or estate in the lands to a third party or that any third party asserts an interest therein.

Mere assertions of what defendants intend to do by way of willing the lands to persons other than plaintiffs, under the facts alleged, are not a sufficient basis for the statutory action to quiet title. 29 N.C.L.R. 332, and cases cited; 78 A.L.R. 40 *et seq.* This is true, *a fortiori,* when the

defendants' right to leave the lands by will as of the date of the death of the last surviving defendant, is not presently determinable.

Plaintiffs do not define their interest in the lands, which they seek to have determined by judgment herein, but allege "that the plaintiffs own, and are seized of, such an interest in said lands that may be quieted by provisions of G.S. 41-10," and "that the plaintiffs have instituted this action to quiet their title, to an interest in the lands," as contracted in Exhibit A. Hence, the action, in effect, is to ask the court to define the rights of the parties now and hereafter under the contract. The complaint fails to disclose any controversy or adverse claims as to plaintiffs' present rights. Future rights cannot be determined now because dependent upon events now unknown and unforesecable. G.S. 41-10 applies only to the extent the alleged adverse claims are presently determinable. Hence, under the facts alleged, this action does not lie.

For the reasons stated, the demurrer should have been sustained.

Reversed.

STATE v. RAY HUMBLES.

(Filed 3 November, 1954.)

1. Criminal Law § 58—

The ordering of a mistrial in a case less than capital is a matter in the discretion of the judge, and the judge need not find facts constituting the reason for such order.

2. Criminal Law § 81a—

The action of the trial court in ordering a mistrial in his discretion in a prosecution for an offense less than a capital felony is not reviewable in the absence of gross abuse.

3. Criminal Law § 22—

The action of the trial court in ordering, in the exercise of his discretion, a mistrial in a prosecution for an offense less than capital will not support a plea of former jeopardy in a subsequent prosecution.

4. Criminal Law § 50d—

Non-impeaching questions asked by the court of defendant in this case *held* not prejudicial, it being apparent that they could not have left the impression on the jury that in the judge's opinion the defendant was unworthy of belief.

5. Criminal Law § 81c (3)—

The exclusion of certain testimony as to a matter which was brought out on the subsequent cross-examination by defendant of another witness, *held* not prejudicial.

6. Criminal Law § 53f—

Where, at the beginning of the narration of the testimony of a witness, the court uses the phrase "tending to show," it is not necessary for the court to repeat this phrase throughout the statement of her testimony, and the court's failure to do so *held* not prejudicial in this case as an expression of opinion by the court as to the truth of the witness' testimony.

APPEAL by defendant from *Williams, J.*, April Term 1954 of PITT.

Criminal prosecution on indictment charging the defendant with feloniously assaulting Mrs. Wyatt Gardner with a deadly weapon, to wit: a tractor, with intent to kill her and inflicting upon her serious injuries not resulting in death.

The defendant and Mrs. Gardner are brother and sister: defendant's wife is the sister of Mrs. Gardner's husband. The case before us originated in a family dispute over possession of a three-acre piece of land which the defendant had put a fence around, sowed with lespedeza and put his cows in. Mrs. Gardner and her husband contended they had rented this piece of land, and were entitled to its possession. Defendant contended he had leased this piece of land, and was in rightful possession. This land was opposite the house where the Gardners lived.

The State's evidence tended to show these facts: On the morning of 29 May 1953 the defendant drove his tractor with a mowing machine attached on this piece of land, and began mowing lespedeza. Mrs. Gardner picked up an axe, went to the land, knocked down every post to the fence surrounding the land, and left the fence lying on the ground. The defendant kept on mowing. Mrs. Gardner's husband arrived, and told the defendant that two years ago he had forbidden him, the defendant, from using this land. The defendant, after a little more mowing, turned his tractor around, and intentionally drove his tractor against and upon Mrs. Gardner fracturing her leg at the knee and inflicting other painful injuries. When the tractor approached Mrs. Gardner, she stood as stiff as a board. Whereupon a fight ensued between Mrs. Gardner, her husband and the defendant. Mrs. Gardner said her husband "whipped the pure dust out of him."

The defendant offered evidence tending to show these facts: That he did not run his tractor into or upon the body of Mrs. Gardner. That while he was mowing, Wyatt Gardner ran up and struck him on the head with a wrench; that Mrs. Gardner grabbed him by the shirt collar. That he jumped off the tractor, and "slammed them down." That he then got back on the tractor, and finished mowing.

The defendant's case was consolidated for trial with a case against Wyatt Gardner and his wife for assaulting the defendant.

Verdict: Guilty as to Ray Humbles of assault with a deadly weapon; Not Guilty as to Mr. and Mrs. Wyatt Gardner.

Judgment was pronounced upon the verdict.

The defendant appeals, assigning error.

Harry McMullan, Attorney General, and Claude L. Love, Assistant Attorney General, for the State.

Albion Dunn and L. W. Gaylord, Jr., for Defendant, Appellant.

PARKER, J. At the November Term 1953 of Pitt County Superior Court, His Honor J. Paul Frizzelle presiding, the defendant was called for trial upon the indictment in the instant case; he pleaded Not Guilty, and a jury was properly impaneled. After the trial had proceeded at some length, and evidence had been offered by the State, Judge Frizzelle withdrew a juror, and ordered a mistrial. Judge Frizzelle found no facts. The defendant did not except. It is obvious that Judge Frizzelle ordered the mistrial in his discretion in order that the case of the defendant for assaulting Mrs. Gardner and the case of Wyatt Gardner and his wife for assaulting Ray Humbles might be tried together. When the defendant's case was called for trial at the April Term 1954, he entered a plea of former jeopardy and Not Guilty. The plea of former jeopardy was denied, and the defendant excepted, and assigns it as error.

The ordering of a mistrial in a case less than capital is a matter in the discretion of the judge, and the judge need not find facts constituting the reason for such order. *S. v. Dove,* 222 N.C. 162, 22 S.E. 2d 231; *S. v. Guice,* 201 N.C. 761, 161 S.E. 533; *S. v. Upton,* 170 N.C. 769, 87 S.E. 328; *S. v. Andrews,* 166 N.C. 349, 81 S.E. 416; *S. v. Bass,* 82 N.C. 570; *S. v. Sheppard Johnson,* 75 N.C. 123. The judge's action is not reviewable—a position undoubtedly sound, unless under circumstances establishing gross abuse; a case not presented by this Record. *S. v. Guice, supra; S. v. Andrews, supra; S. v. Bass, supra.*

In capital cases only is the judge required to find the facts and place them on record, so that if a plea of former jeopardy is entered, the action of the court may be reviewed; a practice based on the innate sense of justice of the common law—no man shall be twice put in jeopardy of life and limb. The word "limb" having reference to the barbarous punishment, which has now become obsolete, of striking off the hand. Coke Litt., 227; 3 Inst. 110; *S. v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; *S. v. Dove, supra; S. v. Guice, supra; S. v. Tyson,* 138 N.C. 627, 50 S.E. 456; *S. v. Sheppard Johnson, supra.*

The defendant's assignment of error to the denial of his plea of former jeopardy is overruled.

The defendant assigns as error No. 2 that the trial judge by the questions he asked the defendant, when he was testifying in the case, conveyed to the jury the impression that the defendant was not worthy of

belief, especially as he asked Mrs. Gardner only two questions and her husband none. The judge on four occasions asked questions of the defendant. *First,* the defendant had said Wyatt Gardner and his wife had not asked him to take the fence down around this three-acre piece of land; he did not know there was a controversy about the land when he put the fence up. Mrs. Gardner had previously testified as to a controversy about this land between her husband, herself and defendant before the fence was erected. The judge asked the defendant: "Q. Anything said to your wife about it in your presence? A. No Sir." The defendant did not object. *Second,* after more testimony by the defendant he said he did not deliberately aim at Mrs. Gardner with his tractor and run over her; that he didn't go anywhere near her with the tractor; doesn't know how she got on his (her husband's) tractor. At this place the judge asked defendant these questions: "Q. Where was she the last time you saw her? A. She was at the path; he was turning the tractor around getting her up. Q. What position was she in? A. I couldn't say. Q. What do you mean 'getting her up'? A. She was getting up on the tractor, and he was getting down off the tractor." The defendant objected and excepted to these questions. These questions refer to Wyatt Gardner carrying his wife out of the field on a tractor he had procured from his home, after his wife had sustained a fractured knee. The judge asked the defendant the questions on these two occasions when the defendant was being cross-examined by S. O. Worthington, attorney for the Gardners. *Third,* when the defendant was being re-examined by his attorney, he testified he had leased this land in 1949. Whereupon the judge asked this question: "Q. You leased it in 1949 and didn't lease it after that? A. Yes." The defendant made no objection. There was re-cross-examination by S. O. Worthington, and then defendant's lawyer examined him again. *Fourth,* the defendant then said he leased the land from Mrs. N. O. Gardner. Whereupon the judge asked this question: "Q. When did you say you leased it? A. I disremember. I believe it was in 1950 I tended it. Q. I understand you tended it that year, and didn't lease it any more, is that right? A. I tended it one year, and my boy went in the Army in Korea, and he was gone two years, and has been back one year, and this is the second year."

On direct examination Mrs. Gardner said: "After I knocked down all the posts he (the defendant) got off his tractor after he drove up to where I was and said: 'What are you tearing down my fence for?'" The judge then asked Mrs. Gardner: "Where were you then?" Later on Mrs. Gardner testified that after her knee was fractured and the fighting was over, her husband helped get her to the path, and she told him put me down, I am about to faint. Then the judge asked: "Q. Did he hear what you told your husband? A. Yes Sir. Q. What did you tell him? A. I said: 'Honey, hurry to the house and get the tractor; I am about to faint.'"

In our opinion, and we so hold, the questions asked by the judge and the evidence brought out could not have created in the minds of the jury the impression that in the judge's opinion the defendant was unworthy of belief. The questions did not impeach him. We do not see how it could have affected the jury's verdict. Prejudicial error is not made to appear. *S. v. Perry*, 231 N.C. 467, 57 S.E. 2d 774. Assignment of error No. 2 is overruled.

On cross-examination of Wyatt Gardner by defendant's counsel, he asked this question: "Q. You heard your wife say she stood there, and wanted to see if he had nerve enough to run over her?" The objection of the State was sustained, and the defendant excepted. This is his assignment of error No. 3. What the witness would have answered, if permitted to do so, is not in the Record.

On cross-examination of Mrs. Wyatt Gardner by defendant's counsel she testified she was standing in the field, after she had torn the posts down, and her husband said "look out." She "looked him (the defendant) right in the face, and he (the defendant) looked me right in the face, and come with the tractor right at me. I stood right there, stiff as a board. . . . he run on me with the tractor."

It would seem that the court's refusal to permit Wyatt Gardner to answer the question was harmless in the light of Mrs. Gardner's replies to defendant's counsel on cross-examination.

The defendant's assignments of error Nos. 4, 5, 6 and 7 are that the judge in his charge in stating the testimony of Mrs. Gardner began by saying the State says and contends that you ought to find beyond a reasonable doubt that the defendant Ray Humbles and the defendants Wyatt Gardner and wife are each guilty as charged in the indictment, "and in support of its contentions offers evidence tending to show in the case of Ray Humbles in the testimony of Mrs. Gardner . . ." The defendant contends that the judge in stating Mrs. Gardner's testimony did not again inject the phrase that Mrs. Gardner's testimony tended to show; that this created in the minds of the jury the impression that the judge thought every statement made by Mrs. Gardner had been proved as a fact.

A reading of the charge in its entirety shows that in stating the testimony of the other witnesses, the judge used the same formula. For instance, "in the case against Mrs. Gardner and Wyatt Gardner, and testifying in his own behalf Ray Humbles offered evidence tending to show etc.," and in narrating Humbles' testimony did not repeat the words, "tending to show." The statement of the testimony of Mrs. Gardner in the charge covers a little over 2¾ pages, and the statement of the testimony of the defendant not quite 2 pages.

In *S. v. Holbrook*, 232 N.C. 503, 61 S.E. 2d 361, the defendant assigned as error the failure of the judge to repeat the words beyond a reasonable

doubt every time he used the words if the State has satisfied you from the evidence. *Stacy, C. J.*, speaking for the Court said: "However, as this was given at the beginning of the charge and repeated several times thereafter, the jury could hardly have been misled by the court's failure to repeat it each time a finding from the evidence was to be made."

The defendant did not object to the court's statement of Mrs. Gardner's testimony, while the charge was being delivered. The judge clearly stated at the beginning of his statement of Mrs. Gardner's testimony that her testimony tended to show, etc. It was not necessary for him to repeat the phrase, while narrating her testimony. The contention of the defendant is unsound. Assignments of error Nos. 4, 5, 6 and 7 are not sustained.

Defendant's other assignments of error have been examined, and are overruled.

On the Record as presented, no reversible error has been made manifest.

No error.

RAY HENDERSON, B. H. TAYLOR AND LOUIS N. HOWARD v. THE CITY OF NEW BERN, A MUNICIPAL CORPORATION, AND MACK L. LUPTON, MAYOR, AND GUY E. BOYD, WILLIAM I. GAUSE, DURWOOD W. HANCOCK, GUY L. HAMILTON AND C. H. RICHARDSON, AS MEMBERS OF THE BOARD OF ALDERMEN OF THE CITY OF NEW BERN, AND C. L. BARNHARDT, AS CITY MANAGER (ORIGINAL PARTIES DEFENDANT); AND JOHN C. ARNOLD, E. B. PUGH, N. G. GOODING, LOUIS ELDEN, T. J. BAXTER, J. G. BACHES, M. H. SMITH, J. T. KENNEDY, MRS. JOSEPH F. RHEM, L. C. SCOTT, SR., FRED W. CARMICHAEL AND W. C. CHADWICK (ADDITIONAL PARTIES DEFENDANT).

(Filed 3 November, 1954.)

1. Municipal Corporations § 48—

In an action against a municipality to restrain it from taking certain proposed action, individuals desiring to be heard in opposition to the relief sought by plaintiffs are neither necessary nor proper parties, but must be heard through the defendant municipality which is the real party defendant in interest.

2. Municipal Corporations § 38½—City may not lease land for off-street parking without finding of public convenience and necessity.

A municipality will be restrained from executing a lease for land to be used for off-street parking when it has passed no resolution finding public convenience and necessity, made no appropriation, adopted no ordinance, designated no nontax fund to be used in furtherance thereof, or taken other action necessary to place it in position, as near as may be, to pursue the alleged proprietary undertaking. When it has taken such action, individuals will be entitled to be heard upon the question of whether such undertaking is for a public purpose within the meaning of the law and

constitutes a legitimate proprietary objective of the municipality under the conditions existing therein.

APPEAL by plaintiffs from *Williams, J.*, June Term 1954, CRAVEN.

Civil action to restrain the defendant municipality from entering into a contract to lease certain property to be used for off-street parking.

The defendant city contemplates the establishment of off-street parking facilities to relieve traffic congestion on its streets and provide motorists with adequate and convenient parking space in its business area. To that end it negotiated the lease or rental of certain property described in the complaint for a term of ten years. It proposes to expend, over the period of said lease, funds derived from sources other than taxation for the construction and maintenance of said facilities.

Plaintiffs instituted this action to restrain the city from executing said lease agreement or proceeding further with said plan. They allege in part that off-street parking facilities are not for a public purpose within the meaning of the law; that the proposed plan contemplates the pledge of the full faith and credit of the city, contrary to the provisions of the Constitution; and that the provisions of General Statutes, ch. 160, art. 18, as amended by ch. 171, Session Laws 1953, under which the city is proceeding, are unconstitutional.

When the cause came on to be heard on the rule to show cause why the temporary restraining order theretofore issued should not be continued to the hearing, the court found certain facts and, upon the facts found, concluded "that the leasing of said lot to establish off-street parking involves an expenditure of public funds for a public purpose within the meaning of the Constitution and the laws of the State of North Carolina, and is reasonably required by the crowded and congested traffic conditions of the City of New Bern."

It thereupon entered its order as follows:

"WHEREFORE, the Court finds as CONCLUSIONS OF LAW, and ORDERS, ADJUDGES and DECREES:

"(a) That the restraining order heretofore issued be, and the same hereby is made permanent to the extent and to the effect that defendants are restrained and enjoined from making any appropriation for, or expending any tax money in connection with, the lease of the lot referred to in the complaint or costs of improving, making suitable for, and the maintenance for said off-street parking lot, and that any costs, debt, or obligation made in connection therewith shall not constitute a general debt or obligation so as to involve the faith and credit of said City, but shall be limited to money and revenues derived from sources other than tax money, unless and until same may be approved by a majority of the

qualified voters in said City in an election duly held for such purpose as provided by law.

"(b) That it is ORDERED and ADJUDGED that the defendant, City of New Bern, may proceed to acquire by lease the McCotter lot referred to in the complaint and establish the off-street parking facilities, provided, however, no tax money is appropriated or used for such purpose, and subject to the limitations herein ADJUDGED, has authority to appropriate annually, from revenues other than those derived from taxes, the annual rental consideration and annual expenses of maintaining and operating said parking lot.

"(c) The Court further finds as conclusion of law and ADJUDGES that the City of New Bern was and is authorized and empowered to enter into and execute a lease agreement for off-street parking facilities and to appropriate and make expenditures of money from revenue and sources other than tax money, including revenues derived from on-street parking meters, during the fiscal year 1953-54, subject to the restrictions and limitations herein adjudged, and that the pledging of such revenues will not be in violation of the provisions of Sec. 4, Article 5, or the provisions of Sec. 7 of Article 7 of the Constitution, or in violation of Sec. 160-399 General Statutes of North Carolina, or in violation of any statutes or laws of the State of North Carolina.

"Done at Sanford, this 12th day of August 1954, and this judgment is signed *nunc pro tunc.*"

Plaintiffs excepted and appealed.

Lee & Hancock for plaintiff appellants.

Laurence A. Stith and Ward & Tucker for defendant appellees.

BARNHILL, C. J. The individual additional defendants are not necessary or proper parties to this action. If they desire to be heard in opposition to the relief the plaintiffs seek to obtain, they must be heard through the defendant municipality which is the real party defendant in interest. *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484. The court below will enter its order striking their names from the record.

"The complexity of today's commercial relations and the constantly increasing number of automobiles render the question of parking a matter of public concern which is taxing the ingenuity of our municipal officials. People who work in the business sections of our cities and towns and who rely on automobiles for transportation find it difficult—sometimes impossible—to locate a place on the public streets where daily parking is permitted. They are driven to seek accommodation in some parking lot maintained (by private enterprise) for the service of the public. There they are met by predetermined conditions which create a marked disparity

of bargaining power and place them in the position where they must either accede to the conditions or else forego the desired service." *Insurance Asso. v. Parker,* 234 N.C. 20, 65 S.E. 2d 341. Those who visit the business areas of our municipalities, resident or nonresident, to patronize merchants or to conduct other business which in large measure furnishes the lifeblood and vitality upon which these cities and towns must depend are met by the same situation.

Have conditions reached the point where this Court should declare that off-street parking facilities maintained by a municipality to meet this problem is for a public purpose within the meaning of the law and constitutes a legitimate proprietary objective of a municipal corporation, and if so, when and under what conditions may a municipality engage in such an enterprise? These are the questions the parties seek to have us answer.

They are questions of vital importance to the people of the State, and they must be answered clearly and unequivocally. Unfortunately, the record before us is in such condition that we cannot presently answer them with that degree of certainty and clarity the importance of the question demands. This is due in part to the promptness with which the plaintiffs acted and partly to the disposition made of the cause in the court below.

The defendant has passed no resolution finding public necessity and convenience, made no appropriation, G.S. 160-399 (c), adopted no ordinance, designated no nontax fund to be used in furtherance of the proposed plan, or taken other action necessary to place it in position, as near as may be, to pursue this alleged proprietary undertaking. It asserts that no tax-source funds will be used. Yet it proposes, and the order entered permits, the use of funds derived through on-street parking facilities. *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289. In effect, the defendant has been set free to take such action, without specific direction, as it deems essential upon its mere promise that it will take such action. But this will not suffice. The plaintiffs are entitled to be heard and to have the court say, after such action is taken, whether defendant has met the test. Furthermore, only in this manner may we render any decision that will serve to guide and direct defendant and the other municipalities of the State.

For the purpose of this appeal we may and do concede—without deciding—that conditions in a municipality may be such that the maintenance of off-street parking facilities is for a public purpose in that particular municipality. It cannot be said, however, that every hamlet, village, and town of the State, irrespective of size or local conditions, may maintain off-street parking facilities as a proprietary public-purpose function of the municipality, the legislative declaration to the contrary notwithstand-

ing. Of necessity the question must be made to depend in each instance upon local conditions as found and declared by the municipality in resolutions duly adopted after notice and an opportunity for local citizens to be heard. *Insurance Co. v. Guilford County,* 225 N.C. 293, 34 S.E. 2d 430. As above indicated, there are other preliminary steps that must be taken by defendant.

To that end the defendant must be left free to take such action as it deems necessary to support its claim to the right to maintain off-street parking facilities. In the meantime, it will be restrained and enjoined from executing the proposed lease agreement. When it has taken such action it shall so notify the court, and the court shall then afford the plaintiffs an opportunity to appear and be heard on the question whether the temporary restraining order against the execution of the proposed lease should be continued in full force and effect. As so modified the order entered in the court below is affirmed.

Modified and affirmed.

R. A. JOHNSON, ADMINISTRATOR OF THE ESTATE OF BILLY JOE JOHNSON, v. CLEVELAND COUNTY BOARD OF EDUCATION AND/OR NORTH CAROLINA BOARD OF EDUCATION.

(Filed 3 November, 1954.)

1. Parties § 3—

The naming of one party defendant "and/or" another party defendant is disapproved, it being required that parties defendant be named with more exactitude.

2. Judgments § 27c—

The sole remedy against an erroneous judgment is by appeal.

3. State § 3f: Administrative Law § 6—

Where, in a proceeding under the Tort Claims Act, the Superior Court on appeal adjudicates that certain findings of the Commission were not supported by evidence, and remands the cause, the Commission is bound by the order unless and until it is set aside on further appeal to the Supreme Court, and the Commission may not merely rephrase the original findings and adopt them as so rephrased.

4. State § 3b—

Intestate was fatally injured when he caught hold of or fell against the door bar of a school bus, causing the locking lever to dislodge and the door to open, through which intestate fell. *Held:* In the absence of any evidence tending to show that the door locking mechanism was loose, or in the slightest state of disrepair, or that a jolt or jar would cause the door to open, a finding of negligence predicated on the disrepair of the door bar is not supported by evidence.

5. Same—

Where there is no evidence before the Commission that the school bus in question was being driven at excessive speed, a finding of negligence based on excessive speed is not supported by the evidence.

6. Same—

Where the evidence discloses that passenger in a school bus left his seat and walked to the front of the bus, that both the bus driver and his companion told him to return to his seat, and that the fatal accident occurred within a matter of moments thereafter, what steps the driver was under duty to take to compel the passenger to return to his seat, is not presented.

APPEAL by defendants from *McSwain, Special J.*, February Term 1954, CLEVELAND. Reversed.

Proceedings under the Tort Claims Act to recover compensation for the alleged wrongful death of plaintiff's intestate.

The deceased was a pupil at the Casar School in Cleveland County, and was transported to and from school on a regular school bus.

On the morning of 18 March 1952 the bus was being operated by a driver who had been transferred from another route. He was accompanied by the regular driver who was directed to familiarize him with the route, etc. Deceased and a girl were the first to board the bus. Deceased went towards the back of the bus and took a seat. A short distance ahead, the driver stopped and "picked up" Annie Canipe. Deceased arose, went to the front of the bus, and put his books in the glove compartment. The driver and his companion both told him to sit down. He "looked back and grinned." The bus was then traveling slowly on a dirt road near or in a slight S-shaped curve—first to the left of the driver and then to the right—and deceased "was standing right up where the door opens."

As the bus went into the curve, deceased either caught hold of the door bar and applied sufficient pressure to cause the door to open or lost his balance and grabbed the bar to regain his balance. In any event, the door opened, and he fell out. The injuries he received caused almost instant death.

After the driver told deceased to sit down, he did not have time to stop before deceased caught the door bar.

The hearing commissioner found the facts, including the following: that at and before the time the bus started, after picking up the Canipe girl, the bus operator knew that deceased had not resumed his seat but was standing at the front of the bus near the door; that the bus was being driven more than twenty miles per hour; that this was faster than was reasonably prudent under the circumstances as they then existed; that by reason of the speed of the bus and its sudden turn to the left, the deceased lost his balance and fell; that driving and turning the bus in the manner described constituted negligence on the part of the driver of the

bus; and that this negligence was a proximate cause of the death of the deceased. He further found that the door control mechanism was not in proper repair, but that it was loose and out of adjustment to such an extent that pressure on the door bar caused the locking lever to dislodge and permit the door to open; that the driver knew of its loose condition, and that pressure on the locking lever would prevent the door from opening even against pressure on the door bar; that the driver did nothing to keep the door from opening; that in failing to do so, being aware of the presence of deceased in a place of potential danger, he failed to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; that this constituted negligence on the part of the driver of the school bus; and that this negligence was a proximate cause of the death of deceased. The hearing commissioner then, upon the facts found and the conclusions made thereon, entered judgment for plaintiff in the sum of $8,000. Defendants appealed to the full Commission. A majority of the full Commission, the chairman dissenting, adopted the facts found and made an award. Defendants appeal to the Superior Court.

When the appeal came on to be heard before Patton, Special J., at the May Term 1953, he concluded that there is no competent evidence in the record of the hearing before the Commission to support the finding made by the Commission "that the bus was being driven more than twenty miles per hour at the time . . . that this was faster than a reasonably prudent person would have operated the bus under the same or similar circumstances," and "that the door control mechanism on the bus was not in proper repair," but "was loose and out of adjustment." He sustained the defendants' exceptions thereto and the exception to the conclusions of law based thereon.

The judgment entered includes the following:

"It appears that the Commission used excessive speed and a sudden turn to the left to form the basis for a finding of negligence. If this is true, this Court is unable to tell whether there would have been a finding of negligence in the absence of the finding of excessive speed and a sudden turn to the left . . . The Commission used the state of repair of the door control mechanism as a basis for finding that the driver of the bus was negligent and that this negligence was a proximate cause of the death of deceased.

"This Court is unable to tell what the finding as to negligence could have been if the condition of the door control mechanism had been eliminated."

The cause was remanded for "clear-cut findings of fact based on competent evidence and conclusions of law which do not conflict with the findings of fact."

When the cause again came on for hearing before the Commission, a majority thereof (the chairman dissenting) found facts which are in substance the identical findings the judge of the Superior Court had ruled are unsupported by competent evidence; made additional findings; concluded "that the record as a whole inevitably leads to a conclusion that the school bus was being driven at an excessive rate of speed, and we have so found as a fact . . . A majority of the Commission is of the opinion that the proximate cause of the death of this child was the conduct of the school bus driver originating with excessive speed and ending with his unexplained failure to reduce his speed and protect the door handle after discovering the perilous position occupied by the boy"; and again awarded plaintiff judgment in the sum of $8,000. Defendants excepted and appealed to the Superior Court.

When the cause came on to be heard in the court below, the judge presiding overruled the exceptions of the defendants and entered judgment affirming the award. Defendants excepted and appealed to this Court.

Attorney-General McMullan, Assistant Attorney-General Love, and Gerald F. White, Member of Staff, for defendant appellants.

R. L. Elam and J. C. Whisnant for plaintiff appellee.

BARNHILL, C. J. We observe with disfavor that the and/or method of naming the defendants in the captions to the summons and pleadings filed has been adopted in this cause. The question immediately arises: Does plaintiff seek recovery against the County Board of Education or the State Board or against both defendants? When a judge of the Superior Court acquires jurisdiction of the parties and the subject matter in pending litigation, any judgment or decree entered by him becomes *res judicata* as to the parties and all their privies. Hence, more exactitude in naming those who are defendants is required. *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320, and cases cited; *S. v. McLamb*, 236 N.C. 287, 72 S.E. 2d 656; *S. v. Daughtry*, 236 N.C. 316, 72 S.E. 2d 658.

When Patton, S. J., on defendants' first appeal to the Superior Court, sustained the exceptions of defendants, plaintiff's remedy was by appeal to this Court. In the meantime, pending the disposition of the appeal, the Commission was bound by the order entered in the Superior Court. Although it is patent that a majority of the Commission are "of the same opinion still," it was their duty to bow to superior authority and eliminate those findings Patton, S. J., concluded are not supported by any competent evidence. Instead, they rephrased the language of the original findings, readopted them as so rephrased, made additional findings, concluded "that the proximate cause of the death of this child was the conduct of the school bus driver originating with excessive speed and ending with his

unexplained failure to reduce his speed and protect the door handle after discovering the perilous position occupied by the boy," and again awarded plaintiff $8,000.

Thus the facts found are in substance the same and the questions presented are identical.

The record is devoid of any competent evidence tending to support the crucial findings made by the Commission on the question of negligence. The bus was one of the newer type, and its door mechanism operated more easily than on the older type bus. Yet it took "sustained pressure" on the door lever to cause it to open. So all the witnesses testified. There is no evidence in the record tending to show that this mechanism was loose or that a jolt or jar would cause the door to open or that the door or door lever was in the slightest state of disrepair.

Nor is there any evidence of speed or other want of due care on the part of the bus operator. The bus had just been put in motion after stopping to pick up a passenger. It could not have attained any considerable speed at the time the mishap occurred, and no witness undertook to testify that it had.

When the deceased left his seat and walked to the front of the bus, both the bus driver and his companion told him to return to his seat. Even if we concede that the bus driver, on proper occasion, was vested with authority to use physical force to compel the deceased to return to his seat, that occasion had not arisen when the unfortunate accident occurred.

It follows that the court below erred in overruling the defendants' exceptions to the findings of fact made by the Commission. It will now remand the cause to the Commission with direction that it enter judgment denying the claim of plaintiff and dismissing the action. To that end the judgment entered in the court below is

Reversed.

ROBERT REYNOLDS v. JOHN S. MURPH, TRADING AS BUILDING SPECIALTY COMPANY, AND J. R. FORDHAM, TRADING AS J. R. FORDHAM SERVICE STATION.

(Filed 3 November, 1954.)

1. Negligence § 3—

Violation of a statute, or ordinance of a city or town, relating to the storage or handling of gasoline, is negligence *per se*, but in order to be actionable such violation must be the proximate cause of the injury in suit, including the essential element of foreseeability.

2. Negligence § 1—

The general rule is that the violation of a statute enacted for the safety and protection of the public constitutes negligence *per se*, *a fortiori*, when such violation is in itself a criminal offense.

3. Negligence § 9—

Foreseeability is an essential element of proximate cause, even when the negligence complained of is a violation of a safety statute.

4. Negligence § 16—

Where the complaint alleges that the violation of a safety statute was the proximate cause of plaintiff's injuries, it is sufficient as against demurrer without particular allegation as to foreseeability, unless it appears affirmatively from the complaint that there was no causal connection between the negligence and the injury.

5. Negligence §§ 3, 6—Allegations held sufficient to allege concurrent negligence of defendants in failing to label jug of gasoline.

The complaint alleged that one defendant sold to the other defendant a one-gallon jug of white gasoline for cleaning purposes, that the jug had no label or warning of its contents, that while the gasoline was being transported in the back of the purchaser's truck and while the truck was parked on a street, some person placed a blowtorch in close proximity to the jug, that the jug exploded, burning plaintiff, who was standing some 15 or 20 feet from the truck, and that the injuries were proximately caused by the concurrent negligence of defendants in violating G.S. 119-43. The complaint further alleged on information and belief that the unknown person would not have placed the blowtorch in close proximity to the jug if it had been labeled or marked as required by law. *Held:* The complaint is sufficient to state a cause of action against each defendant, both as to negligence, and also as to proximate cause, since it cannot be adjudicated as a matter of law that an injury such as that received by plaintiff was unforeseeable as a result of the violations of the statute.

6. Pleadings § 15—

A demurrer admits facts alleged upon information and belief as well as facts alleged on personal knowledge. Whether the plaintiff can prove such allegations upon the trial is irrelevant to the question posed by demurrer.

APPEAL by defendants from *Williams, J.*, August 23rd Term, 1954, of LENOIR. Affirmed.

The complaint, in substance, alleges:

1. Defendants were engaged in business in Kinston. Murph traded under the name of Building Specialty Company. Fordham traded under the name of J. R. Fordham Service Station.

2. On 21 August, 1953, Murph, through named employees, acting as his agents, purchased from Fordham, or one of his employees, acting as his agent, for use in the cleaning of floors on a job contracted by Murph and on which said employees were working, one gallon of white gasoline; and Fordham, or one of his employees, acting as his agent, sold to Murph's

said employees, with knowledge of the purpose for which the purchase was made, the said one gallon of white gasoline.

3. Murph purchased and received, and Fordham sold and delivered, the one gallon of white gasoline "in a one gallon clear glass small neck jug" which did not have upon it the word "Gasoline" in any form whatever or any other word or words to indicate the contents of said jug and did not have the words "Unsafe when exposed to heat or fire" upon any label or elsewhere on said jug, in violation of G.S. 119-43.

4. Murph's said employees placed said jug, containing one gallon of white gasoline, in the rear of Murph's pick-up truck, and in their use and operation of said truck parked it on a street in Kinston, near the curb, with the jug of white gasoline still sitting in the body of the truck.

5. "10. That at or about 11 A.M. o'clock on the 21st day of August 1953, a person whose identity is unknown to the plaintiff placed a blowtorch in close proximity to said jug of gasoline, which said blowtorch the plaintiff is advised, informed, believes and so alleges was either hot or still in operation. That the plaintiff is advised, informed, believes and so alleges that the person who put the blowtorch near the jug of gasoline was unaware of the contents of the said jug, which had the appearance of water or some other harmless liquid, and accordingly was unaware of the danger in placing said blowtorch near said jug of gasoline. That the plaintiff is advised, informed, believes and so alleges that had the jug of gasoline been labeled or marked as by law provided said person would have been made aware of the contents of said jug and accordingly of the danger of exposing the same to heat or fire and would not have placed the blowtorch in such close and dangerous proximity to the jug of gasoline."

6. "11. That the jug of gasoline was ignited by the heat or fire from said blowtorch, exploded violently and set afire the plaintiff, who was standing about fifteen or twenty feet from said truck, seriously and permanently injuring the plaintiff in the manner and to the extent hereinafter set out."

7. "12. That the acts of the defendants as hereinbefore set out were wrongful, careless and unlawful and constituted negligence, which said acts of negligence, acting together, in severalty and each defendant's acts of negligence concurring with the other defendant's acts of negligence, were the direct and proximate cause of the gasoline explosion hereinbefore referred to and of the injuries suffered by the plaintiff as a result thereof as hereinafter alleged."

Further allegations relate to the extent of plaintiff's injuries and damages.

Each defendant demurred to the complaint on the ground that the facts alleged therein are not sufficient to constitute a cause of action. The court below overruled the demurrers. Each defendant excepted and appealed.

Owens & Langley for plaintiff, appellee.

Barden, Stith & McCotter, John G. Dawson, and LaRoque, Allen & Parrott for defendant John S. Murph, appellant.

White & Aycock and Whitaker & Jeffress for defendant J. R. Fordham, appellant.

BOBBITT, J. Plaintiff bases his cause of action squarely and solely upon the alleged violation by each defendant of Ch. 425, Sec. 26, Public Laws of 1937, which, as amended, is now codified in G.S. 119-43 and provides as follows:

"Sec. 119-43. *Display required on containers used in making deliveries.* —Every person delivering at wholesale or retail any gasoline in this State shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word 'Gasoline' or the name of such other like products of petroleum, as the case may be, in English, plainly stenciled or labeled in colors to meet the requirements of the regulations adopted by the Commissioner of Agriculture and/or the Gasoline and Oil Inspection Board. Such dealers shall not deliver kerosene oil in any barrel, cask, can, or other container which has not been stenciled or labeled as hereinbefore provided. Every person purchasing gasoline for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as hereinbefore provided: Provided, that nothing in this section shall prohibit the delivery of gasoline by hose or pipe from a tank directly into the tank of any automobile or any other motor vehicle: Provided further, that in case gasoline or other inflammable liquid is sold in bottles, cans, or packages of not more than one gallon for cleaning and other similar purposes, the label shall also bear the words 'Unsafe when exposed to heat or fire.' "

Violation of the above statute is a misdemeanor. G.S. 119-51.

The facts alleged in the complaint, deemed admitted by the demurrers, are such as to constitute a violation by each defendant of the requirements of G.S. 119-43.

Violation of a statute, or ordinance of a city or town, relating to the storage, handling and distribution of gasoline, is negligence *per se*. *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425, 12 A.L.R. 1297; *Newton v. Texas Co.*, 180 N.C. 561, 105 S.E. 433. This is the rule generally as to statutes enacted for the safety and protection of the public; *a fortiori*, when such violation in itself is a criminal offense. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331. In such case, the sole question is whether such negligence (or wrong) was the proximate cause of the injury for which recovery is sought.

True, proximate cause, even when the violation of such statute is the negligence involved, includes foreseeability as one of its elements. *Ald-*

ridge v. Hasty, supra. But when such negligence is alleged to have been the proximate cause of plaintiff's injury, this is sufficient, as against demurrer, unless it appears affirmatively from the complaint that there was no causal connection between the alleged negligence and the injury.

The complaint here negatives any inference of negligence on the part of the person who put the blowtorch in close proximity to the unmarked jug containing the white gasoline. The explicit allegation is that he was unaware of the contents of such jug, said contents having the appearance of water or other harmless liquid, and that he would not have so placed the blowtorch had he been warned by label or other marking on the jug giving notice of the fact that the jug contained gasoline. These allegations, together with the general allegations as to proximate cause, deemed admitted by the demurrers, and the allegations as to negligence, are sufficient to constitute a cause of action against each defendant.

It is well established that the tort-feasor charged need not foresee the particular consequences ultimately resulting from his negligence, but only that by the exercise of due care he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63. As to those who violate a statute, such as that under consideration here, designed to prevent tragic consequences flowing from a failure to label or otherwise identify a dangerous and explosive, yet apparently harmless, liquid, we cannot say as a matter of law that, in a legal sense, an injury such as that received by plaintiff was unforeseeable. *Ramsey v. Oil Co.,* 186 N.C. 739, 120 S.E. 331; *Kentucky Independent Oil Co. v. Schnitzler,* 271 S.W. 570; *Bradley v. Fowler* (S.C.), 42 S.E. 2d 234; Annotation, 17 A.L.R. 698 *et seq.* Rather, under the allegations here, it would appear that such injury was unforeseeable by the man with the blowtorch.

In accord, in relation to similar statutes, are decisions in other jurisdictions including *Farrell v. Miller Co.* (Minn.), 179 N.W. 566, and *Stone v. Refining Co.* (Mich.), 196 N.W. 339.

We are dealing here only with the sufficiency of the plaintiff's pleading; and we notice, of course, that the facts as to the acts, observations and unawareness of danger of the man with the blowtorch are alleged upon information and belief. Even so, positive allegations of fact, upon information and belief, as well as such allegations made on personal knowledge, when denied, raise issues of fact determinable by jury. *Linker v. Linker,* 167 N.C. 651, 83 S.E. 736; *Calahan v. Roberts,* 208 N.C. 768, 182 S.E. 657. We note that the complaint is verified, the form of such verification being prescribed by G.S. 1-145.

The fact that it is alleged that the identity of the man with the blowtorch is unknown to plaintiff does not impair such allegations. We are

not now concerned with the source of plaintiff's information or the basis of his belief. He has made his allegations. He must offer competent evidence to prove his case, *secundum allegata*. If the identity of the man with the blowtorch remains unknown to plaintiff, he may encounter difficulty in establishing that the alleged violation of G.S. 119-43 was the proximate cause or one of the proximate causes of his injury. But that question is not now before us.

For the reasons stated, the judgment overruling the demurrers is Affirmed.

RILEY P. SHUE v. EULA MAE SHUE.

(Filed 3 November, 1954.)

1. Trusts § 4b—

Where a husband conveys property to his wife, or purchases property and causes it to be conveyed to her, or places improvements upon her land, the law presumes a gift, and no resulting trust arises in favor of the husband unless such presumption is rebutted by clear, strong, cogent, and convincing proof.

2. Trusts § 4c—

Evidence that husband and wife purchased property, that the husband suggested that deed be made to him and his wife, that the wife stated the deed should be made to her individually because of a possible lawsuit against him, and that the husband stated that he had all confidence in her and to make the deed to her individually, without evidence that he had ever requested her to put the title in their joint names, *is held* insufficient to rebut the presumption of a gift, and a motion to nonsuit in his action to establish a parol trust or an equitable lien upon the land for the amount of his contribution was properly allowed.

APPEAL by plaintiff from *Martin, Special Judge,* February Term, 1954, of RANDOLPH.

Civil action instituted on 22 June, 1953, to impress a trust on certain lands situate in Randolph County, North Carolina.

The facts pertinent to this appeal are stated below.

1. It is alleged that in 1936, while the plaintiff and defendant were husband and wife, they purchased the lands in controversy, consisting of 105 acres, more or less, and the title thereto was taken in the name of the defendant.

2. It is further alleged that the funds for the purchase of the property were provided by both parties, and that "it was agreed at said time, . . . by express agreement between both of them that the equitable title was to be and remain jointly in their names and possession."

3. It is also alleged that the plaintiff and defendant executed certain deeds of trust on the property as security for loans; that the proceeds from said loans were used in part payment of the purchase price, and that the sum of $1,700.00 still remains unpaid on the premises.

4. That the defendant obtained a divorce from the plaintiff on 22 June, 1953, on the grounds of two years' separation.

5. The plaintiff seeks to be adjudged owner of a one-half undivided interest in the lands in controversy as a tenant in common with the defendant, or to establish an equitable lien on the property in his favor for $5,000.00, the amount he alleges he has expended either as a part of the purchase price of the property or on improvements which he placed on the premises.

6. The defendant filed an answer in which she denies the material allegations in the complaint and alleges that the plaintiff did not contribute any part of the purchase price of the property described in the complaint.

When this cause came on for trial, the plaintiff offered no evidence in support of his allegation to the effect that he and his wife had an express understanding that the equitable title to the property was "to be and remain jointly in their names and possession," or that it was understood that the defendant was to hold any interest therein as trustee for the plaintiff.

The plaintiff's evidence bearing on this question was to the effect that when the plaintiff and defendant went to the office of their attorney to have him prepare the deed, the plaintiff suggested that the deed be made to him and his wife; that the defendant stated the deed should be made to her individually for the reason that the plaintiff and his former landlord were already involved in a controversy that would likely result in a lawsuit. The attorney raised some question as to whether it would be wise to have the property conveyed to the wife alone. The plaintiff then said, according to his evidence in the trial below, "I have all the confidence in the world in her, go ahead and make the deed to her and her heirs." Plaintiff likewise testified that he had never requested the defendant to put the title to the land in their joint names. That he and the defendant were married on 26 July, 1923; that they have five children, all of whom are married except one daughter, thirteen years of age, who lives with the defendant.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed. The plaintiff appeals, assigning error.

Moser & Moser for appellant.

Hal H. Walker for appellee.

DENNY, J. It is well settled in this jurisdiction that where the husband conveys property to his wife, or where he purchases property and causes it to be conveyed to her, the law presumes that it is a gift and no resulting trust arises. *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Carter v. Oxendine,* 193 N.C. 478, 137 S.E. 424; *Singleton v. Cherry,* 168 N.C. 402, 84 S.E. 698; *Arrington v. Arrington,* 114 N.C. 151, 19 S.E. 351. The same rule applies with respect to improvements placed on the wife's land by the husband. *Nelson v. Nelson,* 176 N.C. 191, 96 S.E. 986; *Kearney v. Vann,* 154 N.C. 311, 70 S.E. 747; *Arrington v. Arrington, supra.*

In order to rebut the presumption of a gift to the wife and establish a parol trust, the evidence must be clear, strong, cogent and convincing. *Carlisle v. Carlisle, supra; Anderson v. Anderson,* 177 N.C. 401, 99 S.E. 106.

The evidence adduced in the trial below is clearly insufficient to rebut the presumption that the money contributed by the plaintiff toward the purchase of the property and for improvements placed thereon was a gift to his wife. On the contrary, the evidence negatives the existence of any parol trust agreement. Likewise, the evidence reveals no facts or circumstances which would entitle the plaintiff to an equitable lien on the premises in question for the money he seeks to recover.

The judgment of the court below is

Affirmed.

PACIFIC FIRE INSURANCE COMPANY v. SISTRUNK MOTORS, INC.

(Filed 3 November, 1954.)

Automobiles §§ 14, 18h (2)—

The evidence tended to show that four cars were traveling in line upon a three-lane highway, that the driver of the front car made a right turn into a side road without giving a signal, forcing the second driver in line to stop in order to avoid hitting the first car, that the driver of the third car brought it to a stop without colliding with the second car, and that the driver of the fourth car collided with the rear of the third car. There were no vehicles approaching from the opposite direction. *Held:* The evidence was sufficient to overrule nonsuit in an action by the owner of the fourth car against its driver to recover for the damage to the car.

APPEAL by defendant from *Martin, Special Judge,* and a jury, at January-February Term, 1954, of RANDOLPH. No error.

Civil action by insurance company to recover, by way of subrogation, for damage to a Cadillac automobile insured by the plaintiff. The dam-

age occurred by collision while the Cadillac was being road-tested in the course of a 3,000-mile check-up by an employee of the defendant automobile dealer. The plaintiff discharged its insurance liability by paying the owner of the car the sum of $720.04, and then instituted this action to recover over against the defendant, alleging negligence of the employee who was road-testing the Cadillac at the time of the collision.

Issues of negligence, damages, and right of the plaintiff to recover as subrogee were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict, awarding the plaintiff a recovery in the amount of $720.04, the defendant appeals.

Ottway Burton for plaintiff, appellee.
G. E. Miller and A. W. Beck for defendant, appellant.

JOHNSON, J. The single question presented by this appeal is whether the evidence on which the plaintiff relies is sufficient to carry the case to the jury on the issue of actionable negligence.

The collision occurred in the daytime on a dry, three-lane highway. Three automobiles were traveling northwardly in line at about 30 to 35 miles per hour. The driver of the front car made a right turn into a side road without giving a signal, forcing the second driver in the line to stop in order to avoid hitting the first car. The third driver in line, one Owens, brought his car to a stop without colliding with the forward automobile. When he stopped, the Cadillac hit the Owens automobile in the rear with such force that the front part of the Cadillac went underneath the Owens car, partially lifting it off the highway. As the witness Owens put it: "The front bumper of the Cadillac was up under my gas tank. The back end of my car was left clear. The bumper went under me." The estimate of repair costs as made by the defendant motor company disclosed damage to the hood, left and right fenders, horns, grill, bumper, parking lights, headlights, fan belt, radiator, and other damage to the Cadillac amounting to $770.04. At the time of the collision Owens, the driver of the third car, had his brakes on, and his tail light was working. However, he gave no other signal of his intention to stop. As to this, he testified: "The man in front of me didn't give me a signal and I stopped as soon as I could, but I didn't have a chance to give a signal." There was no vehicle approaching in the other two traffic lanes at the time.

The elements of negligence alleged by the plaintiff include averments that the defendant's agent in road-testing the Cadillac was (1) driving at an excessive rate of speed, (2) without maintaining a proper lookout, and (3) following the Owens car too closely, in violation of G.S. 20-152.

The evidence on which the plaintiff relies, when viewed with the degree of liberality required on motion to nonsuit, was sufficient to make out a

prima facie case of actionable negligence on one or more of the grounds alleged.

The verdict and judgment will be upheld.

No error.

MRS. RUTH YOW v. DAVE EDWARD PITTMAN, JR., AND WILLIAM D. GASTON.

(Filed 3 November, 1954.)

1. Bill of Discovery § 1a—

The statutes relating to the pretrial examination of witnesses confer no right to investigate or inquire into matters which the court could not investigate or inquire into in the actual trial.

2. Evidence § 14—

Confidential communications of the patient to a physician are privileged and the physician will not be permitted to testify thereto except by consent of the patient or upon order of the presiding judge in term time upon a finding duly entered of record that the testimony is necessary to a proper administration of justice.

3. Bill of Discovery § 1a: Evidence § 14—

The judge of the Superior Court has no authority to enter an order in chambers for the pretrial examination of a physician in regard to confidential communications of his patient. G.S. 8-71; G.S. 8-53.

DEFENDANTS' appeal from *Rudisill, J.*, at Chambers, CATAWBA, 28 August, 1954.

This is a civil action pending in the Superior Court of Catawba County for injury plaintiff alleges she received by reason of the actionable negligence of the defendants in a tractor-trailer-automobile collision. Plaintiff alleges serious personal injury for which she seeks to recover $40,643.55. Each of the defendants answered, denying negligence and liability.

The defendants made a motion in the cause, asking the court for an order permitting them to take the deposition of Dr. A. G. Brenizer, Jr., the physician who treated plaintiff for her injuries, and "requiring the said doctor to submit himself to the taking of said deposition . . . pertaining to his examination, the medical history secured by him, his diagnosis and treatment of the plaintiff, and as to her present condition." The defendants state in their motion: "These defendants have no information concerning the plaintiff's physical condition prior to the collision out of which this action arises and have no information as to the nature

and extent of plaintiff's injuries . . . that the attorneys for the defendants are without sufficient medical information to properly defend this action."

After notice, Judge Rudisill held a hearing in Chambers on 28 August, 1954, and "after reviewing the pleadings and two medical reports signed by Dr. Brenizer pertaining to plaintiff's injuries," concluded he did not have the authority to order the examination, overruled the motion as a matter of law. The defendants excepted and appealed. Only the defendant Gaston perfected his appeal and filed a brief.

Mary Gaither Whitener and Louis A. Whitener for plaintiff, appellee.

James C. Smathers for defendant William D. Gaston, appellant.

HIGGINS, J. The defendants applied for an order of court permitting them to take, and requiring Dr. Brenizer to submit to the taking of, a deposition "pertaining to his examination, medical history secured by him, his diagnosis and treatment of the plaintiff, . . ." Such a deposition would require the physician to disclose not only his clinical findings, diagnosis and treatment, but "the history secured by him" from the plaintiff—information of a very confidential nature.

The defendants do not proceed under the deposition statute, G.S. 8-71, broad as its provisions are: "Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the deposition of persons whose evidence he may desire to use without any special order therefor, unless the witness shall be beyond the limits of the United States." This statute does not contemplate the taking of deposition of a person disqualified to give evidence in the case. It confers no right to investigate or inquire into matters which the court could not investigate and inquire into in the actual trial. The deposition statute, therefore, must be considered in connection with G.S. 8-53, which provides: *"Communications between physician and patient.*—No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that *the presiding judge of a superior court may compel such disclosure,* if in his opinion the same is necessary to the proper administration of justice." (Emphasis added.)

One of the objects of this statute is to encourage full and frank disclosure to the doctor. The law protects the patient's secrets and makes it the duty of the doctor to keep them, a duty he cannot waive. The veil of secrecy can be drawn aside only by the patient or by *"the presiding*

judge of a superior court," and by him only when the ends of justice require it.

In construing C.S. 1798, now G.S. 8-53, *Justice Brogden,* in the case of *Sawyer v. Weskett,* 201 N.C. 500, 160 S.E. 575, said: "C. S. 1798 prescribes the privilege protecting physicians in disclosing confidential information required in the course of employment in treating a patient. The statute was construed in *Ins. Co. v. Boddie,* 194 N.C. 199, 139 S.E. 228, and in *S. v. Newsome,* 195 N.C. 552, 143 S.E. 187. The opinion in the *Newsome case, supra,* declares: 'If the statements were privileged under this statute, then in the absence of a finding by the presiding judge duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded.' "

The statute contemplates a Superior Court in term. As stated in the cases cited, the presiding judge must enter his findings upon the record. This he can do only in term and after hearing. While Judge Rudisill was a Judge of the Superior Court, he was not at the time *the presiding judge of a Superior Court in term.* He had no authority to enter the requested order in Chambers. It follows, therefore, that he was correct in denying the motion as a matter of law.

Affirmed.

DOLLY LOUISE TROUTMAN v. HOMER L. TROUTMAN, SR.

(Filed 3 November, 1954.)

Husband and Wife § 12d (2)—

That the parol separation agreement between the parties included a settlement of the notes theretofore executed by the husband to the wife *held* determined by the verdict of the jury in a trial free from prejudicial error.

APPEAL by plaintiff from *Rousseau, J.,* June Term, 1954, of CABARRUS.

Civil action instituted on 30 November, 1953, to recover balance alleged to be due on two promissory notes.

1. The plaintiff alleges that the defendant borrowed $2,000.00 from her on 22 March, 1948, for which he executed and delivered to her his promissory note in said amount, said note bearing interest at the rate of six per cent per annum from date until paid.

2. That on 11 February, 1952, at which time there was due on said note the sum of $2,466.33, the defendant paid on said note the sum of $2,050.00, leaving a balance due in the sum of $416.33.

3. That on 18 June, 1952, the defendant borrowed from the plaintiff the sum of $3,000.00 for which he executed and delivered to her his promissory note in said sum, bearing interest at the rate of six per cent per annum until paid.

4. That on 29 July, 1952, at which time there was due on the note referred to in paragraph three above, the sum of $3,020.50, the defendant paid the sum of $1,000.00 on said note leaving a balance due of $2,020.50.

5. The defendant filed an answer in which he alleges that the notes described in paragraphs one and three herein have been paid in full; the truth being that the plaintiff and defendant, being husband and wife, entered into a deed of separation on 29 July, 1952, and that the defendant conveyed unto plaintiff real estate of the value of more than $50,000.00 in full and complete payment, satisfaction and settlement of any and all claims and demands of whatsoever kind or nature, including payment of the notes described in the complaint; that in addition to the conveyance of the real estate above mentioned, the defendant turned over to the plaintiff two $500.00 savings bonds and $1,000.00 in cash.

The plaintiff testified that the defendant still owes her $416.33 interest on the note dated 22 March, 1948, and $2,020.50 on the note dated 18 June, 1952; that she did not agree to give her husband $3,000.00 if he would let her have the "big house" instead of the apartment.

The defendant testified that when he paid the $2,000.00 in settlement of the first note, his wife said she was not charging him any interest; that all she wanted was the $2,000.00, but he gave her $50.00 anyway; that she then handed him the note and he tore it up. As to the second note, he testified, he settled that note in full by agreeing to give her the "big house" instead of another house she had agreed to take in their property settlement; that they signed the separation agreement on 29 July, 1952, before the Clerk of the Superior Court. That he then went to the house and got his deed and gave her hers. That he said, "Where is the note that is part of the settlement?" That she went and got the note, and he said, "Now are you perfectly satisfied?" She said, "I am satisfied, perfectly satisfied." That he then counted out ten $100.00 bills, laid them on the table and tore up the note and walked out.

The jury, upon an appropriate issue, returned a verdict to the effect that the defendant was not indebted to the plaintiff in any amount. Judgment was entered on the verdict, and the plaintiff appeals, assigning error.

Kenneth B. Cruse and B. W. Blackwelder for appellant.

R. Furman James for appellee.

PER CURIAM. The sole question to be determined by the jury was whether the property settlement made between the parties at the time they entered into the separation agreement, which settlement was not reduced to writing, included a settlement of any and all liability on the part of the defendant to the plaintiff by reason of the execution and delivery of the aforesaid notes. The jury heard the evidence and, upon the facts found therefrom, returned a verdict in favor of the defendant.

No prejudicial error appears in the charge of the court, and no sufficient reason is disclosed on the record that would justify disturbing the verdict rendered.

No error.

VIRGINIA JARRELL, PETITIONER, v. R. PAUL JARRELL, RESPONDENT.

(Filed 3 November, 1954.)

Divorce § 16—Failure to pay sums for support of children in accordance with order must be willful to constitute contempt.

In an action for alimony without divorce a consent judgment was entered ordering the husband to pay the wife a stipulated sum each month for the support of their two children so long as the children were not self-supporting. At a later term the order was modified to increase the payments and to require the husband to make them to the Clerk of the Superior Court instead of to the wife. Upon motion in the cause to attach the husband for contempt for failure to provide support for the children, the court found upon supporting evidence that the husband acted in good faith in reducing his payments one-half subsequent to the marriage of his daughter and in making no payments for the support of the son during the time his son was living with him. *Held:* The findings support the court's ruling that respondent had shown sufficient cause why he should not be held in willful contempt.

APPEAL by petitioner from *Hall, Special Judge,* July Term 1954 of RANDOLPH. Affirmed.

Motion in the cause to attach the respondent for alleged contempt for wilful failure to provide support for his children.

In February 1949 the petitioner instituted an action for alimony without divorce. G. S. 50-16. In the same month and year the Clerk of the Superior Court of Randolph County signed a consent judgment in said action ordering the respondent to pay to petitioner $50.00 a month for the maintenance and support of their two children, Lorena Jarrell and Roger Lee Jarrell, "so long as said children are not self-supporting."

At the May Special Term 1950 of Randolph Superior Court, Sharp, Special Judge presiding, on motion in the cause—both petitioner and respondent being present in court with counsel and offering evidence—

amended the consent judgment, and ordered the respondent to increase his payments to $100.00 a month. There was no appeal. At the July Term 1953, Pless, J. presiding, the judgment was further modified by requiring the respondent to make the monthly payments to the Clerk of the Superior Court, rather than to petitioner.

Respondent secured an absolute divorce from petitioner at the June Term 1950 of Randolph.

On 2 July 1954 petitioner filed a motion in the cause to attach respondent for contempt for wilful failure to comply with the order of the court entered by Sharp, Special Judge, to pay $100.00 a month for the support of his two children, contending that he was $335.00 in arrears in his payments. At the hearing petitioner testified that Lorena Jarrell was married in November 1952, since which time her husband has supported her. Her evidence also tended to show that respondent has paid only $50.00 a month since Lorena Jarrell's marriage; that Roger Lee Jarrell, now 13½ years old, stayed with his father two weeks in December 1953 and has been with him since 13 June 1954, and respondent has made no payment to the Clerk for his minor son's support, when living with him.

Judge Hall entered an order that respondent assumed in good faith that he was not required to pay $50.00 a month for the support of Lorena Jarrell since her marriage, and assumed in good faith that he was not required to pay $50.00 a month for the support of Roger Lee Jarrell, while living with him; that upon the basis that he is required to pay only $50.00 a month when his son is not with him, Judge Hall found as a fact that respondent is $35.00 in arrears, which he is now ready to pay. His Honor then adjudged that the respondent has shown sufficient cause why he should not be held in wilful contempt of court, and entered an order accordingly.

Plaintiff excepted and appealed, assigning error.

Archie L. Smith and Deane F. Bell for Respondent, Appellee.
Ottway Burton for Petitioner, Appellant.

PER CURIAM. There is competent evidence in the Record to support His Honor's findings of fact that the respondent acted in good faith in reducing his payments to $50.00 a month since Lorena Jarrell's marriage, and in not making a payment of $50.00 a month while Roger Lee Jarrell was living with him, and that on that basis he is only $35.00 in arrears, which he is now ready to pay. Such findings of fact support His Honor's conclusion that respondent has shown sufficient cause why he should not be held in wilful contempt of court. To constitute contempt the violation of the order to pay money for support of children must be wilful. *West v. West,* 199 N.C. 12, 153 S.E. 600; *Vaughan v. Vaughan,* 213 N.C. 189,

195 S.E. 351; *Smithwick v. Smithwick,* 218 N.C. 503, 11 S.E. 2d 455. Judge Hall was correct in ruling that the evidence failed to show a wilful contempt.

Affirmed.

BAXTER C. RICH v. THE TOWN OF ASHEBORO.

(Filed 3 November, 1954.)

Municipal Corporations § 14a—

Nonsuit *held* properly entered in this action by plaintiff to recover for injuries resulting when he stepped from the paved sidewalk to an unpaved grass plot between the sidewalk and the street, and struck his foot against a rock protruding about two inches above the level of the unpaved grass plot.

APPEAL by plaintiff from *Rousseau, J.,* at March Civil Term 1954, of RANDOLPH.

Civil action to recover damages for personal injury sustained by plaintiff in the town of Asheboro on 11 May, 1951, allegedly the result of negligence of defendant, a municipal corporation, under these circumstances:

The scene of the injury, Church Street, runs north and south. It intersects with Hoover Street which runs east and west. There is a paved sidewalk approximately four and a half or five feet wide on west side of Church Street. Between this hard surface and the street there is an unpaved grass plot approximately two and a half feet wide.

When going south on the paved sidewalk on Church Street, approaching, and about twenty feet from Hoover Street, plaintiff, observing a man across the street whom he wanted to see, stepped down on to the said unpaved grass plot, and hit "his toe over a rock," the color of the ground, and sticking "up about two inches high."

Plaintiff testified: "I have probably known this place for 20 or 25 years. I never had seen the rock sticking out of the ground until I hit my foot on it . . . I have been going along this particular road for 15 years. The same path that I take each time. I walk on the cement . . . I do not know whether the city knew there was a rock sticking up. As to why I didn't go down the paved portion of this sidewalk and cross where it is marked and stay on the part that was paved, I wanted to see Mr. Brown over there . . ."

Motion for judgment as of nonsuit was granted at close of plaintiff's evidence, and from judgment in accordance therewith, plaintiff appeals to the Supreme Court and assigns error.

Ottway Burton for plaintiff, appellant.
Archie L. Smith for defendant, appellee.

PER CURIAM. The ruling of the trial court upon the motion for nonsuit finds support in the cases of *Gettys v. Town of Marion,* 218 N.C. 266, 10 S.E. 2d 799, and *Waters v. Town of Belhaven,* 222 N.C. 20, 21 S.E. 2d 840, under authority of which the judgment below is

Affirmed.

DAISY RHEM PATRICK v. BRANCH BANKING & TRUST COMPANY, GUARDIAN OF HOSEA COLLINS RHEM, DISABLED VETERAN.

(Filed 3 November, 1954.)

Insane Persons § 9b—

In a proceeding requesting an increase in the allowance to the dependent of a permanently insane veteran, all persons who would be entitled to a distributive share of the estate in case of death are necessary parties, and the Veterans Administration is a proper party. G.S. 35-23; G.S. 35-28; G.S. 35-29.

DEFENDANT'S appeal from *Frizzelle, J.,* LENOIR.

On 13 February, 1954, Daisy Rhem Patrick filed a verified petition before the Clerk of the Superior Court of Lenoir County, asking for an increase in the allowance ordered paid to her in the former proceeding between the same parties instituted 21 February, 1939. Reference is made to the allegations in the original petition which are fully summarized in this Court in the case on appeal reported in 216 N.C. 525, 5 S.E. 2d 724.

The new allegations in the present petition are: The cost of living has greatly increased; the petitioner's ability to supplement her allowance has diminished by reason of her health and age; the fund in the hands of the guardian has increased to more than $35,000.

The guardian answered, denying the allegation of inability of petitioner to supplement her income by her earnings. The guardian requested the court to conserve the estate of the non-sane veteran.

The allegations in the original complaint, which are referred to in the present one, are that the veteran is and has been since 1918 mentally incompetent, and since that date has been confined in the Veterans Hospital, probably suffering from incurable insanity, and that he will probably remain so confined during the remainder of his life. That the veteran, Hosea Collins Rhem, is of full age, unmarried and without issue. The veteran's next of kin are the petitioner, who is a sister, one brother,

Alonzo Rhem of New York City, and one niece, Jessie May Fisher, of Lenoir County, who has instituted a proceeding similar to this and for the purpose of obtaining an allowance from the veteran's fund. The respondent is the duly qualified and acting guardian of the veteran.

After hearing, the clerk stated his findings of fact and conclusions of law and ordered the guardian to increase the allowance from twenty dollars per month to seventy-five dollars per month. The judgment awarded attorney's fees in the sum of $650.00. It was provided that the monthly allowance and the attorney's fees should be charged as an advancement to the petitioner.

Judge Frizzelle reviewed the clerk's findings of fact, conclusions of law, and approved the order. The guardian appealed. There were no parties to the proceeding other than the petitioner and the guardian. The record does indicate the Veterans Administration was informally notified of the hearing but did not participate.

Allen & Allen and Lamar Jones for petitioner, appellee.

John G. Dawson for defendant, appellant.

PER CURIAM. G.S. 35-23 requires that all persons be made parties who would be entitled to a distributive share in the estate in case of death. G.S. 35-28 provides the allowance shall be made only in case of permanent insanity. G.S. 35-29 provides that the advancements shall cease in case the veteran is restored to sanity.

The next of kin are necessary parties to the proceeding under the first section above quoted. The Veterans Administration would appear to be a proper party under the two succeeding sections.

The case is remanded to the Superior Court of Lenoir County in order that additional parties may be brought in and an opportunity given them to be heard.

Remanded.

JESSIE MAY FISHER; AND DAISY RHEM PATRICK, ATTORNEY IN FACT FOR JESSIE MAY FISHER, v. BRANCH BANKING & TRUST COMPANY, GUARDIAN OF HOSEA COLLINS RHEM, DISABLED VETERAN.

(Filed 3 November, 1954.)

DEFENDANT'S appeal from *Frizzelle, J.*, LENOIR.

Allen & Allen and Lamar Jones for petitioner, appellee.

John G. Dawson for respondent, appellant.

PER CURIAM. On the authority of the case of *Daisy Rhem Patrick v. Branch Banking & Trust Company, Guardian of Hosea Collins Rhem, ante,* 76, this case is remanded to the Superior Court of Lenoir County in order that additional parties may be brought in and an opportunity given them to be heard.

Remanded.

STATE v. VELTON FREEMAN.

(Filed 3 November, 1954.)

Appeal and Error § 16: Criminal Law § 74—

Where judgment is entered in an action tried at a term prior to the convening of the Supreme Court, the appeal must be taken to that term of the Supreme Court.

APPEAL by defendant from *Rousseau, J.,* January Term 1954, MONTGOMERY.

Criminal prosecution upon a bill of indictment in which it is charged that the defendant did unlawfully possess, possess for the purpose of sale, and transport certain intoxicating liquors.

The jury returned a verdict of guilty on all three counts "as charged in the bill of indictment." The court pronounced judgment on the verdict and defendant appealed.

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

McLean & Stacy for the defendant.

PER CURIAM. This criminal action was tried at the January 1954 Term of Montgomery County Superior Court prior to the convening of the 1954 Spring Term of this Court. It was the duty of the defendant to docket his appeal at that term. This he failed to do, and there was no petition for *certiorari.* Docketing for hearing at this term comes too late. Hence the appeal must be dismissed on authority of *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335, and cases therein cited.

Since the exceptive assignments of error relied on by defendant are not of sufficient merit to require a new trial, the result in effect is the same.

Appeal dismissed.

STATE v. TOMMY FLOYD.

(Filed 3 November, 1954.)

APPEAL by defendant from *Fountain, S. J.*, June Term, 1954, of RANDOLPH.

Tommy Floyd, defendant, and Jody R. Floyd, his brother, were charged in one warrant with unlawful possession, transportation and possession for the purpose of sale of approximately 72 gallons of nontax-paid intoxicating liquor. Trial in Randolph County Recorder's Court resulted in defendant's conviction, and from judgment pronounced he appealed to Superior Court. There, after jury trial on original warrant, the verdict was "Guilty of possession and transportation of whiskey, as charged"; and judgment was pronounced thereon. Defendant excepted and appealed, and assigns errors.

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

Sam W. Miller for defendant, appellant.

PER CURIAM. Appellant failed to file his brief in this Court within the time required by Rule 28, Rules of Practice in the Supreme Court, 233 N.C. 750-751. Thereupon, the Attorney-General moved that the appeal be dismissed and the judgment affirmed. Even so, he concedes frankly that he has not been inconvenienced by appellant's delay in filing his brief. But appellant's brief when filed did not comply with other provisions of Rule 28, including the following: "Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment . . ." 221 N.C. 562-563.

No error appears on the face of the record proper. Moreover, careful consideration of appellant's exceptive assignments of error fails to disclose prejudicial error; and the assignments are not such as to call for analysis and discussion. The issue was primarily one of fact, the jury's verdict being adverse to defendant.

Should the Attorney-General's motion be allowed? It matters not, for in either event the judgment of the court below must be affirmed. It is so ordered.

Affirmed.

LONNIE COLE v. CLYDE HIATT.

(Filed 3 November, 1954.)

APPEAL by plaintiff from *Rousseau, J.*, at March Term, 1954, of RANDOLPH.

Civil action for malicious prosecution.

From judgment as of involuntary nonsuit entered at the close of plaintiff's evidence, he appeals.

Ottway Burton for plaintiff, appellant.

Hiatt & Hiatt for defendant, appellee.

PER CURIAM. This appeal presents no new question or feature requiring discussion. The facts are simple and the applicable principles of law are well established by numerous authoritative decisions of this Court. The evidence adduced when liberally construed in favor of the plaintiff is insufficient to make out a *prima facie* case. The judgment of nonsuit will be upheld.

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF WILEY H. TAYLOR, JR., v. CAROLINA RACING ASSOCIATION, INC., THE TOWN OF MOREHEAD CITY, AND THE MOREHEAD CITY RACING COMMISSION.

(Filed 10 November, 1954.)

1. 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.

2. 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.

3. Nuisances § 6b: Injunctions § 4d: Constitutional Law § 20a—

G.S. 19-1 *et seq.*, defining public nuisances and providing for the abatement of such nuisances by the closing of the premises for one year, unless sooner released, and the sale of the personal property seized in the absence of bond by defendant, and the distribution of the proceeds of such sale, is constitutional.

4. Injunctions § 4j: Public Officers § 9—

The rule that acts performed by a public officer or agency under color of legislative authority may not be enjoined as a statutory nuisance under G.S. 19-1, *et seq.*, on the ground of the alleged unconstitutionality of the legislation, does not apply to such injunction against the acts of a private person, firm, association, or corporation.

5. Gambling § 1: Injunctions § 4d—

Betting on dog races under a pari-mutuel system having no other purpose than that of providing the facilities for placing bets, calculating odds, determining winnings, if any, constitutes gambling, and is subject to abatement by injunction as a statutory nuisance, G.S. 19-1 *et seq.*, unless specifically permitted by constitutional statute.

6. Constitutional Law §§ 17, 18—

Construing Chapter 540, Public-Local and Private Laws of 1939, *it is held* that the act contemplates there shall be only one franchise and licensee at a time for the operation of the race track thereunder, and therefore, the act is unconstitutional as being in violation of Article I, Section 7, and Article I, Section 31, of the Constitution of North Carolina.

7. Constitutional Law § 11—

The police power of the state is as extensive as may be required for the protection of the public health, safety, morals, and general welfare.

8. Constitutional Law § 14—

The General Assembly may prohibit or regulate gambling in the exercise of the police power.

9. Same—

The police power may not be exercised to grant privilege or immunity to particular persons, or to persons in a particular locality, to violate general statutory laws condemning gambling and proscribing the operation of gambling establishments.

10. Constitutional Law § 17—

The exclusive privilege granted to the holder of a franchise under Chapter 540, Public-Local and Private Laws of 1939, to operate a dog race track is not in consideration of public service within the meaning of Article I, Section 7, of the Constitution of North Carolina, notwithstanding that a municipality receives a fraction of the gross receipts of such operation.

11. Constitutional Law § 8c—

The General Assembly may not delegate to qualified voters of one governmental unit, *e.g.*, a town, the power to decide whether a statute shall be in force and effect in a territory outside the limits of such governmental unit.

12. Same—

Legislative power rests exclusively in the General Assembly, and may not be delegated except as authorized by the Constitution. Constitution of North Carolina, Article II.

13. Statutes § 2—

Chapter 540, Public-Local and Private Laws of 1939, which provides for the operation of a pari-mutuel dog racing track by the licensee of the Racing Commission *is held* a local and special act relating to trade, and is unconstitutional. Constitution of North Carolina, Article II, Section 29.

APPEAL by defendant from *Williams, J.*, June Term, 1954, of CARTERET.

This is a civil action brought in the name of the State of North Carolina, on relation of Wiley H. Taylor, Jr., a citizen and resident of Carteret County, against the defendant Carolina Racing Association, Inc., a private corporation, under the provisions of Ch. 19 of the General Statutes of North Carolina, entitled "Offenses against Public Morals," to perpetually enjoin, as a nuisance as defined by G.S. 9-1, the defendant's maintenance and use of certain premises, buildings, fixtures and machines, for the purpose of gambling.

The defendant was ordered to show cause why such writ of injunction should not issue. The Town of Morehead City and the Morehead City Racing Commission, upon their separate applications, were made parties defendant and granted leave to file answers.

Upon the pleadings, affidavits and documents before Judge Williams at the hearing, these facts appear:

Pursuant to an Act of the General Assembly of North Carolina entitled, "An Act Creating the Morehead City Racing Commission for the Town of Morehead City in the State of North Carolina and Providing for an Election Thereon," Ch. 540, Public-Local and Private Laws of 1939, hereinafter called the Morehead City Act, an election was held at which a majority of the qualified voters of the town declared themselves in favor of the Act and of the creation of the Racing Commission provided for therein. (While it is not expressly stated in the pleadings or affidavits, we assume that the members of the Racing Commission were appointed as provided in the Act.)

On 15 July, 1947, the Commission adopted a resolution granting to the Racing Association, Inc., hereinafter called defendant, (Section 1) "a franchise, right and privilege for a term of ten (10) years from the date hereof to lease from the Town of Morehead City outside the corporate limits thereof, but within the limits of Carteret County, on property leased by the Town of Morehead City, and to construct, operate and maintain a race course or driving park for trotting, pacing and running races for horses and dogs, and to operate and maintain what is generally known as 'Pari-Mutuel machines or appliances' of the kind generally employed and in general use at racing courses in America; provided, however, that said Pari-Mutuel machines and appliances shall only be maintained and

operated within the enclosure of said park, driving grounds or race course, and only on days or parts of days when races or racing is being therein conducted." The annual rental for the grounds (Section 2) is one ($1.00) dollar. The franchise so granted (Section 5) is irrevocable for such ten-year period so long as the defendant complies with the terms thereof and with the rules and regulations promulgated from time to time by the Commission. It is granted (Section 3) upon terms such that the defendant is required to pay to the Commission "for each day or part of day during which races or racing is conducted a sum equivalent to ten per cent (10%) of the gross receipts derived from all sources or operations connected with or incident to the operation of such races or racing conducted during such day or part of day." The term "sum equivalent to ten per cent (10%) of the gross receipts derived from all sources or operations" shall mean "(a) ten per cent (10%) of the first monies received by the holder of this franchise, derived from the operations of the Pari-Mutuel machines, after the direct return to the bettors shall have been made; (b) ten per cent (10%) of all admissions to the enclosure; . . ." The defendant (Section 7) cannot transfer or assign the franchise to any other person, firm, association or corporation without first obtaining the written consent of the Commission.

Other provisions of the franchise need not be stated, there being no contention that the defendant has breached any of its terms and conditions.

The defendant acquired a tract of land in Carteret County, located approximately four miles west of the Town of Morehead City, and constructed thereon, at a total cost of approximately $300,000.00, a race course intended for and suitable for the racing of dogs, and conducted during the years 1948-1953, both inclusive, on said premises, at stated intervals, dog races, in connection with which it installed and maintained, for the use of persons who chose to patronize them in betting on the races, the "pari-mutuel" system and apparati used in connection therewith of the kind employed and used at recognized race courses in America.

During the years 1948-1953, both inclusive, out of revenues received from the operation of the dog-racing track and the "pari-mutuel" system of betting on the races, the defendant has paid to the Town of Morehead City, through the Commission, the following amounts: 1948—$26,000.00; 1949—$26,500.00; 1950—$33,000.00; 1951—$18,250.00; 1952—$28,000.00; 1953—$38,500.00. These amounts represent ten per cent (10%) of the gross receipts less the salaries and expenses of the Commission. The defendant, for the 1953 season, had a payroll of $107,887.54, exclusive of salaries to its officers, and paid out in purses, that is, to the owners of dogs participating in the races, the sum of $63,389.00, and had total operating expenses of $333,823.36. There being no statement as to the

salaries and expenses of the Commission for the 1953 season, it does not appear to what extent the 1953 operations were profitable to the defendant.

The amounts received by the Town of Morehead City have enabled the municipality, without increasing its tax levy, to purchase new fire-fighting equipment, pave and improve streets, purchase a police radio system and other police equipment, increase the salaries of policemen, make improvements to the municipal hospital, purchase additional equipment for grading streets and the collection and disposal of garbage; and, in short, have been generally advantageous to its fiscal position.

Having acquired a tract of land in Carteret County, outside the corporate limits of Morehead City, the defendant, on or about 15 July, 1947, leased it to said town, which in turn leased it to defendant, each lease being for the term of ten years and each providing that the lessee pay, in advance, a rental of one dollar ($1.00) per year. Under each lease, the defendant was required to pay all taxes and other assessments against the property.

The defendants' pleadings and affidavits are to the effect that the operations of the race track and pari-mutuel system have enabled a large number of Carteret County residents as well as others to obtain employment, that they have been conducted in an orderly and proper manner, and that the Town of Morehead City and the adjoining area in and about Carteret County have been greatly benefited thereby. Further, the defendant alleges that its stockholders, both within and without North Carolina, have invested large sums of money in reliance upon the Morehead City Act and the franchise granted in conformity therewith.

Upon the facts disclosed by the defendants' pleadings, affidavits and pleaded documents, the court below held that the operation of the pari-mutuel machines in connection with the dog races constituted the maintenance of an establishment for the purpose of gambling within the purview of G.S. 19-1 *et seq.*, and that Ch. 540, Public-Local Laws of 1939, as amended by Ch. 75, Public-Local Laws of 1941, and Ch. 616, Session Laws of 1949, is unconstitutional. Thereupon, judgment was entered restraining and enjoining the defendant (Racing Association, Inc.), its servants, agents and employees, from continuing, maintaining and using the premises as a place of business, and restraining and enjoining the removal of furniture, fixtures, etc., therefrom, and ordering the Sheriff of Carteret County to take and retain possession of the premises and of all personal property therein pending the further orders of the court.

The defendants excepted to the foregoing judgment and appealed to this Court. The assignments of error, briefly stated, are as follows:

1. That the court erred in its ruling, and in predicating judgment thereon, that the Morehead City Act is unconstitutional and therefore void.

2. That the court erred in rendering judgment providing for the seizure of defendant's property and the restraint of its business, this constituting an impairment of the contract between the Commission and the defendant in violation of Art. I, Sec. 10, of the Constitution of the United States.

3. That the court erred in rendering judgment whereby the defendant's investment was made practically worthless, thereby depriving the defendant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That Ch. 19 of the General Statutes of North Carolina under which judgment was entered, is violative of the Fourteenth Amendment to the Constitution of the United States in that it deprives the defendant of its property without due process of law and denies to the defendant the equal protection of the law.

Frank B. Aycock, Jr., for plaintiff relator, appellee.

John G. Dawson and Lucas, Rand & Rose for Carolina Racing Association, Inc., defendant, appellant.

George H. McNeil for defendant Morehead City, appellant.

Harvey Hamilton, Jr., for defendant Morehead City Racing Commission, appellant.

BOBBITT, J. This Court has held: 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. *Summrell v. Racing Asso.*, 240 N.C. 614, 83 S.E. 2d 501; *Racing Asso. v. Cahoon, et al.*, 214 F. 2d 830, and cases cited.

The constitutionality of G.S. 19-1 *et seq.*, has been tested and upheld as a valid exercise of police power. *Carpenter v. Boyles*, 213 N.C. 432, 196 S.E. 850; *Barker v. Palmer*, 217 N.C. 519, 8 S.E. 2d 610; *Summrell v. Racing Asso.*, 239 N.C. 591, 80 S.E. 2d 638.

Whenever it is adjudged that a nuisance as defined in G.S. 19-1 is kept, maintained and exists, abatement by injunction as provided in G.S. 19-2 is the statutory remedy. True, the effectual closing of the nuisance premises against use for any purpose is for one year, unless sooner released. G.S. 19-5. The court may, if the owner appears and pays all costs of the proceeding and files an approved bond conditioned that he will immediately abate the nuisance and prevent its re-establishment within one year and satisfies the court of his good faith, cancel the order of abatement and deliver the premises to the owner. G.S. 19-7. In the absence of such cancellation, the personal property seized by the sheriff is to be sold as in case of a sale under execution, the proceeds therefrom

applied in payment of the costs of action and abatement, and the balance, if any, paid to the owner. G.S. 19-5 and 19-16. No application for cancellation of the order of abatement under G.S. 19-7 has been made. No application or order for sale of personal property under G.S. 19-5 and 19-6 has been made. The rights of defendant under these statutes are available now upon its motion. While we deem it appropriate to advert to these statutory provisions, no assignment of error challenges the judgment of the court below for failure to accord the defendant its rights thereunder. Indeed, the statutes themselves are attacked as unconstitutional.

Is the Morehead City Act void as being in violation of limitations upon legislative power imposed by the Constitution of North Carolina? This is the question upon which decision here depends.

On the first appeal in the *Summrell case,* 239 N.C. 591, 80 S.E. 2d 638, the defendant there contended that the constitutionality of the Currituck Act then under consideration was not before this Court for determination, relying largely upon *Amick v. Lancaster,* 228 N.C. 157, 44 S.E. 2d 733. Bearing upon the question, this Court said:

"In *Amick v. Lancaster, supra,* the action was brought under G.S. 19-1, *et seq.* The plaintiff sought to enjoin as a nuisance the operation of a liquor store by 'The Town of Louisburg Board of Alcoholic Control' pursuant to Ch. 862, 1947 Session Laws. The Court held that since the alcoholic control board was acting 'under color of legislative authority' the remedy by action under G.S. 19-1, *et seq.,* 'seems inappropriate.' It is to be noted that the plaintiff in *Amick v. Lancaster, supra,* sought to enjoin the operations of a governmental board acting 'under color of legislative authority.' Whether the rationale of the decision would apply equally to a private person, firm, association or corporation is open to serious question. Be that as it may, the 1949 Currituck Act (Ch. 541, 1949 Session Laws) being unconstitutional and therefore void as declared in *S. v. Felton, ante,* 575, there is error in the judgment below dismissing the action; and the cause is remanded for further proceedings."

Further consideration convinces us that the ruling in *Amick v. Lancaster, supra,* should be restricted to actions to enjoin the operations of a governmental board acting "under color of legislative authority," and should not be extended to actions to enjoin the operations of a private person, firm, association or corporation acting "under color of legislative authority," and we so hold.

We consider the Morehead City Act first in relation to these provisions of our fundamental law, set out under the caption "Declaration of Rights," of the Constitution of North Carolina, viz.:

"Article I, Section 7, which provides: 'Exclusive emoluments, etc.—No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.'

"Article I, Section 31, which provides: 'Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed.' "

In *S. v. Felton,* 239 N.C. 575, 80 S.E. 2d 625, where the 1949 Currituck Act was held unconstitutional, this Court held that betting on dog races under a pari-mutuel system having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, constitutes gambling within the meaning of the statutes presently codified G.S. 16-1, G.S. 16-2, and G.S. 14-292. We refer to the *Felton case* for a full discussion with citations of authority on this point. So, under the general statutes and upon the undisputed facts, the defendant was engaged in the business of operating a gambling establishment incident to its conduct of dog races, subject to abatement by injunction as a statutory nuisance under G.S. 19-1 *et seq.,* unless exempted from its application by the Morehead City Act.

The Morehead City Act (Ch. 540, Public-Local and Private Laws of 1939) was amended first by Ch. 75, Public-Local Laws of 1941, hereinafter called the 1941 amendment, and later by Ch. 616, Session Laws of 1949, hereinafter called the 1949 amendment.

Section 1 of the Morehead City Act creates the Morehead City Racing Commission, consisting of three members. The original members are to be appointed by the Board of Commissioners of the Town of Morehead City, for one, two and three years, respectively, and at the expiration of the first term of each member his successor is to be appointed for a term of four years. In the event of a vacancy, the unexpired portion of his term shall be filled by the remaining members of the Commission; and in the event they cannot agree on the new member the Mayor of the Town of Morehead City is to act with them in filling the vacancy. The salaries of the members of the Commission are to be fixed by a committee of *three,* consisting of the Commission's chairman, the Mayor of the Town of Morehead City, "and a duly authorized representative of *the* person, firm, or corporation or association to whom *the* franchise or privilege hereinafter referred to is granted." (Italics added.) The Commission is directed to organize, elect a chairman, a vice-chairman and a treasurer. The treasurer is required to file with the Board of Commissioners of the Town of Morehead City a $5,000.00 bond for the faithful performance of his duties. The Commission is given authority to employ necessary clerical and legal assistance.

Section 2 vests in the Commission full authority "to grant to any person, firm, association or corporation a franchise or privilege for a term of years, not to exceed ten, to construct, own, lease, operate and maintain a race course or driving park for trotting, pacing and running races for

horses and dogs in the manner hereinafter set out." Section 2 (a) provides that no franchise or privilege shall be granted to a licensee unless and until the Commission is satisfied as to its "financial responsibility and ability to comply with all the rules and regulations of the Commission" and that it "is fully able to financially and otherwise maintain and operate its properties in accordance with such rules and regulations as the commission shall from time to time prescribe."

Section 2 (b) provides that "as a prerequisite to the issuance of the franchise or privilege, the said person, firm, association or corporation desiring said franchise or privilege shall at the time of making application therefor pay to the said commission the following charges or fees:

"First: For the franchise or privilege sought to be granted, a sum to be agreed upon as annual rental or lease for the grounds for the term of the franchise or privilege.

"Second: In the event such franchise or privilege is granted, the person, firm, association, or corporation shall also pay to the commission for each day or part of day during which races or racing is conducted, a sum equivalent to ten per cent (10%) of the gross receipts derived from all sources or operations connected with or incident to the operation of such races or racing conducted during such day or part of day. In no event, however, the amount so paid to exceed the amount of five thousand dollars ($5,000.00) per day and said amount to be paid in addition to any tax as may be now or hereafter fixed by law on such gross receipts." The 1941 and 1949 amendments relate solely to this portion of the Morehead City Act. Originally, it was provided that in the event such franchise or privilege is granted, the licensee was required to pay to the Commission for each day or part of day during which races or racing was conducted a sum equivalent to ten per cent (10%) of the gross receipts derived from all sources or operations connected with or incident to the operation of such races or racing conducted during such day or part of day. The maximum payment required was $5,000.00 per day, "in addition to any tax as may be now or hereafter fixed by law on such gross receipts." The 1941 amendment purports to strike out *Section 2 (b) Second* and insert therefor an entirely different basis for determining the amounts to be paid by the licensee to the Commission, namely, a percentage of the total contributions to all pari-mutuel pools and a percentage of the established admission price for each person admitted to the race track premises. The 1949 amendment purports to repeal the 1941 amendment and thereupon purports to enact *Section 2 (b) Second* of the Morehead City Act as originally provided with the addition of a new paragraph, viz.:

"The term 'sum equivalent to ten per cent (10%) of the gross receipts derived from all sources' referred to above shall mean (a) ten per cent (10%) of the first monies received, derived from the operations of the

Pari Mutuel machines, after the direct return to the bettors shall have been made; (b) ten per cent (10%) of all paid admissions to the enclosure; . . ."

It is noteworthy that the franchise of 15 July, 1947, from the Commission to the defendant, with minor exceptions, is drawn in conformity with the 1949 amendment, ratified 28 March, 1949, rather than in conformity with the 1941 amendment. The interested parties, with remarkable prevision, seem to have anticipated in 1947 the passage of the 1949 amendment.

Section 3 provides that under a franchise or privilege so granted, "the said person, firm, association or corporation is hereby fully authorized and empowered to legally construct, build, lease, carry on, maintain and operate a park, driving ground or race course *on property owned or leased* by the Town of Morehead City *outside the corporate limits thereof,* but within the limits of Carteret County, and to conduct and maintain therein horse and dog races." (Italics added.) Then follows the provision relating to the core of this controversy, viz.: "That such person, firm, association or corporation is hereby expressly granted full power and authority to operate and maintain what is generally known as 'Pari Mutuel Machines or Appliances' of the kind employed and in use at recognized racing courses in America: *Provided, however,* that said Pari Mutuel Machines and Appliances shall only be maintained and operated within the enclosure of said park, driving grounds or race course and only on days or parts of days when races or racing is being therein conducted, and it shall be legal for any and all persons twenty-one years of age legally within the enclosure of said park, driving grounds or race courses while said park, driving grounds or race courses are open for racing, to participate in the operation, or become a patron of said Pari Mutuel Machines and Appliances."

Section 3 provides further that any franchise or privilege granted by the Commission to any person, firm or corporation shall be and remain irrevocable so long as such licensee complies with the terms and provisions of said franchise and complies with the rules and regulations of the said Commission promulgated from time to time and set forth in its contracts; and further, that no franchise granted shall be transferred by the licensee to any other person, firm, association or corporation except by first obtaining the written consent of the Commission.

Section 4 provides that the Commission is authorized to adopt rules and regulations from time to time which it may "deem necessary to properly carry out the intentions of this Act." The violation thereof by the holder of the franchise or by any of its officers, agents or employees is declared to be a misdemeanor.

Section 5 provides that the governing authorities of the Town of Morehead City shall order a special election, at which "the qualified voters of said town" shall vote "For" or "Against" creating the Morehead City Racing Commission. The Act shall be in full force and effect if a majority of the qualified voters vote in favor of the creation of such Commission; otherwise, the Act shall not be in effect. However, should the voters fail to vote in favor of the creation of such Commission, other elections may be called by the governing authorities, successively, but not until six months from the previous election have expired.

Section 6 provides "That all laws and clauses of laws in conflict with the provisions of this Act are hereby repealed."

Section 7 provides "That this Act shall be in full force and effect from and after its ratification." It was ratified 3 April, 1939.

Reference to the 1949 Currituck Act and to *S. v. Felton, supra*, where its provisions were analyzed, will disclose immediately that the 1949 Currituck Act and the Morehead City Act are quite similar both in phraseology and in substance.

1. In each case, provision is made for an original and, if necessary, successive elections, at intervals of six months, for the purpose of voting the Act "in" without any provision whatever, once it becomes effective, for an election for the purpose of voting the Act "out."

2. In each case, under authority of the Act, the franchise is irrevocable during the term thereof except for failure to pay 10% of the licensee's gross receipts from *all* its operations and for failure to comply with the Commission's rules and regulations. See *S. v. Felton, supra*, for observations bearing upon such rules and regulations.

3. In each case, the provisions purporting to authorize the operation by the licensee of pari-mutuel machines within the race course enclosure incident to betting by patrons on dog races are the same.

True, there are differences, including the following:

1. The 1949 Currituck Act was to be in force and effect upon approval by the majority of the qualified voters of Currituck County *who vote* at the special election. The Morehead City Act was to be in force and effect upon approval by the majority of the qualified voters of the Town of Morehead City.

2. The 1949 Currituck Act provides for the ownership by the licensee of land in Currituck County on which the race course and apparati are located. The Morehead City Act provides that the land on which the licensee has the race course and apparati shall be *"property owned or leased by the Town of Morehead City* outside the corporate limits thereof but within the limits of Carteret County." (Italics added.)

3. The methods of appointment of the members of the Commission differ, the provisions of the 1949 Currituck Act making possible a self-perpetuating membership.

4. The period of the irrevocable franchise under the 1949 Currituck Act was 25 years while such period under the Morehead City Act is 10 years.

5. The 1949 Currituck Act expressly provides that the net proceeds from the Commission's operations shall be disbursed by it to the Currituck County School Fund (50%), to the Currituck County Welfare Fund (25%), and to the Currituck County General Fund (25%). Both the Morehead City Act and the franchise are silent as to how the Commission is to disburse the amounts received by it from the licensee other than in salaries and expenses. Probably this was an oversight.

6. The difference emphasized by the defendant on this appeal is the proviso in section 4 (a) of the 1949 Currituck Act that the Commission shall not grant "a franchise or privilege to more than one person, firm, association, or corporation, it being the intention and purpose that the operations shall be under a single management." True, the Morehead City Act does not contain such explicit language, using generally the language that the franchise might be granted to *any* person, firm, association or corporation, and thereafter referring time after time to *the* person, firm, association or corporation to which such franchise is granted. In our opinion, the Morehead City Act, like the Currituck Act, contemplates that there shall be only one franchise and licensee, *at a time;* and this conclusion seems inescapable in view of the provision of the Morehead City Act that *the salaries of the members of the Commission* shall be fixed by a committee of *three,* consisting of the Commission's chairman, the Mayor of the Town of Morehead City, "and a duly authorized representative of *the* person, firm, or corporation or association to whom *the* franchise or privilege hereinafter referred to is granted." (Italics added.)

In *S. v. Felton, supra,* the Currituck Act was held unconstitutional as violative of Article I, sec. 7, and of Article I, sec. 31, of the Constitution of North Carolina. We consider *S. v. Felton, supra,* direct authority for decision here. However, in view of the earnest insistence here and in *Summrell v. Racing Asso.,* 240 N.C. 614, 83 S.E. 2d 501, that cases cited in the *Felton case* as in accord with the conclusion reached departed from and were in conflict with a line of earlier cases, we deem it appropriate to discuss that subject further.

We refer again to the *Felton case,* where we discussed at some length *S. v. Fowler,* 193 N.C. 290, 136 S.E. 709, and *Plott v. Ferguson,* 202 N.C. 446, 163 S.E. 688, and cited later cases approving these decisions. We referred to earlier cases, cited by the defendant as in conflict with *S. v. Fowler, supra,* and decisions based thereon. Thereupon, we stated: "It would seem that *S. v. Fowler, supra,* and *Plott v. Ferguson, supra,* would constitute ample authority for a decision that the 1949 Currituck

Act is unconstitutional. However, in view of the earlier decisions cited by defendant as being in conflict and noted above, it is urged that the decisions in *S. v. Fowler, supra,* and *Plott v. Ferguson, supra,* should be reconsidered. There appears to be no necessity for doing so in relation to the statute now under consideration."

In *S. v. Fowler, supra,* which appellants state frankly in their brief "is more capable of being urged by the State as an authority for its contention here than any other case we have read," the defendant (Fowler) was indicted and convicted in Polk County under the general criminal statutes of the State relating to the unlawful manufacture, sale, possession, etc., of intoxicating liquor, and, for the first such offense, was sentenced to imprisonment as authorized by such statutes. He appealed on the ground that, while the sentence was authorized by the general criminal statutes on the subject, a later public-local act, applicable to Polk and four other named counties, provided that upon conviction for the first offense the maximum punishment was a fine of $100.00. The sentence was upheld by this Court, upon the ground that where there has been a valid enactment of a general criminal statute applicable to the whole State, a subsequent public-local act purporting to exempt offenders in five counties from the punishment prescribed by the general law, granting them a *privilege* or *immunity* not enjoyed by other residents of the State, is violative of Article I, sec. 7, of the Constitution of North Carolina, and therefore is void. Further discussion of the *Fowler case* may be found in our opinion in the *Felton case.*

Earlier cases, cited by appellant as being in conflict with the decision in the *Fowler case,* include the following:

In *S. v. Muse,* 20 N.C. 463, this Court upheld as constitutional *a general criminal statute* prohibiting the sale of spirituous liquors and other articles near a church, meeting house, or other place where persons are assembled for divine worship, except by licensed stores and taverns. We quote from the opinion of *Chief Justice Ruffin:* "There can be no doubt that the Legislature hath power, and that there is an obligation in sound morals and true policy on that body to protect the decency of divine worship by prohibiting any actual interruption of those engaged in worship, or any practices at or near the place, in which the Legislature may see a tendency to produce such interruption." Again: "The object of the Legislature was to prohibit the first step towards an establishment that might draw the idle, thoughtless or dissipated from the opportunities of wholesome edification to be derived from uniting in or witnessing divine worship."

In *S. v. Joyner,* 81 N.C. 534, this Court upheld as constitutional an act, applicable only to Northampton County, prohibiting the sale of

liquor in quantities less than a quart and prohibiting all sales of liquor not of the seller's manufacture.

In *S. v. Stovall,* 103 N.C. 416, 8 S.E. 900, this Court upheld as constitutional an act prohibiting the sale of liquor, tobacco and other refreshments within one-half mile of the Fair Grounds in Northampton County unless the person was regularly engaged in business within the prohibited territory. We quote from the opinion of *Justice Davis:* "We are unable to see that any privilege or right is conferred upon 'any man or set of men' which is denied to others, nor are we able to perceive that any 'perpetuities or monopoly' is created by the act." Again: "The power of the Legislature to enact laws conferring police powers and regulating traffic, etc., within particular localities, seems to be well settled."

In *S. v. Moore,* 104 N.C. 714, 10 S.E. 143, this Court upheld as constitutional an act prohibiting the buying and selling of seed cotton in three named counties in quantity less than usually contained in a bale unless the contract be reduced to writing, etc.

In *S. v. Barringer,* 110 N.C. 525, 14 S.E. 781, this Court upheld as constitutional an act prohibiting the manufacture of liquor within three miles of the Barium Springs Orphanage without the written permission of the Superintendent.

In *S. v. Barrett,* 138 N.C. 630, 50 S.E. 506, this Court upheld as constitutional an act applicable only to Union County providing a rule of evidence, to wit, that the possession of more than one quart of whiskey within that county was *prima facie* evidence that the possession was for the purpose of sale.

It is immediately apparent that the *Joyner, Stovall, Moore, Barringer and Barrett cases* concerned statutes imposing prohibitions, restrictions and burdens in certain localities, *not in conflict* with any general criminal statute dealing with the same subject matter. They do not in any sense grant the residents or any person, firm, association or corporation in such locality *any exemption* or *privilege* not enjoyed throughout the State. Where so understood, there is no conflict between these decisions and the decision in the *Fowler case.* It is noteworthy that these decisions were prior to the effective date of Article II, sec. 29, Constitution of North Carolina, hereinafter discussed.

Legislation enacted in the exercise of the police power for the benefit of the public is as extensive as may be required *for the protection* of the public health, safety, morals and general welfare of the people. *S. v. McGee,* 237 N.C. 633, 75 S.E. 2d 783, and cases cited. Under the police power, the General Assembly may prohibit or regulate gambling. *S. v. Felton, supra,* and authorities cited. The General Assembly, by the enactment of general criminal statutes, has condemned gambling and the operation of gambling establishments. This has been done in the exercise

of the police power. The concept of the police power precludes its exercise to grant a *privilege* or *immunity* to particular persons or to persons in a particular locality permitting them to violate with impunity the general statutory laws condemning gambling and the operation of gambling establishments as inimical to the public morals.

It comes to this: It is not the fact that the Morehead City Act is a public-local law that causes it to be violative of *Article I, sec. 7,* of the Constitution of North Carolina. Rather, it is the fact that it undertakes to grant to the licensee (Racing Association, Inc.) and its patrons a *privilege* or *immunity* directly in conflict with the general statutory laws, not enjoyed by others subject thereto.

Of course, in the exercise of the police power, assuming the general statute, public-local act or municipal ordinance to be otherwise valid, reasonable classifications are upheld. *S. v. McGee, supra; Brunswick-Balke-Collender Co. v. Mecklenburg County,* 181 N.C. 386, 107 S.E. 317.

We need add nothing to what was said in *S. v. Felton, supra,* concerning public service corporations and municipal corporations; nor need we discuss further whether a county or a municipal corporation is a "man or set of men" within the meaning of Article I, sec. 7, since the defendant is a private business corporation, not a political subdivision of the State. True, the Town of Morehead City receives a fraction of the gross receipts; and is, as the petition to intervene puts it, a third party beneficiary of the franchise.

Moreover, the Morehead City Act is invalid as an unconstitutional delegation of legislative power to the *qualified voters of the Town of Morehead City.* They, and they alone, are to determine whether the Morehead City Act shall be in force and effect. The members of the Racing Commission are to be appointed by the Board of Commissioners of the Town of Morehead City. The Mayor of the Town of Morehead City is one of a committee of three to fix the salaries of the members of the Racing Commission. Although the Morehead City Act and the franchise are silent on the subject, payments to the Town of Morehead City by the Racing Commission are made and presumably the act so contemplated. The qualified voters of Carteret County, other than those in the Town of Morehead City, have no voice in determining whether the Morehead City Act shall be in force and effect nor does the county government or any agency thereof receive any of the funds disbursed by the Racing Commission. Yet the Morehead City Act has no application whatever within the corporate limits of the Town of Morehead City, it being expressly provided that the licensee is to operate the race course and parimutuel betting apparati on "property owned or leased by the Town of Morehead City *outside the corporate limits* thereof but within the limits of Carteret County." (Italics added.) There would seem to be no legal

difference if the Morehead City Act had attempted to authorize the establishment of such racing course with its apparati in Clay County upon approval by the qualified voters of the Town of Morehead City.

Legislative power vests exclusively in the General Assembly, Constitution of North Carolina, Article II, and, except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. While an act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality, *Cottrell v. Town of Lenoir,* 173 N.C. 138, 91 S.E. 827, 16 C.J.S., Constitutional Law, Section 142, and 11 Am. Jur., Constitutional Law, Section 216, the General Assembly cannot constitutionally provide that the qualified voters in one governmental unit, *e.g.,* a town, shall decide whether a statute shall be in force and effect elsewhere than in the territory comprising that particular governmental unit. *Levering v. Board of Supervisors of Elections of Baltimore City,* 137 Md. 281, 112 A. 301.

Moreover, the Morehead City Act is unconstitutional and therefore void, not only for the reasons stated above, but because it conflicts with Article II, sec. 29, of our organic law.

We are dealing here, not directly with those who bet on dog races through the pari-mutuel system, but with a private corporation operating a pari-mutuel gambling establishment. Such operation is its trade and business.

The Constitution of North Carolina provides: "The General Assembly shall not pass any *local,* private, or *special* act or resolution . . . *regulating,* labor, *trade,* mining, or manufacturing . . . *Any local,* private or *special act* or resolution passed in violation of the provisions of this section shall be void." Article II, sec. 29. (Italics added.) Submitted by the 1915 General Assembly, ratified by the electorate in 1916, effective on and after 10 January, 1917.

In *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521, this Court considered "An Act to Define Real Estate Brokers and Salesmen; to Provide for the Regulation, Supervision and Licensing Thereof; to Create a Real Estate Commission, and Prescribing the Powers and Duties Thereof; To Provide for the Enforcement of said Act and Penalties for the Violation Thereof." Ch. 292, Public Laws of 1937. It applied to thirty-six counties, sixty-four being expressly exempted from its provisions. It was held that real estate brokers and salesmen were engaged in *trade* within the meaning of Article II, sec. 29; and the act, upon authority of *In re Harris,* 183 N.C. 633, 112 S.E. 425, and *S. v. Warren,* 211 N.C. 75, 189 S.E. 108, was held a local and a special act void under Article II, sec. 29. In *S. v. Dixon, supra,* this Court quoted with approval from *S. v. Worth,*

116 N.C. 1007, 21 S.E. 204, that the word "trade" "includes in this sense any employment or business embarked in for gain or profit."

There can be no doubt but that the Morehead City Act is both local, *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313, and special, *S. v. Dixon, supra,* concurring opinion of *Barnhill, J.* (now *C. J.*), if indeed it may not be considered a private act; for it purports to regulate a licensee in one locality in one county and to permit such licensee to operate there a place of business condemned as a gambling establishment by the general laws of the State. We have no hesitancy in reaching the conclusion that the defendant was engaged, and seeks to continue to engage, in a trade or business condemned by the general laws of the State, under color of the Morehead City Act. And we can perceive no valid reason why, if local and special acts regulating legitimate trade and business are invalid as violative of Article II, sec. 29, such an act purporting to regulate the operations of an unlawful trade or business would not likewise be invalid. In this connection, it is noted that the defendant, as one of its assignments of error, challenges the judgment of the court below on the ground that it forbids the continued operation of its *business* and impairs the value of its *investment.*

We shall not attempt to analyze the reasons prompting the adoption of the constitutional amendment, now Article II, sec. 29, of the Constitution of North Carolina. Full discussion, and the results of exhaustive research, may be found in the Report of Albert Coates, Director of the Institute of Government, to the Commission on Public-Local and Private Legislation authorized by the 1947 General Assembly, appearing in the February-March 1949 issue of Popular Government.

In partial explanation, the practical observations of *Bynum, J.,* in *Simonton v. Lanier,* 71 N.C. 498, seem pertinent: "Public Laws are founded on the gravest considerations of public benefit. They are deliberately enacted, are permanent in character, are for the equal benefit of all, and of universal application. Not so with private statutes. These are not of common concern, and do not receive the watchful and cautious scrutiny of the Legislature which is devoted to those of a public character. They are often procured by agents and for a purpose, who are watchful to take advantage of any relaxation in legislative vigilance."

Cases from other jurisdictions, including *Landers v. Eastern Racing Asso.,* 97 N.E. 2d 385, a Massachusetts case; *Commonwealth v. Kentucky Jocky Club,* 38 S.W. 2d 987; *S. v. Garden State Racing Asso.,* 54 A. 2d 916, a New Jersey case; *Tweel v. West Virginia Racing Com.,* 76 S.E. 2d 874, were decided against the background of constitutional and statutory provisions different from the North Carolina provisions under consideration here. Indeed, in the New Jersey case cited, it appears in the opinion

that the New Jersey Constitution was amended so as to permit parimutuel betting at legalized race tracks.

As stated in the *Felton case,* the General Assembly, in its exercise of the police power, has enacted general statutes on the subject of gambling in its variety of guises and disguises, including the maintenance of establishments for gambling on races and participation therein. Whether such general statutes should be repealed or modified is a matter within its sphere of power and duty.

We are concerned here with the validity of the Morehead City Act, a local and special, if not a private, act, directly in conflict with general statutes presently in force, and conclude, that, for the reasons stated, such act is unconstitutional and therefore void.

For the reasons stated, the judgment of the court below is

Affirmed.

LENOIR COUNTY v. ALVIN OUTLAW, TRUSTEE; E. W. PRICE, ADMINISTRATOR OF THE ESTATE OF STEPHEN ROGERS; AND GEORGE B. LANE, TRADING AS LANE'S FUNERAL HOME.

(Filed 10 November, 1954.)

1. Mortgages § 37—

The trustee or mortgagee must pay into the hands of the clerk of the Superior Court the surplus remaining after foreclosure in all cases where adverse claims to the funds are asserted, G.S. 45-21.31 (b) (4), and where the trustee pays such funds into the hands of the administrator of the deceased trustor, the trustee remains liable therefor until they are paid into the hands of the clerk as provided by law.

2. Public Welfare § 7—

There are two separate and distinct statutory methods by which a county may recover the aggregate amount paid as old age assistance to a recipient: One, a claim against the personalty of the estate, which must be filed within one year after the death of the recipient, and the other a general lien upon the recipient's real estate, attaching upon the filing of the statement therefor in the lien docket and its proper indexing. G.S. 108-30.1; G.S. 108-30.2.

3. Same—

The lien against the estate of a deceased recipient of old age benefits under the provisions of G.S. 308-30.1 may not be enforced by action in any event after the expiration of 10 years from the last day from which assistance was paid, and, even if it be conceded that no action to enforce such lien may be maintained after one year from the death of the recipient, such lien, properly filed, remains in force until satisfied, and attaches to the surplus realized upon foreclosure of a mortgage on the realty of the deceased recipient notwithstanding that foreclosure was had more than one year after his death.

4. Mortgages § 37—

There is no limit to the amount of funds that may be paid to the clerk of a Superior Court under the provisions of G.S. 45-21.31, the limitation of the amount payable to the clerk under the provisions of G.S. 28-68 not being applicable to the surplus realized upon the foreclosure of a mortgage or deed of trust.

5. Mortgages § 37: Executors and Administrators §§ 5, 16—

Where there are adverse claims against the surplus realized upon the foreclosure of a deed of trust after the death of the trustor, and a proceeding is instituted pursuant to G.S. 45-21.32 to determine who is entitled to such funds, it is the clerk and not the administrator who determines the priority of payments, although the administrator claiming the funds is a necessary party.

APPEAL by petitioner from *Williams, J.*, August Term, 1954, of LENOIR.

This is a special proceeding instituted on 4 August, 1954, pursuant to the provisions of G.S. 45-21.32, to determine the ownership of surplus funds that the petitioner alleges should have been paid into the office of the Clerk of the Superior Court of Lenoir County pursuant to the provisions contained in G.S. 45-21.31 (b), subsection (4).

This controversy arose in the following manner: Stephen Rogers, now deceased, was a recipient of old age assistance from the Department of Public Welfare of Lenoir County amounting to $180.00, by virtue of said decedent's application therefor under Chapter 108 of the General Statutes of North Carolina, and more particularly G.S. 108-30.1. Stephen Rogers died 26 March, 1952, and an investigation disclosed at the time of his death that he had no personal estate and no property of any kind except a small parcel of land encumbered by a deed of trust to Alvin Outlaw, trustee, recorded in Book 236, page 315, in the office of the Register of Deeds in Lenoir County. No person qualified as administrator of said decedent's estate and no will of said decedent was offered for probate; that the funeral expenses for said decedent amounted to approximately $400.00.

Further facts necessary to an understanding and disposition of this appeal are set out in the petition and other documents filed by the parties, and may be summarily stated as follows:

1. The petitioner, through its attorney, discussed petitioner's claim with Alvin Outlaw, trustee, and upon being advised that the trustee was going to foreclose the above deed of trust, petitioner's attorney requested said trustee to pay any surplus funds resulting from the sale of the property into the office of the Clerk of the Superior Court as provided by G.S. 45-21.31. The petitioner, through its attorney, was advised by the trustee that such surplus funds would be paid into the office of said Clerk upon the filing of his final account.

2. The trustee filed his final account on 15 July, 1954, showing a surplus over that required to satisfy the indebtedness secured by the said deed of trust, the cost of foreclosure, etc., of $572.73.

4. The petitioner thereupon filed a petition before the Clerk of the Superior Court entitled "In the matter of Stephen Rogers, deceased." In this petition, the petitioner alleged that the above funds, as it was informed and believes, would be paid into the office of the Clerk, and set out the facts giving rise to its claim and prayed for reimbursement for the amount of old age assistance it had paid the deceased. The petitioner likewise, upon information and belief, alleged that there was an amount due by the estate for funeral expenses which was not in excess of $400.00, and that there were no other debts against the estate.

5. According to the allegations in the petition in this proceeding, the trustee, instead of paying the surplus funds into the office of the Clerk of the Superior Court as he had promised to do, notwithstanding the fact that he had actual and constructive notice of the adverse claim of petitioner, procured the appointment of E. W. Price as administrator of the estate of Stephen Rogers, deceased, and paid the surplus funds to him as such administrator.

6. The administrator, based upon information contained in the petition before the Clerk of the Superior Court, forthwith filed with said Clerk a written rejection of the claim of petitioner.

7. Petitioner in the present proceeding prayed for an order requiring the said E. W. Price, administrator, to pay said surplus of $572.73, paid over to him by Alvin Outlaw, trustee, into the office of the Clerk of the Superior Court to be impounded in said office until the rights of the parties to this proceeding can be determined, and also prayed for a restraining order to restrain and enjoin said administrator from disbursing the said funds or permitting them to become liable for any costs or expenses pending the determination of the rights of the parties herein. Such restraining order was obtained on 4 August, 1954.

8. The respondent, E. W. Price, administrator, demurred to the petition on the grounds that it did not state facts sufficient to constitute a cause of action; that the petition had a misjoinder of causes of action, and that there was a defect of parties defendant.

When this matter came on for hearing, the court held the petitioner was not entitled to a lien upon the funds paid to E. W. Price, administrator, by Alvin Outlaw, trustee, and sustained the demurrer, dissolved the restraining order and dismissed the proceeding at the cost of the petitioner. Petitioner appeals, assigning error.

Thomas J. White for petitioner.

E. W. Price for respondent.

DENNY, J. The real questions to be determined on this appeal could have been disposed of expeditiously and without needless complication if the trustee had paid the surplus funds to the Clerk of the Superior Court of Lenoir County in accordance with the provisions of G.S. 45-21.31. *In re Gibbs,* 205 N.C. 312, 171 S.E. 55. This statute is explicit in its provisions as to how surplus funds should be disposed of by a trustee or mortgagee. And subsection (b) thereof expressly provides that the ". . . surplus shall be paid to the clerk of the superior court of the county where the sale was had— . . . (4) In all cases where adverse claims thereto are asserted." This statute was enacted in order to provide a remedy in situations identical with that now before us. *In re Gibbs, supra; Chemical Co. v. Brock,* 198 N.C. 342, 151 S.E. 869.

The petitioner claims a lien on the surplus funds in controversy, under and by virtue of the provisions contained in G.S. 108-30.1, the pertinent parts of which read as follows: "There is hereby created a general lien, enforceable as hereinafter provided, upon the real property of any person who is receiving or who has received old age assistance, to the extent of the total amount of such assistance paid to such recipient from and after October 1, 1951. Before any application for old age assistance is approved under the provisions of this article, the applicant shall agree that all such assistance paid to him shall constitute a claim against him and against his estate, enforceable according to law by any county paying all or part of such assistance. . . . The statement shall be filed in the regular lien docket, . . . and same shall be indexed in the name of the lienee in the defendants', or reverse alphabetical, side of the cross-index to civil judgments; in said index, the county shall appear as plaintiff, or lienor; . . . From the time of filing, such statement shall be and constitute due notice of a lien against the real property then owned or thereafter acquired by the recipient and lying in such county to the extent of the total amount of old age assistance paid to such recipient from and after October 1, 1951. The lien thus established shall take priority over all other liens subsequently acquired and shall continue from the date of filing until satisfied: Provided, that no action to enforce such lien may be brought more than ten years from the last day for which assistance is paid nor more than one year after the death of any recipient . . ."

The above statute includes two separate and distinct methods by which a county may recover the aggregate amount paid as old age assistance to a recipient. Under the agreement executed by the applicant, the assistance payments to him "shall constitute a claim against him and against his estate enforceable according to law by any county for all or part of such assistance." The claim rising under this provision of the statute is for the purpose of reaching assets of recipients other than real estate. Such claim is to be filed "within one year after the death of any person

who has received old age assistance, reimbursement for which has not been made . . . The claim shall be for the total amount of old age assistance paid to or for the benefit of such recipient from and after October 1, 1951, by or through the state and the several counties thereof; and such claim shall have equal priority in order of payment with the Sixth class under section 28-105 of the General Statutes . . ." G.S. 108-30.2.

Since Stephen Rogers, deceased, the recipient of the old age assistance, left no personal estate, we are not concerned with this type of claim in the present proceeding. However, we wish to say in passing that in our opinion the last cited statute should be amended so as to provide for the proof of this class of claims in the same manner as now required by law for proving claims against executors, administrators, and collectors.

The other method for obtaining reimbursement for old age assistance payments is bottomed on the general lien on the recipient's real estate. The demurrer admits the existence of the petitioner's lien as authorized by the statute. However, the respondent appellee challenges the validity of the lien because no action to enforce it was instituted within one year of the recipient's death. If it be conceded that no action to enforce such lien may be maintained after the expiration of one year from the death of a recipient of old age assistance, we do not concede that the petitioner herein is barred from having its claim satisfied to the extent funds may be available out of the surplus realized from the sale of the recipient's real estate. When the petitioner ascertained that the party who held a deed of trust on the property, securing an indebtedness, which constituted a first lien on the property, intended to foreclose thereunder, it became unnecessary for the petitioner to institute foreclosure proceedings based on its lien. Even so, when the petitioner filed its lien and had it indexed and cross-indexed to civil judgments, as required by the statute, the general lien thus established took priority over all other liens subsequently acquired and such lien will continue until satisfied. No action to enforce such lien, however, in any event may be maintained after the expiration of ten years from the last day for which assistance was paid. The statute so provides.

In light of the provisions contained in G.S. 108-30.1, we hold that the petitioner's lien from its filing became effective and superior to all other liens subsequently acquired for the amount of assistance paid to the recipient from time to time to the same extent that a judgment becomes a general lien on the date it is docketed. Consequently, when the recipient's property was foreclosed, the petitioner's lien was transferred to the surplus funds realized from the sale just as the lien of any other junior encumbrancer would be under similar circumstances. *In re Gibbs, supra; Chemical Co. v. Brock, supra; Carpenter v. Duke,* 144 N.C. 291, 56 S.E. 938; *Staton v. Webb,* 137 N.C. 35, 49 S.E. 55. See also *Demai v. Tart,*

221 N.C. 106, 19 S.E. 2d 130; *Fraser v. Bean,* 96 N.C. 327, 2 S.E. 159, and *Long v. Miller,* 93 N.C. 227.

The contention of the respondent appellee that the sum of $572.73 is in excess of $500.00, the amount a clerk of the Superior Court is permitted to accept under the provisions of G.S. 28-68, is without merit. The provisions of G.S. 28-68 are applicable to a factual situation in no way related to that involved in this appeal. There is no limit on the amount of funds that may be paid to a clerk of the Superior Court pursuant to the provisions of G.S. 45-21.31. But, when a proceeding is instituted pursuant to the provisions of G.S. 45-21.32, to determine who is entitled to such funds, it is the clerk and not the administrator who determines the priority of payments. As a matter of course, when the administrator claims the funds, he is a necessary party to the proceeding.

The judgment of the court below is reversed to the end that E. W. Price, administrator of the estate of Stephen Rogers, deceased, be ordered and directed to pay to the Clerk of the Superior Court of Lenoir County, the entire surplus in the sum of $572.73, paid to him by Alvin Outlaw, trustee, and that the proceeding be remanded to the aforesaid Clerk for the purpose of entering judgment for the disbursement of said funds as follows: (1) For the payment of funeral expenses; (2) for the payment of the petitioner's claim, unless it is made to appear that there is a lien outstanding against said funds which is superior thereto; and (3) for the payment of the balance, if any, to the administrator of the deceased, provided no other valid claim or claims are asserted before the said Clerk.

The respondent Alvin Outlaw, trustee, by paying the above surplus funds to E. W. Price, administrator, instead of paying them to the Clerk of the Superior Court of Lenoir County, as required by G.S. 45-21.31, will remain liable therefor until such funds are paid to the said Clerk as provided by law. *Brown v. Jennings,* 188 N.C. 155, 124 S.E. 150. Therefore, let the respondents, Alvin Outlaw, trustee, and E. W. Price, administrator, pay the costs of this appeal, and the administrator any additional costs. G.S. 45-21.32 (d).

Reversed and remanded.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, v. C. O. STORY, BELTON JACKSON, F. W. BRADLEY, JOHN H. BRADLEY, BOB PRICE, J. B. PACE, MOSES BRADLEY, HAROLD C. CASE, D. P. HENDERSON, F. B. EDWARDS, JACK STORY, R. V. THOMPSON, MRS. ALLEN THOMPSON, MISS MARGARET CAUSBY, GAITHER JOHNSON, MRS. J. B. THOMPSON, HORACE THOMPSON, H. R. THOMPSON, MRS. GAITHER JOHNSON, L. R. NEWMAN, MARK CONSTANCE, AND CURTIS GARRETT.

(Filed 10 November, 1954.)

1. Eminent Domain § 6: Hunting and Fishing § 1—

The Wildlife Resources Commission has been delegated the power to acquire land for game farms or game refuges in the public interest, G.S. 113-84, G.S. 143-237, *et seq.*, but the public need for such project in a particular locality must first be established by a certificate of public convenience and necessity from the North Carolina Utilities Commission, G.S. 40-53, before land can be taken by condemnation.

2. Eminent Domain § 4—

Only public necessity justifies the taking of land from a citizen without his consent.

3. Hunting and Fishing § 1—

The Wildlife Resources Commission, in the discharge of its important duties in the public interest, can act only by resolution passed in a legal meeting of its members sitting as a commission, which resolution should be recorded in its minutes, and thus become the best evidence of the Commission's actions.

4. Same: Eminent Domain § 6—

Resolution of the Wildlife Resources Commission authorizing its director to negotiate for the purchase of certain lands and setting up a certain sum in its budget therefor, even if it be construed to authorize the director to actually purchase the lands designated, is not authorization to him to institute proceedings to condemn any part of the lands. Such resolution cannot support a finding that an application for certificate of public convenience and necessity for the acquisition of the land was filed by the Wildlife Resources Commission so as to confer jurisdiction on the Utilities Commission to issue the certificate.

APPEAL by respondents from *Moore, J.*, heard by consent in McDOWELL.

This proceeding originated before the Utilities Commission of North Carolina on an application filed in the name of the North Carolina Wildlife Resources Commission for a certificate of public convenience and necessity as authorized by G.S. 40-53. The Wildlife Resources Commission alleges that in co-operation with the Federal Government it has already under option to purchase approximately 8,000 acres of land in Polk and Henderson Counties, known as the Green River Wildlife Management Area, and that approximately 5,000 acres adjoining are already

under lease. The application alleges further that the acquisition of the land described and owned by the respondents is necessary to complete the area, and when so completed will enable the Wildlife Resources Commission to carry out one of its primary objectives, and to this end "it is in the public interest that the petitioner exercise its rights of eminent domain under the Constitution and laws of the State of North Carolina in acquiring the lands herein described as a public works project." The respondents appeared before the Utilities Commission and filed a protest to the issuance of the certificate.

The Utilities Commission, after notice, conducted hearings at which evidence was introduced in behalf of both the Wildlife Resources Commission and the respondents. The latter made an oral motion to dismiss the application for (1) lack of jurisdiction of the Utilities Commission to grant the certificate, (2) the application for the certificate was not authorized by the North Carolina Wildlife Resources Commission.

Upon the request of the respondents, the Utilities Commission stated findings of fact and conclusions of law, to which respondents filed exceptions. The Utilities Commission ordered the certificate issued. Utilities Commissioner McMahan dissented. The respondents filed a petition to rehear, which was denied. The respondents appealed to the Superior Court, and the Utilities Commission, as provided by G.S. 62-26.6, certified the appeal and record to the Superior Court of Polk County on 16 June, 1954. By consent of all the parties the appeal was heard by Moore, J., in McDowell County. After hearing, Judge Moore overruled all exceptions and affirmed the order of the Utilities Commission. The respondents excepted and appealed.

Attorney-General McMullan and Assistant Attorney-General Paylor for the petitioners, appellees.

Joyner & Howison for respondents, appellants.

HIGGINS, J. Two questions are presented by this appeal: First, does the North Carolina Utilities Commission have authority to issue to the North Carolina Wildlife Resources Commission a certificate of public convenience and necessity for the establishment of the Green River Game Management Area in Polk and Henderson Counties? Second, if so, did the Wildlife Resources Commission authorize the application for the certificate?

The General Assembly of 1925 enacted Chapter 122, now G.S. 113-2, creating a Department of Conservation and Development. Among its duties were declared to be, to aid (a) in the promotion of the conservation and development of the natural resources of the State, (b) to promote a more profitable use of lands, forests and waters. The control and man-

agement of the Department was vested in the "Board of Conservation and Development," consisting of 15 members appointed by the Governor. The Act creating the Board provided for a director whose duty it was to make surveys of the economy and natural resources of the State and to perform such other duties as the Board might prescribe, all under the direction of the Board.

Succeeding sessions of the General Assembly added new duties to the Board, among them that of collaborating with "the several United States Government bureaus and other sources as may assist in carrying out the objects of the Department." Chapter 486, section 4, enacted in 1935, now G.S. 113-84, provides among other things, that the Board may "acquire by purchase, grant, condemnation, lease, agreement, gift or devise, lands or waters suitable for the purposes hereinafter enumerated:

"(a) Game farms or game refuges.

"(b) Lands or waters suitable for game, bird or fur-bearing animal restoration, propagation or protection.

"(c) For public hunting or trapping areas to provide places where the public may hunt or trap in accordance with the provisions of law or the regulations of the Board."

Section 5 provides that the Board may "enter into cooperative agreements with Federal agencies, municipalities, corporations, organized groups of land owners, associations and individuals for the development of game, bird, or fur-bearing animal management and demonstration projects."

In 1947 the General Assembly enacted the North Carolina Wildlife Resources Law, now G.S. 143-237 to 143-254.1. G.S. 143-240 creates the North Carolina Wildlife Resources Commission, consisting of nine members to be appointed by the Governor, and subsection 247 provides that the duties, powers, jurisdiction and responsibilities theretofore vested by statute in the Department of Conservation and Development, the Board of Conservation and Development, the Director of Conservation and Development, the Division of Game and Inland Fisheries, the Commissioner of Game and Inland Fisheries, or any predecessor organization, board, commission or commissioner, or other official relating to the wildlife resources of North Carolina, excluding all commercial fish and fisheries, be transferred to and vested in the North Carolina Wildlife Resources Commission. The Act provides for the taking over of the duties from the organization of the latter commission appointed by the Governor.

The application filed before the North Carolina Utilities Commission recites that the Wildlife Resources Commission in co-operation with the Federal Government has under option to purchase approximately 8,000 acres of land in Polk and Henderson Counties, comprising a project

known as the Green River Wildlife Management Area. The application further alleges that 5,000 acres are already under lease to the North Carolina Wildlife Resources Commission. The application further alleges that the lands of the respondents are necessary for a more complete and satisfactory development of this area for the purposes above mentioned in order that the Wildlife Resources Commission may better protect, propagate and preserve the game animals, birds, fur-bearing animals, and fish in this area. The application states that the Wildlife Resources Commission desires to acquire respondents' property in the manner provided in Article 3, Chapter 40, General Statutes of North Carolina, entitled "Public Works Eminent Domain Law." The certificate is requested in order that the Commission may exercise its right of eminent domain and take the property. The certificate is necessary under G.S. 40-53, which is as follows:

"*Necessity for certificate of public convenience and necessity from Utilities Commission.*—Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the Utilities Commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the Utilities Commission of North Carolina, the said Utilities Commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project."

In construing the above section, *Justice Denny,* in the case of *In re Housing Authority of the City of Charlotte,* 233 N.C. 649, 655, 65 S.E. 2d 761, says: "We think the finding of public convenience and necessity, either in general or specific terms, as pointed out in G.S. 40-53, has reference to any finding made 'either in general or specific' terms by the Legislature and set forth in the Housing Authorities Law, which findings shall not be sufficient to warrant the exercise of eminent domain in connection with any project authorized thereby. But a certificate of public convenience and necessity for such project must be obtained from the Utilities Commission—that is, the public need for such a project in a particular community must be made to appear and a certificate of public convenience and necessity must be obtained before the petitioner may proceed to condemn property for such project."

From the foregoing, it seems clear that the Wildlife Resources Commission has authority to undertake the project outlined in the application in collaboration with the Federal Government. However, before lands for the purpose can be acquired by condemnation under the Eminent Domain Law, a certificate of public convenience and necessity is required from the North Carolina Utilities Commission. The Utilities Commission, upon a proper application and showing, has authority to issue the certificate.

The remaining question is whether the Wildlife Resources Commission authorized the application for the certificate of public convenience and necessity. The respondents challenge the application for the certificate upon the ground that the application was not authorized by the Wildlife Resources Commission. The evidence on this question consists of excerpts from the minutes of a meeting of the Commission held on 21 January, 1952, as follows: "Mr. Connoly moves that the Director be authorized to negotiate for the purchase of the Green River Mountain and Dugger Mountain areas, using funds appropriated at the November 16, 1951, meeting for the purchase of the South Mountain tract. Mr. Kennett seconded the motion. When put to a vote, the motion carried unanimously." The only other reference in the Commission's records consists of Item 2800 in the Budget for the Year 1952-1953, as follows: "Land acquisition (Green River-Polk County Deer Restoration Area) $75,000.00."

The question was raised in the hearing by the cross-examination of Mr. Barick, Chief of the Game Division, North Carolina Wildlife Resources Commission, who examined the minutes of the commission and testified to the above quotations as coming from its records. Respondents requested the Utilities Commission on this evidence to find "that the application filed in this matter on behalf of the North Carolina Wildlife Resources Commission was filed and presented to this Commission without any resolution authorizing the same by the members of the Wildlife Resources Commission and without authority given by the Commission. And upon this finding to conclude as a matter of law that the application for the certificate was without authority." The Utilities Commission refused to find as requested, but did make the following finding:

"1. The Commission finds as a fact that the Wildlife Commission authorized the acquisition of the area in question (Resolution passed at a regular meeting of said Wildlife Commission on January 21, 1952) from funds appropriated at its meeting on November 16, 1951, and that in its Budget for the fiscal year 1952-53 and also in its Budget for 1953-1954 it set aside $75,000 for the purchase of the area known as the 'Green River, Polk County Deer Restoration Area'; that this proceeding was instituted at the direction of Mr. Patton, Executive Director of said

Wildlife Commission, and the application was signed by Mr. Whitmire, attorney for said Wildlife Commission. The Commission further finds as a fact that although the minutes of said Wildlife Commission fail to specifically authorize the institution of this proceeding, that, by approving the acquisition of the land and the appropriation of the money to pay for same, that the implied authority is inescapable that said director should proceed in every way provided by law to consummate the acquisition of the land, either by purchase or by such other means as the law provides, one of which is to obtain a certificate of convenience and necessity to condemn under the Eminent Domain Statute, which latter course the director has followed in the instant case. All of said findings of fact as requested by the protestants in paragraph 2 inconsistent with the foregoing are denied."

From this finding the Utilities Commission concluded as a matter of law that the application was properly filed. The respondents appealed to the Superior Court. Record was transmitted in due course to the Superior Court of Polk County and heard by consent in McDowell County. On the hearing all of respondents' objections and exceptions were overruled, the order of the Utilities Commission granting the certificate was upheld, whereupon the respondents filed exceptions, made assignments of error, and appealed to the Supreme Court.

The facts found by the Utilities Commission do not warrant its conclusion of law that the application for the certificate of public convenience and necessity was filed by the North Carolina Wildlife Resources Commission. The certificate is the first step in the exercise of the sovereign power of condemnation. This first step leads, and is intended to lead to the taking of property of the citizen without his consent and often against his will. Only necessity justifies a taking under such circumstances. That just compensation be made for that which is taken does not make allowance for the sentimental values the citizen attaches to his home. He must submit, and it is proper that he should submit to inconvenience because of the public necessity and for the public good. The Wildlife Resources Commission has been given the power to take land by condemnation when the Utilities Commission has issued a certificate of public convenience and necessity.

The Wildlife Resources Commission is a body of nine members. It is one of the important agencies of the State. It is charged with important duties and with expending large sums of public money. Obviously it can act only by resolution duly passed in a legal meeting. The members must meet as a commission and be in session as such to give validity to its acts. The acts of the Commission must be recorded in its minutes and when so recorded the minutes become the best evidence of the commission's actions.

The Commission's records bearing on the question for decision here disclose that the Commission authorized the Director to negotiate for the purchase of Green River Mountain and Dugger Mountain Areas, and that $75,000 was set up in its budget for that purpose. The wording of the resolution raises a serious question as to whether the Director was authorized to purchase Green Mountain. Technically, he was authorized to negotiate only. It seems reasonable to assume from the resolution that the Commission did not expect the Director to purchase Green Mountain, but only to negotiate for the purchase and report the result of his negotiations for the final determination of the Commission. Nevertheless, if we assume the authority was given not only to negotiate but actually to purchase, it by no means follows that the Director was authorized to invoke the sovereign power of eminent domain and initiate a proceeding to take the property by making application for the certificate. For the Commission to authorize the purchase is one thing—to authorize condemnation is something else. Under proper circumstances the Commission can purchase when the land is desirable for its legitimate purposes. Only the force of necessity gives it the right to condemn.

The conclusion of the Utilities Commission that the application for a certificate of public convenience and necessity was authorized by the Wildlife Resources Commission is not supported by its findings of fact. The Commission was not justified in issuing the certificate because of the lack of a proper application. The Superior Court committed error in affirming the Commission's orders. The respondents' assignment of error No. 3 must be sustained.

Reversed.

THOMAS & HOWARD COMPANY OF SHELBY, INC., v. AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, A CORPORATION, M. B. TATE, JOHNNIE PONDERS, WILLIAM HUDDLESTON, CHARLES VARNER AND JAMES BYRD.

(Filed 10 November, 1954.)

1. Indemnity § 2a—

A contract indemnifying the employer against loss occasioned by dishonesty or fraud of employees is in the nature of a contract of insurance, and is subject to the rules of construction applicable to insurance policies generally.

2. Indemnity § 7: Pleadings § 2—

An employer may join actions against its employees in tort to recover for loss occasioned by the fraud or dishonesty of the employees acting in collusion or conspiracy with each other, with an action *ex contractu* on an indemnity policy covering such losses executed by the corporate defendant, since both actions arise out of the same transaction.

3. Indemnity § 7—

In an action on a fidelity policy, a complaint setting forth the essential features of the contract, and alleging that it was in force at the time in question, and that plaintiff employer had sustained loss by the dishonesty or fraud of its employees acting in collusion or conspiracy with each other, *is held* insufficient, it being required that plaintiff employer alleged the facts upon which the conclusions of fraud and conspiracy are predicated.

4. Pleadings § 3a—

The complaint should allege the substantive and constituent facts of the cause of action, but should not narrate the evidence supporting them.

5. Indemnity § 7—

In an action on a fidelity policy, the plaintiff must specify the loss with particularity, and allegation that plaintiff had sustained "property and/or inventory loss" is insufficient. The use of the term "and/or" disapproved.

6. Pleadings § 15—

The rule that the complaint must be liberally construed upon demurrer does not permit the court to read into it facts which it does not contain.

7. Pleadings §§ 19c, 22—

Where the complaint contains a defective statement of a good cause of action, demurrer thereto is properly sustained, but the action should not be dismissed, since plaintiff is entitled to move for permission to amend so as to allege the essential and ultimate facts omitted.

APPEAL by plaintiff from *Patton, Special Judge,* August Term 1954 of CLEVELAND.

Civil action to recover an alleged loss on a Comprehensive Crime Policy, heard on a demurrer.

The defendant American Mutual Liability Insurance Company demurred on the grounds of misjoinder of parties and causes of action; that two or more causes of action have been improperly united; and for failure to state facts sufficient to constitute a cause of action against it.

The court sustained the demurrer, and dismissed the action as to American Mutual Liability Insurance Company. The court did not specify the ground, or grounds, upon which it acted.

The plaintiff appealed assigning error.

Falls & Falls for Plaintiff, Appellant.

Helms & Mulliss, Wm. H. Bobbitt, Jr., and D. Z. Newton for Defendant, Appellee.

PARKER, J. The facts alleged in the complaint to which the demurrer was directed are substantially these—the numbered paragraphs are ours and not those of the complaint:

One. The plaintiff is a North Carolina corporation engaged in the wholesale grocery business at Shelby. American Mutual Liability Insurance Company of Boston, Mass. is an insurance company, and does business in North Carolina. The defendants M. B. Tate, Johnnie Ponders, William Huddleston, Charles Varner and James Byrd were at the times alleged in the complaint employees of the plaintiff in its wholesale grocery business.

Two. About 20 May 1949 plaintiff purchased from American Mutual Liability Insurance Company a Comprehensive Crime Policy No. FX 70607-R insuring and indemnifying plaintiff against loss by dishonesty and/or fraud of its employees, whether acting alone or in collusion with others, of money, securities, and other property, including that part of any inventory shortage which insured shall conclusively prove to have been caused by dishonesty and/or fraud on the part of its employees to an amount not in excess of $50,000.00. Plaintiff paid the premiums on the policy, and it was in full force and effect during the times alleged in the complaint.

Three. While this Comprehensive Crime Policy was in full force and effect, between 20 May 1949 and 20 May 1952, plaintiff sustained property and/or inventory loss of $38,167.09 through the dishonesty and/or fraud of its employees, to wit: M. B. Tate, Johnnie Ponders, William Huddleston, Charles Varner and James Byrd acting in collusion and/or conspiracy with each other and with others named and unnamed, known and unknown, which loss was, and is, covered by the terms of the policy.

Four. Immediately upon the discovery of its losses plaintiff gave notice to American Mutual Liability Insurance Company in accordance with the terms of its policy. Plaintiff discovered its losses by an inventory item count, which is the basis of its proof of loss. Within four months after discovery of its loss and notification thereof to American Mutual Liability Insurance Company, and in compliance with the terms of the policy, plaintiff filed with the Insurance Company a statement supporting proof of loss under date of 4 September 1952.

Five. After 4 September 1952 American Mutual Liability Insurance Company sent a special investigator to plaintiff's place of business, and to him plaintiff surrendered all its records, books, papers and proof of loss and cooperated with him in every way.

Six. Plaintiff has duly performed all the conditions precedent in its policy, and has complied with all its terms.

Seven. That the defendants, and each one of them, are indebted to plaintiff in the sum of $38,167.09, and payment has been refused though requests therefor have been frequently made.

The complaint alleges that plaintiff's policy of insurance is incorporated in and made a part of the complaint, as fully as if written therein. A copy of the policy is not in the Record of the case.

The first question presented is whether there is a misjoinder of parties and causes of action.

We have examined the original record in the case of *Shuford v. Yarborough,* 197 N.C. 150, 147 S.E. 824. The complaint in that case alleges: "The defendant, Eagle Indemnity Company, for a premium or money consideration entered into a written contract with the plaintiff corporation known as its Fidelity Guarantee Policy No. F. B. F.-501, in the amount of $100,000.00, in which, among others, it insured and guaranteed the fidelity of the President and Treasurer of the corporation in the sum of $10,000.00 in the following words: 'The Eagle Indemnity Company hereby agrees with the Insured named in Statement 1, that it will make good to the Insured such pecuniary loss of money, funds or other personal property (including that for which the Insured is responsible) as the Insured shall sustain by any act or acts of fraud or dishonesty (including theft, embezzlement, wrongful abstraction or misapplication) committed during the period beginning on the date mentioned in Statement 6, and ending on the termination of this Insurance by any person (directly or through connivance with others) in the employ of the Insured while occupying and performing the duties of any one of the positions described in Statement 4 (any such person while so employed is herein called 'the employee') but not to exceed on account of the act or acts of any one employee, the amount set opposite the respective position specified in Statement 4.'"

Counsel for the Eagle Indemnity Company in that case filed a demurrer to Shuford's complaint alleging, among other grounds, that "there is a misjoinder of parties defendant for the reason that the complaint does not allege that the defendants were joint tort feasors; nor does the complaint allege that any relationship, contractual or otherwise, existed between the parties defendant"; and the demurrer alleges as a further ground: "3. For that several causes of action have been improperly united in the complaint, for the reason that: (a) The only cause of action, if any, alleged in the complaint against the defendant, J. A. Yarborough, arises out of, and is based upon tort, and out of transactions, matters and things to which the defendant, Eagle Indemnity Company, was not in any wise or in any sense a party, in which said cause of action, if any exists, the rights of the parties thereto are governed, controlled and fixed by the laws of tort action; Whereas, it appears on the face of the complaint that the cause of action of the plaintiff, if any exists, against the defendant, Eagle Indemnity Company, arises out of and is based upon an alleged contract between the plaintiff corporation and the defendant,

Eagle Indemnity Company, to which said contract the defendant, J. A. Yarborough, is not alleged to be in any wise or in any sense a party, and in which cause of action, if any exists, on said contract, the rights of the parties thereto are governed, controlled and fixed by the law or laws of contract." In the instant case the corporate defendant makes substantially the same contentions that there is a misjoinder of parties and causes of action, and that two or more actions have been improperly united.

In the *Shuford v. Yarborough Case, Stacy, C. J.,* speaking for the Court said: "It is not a misjoinder of parties and causes for the receiver of a corporation to sue its president and treasurer for wrongfully abstracting and misappropriating funds of the corporation and at the same time join as party defendant his surety or the guarantor of his honesty and fidelity."

The allegations of the present complaint are to the effect that the defendant, American Mutual Liability Insurance Company, agreed to insure and indemnify plaintiff against loss by dishonesty and fraud of its employees, whether acting alone or in collusion with others, of money, securities, and other property, including that part of any inventory shortage which the insured shall conclusively prove to have been caused by dishonesty and fraud on the part of any of its employees.

"Fidelity insurance, as the term is usually employed, is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want of honesty, integrity, or fidelity of employees or others holding positions of trust. The contract is sometimes in a form very similar to that of a policy of insurance, while frequently it is in the form of a bond of indemnity. It is sometimes issued upon the application of the employer, and sometimes upon the application of the employee." 25 C. J., Fidelity Insurance, p. 1089, Secs. 1 and 2. Quoted in *Employers' Liability Assur. Corp. v. Citizens' Natl. Bank,* 85 Ind. App. 169, 151 N.E. 396. Such undertakings in respect to the fidelity of employees are in the nature of contracts of insurance, and are subject to rules of construction applicable to insurance policies generally. That is the rule in this State and in many other jurisdictions. *Bank v. Fidelity Co.,* 128 N.C. 366, 83 Am. St. Rep. 682, 38 S.E. 908; *Loan Ass'n. v. Davis,* 192 N.C. 108, 133 S.E. 530, (modified on re-argument, but not on the question for which it is here cited) 193 N.C. 710, 138 S.E. 338; Anno. 63 A.L.R. pp. 728-9.

The complaint in the instant case further alleges that while said policy was in full force "plaintiff sustained a property and/or inventory loss of $38,167.09 through the dishonesty and/or fraud of one or more of its defendant employees, namely, M. B. Tate, Johnnie Ponders, William Huddleston, Charles Varner and James Byrd, acting in collusion and/or conspiracy with each other and others . . ., which loss was, and is, covered by the terms of the policy."

We do not look with favor upon the ambiguous and uncertain term "and/or." *Johnson v. Board of Education, ante,* 56, 84 S.E. 2d 256; *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320.

There is no misjoinder of parties and causes of action, nor are two or more causes of action improperly joined. *Shuford v. Yarborough, supra.* In *Stephenville North and South Texas Ry. Co. v. Grier,* Texas Civ. App., 178 S.W. 984, plaintiff brought an action against its ticket agent to recover money converted to his use and the surety company which had guaranteed the railroad against loss by the agent's defalcation. The surety company filed a plea of misjoinder of causes of action. The Texas Court said: "The alleged cause of action against the surety company relates to the same transaction upon which appellant's cause of action is founded against Grier, viz., his defalcation as ticket agent. It has frequently been declared to be the policy of our system of procedure to avoid multiplicity of suits, and to settle in one suit all matters between the same parties, or concerning the same subject-matter." 46 C. J. S., Insurance, Sec. 1269, last sentence of (d) p. 305 states the above principle of law, and cites the Texas Case as authority.

We now come to the question: Does the complaint state facts sufficient to constitute a cause of action against American Mutual Liability Insurance Company?

Bank v. Fidelity and Deposit Co., of Maryland, and James G. Mehegan, 126 N.C. 320, 35 S.E. 588, was an action brought upon an indemnity bond given by the corporate defendant to secure plaintiff against all loss from any fraudulent acts of its co-defendant, Mehegan, as cashier of plaintiff bank. This Court said: "The complaint alleges the execution of the bond and its renewal, and sets out their substantial features, *the alleged fraudulent acts of the cashier,* and notice to the defendant company. These facts being proved would have made out the plaintiff's case:" (Emphasis added). This same case was before this Court again in 128 N.C. 366, 38 S.E. 908, wherein it is said referring to the quotation above: "That this is now the law of this case, and our opinion of its correctness has been confirmed by subsequent investigation and further reflection. The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one."

In the instant case the plaintiff has alleged that the insurance contract was in full force and effect, sets out its essential features, notice to the defendant company, but he has not stated the alleged fraudulent acts of the individual defendants, nor the alleged facts in respect to the alleged conspiracy between the individual defendants. The allegations that the plaintiff sustained a loss "by the dishonesty and/or fraud" of one or more

of its defendant employees, and that the individual defendants acted "in collusion and/or conspiracy" with each other are mere conclusions, and not sufficient. The pleader must allege facts tending to support the allegations of fraud. *Davis v. Whitehurst,* 229 N.C. 226, 49 S.E. 2d 394; *Griggs v. Griggs,* 213 N.C. 624, 197 S.E. 165. ". . . unless the facts relied on to constitute fraud or mistake are distinctly alleged the courts cannot grant relief." *McNeill v. Thomas,* 203 N.C. 219, 165 S.E. 712. The pleader must also allege the facts from which the alleged conspiracy may be inferred and the alleged unlawful acts agreed upon. *Kirby v. Reynolds,* 212 N.C. 271, 193 S.E. 412. However, the purpose of the complaint is to allege the substantive and constituent facts of the cause of action, not to narrate the evidence supporting them. *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47; *Chason v. Marley,* 223 N.C. 738, 28 S.E. 2d 223.

The corporate defendant asks in its brief: "What loss has the plaintiff suffered within the coverage of the insurance contract?" The complaint gives no answer, except "property and/or inventory loss" which is too ambiguous for the court to afford relief. The pleader must specify plaintiff's loss with particularity. While we are required to construe the complaint liberally, we are not permitted to read into it facts which it does not contain. *Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500; *Jones v. Furniture Co.,* 222 N.C. 439, 23 S.E. 2d 309.

The complaint attempts to allege a good cause of action, but is defective in that it does not definitely and sufficiently set out all the essential, ultimate facts and in that it uses the ambiguous term "and/or." The plaintiff will be permitted to amend its complaint. *Scott v. Veneer Co.,* 240 N.C. 73, 81 S.E. 2d 146; *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43; *Foy v. Stephens,* 168 N.C. 438, 84 S.E. 758.

The lower court ruled correctly in sustaining the demurrer, but it erred in dismissing the action against American Mutual Liability Insurance Company. Upon motion of plaintiff the Superior Court will enter an order permitting it to amend its complaint.

Reversed.

LUTHER J. DAVIS, ALBERT LEROY DAVIS, MRS. JUANITA D. HARGETT, ROBERT DAVIS, ALBERT H. DAVIS, THOMAS I. DAVIS, MRS. MOLLIE D. BOYD, ARTIS DAVIS AND MRS. LOUIE DELL TOWNE, PETITIONERS, *v.* MRS. JESSIE FLORINE FRAZIER BROWN, MRS. SUSAN BEATRICE DAVIS GASKINS, HERVEY C. IPOCK, ARCHIE DAVIS, AND CAROL YVONNE DAVIS, BERT JEFFERSON DAVIS AND RUBY ELIZABETH DAVIS, MINORS, RESPONDENTS.

(Filed 10 November, 1954.)

1. Deeds § 11—

Ordinarily, in construing a deed it is the duty of the court to ascertain the intent of the grantor or grantors as embodied in the entire instrument, and each and every part thereof must be given effect if this can be done by any fair or reasonable interpretation.

2. Same—

In arriving at the intent of the grantor, settled rules of construction should be observed and enforced.

3. Deeds § 13b—

Where a conveyance is made to A and his children, and A has children at the time the deed is executed, A and his children take as tenants in common, but if A has no children at the time the deed is executed, A takes an estate tail which is converted into a fee by G.S. 41-1.

4. Same—

Grantors executed a deed to their daughter and "her children or heirs." At the time of the execution of the deed the daughter had no children. *Held:* The deed conveyed an estate tail to the daughter, which estate is converted into a fee simple by G.S. 41-1, and the daughter has power to dispose of the property by will.

APPEAL by petitioners and infant respondents from *Martin, Special Judge,* September Term, 1954, of CRAVEN.

Special proceeding instituted for partition of land.

1. The petitioners allege that they and the respondents Susan Beatrice Davis Gaskins, Mrs. Jessie Florine Frazier Davis, and Carol Yvonne Davis, Bert Jefferson Davis and Ruby Elizabeth Davis, minors, are tenants in common and seized in fee simple and in possession of the three tracts of land described in the petition.

2. That the interests of the petitioners and of the respondents in said lands are as follows: Mrs. Jessie Florine Frazier Brown, Mrs. Susan Beatrice Gaskins and Luther J. Davis each own an undivided one-fifth of the whole thereof; Albert LeRoy Davis, Mrs. Juanita D. Hargett, Robert Davis, Carol Yvonne Davis, Bert Jefferson Davis and Ruby Elizabeth Davis each own an undivided one-sixtieth thereof; Albert H. Davis and Thomas I. Davis each own an undivided one-twentieth of the whole

thereof; Mrs. Mollie D. Boyd, Artis Davis and Mrs. Louie Dell Towne each own an undivided one-fifteenth of the whole thereof.

3. That petitioners are advised, informed and believe that respondents Hervey C. Ipock and Archie Davis mistakenly claim some interest in said lands.

4. The respondents, other than the minors hereinabove named, filed answers and alleged that on 8 February, 1906, E. Z. R. Davis and Mollie D. Davis, his wife (under whom the petitioners and the minor respondents claim), by warranty deed conveyed to their daughter, Myrtle LaMott Davis, a fee simple title to the three tracts of land described in the petition, subject to the life estate of each of the grantors, which deed was recorded 10 September, 1907, in the office of the Register of Deeds of Craven County.

5. In the granting clause of the above deed, the property is conveyed "to said Myrtle LaMott Davis and her children or heirs." The *habendum* reads as follows: "To have and to hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging to the said Myrtle LaMott Davis and her children her life and then to her children or heirs and assigns in fee simple forever"; while in the warranty the grantors "covenant with said party of the second part, her heirs and assigns . . ."

6. Mollie D. Davis died 7 October, 1910, and E. Z. R. Davis died 8 September, 1914. Myrtle LaMott Davis, the grantee in the aforesaid deed, upon the death of her father, went into possession of the three tracts of land and lived thereon until her death on 13 March, 1954.

7. Myrtle LaMott Davis first married J. F. Perry, who died. She thereafter married Hervey C. Ipock, who survives her. There were no children born of either marriage.

8. Myrtle LaMott Davis Perry Ipock left a last will and testament dated 27 October, 1951, which has been duly probated in the office of the Clerk of the Superior Court of Craven County. The testatrix devised her dwelling house and yard to her husband, Hervey C. Ipock, during his lifetime, then to her niece, Jessie Florine Frazier Brown. She devised another portion of the premises, consisting of 36 acres more or less, to the respondents, Jessie Florine Frazier Brown, and her sister, Susan Beatrice Davis Gaskins. The remainder of the premises was devised to her niece, Jessie Florine Frazier Brown, Susan Beatrice Davis Gaskins; her nephew, Archie Davis, respondents; and her brother, Luther J. Davis, one of the petitioners, to be equally divided among them.

9. W. J. Lansche, Jr., who was duly appointed guardian *ad litem* for Carol Yvonne Davis, Bert Jefferson Davis and Ruby Elizabeth Davis, the minor respondents, filed an answer in which he adopted the petition filed herein and asked for the same relief sought by the petitioners.

The respondents having filed answers raising issues of fact, this proceeding was transferred to the civil issue docket for trial. When the cause came on for hearing it was heard by the trial judge, by consent, without a jury, upon an agreed statement of facts, the pertinent parts of which are hereinabove set out.

The parties agreed that if the court should be of the opinion that the deed from E. Z. R. Davis and wife, Mollie D. Davis, dated 8 February, 1906, conveyed a fee simple title to Myrtle LaMott Davis, the grantee, judgment should be entered in favor of the devisees named in the will; but if the court should be of the opinion that said deed conveyed only a life estate to Myrtle LaMott Davis, the grantee, then judgment should be entered in favor of the petitioners and respondents as tenants in common as set forth in paragraph two hereinabove.

The court being of the opinion that the said deed conveyed to Myrtle LaMott Davis, the grantee, a fee simple title to the lands described therein, and that she had the right to devise said lands in her last will and testament, entered judgment accordingly. The petitioners and the minor respondents appeal, assigning error.

Larkins & Brock, Wm. J. Lansche, Jr., and R. A. Nunn for appellants.
Lee & Hancock and Grantham & May for appellees.

DENNY, J. Ordinarily, in construing a deed it is the duty of the court to ascertain the intent of the grantor or grantors as embodied in the entire instrument, and each and every part thereof must be given effect if this can be done by any fair or reasonable interpretation. *Featherston v. Merrimon,* 148 N.C. 199, 61 S.E. 675; *Triplett v. Williams,* 149 N.C. 394, 63 S.E. 79, 24 L.R.A. (N.S.) 514; *In re Dixon,* 156 N.C. 26, 72 S.E. 71; *Acker v. Pridgen,* 158 N.C. 337, 74 S.E. 335; *Midgett v. Meekins,* 160 N.C. 42, 75 S.E. 728; *Seawell v. Hall,* 185 N.C. 80, 116 S.E. 189; *Boyd v. Campbell,* 192 N.C. 398, 135 S.E. 121; *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745; *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157. However, in arriving at the intent of the grantor in a deed, we must not lose sight of the principle that when rules of construction have been settled they should be observed and enforced. *Boyd v. Campbell, supra; Bagwell v. Hines,* 187 N.C. 690, 122 S.E. 659.

It is settled law with us that when a conveyance is made to A and his children, if A has children when the deed is executed, he and they take as tenants in common. *Cullens v. Cullens,* 161 N.C. 344, 77 S.E. 228, L.R.A. 1917B, 74. But if A has no children when the deed is executed, he takes an estate tail which, under our statute, is converted into a fee. G.S. 41-1; *Cole v. Thornton,* 180 N.C. 90, 104 S.E. 74; *Boyd v. Campbell, supra. Cf. Martin v. Knowles,* 195 N.C. 427, 142 S.E. 313.

In *Boyd v. Campbell, supra,* the granting clause was, "To the said Pleas Clodfellow, his children and then to his grandchildren forever and heirs and assigns." The *habendum* was, "To the said Pleas Clodfellow, to him and his children, their lives, heirs and assigns, and then to his grandchildren forever, only use and behoof forever." Clodfellow had no children when the deed was executed and this Court held that he took a fee tail which, under C.S. 1734 (now G.S. 41-1), was converted into a fee.

Likewise, Myrtle LaMott Davis had no children when the deed was executed to her; therefore, she obtained an estate tail which the statute converted into a fee simple title, subject to the life estate of her parents, the grantors. Hence, the judgment of the court below is

Affirmed.

STATE v. RANSOME PERRY.

(Filed 10 November, 1954.)

1. Bastards § 6—

Where, in a prosecution for willful neglect and refusal to support an illegitimate child, the evidence discloses that no demand for support of the child was made upon defendant until after the warrant was drawn, nonsuit must be entered, since the warrant must be supported by the facts as they existed at the time it was formerly laid, and cannot be supported by evidence of willful failure thereafter.

2. Bastards § 1: Criminal Law § 24½—

The willful failure to support an illegitimate child is a continuing offense, and therefore dismissal for want of evidence that the failure to support was willful will not preclude a subsequent prosecution.

APPEAL by defendant from *Paul, S. J.,* at May Criminal Term 1954, of WAKE.

Criminal prosecution upon a warrant issued 14 January, 1954, out of Domestic Relations Court of Wake County charging, as amended in Superior Court that on "14th day of January, 1954, Ransome Perry . . . being the father of Reginald L. Jones, did unlawfully and wilfully neglect and refuse to support and maintain the said Reginald L. Jones, his illegitimate child, against the statute," etc., heard in Superior Court of Wake County upon appeal thereto by defendant.

Upon the trial in Superior Court, the evidence offered by the State tends to show: (1) That an illegitimate child, Reginald L. Jones, was born in Wake County, N. C., to Dorothy Louise Jones, an unmarried woman on 24 November, 1953; (2) that defendant Ransome Perry is the father of said illegitimate child; (3) that warrant in this proceeding was

issued 14 January, 1954; and (4) that no demand for the support of the child was made upon defendant until two days thereafter, that is, 16 January, 1954.

Verdict: Guilty as charged.

Judgment: Pronounced.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and William P. Mayo, Member of Staff, for the State.

Taylor & Mitchell for defendant, appellant.

PER CURIAM. Since the charge in the warrant "must be supported by the facts as they existed at the time it was formally laid in court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and the time of the trial—at least when the trial is had—as it was here upon the original warrant," *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462, pertinent evidence in this respect offered upon trial of present case in Superior Court being directed to occurrence after the warrant was issued is insufficient to support the charge,—and the motion of defendant for judgment of nonsuit must be allowed. However, the statute, as interpreted by this Court, creates a continuing offense, *S. v. Johnson,* 212 N.C. 566, 194 S.E. 319; *S. v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209, and cases cited.

Hence the decision here will not preclude further prosecution in keeping with the existing factual situation.

Reversed.

LUTHER E. GALYON AND OLLIE MAE BROWN GALYON v. ROY B. STUTTS AND VERNELLE A. STUTTS.

(Filed 24 November, 1954.)

1. Contempt of Court § 2a—

A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess, which tend to subvert or prevent justice.

2. Contempt § 2c—

An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice.

3. Contempt §§ 2a, 2b—

The acts and omissions enumerated in G.S. 5-1 correspond to criminal contempt and involve offenses against the court and organized society, punishable for contempt for the purpose of preserving the power and vindicating the dignity of the court.

4. Contempt of Court § 2c—

The acts and omissions enumerated in G.S. 5-8 correspond to civil contempt and involve matters tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court, and are punishable as for contempt with the underlying purpose of preserving private rights by coercion.

5. Contempt of Court §§ 2a, 2c—

The refusal of a witness to testify at all, or his refusal to answer any legal or proper question is punishable for contempt under G.S. 5-1 (6), or as for contempt under G.S. 5-8 (4), depending upon the facts of the particular case.

6. Same—

The power of the court to require a witness to give proper responses is inherent and necessary for the furtherance of justice, and therefore, testimony which is obviously false or evasive is equivalent to a refusal to testify. G.S. 5-1 (6) and G.S. 5-8 (4).

7. Contempt of Court § 3—

Contempt committed in the immediate view and presence of the court may be punished summarily. G.S. 5-5.

8. Contempt of Court § 4—

The procedure to punish for indirect contempt is by order to show cause. G.S. 5-7.

9. Same—

A contempt against a subordinate officer appointed by a court, such as a commissioner, ordinarily is regarded as contempt of the authority of the appointing court, and the appointing court has power to punish such contempt even though the subordinate officer is also vested with the power to punish. G.S. 5-6.

10. Contempt of Court § 4—

Where the court undertakes to punish a contempt against a subordinate officer appointed by the court, an order to show cause, or other process constituting an initiatory accusation meeting the requirements of due process, must be issued, since the court has no direct knowledge of the facts constituting the alleged offense.

11. Contempt of Court § 5—

Where, in response to an order to produce records of his business for a designated period, defendant appears and testifies that the only business records kept by him were the cash register tapes, that these had been destroyed by rats, and therefore, he had no records or documents with which to comply with the order, and there is no evidence to the contrary, it is

error for the court to find and conclude that defendant was in contempt within the purview of G.S. 5-1 (4) for noncompliance with the order.

12. Contempt of Court § 4—Show-cause order is necessary as basis for punishment for indirect contempt or for civil contempt.

Upon an adverse examination before a commissioner appointed by the court, defendant's replies to pertinent questions were to the effect that he did not remember. The commissioner took no action to punish for contempt, but recessed the proceedings, and thereafter defendant was served with notice that plaintiffs would move before the judge at term, pursuant to G.S. 1-568.19, that defendant be held in contempt of court. At such hearing the court did not follow the procedure outlined in G.S. 1-568.18, but heard the matter as a proceeding for direct contempt under G.S. 5-1 (6), and entered judgment holding defendant guilty of wilful contempt. *Held:* Even conceding that defendant's testimony was so obviously evasive as to amount to a refusal to testify, G.S. 5-1 (6), the judgment is erroneous for application of the wrong procedural remedy, and also for failure to comply with the minimum accusatory requirements of due process, since the issuance of a show-cause order is necessary both in proceedings to punish for indirect contempt under G.S. 5-7 and in proceedings to punish as for contempt under G.S. 5-9.

APPEAL by defendant Roy B. Stutts from *Rousseau, J.*, at March Term, 1954, of RANDOLPH.

Contempt proceedings in civil action for rescission.

The defendant Roy B. Stutts (hereinafter referred to as the defendant) formerly operated a retail grocery business in the town of Liberty, North Carolina. In May, 1953, he sold the business, including stock in trade and fixtures, as a going concern to the plaintiffs. As part of the cash payment the plaintiffs conveyed to the defendants Stutts their home in Asheboro. The deferred balance of $13,000 was evidenced by note secured by chattel mortgage on the store fixtures and equipment.

In October, 1953, the plaintiffs, on allegations of fraud and deceit, instituted this action for the purpose of rescinding the contract of sale and all written instruments incident thereto, alleging in gist that the defendant fraudulently misrepresented the established character of the business as to its volume of sales and profits. The defendants answered denying all allegations of fraud.

After the complaint and answer were filed, the plaintiffs obtained orders of court directing the defendant to produce for inspection and copy certain books and records and requiring him to appear before a commissioner for adverse examination.

The defendant failed to produce any documents or records. However, he appeared on the appointed day before the commissioner and was examined adversely at length by counsel for the plaintiffs.

Following adjournment of the adverse examination the defendant was served with notice that the plaintiffs would move before the presiding

Judge at the March 1954 Term of court for an order declaring the defendant to be in contempt of court for his failure to produce records as directed. The defendant also was served with notice that the plaintiffs, pursuant to G.S. 1-568.19, would move before the presiding Judge for an order holding the defendant in contempt of court for his failure and refusal to answer questions asked on adverse examination.

When the cause came on for hearing, judgment was entered adjudging the defendant in wilful contempt of court (1) for failure to produce the records as previously directed and (2) for refusal to answer questions propounded on adverse examination. He was ordered to pay the costs of the adverse examination and the further sum of $50. From the judgment so entered the defendant appealed, assigning errors.

Ottway Burton for appellant.

Brooks, McLendon, Brim & Holderness and Moser & Moser for appellees.

JOHNSON, J. Contempts of court are classified in two main divisions, namely: direct and indirect, the test being whether the contempt is perpetrated within or beyond the presence of the court. A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session (*S. v. Woodfin,* 27 N.C. 199; *S. v. Nowell,* 156 N.C. 648, 72 S.E. 590) or during recess (*Ex parte McCown,* 139 N.C. 95, 51 S.E. 957; *S. v. Little,* 175 N.C. 743, 94 S.E. 680) which tend to subvert or prevent justice. An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice. *In re Parker,* 177 N.C. 463, 99 S.E. 342; *Snow v. Hawkes,* 183 N.C. 365, 111 S.E. 62. See also 12 Am. Jur., Contempt, section 4; 17 C.J.S., Contempt, sections 3 and 4.

Proceedings for contempt are of two classes, criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Criminal proceedings, involving as they do offenses against the courts and organized society, are punitive in their nature, and the government, the courts, and the people are interested in their prosecution. Whereas civil proceedings, having as their underlying purpose the preservation of private rights, are primarily remedial and coercive in their nature, and are usually prosecuted at the instance of an aggrieved suitor. 12 Am. Jur., Contempt, section 6.

With us contempts are defined and classified generally by two statutes: G.S. 5-1 and G.S. 5-8. These statutes recognize and preserve the fundamental distinction between civil and criminal contempt in substance but not in name. Acts or omissions which ordinarily constitute criminal contempt as defined in the textbooks are designated by our statute (G.S. 5-1) as punishable "for contempt," without further designation; the acts or omissions which ordinarily constitute civil contempt as defined in the books are designated by our statute (G.S. 5-8) as punishable "as for contempt." Thus, under our statutes the proceedings for criminal and civil contempt are "for contempt" and "as for contempt," respectively.

A person guilty of any of the acts or omissions enumerated in the eight subsections of G.S. 5-1 may be punished *for contempt,* because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. Whereas a person guilty of any of the acts or omissions described in the seven subsections of G.S. 5-8 is punishable *as for contempt,* because such acts or omissions tend to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court. *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345.

G.S. 5-1 (6) provides that "The contumacious and unlawful refusal of any person to be sworn as a witness, or, when so sworn, the like refusal to answer any legal and proper interrogatory" may be punished *for contempt.*

G.S. 5-8 (4) provides for punishment *as for contempt* of any person summoned as a witness "in refusing or neglecting to . . . attend, be sworn, or answer as such witness."

It is thus noted, from the tenor of the latter two statutes, that the refusal of a witness to testify at all or to answer any legal or proper question is made punishable both "as contempt" and "as for contempt." And since the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of the foregoing statutes, and therefore punishable "as contempt" or "as for contempt," depending upon the facts of the particular case. 12 Am. Jur., Contempt, sections 15 and 17.

G.S. 5-5 deals with direct contempt. It provides that "contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order."

G.S. 5-7 deals with indirect contempt. It provides that "When the contempt is not committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt . . ."

G.S. 5-9 provides: "Proceedings *as for contempt* shall be by an order directing the offender to appear within a reasonable time and show cause why he should not be attached for contempt." (Italics added.)

A contempt against a subordinate officer appointed by a court, such as a commissioner, ordinarily is regarded as contempt of the authority of the appointing court, and the appointing court has power to punish such contempt. This is true even where such subordinate officer, as with us under G.S. 5-6, is vested with the power to punish. See *Fertilizer Co. v. Taylor*, 112 N.C. 141, 17 S.E. 69; 17 C.J.S., Contempt, section 52. However, when the conduct complained of was before a commissioner or other subordinate officer of the court and the court has no direct knowledge of the facts constituting the alleged contempt, in order for the court to take original cognizance thereof and determine the question of contempt, the proceedings must follow the procedural requirements as prescribed for indirect contempt (G.S. 5-7) or "as for contempt" (G.S. 5-8) and be based on rule to show cause or other process constituting an initiatory accusation meeting the requirements of due process as prescribed by our statutes. See 17 C.J.S., Contempt, section 62, p. 74.

In the case at hand the defendant stands adjudged in contempt of court on two grounds: (1) for wilful failure and refusal to produce records and documents for inspection in compliance with a former order of the court, and (2) for wilful, contumacious, and unlawful failure and refusal to answer questions propounded on adverse examination. Both grounds are challenged by the defendant. We discuss them *seriatim*.

1. *The Failure to Produce Records.*—By order signed by Judge Martin the defendant was directed to produce "all of the documents, ledgers, journals, inventories, records and books" of his grocery business for the years 1951, 1952, and 1953. The court below found and concluded that the defendant wilfully failed and refused to comply with this order and that such failure and refusal amounted to contempt of court within the purview of G.S. 5-1 (4). The record does not support the finding and adjudication.

While the defendant produced no documents or records in response to the order, he did appear on the appointed date before the commissioner for the adverse examination. He was examined at length by counsel for the plaintiffs. The examination, as reported in question and answer form, is brought forward on the appeal and covers more than 40 pages of the record. In response to questions propounded by plaintiffs' counsel,

the defendant explained that he had no records or documents with which to comply with the order of Judge Martin. By way of explanation he said in substance that he retained no copies of his income tax returns and that he kept no ledgers, journals, or other like records in connection with the operation of the grocery business. His testimony discloses that the only business records kept by him were the "cash register receipts." As to these, he said they were stored in boxes in "the car house," and that "the rats ate them up, gnawed them up," to the extent they "were not fit to be salvaged," and when he found them in that condition, after sale of the business in 1953, he threw "them all out."

The record thus affirmatively discloses—with nothing appearing *contra* —that the defendant had no books or records with which to comply with the order of Judge Martin. Therefore, the court below erred in finding and concluding that the defendant was in contempt within the purview of G.S. 5-1 (4) for noncompliance with the order.

2. *The Failure or Refusal to Answer Questions on Adverse Examination.*—After the defendant testified he kept no books and records in connection with the grocery business and retained no copies of his income tax returns for the years he operated the business, he was examined at length in respect to the receipts and yearly profits of the business and the amount of income reported by him for tax purposes. To this line of questions his stock answer was "I don't remember" or "I don't know," and when asked if he knew the amount of his reported yearly income within $2,000, $5,000, and $10,000, he replied as to each figure that he did not know. After stating he had no recollection of the approximate amount he drew out of the business, he was asked this question: "Will your tax returns, Federal and State, for the years 1951 and 1952 . . . accurately show your income for these years?" Whereupon objection was interposed "on the ground of incrimination of the witness." The Commissioner responded: "If that is the ground for the objection, the only recourse is to take it to the Clerk." Counsel for the plaintiffs, after arguing at some length the relevancy of the question and the admissibility of the information sought, stated: "And the plaintiffs hereby except and appeal from the ruling of the Commissioner and for the reason that . . . the witness has refused to comply with the order of examination and has repeatedly refused in good faith (to) answer the questions." At this juncture the Commissioner noted a "recess for a ruling of the Clerk." The record discloses no ruling of the Clerk. Instead, the defendant on 1 March, 1954, was served with notice signed by the Clerk, notifying him that the plaintiffs, pursuant to G.S. 1-568.19, would move before Judge Rousseau at the March 1954 Civil Term of the Superior Court of Randolph County (1) that the defendant Roy B. Stutts be held for contempt of court for failure and refusal to answer the questions asked at the adverse

examination previously held on 19 February, 1954, (2) that the defendant be taxed with all costs of the action, and (3) that judgment by default be rendered against him because of such refusal.

It is significant that G.S. 1-568.19, the statute under which the defendant was notified the plaintiffs would move for relief, merely provides procedure for the enforcement of the immediately preceding section, G.S. 1-568.18, which prescribes the procedure to be followed in compelling answers on adverse examination.

While the notice served on the defendant stated the plaintiffs would move for relief under the foregoing statutes, the record nowhere discloses that any such relief was sought and no attempt was made to require the defendant to answer the question he had refused to answer immediately before the adverse examination was recessed. And it nowhere appears that the Clerk or Judge at any time ordered the defendant to answer any question or series of questions pursuant to the procedure prescribed in G.S. 1-568.18 and on which G.S. 1-568.19 is based.

On the contrary, the record discloses that when the cause came on for hearing the presiding Judge, upon consideration of the transcript of the adverse examination, found therefrom that in respect to numerous material questions propounded to the defendant he made no *bona fide* attempt to answer, but rather declared that he did not know the answers, when as a matter of ordinary experience he was charged with knowledge and recollection of the matters and things concerning which he was being interrogated. And upon such findings the court concluded and adjudged that the defendant's conduct by way of evasion amounted to failure and refusal to answer the questions and constituted direct contempt of court.

It thus appears that the defendant was cited to appear and respond to a motion or motions designed to compel him to answer a line of questions in respect to which he had refused to give answers on the ground of self-incrimination. Whereas no such inquiry was had. Instead, by summary procedure, without previous order to show cause, final judgment was entered adjudging the defendant to be in direct contempt of court within the purview of G.S. 5-1 (6) and G.S. 1-568.19.

Conceding, without deciding, that the defendant's testimony in pertinent aspects was so obviously evasive as to amount to a refusal to testify within the meaning of G.S. 5-1 (6), and that the Commissioner may have summarily attached him for direct contempt under authority of G.S. 5-6, even so, it here appears that the Commissioner did not take action. Rather, it appears that he recessed the examination and referred the matter to the presiding Judge, who heard it as a proceeding for direct contempt under G.S. 5-1 (6), notwithstanding he had no direct knowledge of the facts constituting the alleged contempt and notwithstanding the notice

to the defendant indicated the purpose of the hearing was to inquire into the question of his refusal to answer on the ground of self-incrimination.

The action of the court below in so adjudging the defendant to be in direct contempt must be held for error both for failure to comply with the minimum accusatory requirements of due process (*Buchanan v. Vance*, 237 N.C. 381, 75 S.E. 2d 240) and for application of the wrong procedural remedy. Since the presiding Judge had no direct knowledge of the facts constituting the alleged contempt, the appropriate procedure was that prescribed for "indirect contempt" under G.S. 5-7, or "as for contempt" under G.S. 5-8 (4) and G.S. 5-9, wherein the statutory procedure requires in each instance the issuance of a show-cause order before hearing.

For the errors indicated the judgment appealed from will be set aside and the cause will be remanded to the court below for such further orders and proceedings as may be appropriate under proper practice and procedure and in accord with this opinion. This without prejudice to the plaintiffs' rights to move for an order allowing further adverse examination of the defendant and making accessible to the plaintiffs the facts in respect to the defendant's income tax returns for the years 1951, 1952, and 1953.

Error and remanded.

JACK HUSKINS, EMPLOYEE, v. UNITED FELDSPAR CORPORATION (EMPLOYER); COAL OPERATORS CASUALTY COMPANY (CARRIER).

(Filed 24 November, 1954.)

1. Master and Servant §§ 40f, 43—

A workman, whatever his actual physical condition may be, is not charged with notice that he has silicosis until and unless he is so advised by competent medical authority, and the time within which he must file his claim for compensation begins to run from the date he is so advised. G.S. 97-58 (b).

2. Master and Servant § 40f—

In order to support recovery of compensation for silicosis, there must be medical expert testimony that claimant was disabled as a result of this disease and that such diability occurred within two years from the last exposure to the hazards of silica dust. G.S. 97-54 (a).

3. Same—Evidence held insufficient to support finding that disability from silicosis occurred within two years from last exposure.

The evidence before the Industrial Commission was to the effect that claimant left his employment as a "mucker" in a mica mine because of

shortness of breath, that he thereafter worked regularly at several employments at a much higher wage, and was thus gainfully employed at the time of the hearing. There was medical expert testimony based upon examination almost six years after the termination of claimant's employment as a mucker, that claimant was then incapacitated from performing normal labor as a mucker in a mica mine, and that it was impossible to state how long claimant had been so disabled prior to the examination. There was no testimony that claimant was physically incapable of performing regularly the duties incident to his several employments since he left the mica mine. *Held:* There is no sufficient evidence to support a finding that claimant was disabled from silicosis occurring within two years from claimant's last exposure to silica dust.

4. Same—

"Disablement" from silicosis and asbestosis is defined in unambiguous terms by G.S. 97-54, and under the statute "the last occupation in which remuneratively employed" is not synonymous with the "place of last injurious exposure" nor does "disablement" mean disability to perform the duties of employment at the place of last exposure.

5. Same—

An employee is actually disabled by reason of silicosis when by reason of this disease he is incapable of continuing to perform the normal labor incident to the employment in which he is then engaged with substantial regularity. This definition does not include odd jobs of a trifling nature which the employee may be driven to perform irregularly as a result of economic necessity.

APPEAL by defendants from *Nettles, J.,* March-April Term 1954, MITCHELL.

Proceedings under the Workmen's Compensation Act to recover compensation for disablement resulting from silicosis, an occupational disease.

Plaintiff began work as a mucker in a mica mine as an employee of Tennessee Mineral Company, predecessor of defendant United Feldspar Corporation. For convenience the defendant United Feldspar Corporation will hereafter be referred to as Feldspar or defendant. As the insurance carrier is made party defendant to the end it may be bound by any award made to plaintiff and for no other purpose, no reference will hereafter be made to it.

Except for approximately thirteen months, plaintiff continued to work for Tennessee Mineral Company and its successor, Feldspar, until 1946. In his work he was exposed to silica dust. While he was accepted for military service and served from 28 June 1945 to 17 November 1945, his commanding officer exempted him from the heavy basic training duties for the reason he was short-winded. He was discharged from military service on dependency grounds and returned to his job as a mucker 16 December 1945.

On 2 May 1946 he left the employment of Feldspar. At the time he left Feldspar he had already procured employment by Phillips & Coulter Oil Co. as a driver of an oil truck. This employment entailed less physical exertion and paid a higher wage.

In 1949 he procured employment in West Virginia with a road contractor as an oiler on a Diesel-propelled road construction shovel where he remained for about nine months. He left that job and returned to Phillips & Coulter. In July or August 1952 he procured employment with L. M. Carpenter and Associates where his duties involved the packing of sheeted mica in boxes. He was thus employed at the time of the hearing in this cause. From 1946 to 1952 he also held other jobs for short periods of time.

In all the jobs above listed which plaintiff has had since leaving the mine of Feldspar, he has earned more than he earned while working for Feldspar, and at the time he was advised that he had silicosis he was earning more than twice as much as he earned as a mucker in Feldspar's mica mine.

While employed as a mucker where he was exposed to silica dust, he was examined 14 October 1936, 22 May 1940, 27 August 1941, and 27 April 1943, with only negative findings. On 11 February 1952 he had X-rays of his chest. These were examined by Dr. C. D. Thomas. Basing his opinion on this examination, Dr. Thomas testified that as of 11 February 1952 plaintiff had silicosis grade 2, and that in his opinion claimant "is now actually incapacitated by reason of silicosis from performing normal labor as a mucker in a feldspar mine. It is my opinion that his disability occurred prior to February 11, 1952. It is my opinion that it would be impossible to state how long before February 11, 1952, that he became disabled . . . If plaintiff in this case held down a job on a contracting, road-building job as oiler on a shovel for some eight or nine months continually in 1949, it would be my opinion that he was not disabled back at that time."

Shortly after the X-rays of 11 February 1952, Dr. Thomas advised plaintiff that he had silicosis. This was the first time he was ever advised by competent medical authority that he was suffering from silicosis.

On 23 October 1952 the Industrial Hygiene Section of the Commission re-examined and X-rayed claimant and made a diagnosis of "probable Silicosis in the second stage."

Dr. G. W. Murphy of Asheville made an X-ray examination of plaintiff on 28 November 1952 and concluded (as revealed through plaintiff's case history furnished by Dr. Swisher) that "This is the classical x-ray picture of a late second or early third degree silicosis . . . I believe that the diagnosis of silicosis may be accepted as final." Dr. E. W. Schoenheit of Asheville, after examining plaintiff, stated that "it seems quite definite the patient has silicosis."

Plaintiff testified that he left the employment of Feldspar in 1946 because he was not able to work, that the work of a mucker in a feldspar mine is hard work and he did not have the strength to do what he was supposed to do, that he has had some trouble with shortness of breath and with coughing, that he has noticed a change in his physical condition since 1946, and that he has noticed it all along, and he is not now physically able to do the work that he did while employed by Feldspar.

In all the jobs which plaintiff has had since leaving Feldspar in 1946, he has earned more money than he earned while working for said defendant.

The work of a mucker requires the use of a sledge hammer and involves heavy manual labor.

In 1952 he was advised by a competent medical authority that he was suffering from silicosis. The Commission found as a fact that defendant, in performing the duties of the various jobs held by him after 1946, worked with substantial regularity and made more money up to the very day of the hearing; that at the time he was advised he had silicosis, he was earning more than twice as much as he earned as a mucker. It further found that claimant is disabled.

Upon the facts found by it, the Commission concluded as a matter of law that the claimant is actually incapacitated by reason of silicosis from performing normal labor as a mucker (which was the last occupation in which he was remuneratively employed while exposed to the hazard of silica), that this incapacity occurred on 2 May 1946, which was within two years of the claimant's last injurious exposure, and that the claimant is entitled to ordinary compensation under the provisions of G.S. 97-29 during not more than 400 weeks beginning 2 May 1946. It made an award in accord with its findings, and defendants excepted and appealed to the Superior Court.

When the appeal came on for hearing in the court below, the court overruled all exceptions to the findings of fact and conclusions of law made by the Commission and affirmed the award in its entirety. Defendants excepted and appealed to this Court.

Charles Hughes for plaintiff appellee.
Williams & Williams for defendant appellants.

BARNHILL, C. J. The plaintiff has failed to establish a compensable claim for disablement due to silicosis which arose within two years after his last injurious exposure to the hazards of free silica dust.

The Commission found as a fact that claimant is actually incapacitated by silicosis, and that his disablement occurred on 2 May 1946, the day he left the employment of Feldspar to accept a job with Phillips & Coul-

ter. There is no sufficient evidence in the record to support this finding or a finding that he suffered disablement from silicosis at any time prior to 2 May 1948, the end of the two-year period next after his last injurious exposure. G.S. 97-58.

There is no evidence in the record that plaintiff lost any time from his work due to silicosis. Although he testified that he left the employment of Feldspar in 1946 because he was not able to work, that the work of a mucker is hard work, and he did not have the strength to do what he was supposed to do, that he was short of breath and had a cough; he also testified that he had only lost about a week on several occasions on account of influenza, and that while he consulted his physician occasionally, he at no time during that period considered his cough, shortness of breath, or lung condition sufficiently serious to mention it to his physician.

There is no evidence in the record that his loss of time or his condition was due to silicosis. In 1952 he passed a Board of Health X-ray motor truck and decided he would stop and have his chest X-rayed. It was thus that he learned, more or less by accident, that he was suffering from silicosis.

Due to the peculiar nature of the disease, the slow process of its development, the similarity of its symptoms to those of other diseases which affect the lungs, and for other reasons, a workman, whatever his actual physical condition may be, is not charged with notice that he has silicosis until and unless he is so advised by competent medical authority, and the time within which he must file his claim for compensation begins to run from the date he is so advised. G.S. 97-58 (b).

For the same reasons and in view of the requirements of the statute, we have held that evidence tending to establish "disablement," as that term is used in the statute in reference to silicosis, must be supported by medical testimony and *"that the finding of the competent medical authority must be to the effect that disablement occurred within two years from the last exposure . . ."* (Italics supplied.) *Duncan v. Carpenter,* 233 N.C. 422, 64 S.E. 2d 410; *Singleton v. Mica Co.,* 235 N.C. 315, 69 S.E. 2d 707. This record is devoid of such evidence.

It follows that the plaintiff has failed to offer evidence sufficient to support his claim.

In so holding we are advertent to the fact that Dr. Thomas testified that in his opinion plaintiff was then (at the time of the hearing) actually incapacitated from performing normal labor as a mucker in a mica mine, and that such disability occurred sometime prior to 11 February 1952. He testified further that: "It is my opinion that it would be impossible to state how long before February 11, 1952, that he became disabled . . . All I can say is that it happened sometime during that time and I cannot fix a time." He did not testify, however, that plaintiff is even now physi-

cally incapable of performing regularly the duties incident to the several employments he has had since he left Feldspar.

We are likewise advertent to the finding of the Commission "That the claimant is actually incapacitated by reason of silicosis from performing normal labor as a mucker in a feldspar mine, the last job in which he was remuneratively employed while exposed to the hazards of inhaling dust containing silica or silicates." In this connection it also found that plaintiff worked regularly at the various jobs he held after leaving Feldspar, and for more pay—55c per hour with Feldspar, and $1.50 per hour with L. M. Carpenter and Associates, by whom he was employed at the time of the hearing.

The inability of plaintiff to perform normal labor as a mucker in a feldspar mine is not the test. Nor is the place of last exposure necessarily the last place he was remuneratively employed.

The difference in the statutory rule to be followed in ascertaining the amount of recovery in case of an industrial accident, on the one hand, and silicosis, asbestosis, or lead poisoning, on the other, has been fully discussed in former decisions of this Court. *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426; *Duncan v. Carpenter, supra; Singleton v. Mica Co., supra; Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797. Those opinions are written in clear and understandable language. No further clarification should be necessary. In view of our conclusion that plaintiff has failed to establish disablement occurring within two years next after his last injurious exposure to free silica dust, we would not so much as mention this phase of the case except for the fact it is apparent the Commission has misconstrued our decision in the *Honeycutt case.*

Suffice it to say that the statutory definition of disablement as used in respect to silicosis, G.S. 97-54, is clear and unambiguous. There is no need for construction. The interpolation of other words, as the Commission has done, to discover its meaning is wholly unnecessary. There is not the faintest suggestion in the statute that the Legislature intended to make "the last occupation in which remuneratively employed" and "the place of last injurious exposure" synonymous terms, or that "disablement," as that term is used in respect to silicosis and asbestosis, means disability to perform the duties of his employment at the place of his last exposure.

Had the Legislature intended to tie the measure of compensation to the wage the claimant was earning at the time of his last exposure and to make disablement mean "the event of becoming actually incapacitated because of silicosis from performing the duties of his employment at the place of his last injurious exposure," it could have so provided by simply using that language in lieu of "the last occupation in which remuneratively employed." If we had intended to so construe the statutory defi-

nition of "disablement," *Denny, J.*, author of the opinion in the *Honeycutt case,* would have so stated in plain and explicit language that could not be misconstrued by Bench or Bar.

In the *Honeycutt case* the defendants conceded there was evidence to support the finding of disability within the meaning of G.S. 97-54. The contest there involved the measure of his recovery, and we held that "the last occupation in which remuneratively employed" has no reference to odd jobs a self-respecting employee, driven by stark economic necessity, will accept and attempt to perform so as to eke out a living for himself and his family rather than to become the recipient of charity or government aid.

We gave the term the liberal, practical and realistic construction required by the statute and to which an employee is entitled by concluding the language means just what it says. An employee is actually disabled by reason of silicosis when his condition has reached the stage that he is incapable of continuing to perform the normal labor incident to the employment in which he is then engaged, with substantial regularity, and which he would be able to perform were it not for his silicotic condition. This is the last job in which he was remuneratively employed within the meaning of the statute.

In that particular case, under the construction adopted by us, the wage he was earning at the place of last injurious exposure was the criterion. We adopted that wage as the measure of the plaintiff's recovery, not because it was the wage earned at the job of last injurious exposure, but for the reason it was earned in the last occupation in which the plaintiff was remuneratively employed. When this is understood, there should be no misconception of the opinion in that case.

The court below will remand this cause to the Industrial Commission with direction that it proceed in accord with this opinion. To that end the judgment entered in the court below is

Reversed.

STATE v. EULA CAGLE.

(Filed 24 November, 1954.)

1. Criminal Law § 63: Judgments § 20a—

During the term a judgment is *in fieri,* and the judge has the discretionary power to make such changes and modifications in the judgment as he may deem wise and appropriate for the administration of justice. In the exercise of this power the court may strike out a suspended judgment, remit the fine paid thereunder, and enter a different sentence in conformity with law.

2. Criminal Law § 62a—

A defendant may be sentenced to the Central Prison only upon conviction of a felony. Sec. 3 of Art. XI of the Constitution of North Carolina. G.S. 148-28.

3. Same—

In sentencing a *feme* defendant convicted of a misdemeanor, the court may designate the place of imprisonment as the quarters provided by the State Highway and Public Works Commission for women prisoners, G.S. 148-27, and upon a finding that such quarters are maintained in the Central Prison at Raleigh, order defendant's imprisonment in such quarters at that place.

4. Criminal Law § 77d—

The presumption is that the record as it appears is true.

5. Criminal Law § 63: Judgments § 20a—

After the expiration of the term, the Superior Court has the power at term time to make its records speak the truth by correction of clerical errors or correction of the judgment to make it express correctly the action taken by the court. This power does not extend to the correction of errors of law. Such power must be exercised at term time in the county, and the judge may not correct such errors while holding court in another district.

THIS case comes to this Court upon its writ of *certiorari* allowed and issued upon petition of Eula Cagle, defendant in two criminal prosecutions Numbers 716 and 666 against her in Superior Court of Haywood County, North Carolina, to review the order of *Patton, Special Judge,* denying her application in *habeas corpus* proceedings for discharge from alleged illegal imprisonment in Women's Division of Central Prison at Raleigh, N. C., under judgments entered in said prosecutions at November Term 1953 of said court.

The record proper and findings of fact made by Patton, Judge, to whom the application for *habeas corpus* made to Moore, Judge, was transferred, are substantially these:

I. Two criminal prosecutions begun upon warrants issued out of courts of Justices of the Peace of Haywood County, charging defendant with violations of the prohibition laws of North Carolina on 29 July, 1953, and on 8 October, 1953, respectively, on which, probable cause being found, she was bound over to Superior Court of said county for trial.

In Superior Court at November Term, 1953, two true bills of indictment were found as follows: Numbers 716, in four counts charging that defendant did, on 29 July, 1953, unlawfully and willfully (1) "have and keep intoxicating liquors in her possession for the purpose of sale," (2) "have in his (her) possession intoxicating liquors for beverage purpose," (3) "transport intoxicating liquors," and (4) "sell intoxicating liquors for gain."

And in Number 666, charging in four counts that defendant and another did commit on 8 October, 1953, like offenses to those just detailed in respect of the bill in Number 716.

And the record discloses that the Honorable Susie Sharp, one of the special judges of the Superior Court, was duly commissioned to hold the regular two-weeks term of the Superior Court for the County of Haywood, beginning 23 November, 1953, for the trial of criminal and civil cases.

At said November Term, 1953, of Superior Court defendant pleaded guilty in each of said cases to unlawful possession of intoxicating whiskey for the purpose of sale. Thereupon at said term the court pronounced judgments as follows:

In Number 716 "that the defendant be confined in the Women's Division of the Central Prison for a period of 12 months. The prison sentence is suspended for a period of five years upon the good behavior of the defendant and upon the payment of a fine of $300.00 and the costs."

And in Number 666 "that the defendant be confined in the Women's Division of the Central Prison for a period of 12 months. This sentence to begin at the expiration imposed in No. 716. The prison sentence is suspended for a period of five years, and the defendant is placed on probation on the following terms and conditions:

"1. That she pay the costs. 2. That she dispose of the property known as Mountain View, and that she not reside there in the future. 3. That she not operate a cafe or any place of business to which the public is invited, for a period of five years. 4. That she have no intoxicating beverages of any sort in her possession at any time."

II. On 27 November, 1953, "Capias Instanter" issued by Clerk of the Superior Court to Sheriff of Haywood County, commanding him to take and have Eula Cagle before Judge Susie Sharp, at the courthouse in Waynesville, Instanter, "then and there to answer the charge of the State against her on an indictment for violating probation."

The Minute Docket for the same term shows the following additional entry made by her Honor Susie Sharp, Judge Presiding:

"November Term 1953

"State of North Carolina
"Haywood County—

666-716—State v. Eula Cagle

"The judgment heretofore entered is stricken out and the following is entered in lieu thereof: (The Clerk is ordered to refund to the defendant the fine and costs heretofore paid).

"In No. 666 it is the judgment of the court that the defendant be confined in the Women's Division of the Central Prison for a period of two years.

"In No. 716, it is the judgment of the court that the defendant be confined in the Central Prison at Raleigh for a period of two years. This sentence to begin at the expiration of the sentence imposed in No. 666. This prison sentence is suspended for a period of five years upon the good behavior of the defendant, and upon the further condition that she at no time have in her possession or on her premises any alcoholic beverages, and that she not operate or work in a cafe.

"The defendant gives notice of appeal from the court's judgment, and upon the changing of the sentence. Appearance bond is fixed in the sum of $7000.00."

III. At July Term, 1954, of Superior Court of Haywood County, defendant, having failed to perfect her appeal, motion of Solicitor for the State that the appeal be declared abandoned was allowed, and commitment was ordered to be issued to put into effect the sentence in case No. 666. Pursuant thereto a duly executed and authenticated commitment for the above mentioned was issued by the Clerk of said Superior Court on 21 July, 1954.

IV. And the record discloses that thereafter on 27 July, 1954, the said Eula Cagle applied to the Honorable Dan K. Moore, a Judge of Superior Court of North Carolina, for a writ of *habeas corpus* to the end that inquiry be made into legality of her imprisonment (for reasons stated, to pertinent portions of which reference is hereinafter made in this opinion).

Writ of *habeas corpus,* directed to Director of Central Prison, Women's Division, Raleigh, North Carolina, was issued ..... day of July, 1954, commanding that the body of Eula Cagle be produced before Judge George B. Patton, at the courthouse of Cleveland County, in Shelby, North Carolina, at 2 o'clock on 2 August, 1954, together with a return of the writ, etc. By consent the cause was transferred to Franklin in Macon County, North Carolina, for hearing at stated hour on 6 August, 1954. Return to the writ signed by "Superintendent of Women's Prison, Raleigh, North Carolina" verified before a notary public was filed. Accordingly, the matter came on for hearing, and was heard before Judge Patton, Eula Cagle being represented by Charles Fortune and F. Piercy Carter, members of the Asheville Bar, and the Superintendent by E. O. Brogden, Jr.

Thereupon the court, having heard all the evidence presented and having examined the court records in the Eula Cagle cases, hereinbefore detailed, entered judgment under date of 19 August, 1954, denying the relief prayed. And thereupon the petitioner was remanded to the custody wherein she was restrained when the writ was issued.

To the entry of this judgment the petitioner, Eula Cagle, through her counsel, excepted and gave notice in open court of her intention to petition the Supreme Court for a writ of *certiorari*—further notice being waived.

(Note: The record now before this Court under certificate of Clerk of Superior Court also shows that on 23 August, 1954, Judge Susie Sharp signed what purports to be an "Order *Nunc pro tunc*," in *State v. Cagle*, attempting to correct the minutes of the Clerk of Superior Court of Haywood County as to the place of imprisonment for the defendant in the several judgments entered by her at November Term, 1953, of Superior Court of Haywood County.)

R. Brookes Peters and E. O. Brogden, Jr., for respondent, appellee.
Charles M. Fortune and F. Piercy Carter for defendant, appellant.

WINBORNE, J. These are questions now presented for decision:

1. Where at a regular term of Superior Court a defendant in a criminal prosecution has pleaded guilty to a misdemeanor charged therein, and the trial judge has pronounced judgment sentencing defendant to confinement in prison for a specific term and suspends the prison sentence for a certain length of time "upon the good behavior of the defendant" and upon the payment of a fine and the costs, and the defendant has paid the fine and costs, may the judge during the same term strike out the judgment, and order refund to defendant of the amount of the fine and costs paid, and enter judgment that defendant be confined in prison for a given term?

2. If so, may the trial judge designate the women's division of the Central Prison at Raleigh, N. C., as the place of imprisonment?

3. If the minutes of the Clerk incorrectly record the place of imprisonment designated in the judgment, may the minutes be corrected to speak the truth?

4. If so, may the trial judge, after the expiration of the term, and while holding a term of court in another county, order the correction of the minutes *nunc pro tunc?*

The first question merits an affirmative answer. For until the expiration of the term of court, that is during the term, the judgments of the court are *in fieri*, and the judge has the power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice. *S. v. Godwin*, 210 N.C. 447, 187 S.E. 560; *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407; *S. v. Gross*, 230 N.C. 734, 55 S.E. 2d 517.

In the *Gross case, supra*, this Court in opinion by *Seawell, J.*, declared that "as the term of court had not expired the whole matter was *in fieri* and the right of the judge to modify, change, alter or amend the prior judgment, or to substitute another judgment for it, cannot be questioned," citing cases.

The second question in the light of the provisions of Sec. 3 of Art. XI of the Constitution of North Carolina, implemented by G.S. 148-28, is answered "No."

It is provided in Sec. 3 of Art. XI of the Constitution that "the General Assembly shall . . . make provision for the erection and conduct of a State's Prison or penitentiary, at some central or accessible point within the State." And the General Assembly has declared in G.S. 148-28 entitled "Sentencing of prisoners to Central Prison" that "the several judges of the Superior Court are hereby given express authority in passing sentence upon persons convicted of a felony . . . to sentence such person to the Central Prison at Raleigh . . ." Thus it appears that only persons convicted of felonies may be sentenced to the Central Prison. However, the General Assembly of 1933 created the State Highway & Public Works Commission, P. L. 1933, Chap. 172, Sec. 2, and vested in it the control and custody and management of, among others, all State Highway prison camps, and the Central Prison at Raleigh. And at the next session the General Assembly passed an act, P. L. 1935, Chap. 257, providing that "the State Highway & Public Works Commission may provide within the bounds of the Central Prison at Raleigh, or elsewhere in the State, suitable quarters for women prisoners, and arrange for work suitable to their capacity," and that "the several courts of the State may assign women convicted of offenses, whether felonies or misdemeanors, to such quarters so provided," etc.

However, when the above was incorporated into the General Statutes, G.S. 148-27, it was made to read that: "The State Highway & Public Works Commission may provide suitable quarters for women prisoners and arrange for work suitable to their capacity," omitting any reference as to where such quarters should be provided. And in the case in hand there is no finding that the "quarters for women" provided by the State Highway & Public Works Commission at the time of the judgments here in question were entered, are in the Central Prison at Raleigh.

Now as to the third and fourth questions, the presumption is that the record as it appears is true, *S. v. Brown,* 203 N.C. 513, 166 S.E. 396. But the Superior Court at term has the power to correct its records to speak the truth. Such power extends to clerical errors or to make the judgment express correctly the action taken by the court, but it does not extend to the correction of errors of law. *In re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526. See also *S. v. Brown, supra,* and cases cited. *Ragan v. Ragan,* 212 N.C. 753, 194 S.E. 458; *Land Bank v. Cherry,* 227 N.C. 105, 40 S.E. 2d 799, and cases cited.

In the *Ragan case* it is said that it is the duty of the court below, and not ours, on application, or *ex mero motu,* to correct the record to speak the truth, and to make entries *nunc pro tunc* that were certainly intended

to be made, but omitted by mistake, accident or inadvertence of the court.

Hence, if the place of imprisonment designated in the judgments is the quarters provided by the State Highway & Public Works Commission for women prisoners, a fact to be found by the Superior Court, the judgments would not be subject to attack, and it would not be necessary to correct the minutes.

But if the place of imprisonment designated in the judgment or shown in the minutes, is not the quarters provided by the State Highway & Public Works Commission for women prisoners, the Superior Court in term, upon motion or *ex mero motu,* may correct the judgment or minutes by designating the proper place. For determination of the truth of the matter the case must be remanded to Superior Court to be heard at term. This does not work a new trial of the case, but is simply an order to remand to have the correction properly made. *S. v. Brown, supra.*

It may be added that the order signed by Judge Sharp is without force and effect. *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338; *Bisanar v. Suttlemyre,* 193 N.C. 711, 138 S.E. 1. On the date she purported to act, she had no commission to hold a term of court in Haywood County, but was commissioned to hold a one-week term in Buncombe County for the trial of criminal and civil cases in lieu of Moore, J., by order of the *Chief Justice* under date of 19 June, 1954. Nevertheless, the purported order signed by her may be helpful to the court in determining the proper place of imprisonment as intended in the judgment, and in correcting the minutes, for which purpose it may be considered as a certificate in respect thereto.

The petitioner also complains that she has been prejudiced by the failure to perfect her appeal. As to this, it is sufficient to say that a careful consideration of the whole case fails to reveal any matter prejudicial to her, and not considered by this Court.

The case will be remanded for further proceedings in accordance herewith.

Remanded.

E. J. KINDLEY v. H. A. PRIVETTE.

(Filed 24 November, 1954.)

1. Pleadings § 15—

A complaint will not be overthrown by demurrer unless it is fatally defective, and if in any portion it alleges facts sufficient to constitute a cause of action, demurrer should be overruled.

2. Libel and Slander § 2—

The words "libelous *per se*" mean actionable *per se*, that is, actionable without allegation of special damage.

3. Same—

Written words may be libelous *per se* even though such words, if spoken, would not be slanderous *per se; a fortiori* words which would be slanderous *per se*, when written or printed, are libelous *per se*.

4. Same: Libel and Slander § 10—Complaint held to allege libel actionable per se.

The complaint alleged that plaintiff is a licensed and ordained minister of the Baptist church and was serving as a guest preacher in Baptist churches, that defendant minister, with malice, published in the church bulletin words understood to refer to plaintiff to the effect that plaintiff had been a disorderly member of the church and that he was unwilling to co-operate in maintaining peace and right spirit therein, that he caused trouble amounting to continuous upheaval, disrupting the peace and harmony of the church, and therefore, was excluded therefrom, and that such words injured plaintiff in his ministerial profession. *Held:* The complaint alleges a libel actionable *per se*, and defendant's demurrer to the complaint was properly overruled.

5. Libel and Slander § 6—

The statutory provision relating to notice and an opportunity for retraction are germane solely to the issue of punitive damage and have no bearing upon the sufficiency of the facts alleged in the complaint to constitute a cause of action for libel. G.S. 99-1 *et seq.*

APPEAL by defendant from *Sharp, Special J.*, March Term, 1954, of CABARRUS. Affirmed.

Civil action for damages for defamation, heard on demurrer to complaint.

The complaint, in substance, alleges:

1. Plaintiff was a member, *bona fide* and in good standing, of Southside Baptist Church of Concord, N. C., of which defendant is pastor. This church is a duly organized congregational unit of the Orthodox Baptist Church. It is a member of the Cabarrus County Association of Baptist Churches, the North Carolina State Baptist Convention, and the Southern Baptist Convention; and, as such, is bound by, and is subject to, the rules and regulations thereof.

2. Plaintiff is a regularly licensed and ordained minister of the Orthodox Baptist Church, accepted as such by said association and conventions; and he has served as regular pastor in Baptist churches in said association and conventions and as guest preacher in other Baptist churches therein.

3. Plaintiff has served as guest preacher, leader of mid-week prayer service, teacher of the Men's Bible Class, and generally as a leader in the Sunday School and church activities of the Southside Baptist Church, and on occasion has been commended by defendant, through the church bulletin, for his "sound and inspiring messages," and had gained "the

love, affection, confidence and respect of a large majority of the congregation of Southside Baptist Church."

4. In this situation, the defendant, "seized with a tantrum of fear and a fit of jealousy," and with malice, resolved to destroy plaintiff "in the eyes of both the clergy and laity of the Baptist Church."

5. The first step in defendant's course of action was to attempt to exclude plaintiff from membership in the Southside Baptist Church. So, at a congregational meeting on Sunday, 6 September, 1953, defendant acting as Moderator, a resolution, instigated by defendant and maneuvered by a few personal friends of defendant, was adopted, excluding plaintiff from membership. No notice or warning had been given plaintiff, nor had charges been preferred against plaintiff, nor did the congregation have prior notice that such resolution would be considered. And after the resolution had passed, a motion was made and carried by a big majority vote of the congregation that plaintiff be granted the right to take the floor to defend himself against the charges made; but defendant, as Moderator, arbitrarily refused to comply therewith on the ground that plaintiff had been excluded, was no longer a member and had no right to be heard. In relation to these events, it is alleged explicitly that the purported exclusion of plaintiff was and is "null and void and of no effect."

6. On Sunday, 13 September, 1953, defendant "issued or caused to be issued" a printed or mimeographed church program and bulletin, which was distributed among the members and visitors of Southside Baptist Church, in which, under the head of "Church Discipline," defendant cited and quoted Scripture passages, the purport being, according to defendant's contention, that the preliminary procedure outlined in Matt. 18:15-17 for treating with a brother who causes offense relates to relations between brethren and does not bear upon the exclusion of a member from the church.

7. Immediately following, under the caption, "Note," defendant makes application of the premise he had undertaken to establish by Scripture, including these excerpts: "At no place in the New Testament is it ever mentioned that one is to be granted a 'Church Trial' in *disorderly* cases." ". . . any Baptist Church at any time can withdraw itself from any member . . . for *disorderly conduct* . . ." "In the recent case in question the Deacons did reason with the *disorderly brother* and ask his cooperation in maintaining peace and the right spirit in the church. It did no good and the church had no other choice unless it wants *to tolerate a continued upheaval* and *trouble making*. God will not bless a church that *tolerates such people* in membership. Any *other* person *who continues to disrupt the peace and harmony* of the church and who refuses

to cooperate with the church ought to either get out of the church or be excluded from the membership." (Italics added.)

8. This bulletin also gave notice that plaintiff had been excluded from membership, and that letters of dismission had been granted to members of plaintiff's family and other persons.

9. Defendant mailed a copy of this bulletin to the following: Moderator of the Cabarrus County Association of Baptist Churches; the 1952 Moderator of said Association; each Baptist preacher in said association; a number of other Baptist preachers in other counties and even beyond the State.

10. By reason of the foregoing false, malicious and wanton charges, as calculated and intended, defendant has embarrassed, humiliated and disgraced the plaintiff and has brought him into disrepute among his fellow members of the Baptist clergy and laity.

11. Defendant well knew of plaintiff's status as a professional man and that plaintiff depended in large measure upon his ministerial profession for a livelihood for himself and family.

12. As the result of the false, malicious and wanton charges so made and published by defendant, plaintiff "has not received a single invitation to conduct religious services in any church, anywhere"; and plaintiff has suffered actual damages of $10,000.00, special damages of $10,000.00, and is entitled to recover $10,000.00 as punitive damages.

Defendant demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. Defendant excepted and appealed.

C. M. Llewellyn, B. W. Blackwelder, and M. B. Sherrin for plaintiff, appellee.

R. Furman James, L. E. Barnhardt, Hartsell & Hartsell, and William L. Mills, Jr., for defendant, appellant.

BOBBITT, J. The demurrer tests the sufficiency of the complaint. The rules applicable in so testing the complaint have been often stated and are well settled. *Pressly v. Walker,* 238 N.C. 732, 78 S.E. 2d 920, and cases cited. The complaint must be fatally defective. If any portion of it alleges facts sufficient to constitute a cause of action, the complaint will stand. *Cummings v. Dunning,* 210 N.C. 156, 185 S.E. 653. This explains, in part, why we have not undertaken to include all allegations of the complaint in the above statement of facts.

The complaint, apart from other allegations, alleges that defendant published and circulated a church bulletin, which, in explanation of the exclusion (or attempted exclusion) of plaintiff from the membership of the Southside Baptist Church, contained statements of and concerning

plaintiff to the effect that plaintiff had been a disorderly member thereof in the sense that he was unwilling to cooperate in maintaining peace and the right spirit in the church but caused trouble amounting to a continuous upheaval and disrupted the peace and harmony of the church and therefore was excluded therefrom. Do these allegations, considered in relation to allegations as to plaintiff's professional status, and the allegations as to their damaging effect upon his reputation and means of livelihood, and the allegations as to the embarrassment, humiliation and disgrace caused thereby, state a cause of action?

"The publication of any libel is actionable *per se,* that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise. Such a publication is itself an injury (see sec. 7) and therefore a sufficient ground for recovery of at least nominal damages." Restatement of the Law, Torts, sec. 569.

As stated in 33 Am. Jur., Libel and Slander sec. 6: "Much that, when spoken, is not actionable without an averment of extrinsic acts or an allegation and proof of special damages is, when written or printed, actionable *per se.*"

And as stated in 53 C.J.S., Libel and Slander sec. 13: "As a general rule, except as changed by statute, words written or printed may be libelous and actionable *per se,* that is, actionable without any allegations of special damages, if they expose or tend to expose plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, induce an evil opinion of him in the minds of right thinking persons, and deprive him of their friendly intercourse and society, regardless of whether they actually produce such results. As otherwise stated, words published are libelous if they discredit plaintiff in the minds of any considerable and respectable class in the community, taking into consideration the emotions, prejudices, and intolerance of mankind; and it has been held that it is not necessary that the published statements make all or even a majority of those who read them think any the less of the person defamed, but it is enough if a noticeable part of those who do read the statements are made to hate, despise, scorn, or be contemptuous of the person concerning whom the false statements are published."

The phrase "libelous *per se,*" used extensively, has been criticized as inexact. Southern California Law Review, Vol. 17, p. 347 *et seq.* While this phrase appears in our decisions, the words are used in the sense of actionable *per se. Flake v. Greensboro News Co.,* 212 N.C. 780, 195 S.E. 55.

Words characterizing plaintiff as a trouble maker and as one who stirs up dissension and strife within the church are reasonably calculated and naturally tend to cause the Baptist brethren, clergy and laity alike, to cease to avail themselves of his professional services and to avoid and

withdraw from further contacts and association with him. If a minister has such reputation, experience teaches that others, clergy and laity alike, are disposed to be shy and wary of him as a minister and otherwise. The words in the bulletin "Note," if the facts are as alleged, are defamatory and if spoken would be slanderous *per se*. *A fortiori*, they constitute a basis for an action for libel. *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616; 33 Am. Jur., Libel and Slander sec. 75; 53 C.J.S., Libel and Slander sec. 39.

In *Simmons v. Morse*, 51 N.C. 6, the trial court intimated an opinion that the paper (a letter) was not a libel *per se;* and thereupon plaintiff submitted to nonsuit and appealed. The letter, written by defendant, addressed to plaintiff, was read by defendant to another person, who was requested to carry it and did carry it to plaintiff. It contained these alleged defamatory statements: "You have been trying to defraud me a long time, and has done it all you had power to do for the last ten or twelve years." *Battle, J.*, writing the opinion for the Court, says: "A libel, as applicable to individuals, has been well defined to be a malicious publication, expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt or ridicule. See 2 Kent's Com., 16, and the cases there referred to. The distinction between written and verbal slander is so well known, that it is unnecessary to refer to it more particularly than to say, that, any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, is actionable, though it do not impute any definite infamous crime punishable in the temporal courts."

The distinction has been recognized in our later cases. *Brown v. Lumber Co.*, 167 N.C. 11, 82 S.E. 961; *Pentuff v. Brown, supra; Hall v. Hall*, 179 N.C. 571, 103 S.E. 136; *Paul v. Auction Co.*, 181 N.C. 1, 105 S.E. 881; *Flake v. News Co., supra.* And in *Flake v. News Co., supra*, it is stated by *Barnhill, J.* (now *C. J.*), that a publication is actionable *per se*, "if, when considered alone without innuendo: . . . (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession," citing authorities. It seems clear that the bulletin published and circulated by defendant contains defamatory language within the scope of both (3) and (4). And, as for innuendo, it is alleged very plainly that the defamatory words so published by defendant referred to plaintiff and were so understood by persons reading the bulletin and held the plaintiff up as "a formenter of trouble and discord."

As to defendant's contention that plaintiff fails to allege that he gave notice of the alleged defamatory statement and thereby failed to afford opportunity for retraction by defendant, in accordance with "London Libel Law," G.S. 99-1 *et seq.*, a sufficient answer is that, if applicable,

these statutory provisions relate solely to punitive damages and so have no bearing upon the sufficiency of the facts alleged to constitute a cause of action. *Osborn v. Leach,* 135 N.C. 628, 47 S.E. 811; *Paul v. Auction Co., supra.*

For the reason stated, the judgment overruling demurrer is

Affirmed.

PETER KELLY AND WIFE, ETHEL KELLY, v. JOHN KELLY AND WIFE, BETTY G. KELLY (ORIGINAL PARTIES DEFENDANT), AND FRANKLIN COUNTY (ADDITIONAL PARTY DEFENDANT).

(Filed 24 November, 1954.)

1. Judgments § 33a—

A judgment as of nonsuit entered upon demurrer to the evidence constitutes *res judicata* and bars a subsequent action upon substantially the same allegations and evidence, but will not bar a subsequent action in which plaintiff "mends his licks" by the introduction of additional evidence on a material aspect not covered by the evidence at the former trial.

2. Same—

In a second action after an involuntary nonsuit upon demurrer to the evidence, there is no presumption that available pertinent evidence was introduced at the former trial merely because such evidence was available.

3. Ejectment § 17—

Where plaintiff in ejectment attempts to establish a common source of title by showing that defendant claims under a tax foreclosure against the common ancestor, and introduces a deed from the county to defendant, deed from the commissioner to the county, together with the original summons and complaint in the tax foreclosure proceeding and the sheriff's return on the summons, order for service by publication and notice and affidavit of publication, but fails to introduce either the interlocutory judgment of foreclosure or the final decree of confirmation of sale, there is a break in the chain of title, and nonsuit for failure of plaintiff to establish a common source of title is proper.

4. Ejectment § 13: Pleadings § 10—

In an action in ejectment where defendant claims under a tax foreclosure deed of bargain and sale, the county is a proper party for the purpose of defending its title to defendant, but defendant has no right to litigate in plaintiff's action any rights he may have against the county in the event the tax foreclosure deed is declared invalid.

5. Cancellation and Rescission of Instruments § 8—

The right to attack the validity of a deed on the ground of mental incapacity of grantor or undue influence and duress, is vested exclusively in the grantor, or, in the event of his death, in his heirs unless the personal representative is required to sell real estate in order to create assets, in

which event the grantor's personal representative would have the right to attack the deed.

APPEAL by plaintiff Peter Kelly from *Stevens, J.*, April Term, 1954, of FRANKLIN.

This is an action in ejectment to recover possession of two tracts of land in Franklin County, North Carolina, containing 13.12 acres and 15.68 acres, more or less, respectively. The plaintiffs originally were Peter Kelly and his wife, Ethel, who is now deceased, leaving Peter Kelly as the surviving plaintiff who will be referred to hereinafter as plaintiff.

1. The plaintiff instituted a similar action on 17 February, 1950, and at the trial, for the purpose of establishing his title to the above tracts of land, introduced evidence as follows: (a) Deed from Sam Kelly, Jr., and wife to Peter Kelly and wife, dated 27 April, 1948, recorded in Franklin County Registry, Book 425, pages 416 and 417; (b) deed from Sam Kelly, Sr., and wife to Samuel Kelly, Jr., dated 25 May, 1918, recorded in Franklin County Registry, Book 217, page 510; (c) oral testimony of Peter Kelly. The evidence was held insufficient to make out a case for the jury and a judgment of nonsuit was entered at the April Term, 1951, of the Superior Court of Franklin County. Plaintiff gave notice of appeal to the Supreme Court but instead of perfecting his appeal he paid the costs and instituted the present action on 31 May, 1951.

2. The plaintiff's allegations in the present action are identical in substance with those in the former action. The original defendants, John Kelly and wife, made a motion on 19 July, 1951, that Franklin County be made a party defendant to the action. The plaintiff objected. Objection was overruled and Franklin County was brought in as a party defendant. Plaintiff excepted.

3. The defendants, John Kelly and wife, filed an answer in which they allege that they are the owners of the two tracts of land in controversy under a deed from Franklin County; that Franklin County obtained title thereto in a tax foreclosure proceeding instituted 29 August, 1930. These defendants, as a further answer and defense, allege that plaintiff's deed from Sam Kelly, Jr., under which he claims, is null and void by reason of the mental and physical weakness and infirmity of Sam Kelly, Jr., at the time of its execution, and that it was obtained by the plaintiff through undue and improper influence and duress upon the said Sam Kelly, Jr. The plaintiff interposed a demurrer *ore tenus* to this further answer and defense and the demurrer was overruled. The plaintiff duly excepted. These defendants also plead the judgment in the former action as *res judicata* in bar of plaintiff's right to maintain this action. They further plead what they denominate a counterclaim, but which is in reality a cross-action against Franklin County for $1,000.00, being the amount

paid by John Kelly as the purchase price for the property, and pray for judgment against the County for said amount in the event the deed from Franklin County to John Kelly is held to be invalid.

4. Franklin County filed an answer to the complaint and a reply to the cross-action of its codefendants. In its reply, it admitted that in the event its deed to the said John Kelly is invalid he "would be entitled to a refund for any sums over and above all amounts which this defendant has invested in said lands in the way of delinquent taxes, interest, penalties, costs, etc., up to the purchase price of $1,000.00."

When this cause was tried in the court below, the plaintiff introduced the same documentary evidence he introduced at the trial in the former action, and it is admitted that the oral evidence was substantially the same. However, for the purpose of showing that the plaintiff and the original defendants claim title from a common source, and for the purpose of attacking the validity of the deeds in the defendants' chain of title, the plaintiff introduced in evidence a deed from Franklin County to John Kelly, dated 7 February, 1949, duly recorded in the office of the Register of Deeds of Franklin County on 11 February, 1949; a deed from G. M. Beam, Commissioner, to Franklin County, dated 11 July, 1931, duly recorded on 29 February, 1932; the original summons in the tax foreclosure proceeding; the complaint; the Sheriff's return on the summons, stating Sam Kelly, Jr., was not found; order for service by publication, and notice and affidavit of publication. Other evidence was offered but excluded.

The defendants, John Kelly and wife, in support of their plea of *res judicata,* introduced in evidence the original summons in the former action between Peter Kelly and wife and John Kelly and wife, the complaint and judgment of nonsuit entered therein at the April Term, 1951, of the Superior Court of Franklin County.

At the close of all the evidence, the court below entered judgment in favor of the above defendants on their plea of *res judicata,* finding as a fact that in addition to the evidence admitted to have been introduced at the former trial between the parties, the plaintiff "introduced additional documentary evidence composed of public records of Franklin County which were available to plaintiffs at the former trial, all of which are conclusively presumed by the court to have been set up in said former action," and dismissed the action and directed that the costs be taxed against the plaintiff. Plaintiff appeals, assigning error.

John Matthews for plaintiff, appellant.

Beam & Beam for defendants John Kelly and wife, appellees.

Hamilton Hobgood for defendant Franklin County, appellee.

DENNY, J. This appeal presents a number of questions for determination. However, the two which are of primary importance are these: (1) Is the ruling of the court below, in respect to the plea of *res judicata,* erroneous? (2) If so, did the plaintiff introduce sufficient evidence to take the case to the jury? We think the first question must be answered in the affirmative, and the second in the negative.

The general rule with respect to *res judicata* is that where a former judgment has been entered on the merits of the controversy and the new action is based upon substantially the same allegations, and substantially the same evidence, the trial court should hold that the judgment in the first action was a bar, or *res judicata,* and thus end that particular litigation. *Hampton v. Spinning Co.,* 198 N.C. 235, 151 S.E. 266. For example, if, in a tort action, a plaintiff introduces his evidence and the trial court holds such evidence shows that the plaintiff was guilty of contributory negligence as a matter of law, and enters a judgment of nonsuit, the judgment, unless reversed on appeal, would be a bar to a second action involving the same allegations and the same evidence. *Batson v. Laundry,* 209 N.C. 223, 183 S.E. 413. But, ordinarily, where there is a demurrer to the evidence and the court sustains the demurrer and enters a judgment of involuntary nonsuit, the plaintiff is permitted to bring another action in order that he may "mend his licks," if he can. *Batson v. Laundry,* 206 N.C. 371, 174 S.E. 90; *Swainey v. Tea Co.,* 204 N.C. 713, 169 S.E. 618; *Hampton v. Spinning Co., supra; Tuttle v. Warren,* 153 N.C. 459, 69 S.E. 426; *Trull v. R. R.,* 151 N.C. 545, 66 S.E. 586; *Smith v. Manufacturing Co.,* 151 N.C. 260, 65 S.E. 1009; *Hood v. Telegraph Co.,* 135 N.C. 622, 47 S.E. 607; *Nunnally v. R. R.,* 134 N.C. 755, 48 S.E. 998; *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800.

In the case of *Tuttle v. Warren, supra,* the action was for the possession of land. The court said, in respect to plaintiff's proof, "He has shown no legal right to claim under Reuben Warren, or to avail himself of his possession of the *locus in quo.* . . . In the absence of the essential proof, we must sustain the judgment of nonsuit, but this does not prevent the plaintiff from bringing another action (*Tussey v. Owen,* 147 N.C. 335) and supplying the present deficiency in the evidence, if he is able to do so."

Ordinarily, if the evidence on which the plea of *res judicata* is sustained tends to show the facts to be as found by the trial court, its findings will not be reviewed by this Court. *Batson v. Laundry, supra* (209 N.C. 223). But, in the present action it appears from the record that in addition to the evidence offered in the first action, additional documentary evidence was offered in the trial below. This evidence was not only pertinent but necessary if the plaintiff is to show a common source of title. Certain parts of this additional documentary evidence was also introduced for the purpose of attack. The court below, in sustaining the plea of

res judicata, pointed out that additional evidence was offered in the present trial but held that since it was documentary and was available to the plaintiff at the other trial, it is "conclusively presumed to have been set up in said former action." We know of no rule of law or decision that holds that merely because pertinent evidence was available at the time of a former trial it is conclusively presumed to have been introduced at such trial. The court, it seems, erroneously applied to the introduction of evidence at the former trial, the well established principle that when a final judgment has been entered in an action, it is conclusive and operates as a bar to a subsequent action between the same parties as to matters which were adjudicated, or which were within the scope of the issue and might have been litigated in the former suit. *Gibbs v. Higgins,* 215 N.C. 201, 1 S.E. 2d 554; *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15.

On the second primary question set out above, we hold that the plaintiff's evidence was not sufficient under our decisions to show that the plaintiff and the defendant John Kelly are claiming title from a common source.

In the case of *Meeker v. Wheeler,* 236 N.C. 172, 72 S.E. 2d 214, this Court held that in attempting to show that the plaintiffs and defendant claimed title from a common source, the introduction of a trustee's deed to plaintiffs without introducing the deed of trust in which the power of sale was given, and under which the trustee purported to act, left a break in plaintiff's chain of title. In the instant case, neither the interlocutory judgment of foreclosure nor the final decree of confirmation of sale pursuant thereto, was introduced in the trial below. The failure to introduce such documents left a break in the defendants' chain of title. The action should have been nonsuited in the court below for the same reason the nonsuit was entered in the first action rather than dismissing it upon the plea of *res judicata.* However, since the action was dismissed, we will affirm the judgment to that extent only. But this does not preclude the institution of another action if the plaintiff is so advised. *Hampton v. Spinning Co., supra.*

In view of the conclusions we have reached, and the probability that another action will be instituted, we deem it advisable to pass upon the plaintiff's exception and assignment of error with respect to making Franklin County a party defendant, as well as his exception to the overruling of his demurrer *ore tenus* to certain pleadings set up in the original defendants' further answer and defense.

The deed from Franklin County to John Kelly, dated 7 February, 1949, is a deed of bargain and sale and not merely a quitclaim deed as was the case in *Turpin v. County of Jackson,* 225 N.C. 389, 35 S.E. 2d 180, or a direct purchase at a tax foreclosure sale as was the case in *Wilmington v. Merrick,* 234 N.C. 46, 65 S.E. 2d 373. Even so, we hold

that while Franklin County is not a necessary party to this action it is a proper one for the purpose of defending its title to the defendant John Kelly. But, we do not think the defendants, John Kelly and wife, are entitled to have their purported cross-action litigated in this ejectment suit. The adjudication of rights that may arise as between John Kelly and wife and Franklin County, in the event the latter's deed to John Kelly is declared invalid, is not essential to a complete determination of the matters in controversy between the plaintiff and the defendants, John Kelly and wife. *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655, 170 A.L.R. 147; *Schnepp v. Richardson,* 222 N.C. 228, 22 S.E. 2d 555.

We now consider the plaintiff's demurrer to the further answer and defense of John Kelly and wife, in which they allege the plaintiff's deed is invalid by reason of the mental and physical condition of Sam Kelly, Jr., at the time the deed is purported to have been executed, and that it was obtained by the plaintiff through undue and improper influence and duress upon the said Sam Kelly, Jr. In our opinion, these defendants are without legal authority to assert such an attack. This right is vested exclusively in the heirs of Sam Kelly, Jr. (Sam Kelly, Jr., having died since the execution of said deed and, according to plaintiff's brief, these defendants are not his heirs), unless the personal representative of Sam Kelly, Jr., deceased, is required to sell real estate in order to create assets to pay the obligations of his estate. In this event, his personal representative would have the right to bring such an action. *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448; *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176; 21 Am. Jur., Executors and Administrators, sections 908, 909, 1007, and 1013; 26 C.J.S., Descent and Distribution, section 85. Hence, the ruling of the court below on plaintiff's demurrer *ore tenus* is reversed. G.S. 1-141; *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

We will not consider or express an opinion at this time on plaintiff's contention that proper service by publication was not obtained on Sam Kelly, Jr., in the tax foreclosure proceeding pursuant to which the defendant John Kelly claims to have obtained title to the lands in question. Neither do we express an opinion as to the sufficiency of the description of the property in the tax foreclosure proceeding, but see *Com'rs. of Beaufort v. Rowland,* 220 N.C. 24, 16 S.E. 2d 401; *Johnston County v. Stewart,* 217 N.C. 334, 7 S.E. 2d 708; *Bissette v. Strickland,* 191 N.C. 260, 131 S.E. 655.

The judgment of the court below is

Modified and affirmed.

ERNEST REDIC v. MECHANICS AND FARMERS BANK, J. E. STRICKLAND AND WIFE, JUANITA A. STRICKLAND, AND S. T. GIBSON, AND WIFE, THELMA G. GIBSON.

(Filed 24 November, 1954.)

1. Mortgages § 14—

In a tax foreclosure by a commissioner duly appointed, the holder of a note secured by a deed of trust on the property has the right to purchase the encumbered land for the purpose of protecting its security, and, nothing else appearing, such purchase creates no trust in favor of the debtor.

2. Same—

Provision in a deed of trust that upon default or failure of trustor to comply with any of the conditions or covenants of the instrument, the creditor, immediately before instituting foreclosure proceedings, should have the right to enter upon the land and collect the rents and income and apply same to the debt, taxes, and insurance, *is held* for the protection of the creditor, and creates a right but imposes no duty upon the creditor to prevent foreclosure or redeem the land from tax sale. Further, such right does not accrue prior to default or the institution of foreclosure proceedings.

3. Same—

G.S. 105-409 was enacted for the benefit and protection of holders of notes and bonds secured by deeds of trust or mortgages, and it vests them with the right, at their election, to pay taxes due on the property to protect their security, but imposes no duty upon them to do so for the protection of the trustor.

4. Same—

Where the holder of a note secured by a deed of trust purchases the land at a tax foreclosure, but does not go into possession or collect the rents and profits from the land until after trustor had been divested of any interest in the land by such tax foreclosure, the transaction creates no equity in favor of trustor, and trustor is not entitled to impress a trust upon the creditor's title or enforce an accounting, either under the provisions of G.S. 105-409, or under provisions of the deed of trust giving the creditor the right, upon default, to enter upon the land, and apply the rents and income therefrom to the debt, taxes and insurance.

5. Pleadings § 19c—

Where the allegations of the complaint constitute a statement of a defective cause of action rather than a defective statement of a good cause of action, judgment sustaining the demurrer and dismissing the action is proper.

APPEAL by plaintiff from *Hall, Special J.*, August Term 1954, WAKE. Affirmed.

Civil action to impress a trust on the title of defendants to the real property described in the complaint for the use and benefit of plaintiff, heard on demurrer to the complaint.

On 8 April 1935 the plaintiff borrowed from the defendant Bank $336.45. As security for the payment thereof, he and his wife (now deceased) executed a trust deed on the *locus* to R. L. McDougald, which trust deed contained the usual power of sale. It likewise contained the following provision, to wit:

"That on the failure of the parties of the first part to pay when due the bond secured by this conveyance, or any part of the principal or interest thereon, as the same shall fall due, or on the failure to comply with any of the conditions, covenants or agreements of this instrument, the party of the second part without waiving any rights given him by this instrument to foreclose this deed of trust shall have the right immediately before any foreclosure proceedings either in court or by advertising, to enter himself and collect the rents and income from the property and apply the same to the payment of taxes, insurance premiums, assessments and the principal and interest of the obligation hereby secured . . ."

On or about 1 July 1935, Wake County instituted an action to foreclose its tax lien on said property. Defendant Bank was made a party thereto. The foreclosure sale was had 24 August 1936 by the commissioner appointed by the court. Defendant Gibson appeared at the sale and became the purchaser at the price of $205. Foreclosure deed was duly executed to him. On 15 August 1936, the Bank petitioned the court for an order directing the payment to it of any balance remaining from the tax foreclosure sale after the satisfaction of the tax claim, costs, and expenses, for application upon its note; and it was thereafter paid the sum of $66.65 as a credit on its note.

On or about 15 December 1937, the Bank or its agent entered in possession of the *locus* and began collecting rents and has continued to collect rents from said land since that date. On 18 March 1938, Gibson and wife conveyed the *locus* to defendant Bank. On 13 April 1950, the Bank, "having acquired a superior title adverse to that held by the plaintiff and also to itself as *cestui que trust*," conveyed the property to defendant Juanita A. Strickland, wife of J. E. Strickland, Vice-President of defendant Bank and manager of its Raleigh branch. This deed was filed for registration 21 April 1952. On 9 April 1951, defendant Strickland and wife executed a deed thereto to S. T. Gibson, trustee, and on the same date Gibson, trustee, reconveyed the property to Strickland and wife so as to create an estate by entirety in said two defendants.

These are the essential facts alleged by the plaintiff upon which he bases the allegation that defendant Bank thus acquired title to the mortgaged property "in disregard to the statute allowing the Trustee under the deed of trust to pay said taxes and add it to the original indebtedness and further disregarding the express proviso to allow said Trustee to enter and collect rents and profits and to apply the same to taxes and other

assessments against the property without waving the right to foreclose, as set out hereinbefore in paragraph V, and said defendants allowed a tax foreclosure and sale of said property by John W. Hinsdale, Commissioner, on the 24th day of August, 1936, for the sum of two hundred and five ($205) dollars, by deed recorded in Book 606 at page 144, Wake County Registry, to the defendant S. T. Gibson, of whom the plaintiff is informed and believes and on information and belief alleges that said defendant S. T. Gibson was acting solely in the interest of and under the direction and control of the defendant Mechanics and Farmers Bank in purchasing said property at the sale hereinbefore set out."

He further alleges that he has never received any statement of the amount of rents or other profits from said land collected and received by defendant Bank, and that the amount of such rents and other profits so received is clearly in excess of the balance due on said note "and the plaintiff is entitled to and demands an accounting by the defendant Mechanics and Farmers Bank for such rents and profits."

He prays (1) an accounting for the proceeds of rents and profits collected by the Bank, (2) that he recover any excess thereof over and above the amount required to pay the note held by the Bank, (3) that the note executed and delivered to the Bank and the deed of trust executed and delivered to McDougald, trustee, be canceled, and (4) that the several deeds alleged in the complaint, including the deed from Hinsdale, commissioner, to S. T. Gibson, be declared null and void.

When the cause came on for hearing, the court below entered its order sustaining the demurrer and dismissing the action. Plaintiff excepted and appealed.

Wright T. Dixon, Jr., for plaintiff appellant.

Paul C. West for defendant appellee Mechanics and Farmers Bank.

Ellis Nassif and J. C. Keeter for defendant appellees J. E. Strickland and wife, Juanita A. Strickland, and S. T. Gibson and wife, Thelma G. Gibson.

BARNHILL, C. J. For some undisclosed reason plaintiff prays cancellation of the tax foreclosure deed. But whether plaintiff has stated a cause of action does not depend upon the validity or invalidity of the tax foreclosure deed. The quality of the estate it conveyed to Gibson, and through him to the defendant Bank, is the determinative factor.

The holder of a note secured by deed of trust on real property has the right to purchase the encumbered land at a sale had in a tax foreclosure proceeding. When the creditor is a bank entrusted with the investment of the money of its depositors, it may well be said that it is its duty to appear at such sales and, if necessary to protect the best interests of its

depositors, bid therefor whatever in its best judgment is necessary to that end.

Here there was no relationship whatsoever between the defendant Bank and the commissioner appointed to make sale in the tax foreclosure proceeding which placed the obligation on the Bank to purchase the land for the use and benefit of plaintiff. The commissioner was making sale in foreclosure of a senior lien, and the Bank was the holder of a junior encumbrance the value of which might be completely destroyed by the tax foreclosure sale. Nothing in connection with this bare relationship could possibly create an obligation on the part of the Bank to purchase the land at said sale for the use and benefit of its debtor. Its first duty was to protect its depositors.

In any event, plaintiff does not rely upon the existence of a relationship between the commissioner to make sale and the defendants which created a fiduciary relation between the two. The cause of action he conceives exists in his favor against the defendants is made to rest upon the provisions of the paragraph contained in the trust deed to McDougald quoted in the foregoing statement of facts, granting the trustee the right "immediately before any foreclosure proceedings whether in court or by advertising" to enter upon the premises and "collect the rents and income from the property and apply the same to the payment of taxes, insurance premiums, assessments and the principal and interest of the obligation" secured thereby, and the provisions of G.S. 105-409 vesting in the holder of a lien upon real property the right to pay the taxes assessed against the mortgagor to the extent they are a lien upon the property. He takes the position that they created a positive obligation on the part of defendant Bank to pay the taxes due by plaintiff on the *locus* and thereby avoid the tax foreclosure sale. He alleges in effect that the defendant Bank breached this duty and instead appeared at the foreclosure sale through its agent and purchased the land for its own use and benefit. His alleged cause of action is grounded upon the assumption that by reason of this alleged breach of trust, equity will impress a trust upon the title thus acquired by defendant for his use and benefit. But this assumption is not well founded.

The provision in the trust deed was for the protection of the creditor. It created a right but imposed no duty. Furthermore, as there had been no default at that time, and no foreclosure of the trust deed "in court or by advertising" was ever begun, the right of entry to collect the rents and profits had not accrued at the time plaintiff was divested of his equity of redemption by the tax foreclosure deed.

Likewise, G.S. 105-409 was enacted for the benefit and protection of the holders of notes and bonds secured by a trust deed or mortgage on real property. It vests them with the right, at their election, to pay taxes due

on their security without being charged with having made a voluntary payment and creates a lien on the property in their behalf as security for the payment of the amount thus expended by the creditor to pay the taxes due by his debtor.

The defendants did not owe the plaintiff the duty to pay his taxes assessed against his property. Their failure so to do created no equity in favor of plaintiff which may be made the basis of an action to impress a trust upon the title of the defendants in favor of plaintiff. As they did not take possession of the property and begin collecting the rents and profits until after plaintiff had been divested of any interest in the land, plaintiff is not entitled to an accounting.

The decisions cited and relied on by plaintiff are not in point. They are clearly distinguishable.

Since the allegations contained in the complaint constitute a statement of a defective cause of action rather than a defective statement of a good cause, *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43; *Scott v. Veneer Co.,* 240 N.C. 73; *Mills v. Richardson,* 240 N.C. 187, the judgment sustaining the demurrer and dismissing the action must be

Affirmed.

STATE v. MARSHALL NORMAN HICKS.

(Filed 24 November, 1954.)

1. Robbery § 1a—

The crime of robbery *ex vi termini* includes an assault on the person.

2. Robbery § 3—

In a prosecution for robbery, the court must submit the question of defendant's guilt of assault in those instances where the evidence warrants such finding, even in the absence of a request, and even though the State contends solely for conviction of robbery and the defendant contends solely for complete acquittal.

3. Same—

If the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of this offense, the court is not required to submit the question of defendant's guilt of assault.

4. Same—Evidence in this prosecution for robbery held to require submission of question of defendant's guilt of assault.

In this prosecution for robbery, the prosecuting witness testified that defendant came to his house, saw the prosecuting witness put a large sum of money in his pocketbook, that upon returning from a trip, defendant entered the house with him, hit him on the head, and took his pocketbook

out, threw it on the floor and left. Defendant's evidence was to the effect that the prosecuting witness at the time of the alleged robbery did not have the large sum of money as testified to by the prosecuting witness, or any such sum, and that defendant did not go into the prosecuting witness' house upon return from the trip. *Held:* Conceding that defendant assaulted the prosecuting witness, it does not necessarily follow from the evidence that defendant by means thereof robbed the witness of such sum, or any other amount, and it was the duty of the trial court to submit to the jury the question of defendant's guilt of assault. G.S. 15-169.

5. Criminal Law §§ 53g, 81c (2)—

When presented by the evidence, it is the duty of the trial court, even in the absence of a request, to submit to the jury the question of defendant's guilt of a lesser degree of the offense, and error in failing to do so is not corrected by a verdict convicting the defendant of the graver offense.

APPEAL by defendant from *Whitmire, Special J.*, March 1954 Term, of GASTON.

Criminal prosecution on bill of indictment containing two counts, the first charging common law robbery and the second charging the statutory felony of robbery with firearms or other dangerous weapons as defined in G.S. 14-87. The first count charged that the defendant on 17 August, 1953, "unlawfully, wilfully and feloniously, . . . did commit an assault upon and put in fear of life one Walter Abernethy and by means aforesaid and by threats of violence, did steal, take and carry away from his person and did rob . . . the said Walter Abernethy, of the sum of $1,550.00 in money, the property of the said Walter Abernethy, . . ."

Abernethy, the prosecuting witness, and Hicks, the defendant, had worked side by side in a mill. Abernethy had known Dock Hicks, defendant's father, for many years. Dock Hicks lived in Lincolnton. On Sunday night, 17 August, 1953, defendant went to Abernethy's home near Gastonia about 8 p.m. There they drank some liquor Abernethy had at the house. They left Abernethy's home, got in the defendant's car, stopped while Abernethy purchased another pint of liquor, and then drove to Dock Hicks' home in Lincolnton. Apart from these undisputed facts the evidence is in sharp conflict.

Abernethy testified that on Saturday, 16 August, 1953, he had received $1,550.00 from one Walter Cooper, which Cooper had been keeping for him; that he had this money out when defendant came to his home on Sunday night; that, upon defendant's arrival, he put the money in his pocketbook; and that no one saw the money except the defendant. The investigating officer testified that Abernethy had told him that he had gotten the money through a filling station deal. Abernethy admitted on cross-examination that he had told the officer that the money "came through a filling station," that he did not sell a filling station to Walter

Cooper, and that he had no explanation of what he meant when he made this statement to the officer. Walter Cooper was not a witness. The defendant testified that he saw no money at Abernethy's home.

Testimony offered by defendant tended to show that in Lincolnton Abernethy took Dock Hicks aside, told him that he and defendant were out on a little drinking party but "that he was broke and wanted to borrow $2.00 to get liquor." Abernethy testified that no such incident occurred.

Abernethy testified that he and defendant got back to his home about 3 a.m., sat in the car about an hour, and then went into his house together. The defendant's testimony was to the effect that they reached Abernethy's home about 12:30 a.m., that he did not get out of his car, and that Abernethy got out of the car and was walking towards his home as defendant drove away.

The testimony of Abernethy as to what occurred after their return to the Abernethy house, is brief: "He hit me in the back of the head, knocking me to my knees, then hit me on the head with a chair, and then took my pocketbook out, threw it on the floor, and left." Other witnesses, without objection, testified that Abernethy told them that the defendant had hit him in the head and robbed him of $1,550.00.

There was testimony that Abernethy, on Monday, 18 August, 1953, had a black eye, bruised and swollen cheek, and a knot on the back of his head.

The investigating officer testified that he was unable to learn that the defendant had spent any money after the alleged robbery. There was no testimony that the defendant was observed to have any appreciable amount of money in his possession after the alleged robbery.

The court, in its instructions, limited the jury to one of two possible verdicts, that is, either guilty of common law robbery or not guilty. Upon the jury's return of a verdict of guilty of common law robbery, the court pronounced judgment that the defendant be confined in the State's Prison for a term of not less than five nor more than seven years. The defendant excepted and appealed, assigning errors.

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

Mullen, Holland & Cooke for defendant, appellant.

BOBBITT, J. Is there error in the charge on account of the instructions requiring the jury to return a verdict of guilty of common law robbery or a verdict of not guilty? This is the determinative question on this appeal.

The statute bearing directly upon the factual situation disclosed by the evidence is G.S. 15-169, which reads as follows:

"15-169. Conviction of assault, when included in charge.—On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

No need arises to restate definitions of the crime of robbery. *S. v. Sipes,* 233 N.C. 633, 65 S.E. 2d 127; *S. v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410; *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834. The notable fact here is that the crime of robbery *ex vi termini* includes an assault on the person. *S. v. Holt,* 192 N.C. 490, 135 S.E. 324. Moreover, the bill of indictment upon which defendant was tried charges in express terms that the defendant assaulted Abernethy and by means thereof robbed him.

The question posed is whether the evidence brings this case within the rule of *S. v. Holt, supra,* and *S. v. Lunsford, supra,* or within the rule of *S. v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34, and *S. v. Bell, supra;* for under G.S. 15-169 the jury may acquit of the felony and return a verdict of guilty of assault *if the evidence warrants such finding.* If the evidence warrants such finding, the trial judge must submit that phase of the case to the jury whether requested to do so or not. *S. v. Holt, supra.*

In *S. v. Holt, supra,* there was evidence tending to show that the money was paid voluntarily by the State's witness to the defendant and thereafter the alleged assault occurred. In *S. v. Lunsford, supra,* there was evidence tending to show that the defendants took a pistol from the prosecuting witness to prevent him from harming them or some other person. In each of these cases, a new trial was ordered because of the failure of the trial judge to instruct the jury that they might find the defendant guilty of assault.

In *S. v. Sawyer, supra,* and in *S. v. Bell, supra,* the only evidence relating to elements of the crime charged was the State's evidence, tending to show a completed robbery. In each of these cases, the court held that the trial judge in such case was correct in requiring the jury to return a verdict of guilty of robbery as charged or a verdict of not guilty. Hence, the verdicts and judgments were sustained.

The distinction is this: The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's

evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.

Applying the rule to the facts of this case, we find that the defendant's evidence is silent as to what, if anything, occurred in the Abernethy house upon return from the Lincolnton trip. As to this, his position is simply that he did not go into the house with Abernethy. So, with reference to the alleged assault, the only evidence before the court was the testimony of Abernethy. His testimony, if accepted, was sufficient to support a verdict of guilty of an assault with a deadly weapon, to wit, a chair. There is no other evidence bearing on this phase of the case. But, conceding such assault was made by defendant on Abernethy, it does not necessarily follow that the defendant by means thereof robbed Abernethy of $1,550.00 or any other amount. As appears in the above statement of facts, there is evidence tending to show that Abernethy, at the time of the alleged robbery, did not have $1,550.00 or any such sum.

In view of such conflicting evidence, relating to an essential element of the crime of robbery, we are constrained to hold that the rule of *S. v. Holt, supra,* and *S. v. Lunsford, supra,* applies here, and that the jury should have been instructed that if they found from the evidence beyond a reasonable doubt that the defendant assaulted Abernethy with a chair as Abernethy's testimony tended to show, but failed to find from the evidence beyond a reasonable doubt that the defendant robbed Abernethy, they would return a verdict of guilty of an assault with a deadly weapon. Error in this respect is not cured by a verdict convicting the defendant of the more serious crime of robbery. *S. v. Williams,* 185 N.C. 685, 116 S.E. 736; *S. v. Childress,* 228 N.C. 208, 45 S.E. 2d 42; *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130.

True, in such cases the State may contend solely for conviction of robbery and the defendant may contend solely for complete acquittal, but the trial judge, when there is evidence tending to support a verdict of guilty of an included crime of lesser degree than that charged must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings. *S. v. Jones,* 79 N.C. 630; *S. v. Childress, supra.*

For the error indicated, there must be a new trial; and it is so ordered

New trial

ALEX WEINSTEIN AND BENJAMIN WEINSTEIN v. JOHN W. GRIFFIN AND DONALD F. WILLIAMS.

(Filed 24 November, 1954.)

1. Damages § 1d—

While liquidated damages which are in the nature of a penalty are not favored, where the liquidated damages as fixed in the contract are not less favorable to defendant than the applicable rule of law would impose, the formula for the liquidation of damages as fixed in the contract may be applied.

2. Landlord and Tenant § 29—

Where the evidence establishes that plaintiff landlords received possession of the leased premises prior to the expiration of the renewal term, an instruction to the effect that if the jury found that defendant lessees had breached the agreement, to award damages for the full amount of the rent for the renewal period, is error. Defendants are entitled to an instruction applying the provisions of the lease for liquidated damages by subtracting from the contract rental the amount of the reasonable rental value for the unexpired term after possession by lessors, or instruction on lessors' duty to exercise due diligence to relet the property and thus minimize the loss.

3. Same—Where breach of lease is in controversy under the evidence, court should submit question of breach to the jury.

Where, in lessors' action to recover the rent for the yearly renewal in accordance with an extension executed by lessees in conformity with the original lease, defendant lessees claim they surrendered possession of the premises with lessors' approval the day the original lease expired, and that, therefore, there was no breach of the lease, and lessors, while contending that lessees breached the agreement by failure to pay rent during the extension, admit that they re-entered possession during the extension period, the court should submit to the jury the question whether the contract was breached, and, if so, when such breach occurred, and should submit with sufficient explicitness defendant lessees' contention and evidence with respect to agreement of lessors to release lessees of their obligation under the lease and renewal thereof.

APPEAL by defendants from *Stevens, J.*, March Civil Term, 1954, WAKE.

In substance, the plaintiffs allege that on 6 August, 1951, they entered into a written contract, leasing to the defendants a certain lot known as the Hobby property on the corner of Fayetteville and South Streets in the City of Raleigh. The lease was for a period of one year beginning with the delivery of possession on 15 August, 1951, subject to a renewal at the option of the defendants for additional one-year periods not to exceed four renewals, provided notice of intention to renew be given plaintiffs not less than thirty days prior to the expiration of the original, or any extension. The terms of the lease required the payment of rent at the rate of $300.00 per month, payable on the 15th of each month, in

advance. The lease provided: "In the event the demised premises, or any part thereof, shall be abandoned by the lessees or shall become vacant during the said term, the lessors or its agents may immediately or at any time thereafter, re-enter and resume possession of said premises . . . No entry by the lessor shall be deemed an acceptance of a surrender of this lease."

Plaintiffs further allege the defendants paid the rent for the first year and in apt time gave written notice of their intention to exercise their option to extend the lease for an additional year. In paragraph five of the complaint the plaintiffs allege "that the amount of monthly rentals now past due and unpaid by the defendants aggregates $1,800.00, the same being rentals for the months of July, August, September, October, November and December." However, during the trial, plaintiffs were allowed to amend the complaint, eliminating the month of July and claiming the amount due up to the date plaintiffs repossessed the leased premises to be only $1,500.00 instead of the $1,800.00 set out in the original complaint.

In paragraph six the plaintiffs allege ". . . upon default of defendants in payment of rent . . . plaintiffs re-entered the premises on or about ..... day of November, 1952, and by reason of said breach and default the said defendants under said agreement thereupon became justly and fairly liable and indebted to plaintiffs for liquidated damages with respect to the breach and default in the additional sum of $2,100.00." This claim was for the remaining seven months of the extended term after breach as contended by the plaintiffs.

The defendants filed separate answers, admitting the execution of the lease and the giving of the notice to renew for an additional year. The defendant Griffin alleges "that during the month of October, 1951, he dissolved partnership with Williams and that he entered into an agreement with plaintiffs whereby they released him from any and all further obligations under the lease, and that he signed the written notice of election to extend for another year merely as an accommodation and to prevent the necessity of having the plaintiffs prepare another lease, and that he owed the plaintiffs nothing."

The defendant Williams answered, admitting the execution of the lease and the giving of notice of renewal for an additional year. He alleges the notice to renew was given "upon the insistence of one of the plaintiffs, Alex Weinstein, and at his request." He denied that he had breached the contract and that he was due anything by way of rent.

Upon the trial, the plaintiffs introduced the written lease and the written notice signed by the defendants dated 12 June, 1952, signifying their election to renew for an additional year. Plaintiffs denied that there was

any agreement to release either of the defendants from the obligations of the contract and the renewal thereof.

The defendant Griffin testified: "I am not now in partnership with Williams; that was terminated in October, 1951. I have not had any interest in the business since that time; I sold out everything. I called Ben, Alex's brother, and told him I was withdrawing from the partnership and he said, 'all right.' I did not thereafter have any business dealings with them . . . During the month of June, 1951, I signed an extension or renewal of the lease as they said they would not want to have to rewrite it. He also stated he knew I wasn't in the business . . . I was only doing him (Alex Weinstein) a favor and he knew I was out of it. I was doing him a favor by keeping him from having to draw a new lease. I was told that was the only reason . . . Donald brought it to me and he asked me to sign it so they wouldn't have to rewrite it and that I wouldn't be liable for the lease."

Defendant Williams testified: "In July (1952) I went to Mr. Alex Weinstein and told him I was having financial difficulties and if I couldn't make arrangements in a few days I would have to close up, and I said 'I'll let you know about it,' and he told me, said 'all right.' I went back the last few days of August and saw Mr. Alex Weinstein . . . and I told him, 'Alex, I don't have any choice. I have to close up. I'll have the rent paid up until the 15th day of August and I'll be out of your lot on the 15th day of August.' He said 'All right.' I was out on the 15th of the month."

Six issues were submitted to and answered by the jury:

"1. Did the defendants execute and secure an extension of the lease agreement dated August 6, 1951? Answer: Yes (answered by the court by consent).

"2. Was the defendant John W. Griffin thereafter released from the extension of the lease agreement? Answer: No.

"3. Was the defendant Donald F. Williams released by the plaintiffs from the extension of the lease agreement? Answer: No.

"4. In what amount, if any, are the plaintiffs entitled to recover of the defendant John W. Griffin by reason of any breach of said agreement? Answer: .....

"5. In what amount, if any, are the plaintiffs entitled to recover of the defendant Donald F. Williams by reason of any breach of said agreement? Answer: .....

"6. In what amount, if any, are the defendant John W. Griffin and the defendant Donald F. Williams indebted to the plaintiffs? Answer: $3,600.00."

Judgment was entered against the defendants for $3,600.00, from which they appealed.

J. C. B. Ehringhaus, Jr., for plaintiffs, appellees.
Allen Langston for defendant Griffin, appellant.
J. C. Keeter and Ellis Nassif for defendant Williams, appellant.

HIGGINS, J. Section 10 of the lease provides for liquidated damages in case of breach. The section, standing alone, is confusing. Yet, considered in the light of other provisions, its purport becomes reasonably clear; that is, it fixes a rule for determining liquidated damages for the unexpired term in case of breach. Stripped of its unnecessary verbiage, the section provides that liquidated damages shall be determined for the remainder of the term after breach by allowing the defendants credit for the reasonable rental value of the premises for the unexpired portion of the lease, less a discount of four per cent per annum, or the difference between the reasonable rental value and the rent provided in the contract. The difference between the reasonable rental value thus discounted, when deducted from the contract price of $300.00 per month, shall be the liquidated damages for the unexpired term. The plaintiffs, therefore, if their contention prevails, would be entitled to recover $300.00 per month rent from the beginning of the renewal period until the breach, which they allege occurred in November, 1952, and then recover liquidated damages for the remainder of the year calculated according to the rule above given.

Realizing there is room for misunderstanding in the statement of mathematical problems, we are offering a sample solution for the problem here presented. Assuming the defendants are bound for the additional year of the lease beginning 15 August, 1952, and that the breach occurred on 15 November, 1952, and assuming the jury should find the reasonable rental value of the premises to be $200.00 per month, the defendants' liability would work out in this manner: For the four months before the breach the plaintiffs would be entitled to recover rent at the rate of $300.00 per month, or $1,200.00. For the remaining eight months the reasonable rental value would be $1,600.00. The difference between the rent provided in the contract and the $1,600.00 would be $800.00. The discount on $800.00 for eight months at the rate of four per cent per annum would be $21.33. Deducting the discount from the $800.00 would fix the liquidated damages for the eight months at $778.67. This, when added to the rental for the four months before breach, would fix the total liability of the defendants at $1,978.67, assuming, of course, all issues were answered in their favor.

While liquidated damages, if in the nature of a penalty, are not favored (*Crawford v. Allen*, 189 N.C. 434, 127 S.E. 521), the liquidated damages fixed in the contract are not less favorable to the defendants than the rule of law would impose in the absence of any provision for liquidated damages. The rule fixed in the lease gives the defendants credit for the

reasonable rental value from the date of the breach. The law, in the absence of Section 10 of the lease, would require only that the plaintiffs exercise reasonable diligence to relet the property and thus minimize the defendants' loss. After due diligence the plaintiff might not be able to relet immediately or they might not be able to find a tenant who would pay the reasonable rental value for the remaining part of the term, in which event the defendants would get no credit at all. In no wise could the liquidated damages fixed in the lease be considered unreasonable or oppressive, or "arbitrarily adopted without reference to the loss actually suffered and liable to arise in case of breach." *Horn v. Poindexter,* 176 N.C. 620, 97 S.E. 653.

There appears no reason, therefore, why the formula fixed by the parties for determining damages should not be allowed.

The trial court charged the jury as follows: "Now, if you come to the sixth issue, 'In what amount, if any, are the defendant John W. Griffin and defendant Donald F. Williams indebted to the plaintiffs,' the burden of that issue is upon the plaintiffs to satisfy you from the evidence and by its greater weight; that is to say, if you have heretofore found that neither Griffin nor Williams *were* released, but that they were both bound under the extension agreement as they were under the original agreement, then you would answer the sixth issue against both defendants in the sum of $3,600.00."

The court, in giving the instructions, neither took into account Section 10 in the lease with respect to liquidated damages for the unexpired term, nor the fact plaintiffs received possession of the leased premises and had the benefit of such use.

There is no finding in the verdict that the contract was breached, or, if so, when the breach occurred. The plaintiffs allege that the contract was breached and that they re-entered on ..... November, 1952. The defendants deny the breach in their pleadings, and nowhere in their testimony do they admit that they breached the contract. In fact, they claim they never went into possession for the unexpired term but that they surrendered the premises on 15 August, 1952, the day the original term expired, and this was done with plaintiffs' approval.

There is doubt, also, as to whether the court was sufficiently explicit in its instructions to the jury as to the law arising upon defendants' contentions and evidence with respect to agreement of the plaintiffs to release them from their obligations under the lease agreement and the renewal thereof. Exceptions in the record raise these questions.

For the reasons indicated, it is ordered that there be a

New trial.

THE WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF CARL J. McEWEN, DECEASED, v. MINNIE BELL McEWEN, FRANCES M. HUNTER, MARY M. ELLINGTON, HELEN M. ANDERSON, BETTY W. McEWEN, CARL McEWEN ELLINGTON, A MINOR; JEAN HUNTER, A MINOR; SUSAN HUNTER, A MINOR; JUDITH ANDERSON, A MINOR; JOYCE ANDERSON, A MINOR; THE UNBORN ISSUE OF FRANCES M. HUNTER; THE UNBORN ISSUE OF MARY M. ELLINGTON; THE UNBORN ISSUE OF HELEN M. ANDERSON; THE UNBORN ISSUE OF BETTY W. McEWEN; L. M. McEWEN, SR.; L. M. McEWEN, JR.; MARY KATHRYN McEWEN, A MINOR; L. M. McEWEN, III, A MINOR; JAMES WEBB McEWEN, A MINOR; HERBERT L. McEWEN, A MINOR; CAROL ELIZABETH McEWEN, A MINOR; MARGARET ELAINE McEWEN, A MINOR; ROBERT J. McEWEN; AND ALL OTHER PERSONS WHOSE NAMES ARE UNKNOWN, IN BEING OR WHO MAY BE IN BEING AT THE TIME OF THE DEATH OF MINNIE BELL McEWEN AND WHO HAVE OR MAY HAVE ANY INTEREST IN THE ESTATE OF CARL J. McEWEN, DECEASED.

(Filed 24 November, 1954.)

1. Wills § 33c—

A remainder is vested if it is subject to no condition precedent except the determination of the preceding estate.

2. Same—

It is the general rule that remainders vest at the death of the testator unless some later time for the vesting is clearly expressed in the will or is necessarily implied therefrom.

3. Same—

Ordinarily, adverbs of time and adverbial clauses designating time do not create a contingency, but merely indicate the time when the enjoyment of the estate shall commence.

4. Same—

Testator devised and bequeathed property to a trustee for the benefit of his wife for life, with provision that upon her death the estate should be equally divided among his children, with further provision that if any child should be then deceased, his or her share should go to his or her children, or held in trust for such children if they were then minors. *Held:* The children of testator took a vested remainder, and the preceding life estate was solely for the benefit of the widow and was not for the purpose of postponing the enjoyment of the remainder.

5. Wills §§ 33k, 40—

Testator devised and bequeathed his property in trust for the benefit of his wife for life with provision that upon her death the estate should be equally divided among his children, with further provision that if any of his children were dead at the time of the falling in of the life estate, their share should go to their children. The widow dissented from the will. *Held:* The dissent of the widow terminates her life estate under the will, and accelerates the interests of testator's children so as to give them the right of immediate possession.

6. Same—

A vested remainder may be accelerated even though future contingent interests will thereby be cut off.

APPEAL by B. Irvin Boyle and John Schuber, Jr., guardians *ad litem,* from *Patton, Special Judge,* October Term, 1954, of MECKLENBURG.

This action was instituted by the plaintiff, executor and trustee under the last will and testament of Carl J. McEwen, deceased, to obtain the advice and instruction of the court relative to certain questions that have arisen in connection with the administration of the estate.

Carl J. McEwen, late of Mecklenburg County, North Carolina, died on 12 October, 1953, leaving a last will and testament which was duly filed and probated in the office of the Clerk of the Superior Court in the aforesaid county on 20 October, 1953.

Under the terms of the will, the residual estate was devised and bequeathed to the Wachovia Bank and Trust Company as trustee, for the use and benefit of Minnie Bell McEwen, the testator's wife, for life. The will also provided:

"Upon the death of my said beloved wife, the Trustee named herein shall liquidate my estate and shall divide the same equally among my four children: Frances M. Hunter; Mary M. Ellington, Helen J. McEwen and Betty W. McEwen, if said children are living at that date. In the event any one or more of my said children shall have died as of the date of the death of my said wife and if said child shall have left issue surviving her, then such issue shall be entitled to its parent's share in this trust estate, but if such issue shall at the death of my said beloved wife be less than 21 years of age, then the Trustee named herein shall continue to hold such beneficiary's share of this trust estate in trust until said child shall have arrived at the age of 21 years, during which time the Trustee named herein shall pay over unto the said beneficiary in annual, semi-annual or quarterly payments, as it shall deem best, the net income arising on said beneficiary's interest in this trust estate; when said beneficiary shall have arrived at the age of 21 years, the Trustee named herein shall then pay over unto said beneficiary the *corpus* of this estate to which he, she or they may then be entitled."

On 16 April, 1954, Minnie Bell McEwen, widow of Carl J. McEwen, deceased, filed in the office of the Clerk of the Superior Court of Mecklenburg County, a written dissent from the will of her late husband.

It appears from the record that all necessary parties have been joined in this action and that all the defendants have been duly served with process and are properly before the court and subject to its jurisdiction.

All the defendants filed answers except Minnie Bell McEwen, Frances M. Hunter, Mary M. Ellington, Helen M. Anderson, Betty W. McEwen,

L. M. McEwen, Sr., L. M. McEwen, Jr., Herbert L. McEwen, and Robert J. McEwen, and at the time of the hearing the time for answering had expired and no extension of time had been granted.

B. Irvin Boyle was duly appointed guardian *ad litem* for the following minor defendants: Carl McEwen Ellington, Jean Hunter, Susan Hunter, Judith Anderson, Joyce Anderson, and the unborn issue of the defendants Frances M. Hunter, Mary M. Ellington, Helen M. Anderson, and Betty W. McEwen.

John Schuber, Jr., was duly appointed guardian *ad litem* of the following minor defendants: Mary Kathryn McEwen, L. M. McEwen, III, James Webb McEwen, Carol Elizabeth McEwen, Margaret Elaine McEwen, the unborn issue of L. M. McEwen, Sr., L. M. McEwen, Jr., Herbert L. McEwen and Robert J. McEwen, and for unknown parties.

All the parties who were present in person or represented by counsel at the hearing, waived a trial by jury and agreed that the trial judge should find the facts, draw his conclusions of law, and enter judgment accordingly.

Upon the facts found by the court, the material parts of which are hereinabove set out, the court held that the dissent filed by the widow is legally effective as a dissent, and the widow is entitled to her statutory distributive share of the estate; that the dissent filed by the widow had the legal effect of accelerating the vesting, both in right and enjoyment, of the residue of the estate not allocated to the widow as her distributive share; and that Frances M. Hunter, Mary M. Ellington, Helen M. Anderson and Betty W. McEwen, upon filing of the dissent, became entitled to the residue of the estate of the trust and free of the contingent interest of any person, subject only to the rights of the widow, and entered judgment accordingly. Both guardians *ad litem* appeal and assign error.

McDougle, Ervin, Horack & Snepp for appellee.

B. Irvin Boyle and John Schuber, Jr., guardians ad litem.

DENNY, J. The appellants contend that the judgment of the court below is erroneous. They insist that the remainder interests of Frances M. Hunter, Mary M. Ellington, Helen M. Anderson, and Betty W. McEwen are contingent upon their surviving the life tenant, and that the dissent of the widow did not accelerate the vesting of such interests. We do not concur in this view.

Barnhill, J., now *Chief Justice,* speaking for this Court in *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E. 2d 341, defined a vested remainder as follows: "The remainder is vested, when, throughout its continuance the remainderman and his heirs have the right to the immediate possession whenever and however the preceding estate is determined; or,

in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate."

It is the general rule that remainders vest at the death of the testator, unless some later time for the vesting is clearly expressed in the will, or is necessarily implied therefrom. It is likewise a prevailing rule of construction with us that adverbs of time, and adverbial clauses designating time, do not create a contingency but merely indicate the time when enjoyment of the estate shall begin. *Pridgen v. Tyson,* 234 N.C. 199, 66 S.E. 2d 682; *Priddy & Co. v. Sanderford, supra.*

In 31 C.J.S., Estates, section 82, page 96, it is said: "A vested remainder may be accelerated, although future contingent interests will thereby be cut off . . . A remainder will not be accelerated if it is impossible to identify the remaindermen, or if there is evidence of an intention to postpone the taking effect of the remainder; but, where contingencies are determined and donees ascertained, the doctrine of acceleration applies as well to a contingent as to a vested remainder. . . . An instrument providing that the particular estate shall terminate on the happening of an event specified may provide for the acceleration and immediate vesting of what would otherwise be contingent remainders." *Blackwood v. Blackwood,* 237 N.C. 726, 76 S.E. 2d 122; *Christian v. Wilson's Ex'rs.,* 153 Va. 614, 151 S.E. 300; *Eastern Trust & Banking Co. v. Edmunds,* 133 Me. 450, 179 A. 716.

In our opinion, the interests of the children of Carl J. McEwen vested at the death of the testator, and we so hold. Therefore, any question relative to the acceleration of their interests and the right to the immediate possession thereof, must be determined in light of the legal effect of the widow's dissent.

The election of the widow, Minnie Bell McEwen, to take under the statute in lieu of taking the life estate devised to her in her husband's will, in so far as the remaindermen are concerned, was equivalent to her death. *Bank v. Easterby,* 236 N.C. 599, 73 S.E. 2d 541; *Trust Co. v. Johnson,* 236 N.C. 594, 73 S.E. 2d 468; *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385; *Cheshire v. Drewry,* 213 N.C. 450, 197 S.E. 1; *Young v. Harris,* 176 N.C. 631, 97 S.E. 609, 5 A.L.R. 477; *University v. Borden,* 132 N.C. 476, 44 S.E. 47.

The doctrine of acceleration rests upon the theory that the enjoyment of an interest having been postponed for the benefit of a preceding estate, upon determination of such preceding estate before it would ordinarily expire, ultimate takers should come into the immediate enjoyment of their property. *Trust Co. v. Johnson, supra,* and cited cases.

A consideration of the will of Carl J. McEwen, deceased, leads us to the conclusion that the testator devised a life estate to his wife solely for her benefit, and that such estate was not created in any sense for the independent purpose of postponing the disposition of his estate until the death of his wife in the event she rejected the devise thereunder and elected to take her dower interest and distributive share in the estate as provided by law. Hence, the judgment of the court below is

Affirmed.

GENERAL AIR CONDITIONING COMPANY, INC., v. CHARLES B. DOUGLASS AND WIFE OLIVE J. DOUGLASS; DOUGLAS A. JOHNSON AND WIFE, LOTTIE M. JOHNSON; DURHAM BANK & TRUST COMPANY, TRUSTEE, AND HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 24 November, 1954.)

1. Husband and Wife § 13a (3)—

No presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife; there must be proof of the agency.

2. Same—

The fact that a contractor, with knowledge that the several tracts of land are held by the entireties, contracts and deals over a period of years solely with the husband in installing heating equipment in houses erected on the several lots, fails to show actual or implied authority in the husband to act in the premises as agent for the wife.

3. Pleadings § 24—

Allegation and proof must concur to establish a cause of action.

4. Principal and Agent § 7d—

Ratification confirms conduct, and the alleged principal cannot ratify the acts of a person in executing an unauthorized contract unless such person professes, represents, reports, assumes or undertakes to be acting as agent for the alleged principal.

5. Estoppel § 5—

An estoppel exists where a person is induced by words, conduct, or representation to act to his prejudice.

6. Husband and Wife § 13a (3): Principal and Agent § 7d—

Where a contractor, with knowledge that the several tracts of land are held by the entireties, contracts and deals over a period of years solely with the husband in installing heating equipment in houses erected on the several lots, and the husband does not act or profess to act as agent for the wife, and the wife does not by words or conduct represent or permit it to be represented that the husband is acting as her agent, the contractor may not hold the wife liable on the contract by ratification or estoppel.

7. Husband and Wife § 16—

An estate by entireties cannot be aliened, encumbered, nor a lien acquired upon it without the assent of both husband and wife; nor would a judgment against either be a lien upon the property.

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

A lien for labor and material arises out of the relationship of debtor and creditor created by contract, and it is for the debt that the lien is created by statute.

9. Same—

Mere knowledge by the owner that work is being done or material furnished does not enable the person furnishing the labor or material to obtain a lien.

10. Same—

Where a contractor contracts solely with the husband for material furnished in the erection of a house held by the husband and wife by entireties, the contractor may not enforce a lien upon the realty unless the wife is bound by the contract through agency, ratification or estoppel.

APPEAL by plaintiff from *Fountain, Special Judge,* March Civil Term 1954 of WAKE.

Action to recover contract price for the installation of a warm air-type heating system complete in a house on the property described in the Complaint, and to enforce thereon a laborers' and materialmen's lien.

The defendants Charles B. Douglass and Olive J. Douglass, his wife, owned this property by the entireties. Charles B. Douglass was engaged in the business of building and selling houses. About 11 March 1952 plaintiff entered into a written contract with Charles B. Douglass to install a warm air-type heating system complete in a house on the property described in the Complaint for an agreed price of $917.00. Plaintiff began this work on 17 April 1952, and completed it on 11 July 1952. When the work was completed, Charles B. Douglass inspected it, and said that it was satisfactory. Plaintiff has made demands for payment of said work upon Charles B. Douglass, but he has paid nothing.

Benjamin F. Carter testified on direct examination he was manager of plaintiff, and it installed 27 furnaces for Charles B. Douglass from 19 July 1951 to 12 March 1952, and that all the negotiations were with Charles B. Douglass alone. Carter further said: "I did not have any negotiations on these contracts and furnace jobs with Mrs. Douglass: in fact I have never met Mrs. Douglass." On cross-examination of Carter he testified: "We dealt with Charles B. Douglass, contractor, and all the checks we received for the jobs were from Mr. Charles B. Douglass. I knew that the property was held by the entireties, . . . In all our dealings with Mr. Douglass, contractor, we never have entered into any agreement with Mrs. Douglass whatsoever, and did not know Mrs. Douglass."

On 30 April 1952 plaintiff sent a bill to Charles B. Douglass for labor and material furnished prior to that date; and on 10 June 1952 billed Charles B. Douglass for a completed job though it was only substantially completed then, because he was getting ready to sell the house.

The only other witness for plaintiff was J. W. Bunn, Jr., who testified plaintiff made a written contract with Charles B. Douglass for the work in the instant case, and the contract was signed by plaintiff and Charles B. Douglass.

From 4 February 1951 to 4 March 1952 thirty-five conveyances of real estate were made to Charles B. Douglass and wife, and no conveyances to either individually. From 8 March 1951 to 18 June 1952 Charles B. Douglass and wife executed 72 conveyances.

On 18 June 1952 Charles B. Douglass and wife conveyed by deed the house and lot described in the complaint to Douglas A. Johnson and wife, Lottie M. Johnson. On 16 July 1952 Douglas A. Johnson and wife obtained a loan on said property from the Home Security Life Insurance Company, and gave a note secured by a deed of trust therefor to Durham Bank & Trust Company as trustee.

On 6 December 1952 plaintiff filed a notice of a claim of laborers' and materialmen's lien on the said house and lot in the Office of the Clerk of the Superior Court of Wake County. This action was instituted 11 February 1953.

At the close of plaintiff's evidence motions for judgment of nonsuit by the defendants Olive J. Douglass, Douglas A. Johnson and wife, Lottie M. Johnson, Durham Bank & Trust Company, Trustee, and Home Security Life Insurance Company were sustained. A similar motion was made by Charles B. Douglass, and was overruled.

The jury found that Charles B. Douglass was indebted to the plaintiff in the sum of $917.00. Judgment was entered that plaintiff have and recover of Charles B. Douglass $917.00 with interest; that Charles B. Douglass be taxed with the costs; that plaintiff recover nothing of the other defendants; and that the property described in the Complaint is not subject to notice of lien filed in the Office of the Clerk of the Superior Court of Wake County.

Plaintiff excepted and appealed as to the allowance of the motions for judgments of nonsuit, and as to the judgment signed by the court.

Bunn & Bunn for Plaintiff, Appellant.

Howard E. Manning and Charles L. Fulton for Defendant Olive J. Douglass, Appellee.

Poyner, Geraghty & Hartsfield and James R. Trotter for Defendants Douglas A. Johnson, Lottie M. Johnson, Durham Bank & Trust Company, Trustee, and Home Security Life Insurance Company, Appellees.

PARKER, J. Plaintiff alleged in its Complaint that "Charles B. Douglass acting for himself and as agent for his wife, Olive J. Douglass, entered into an entire and indivisible contract with plaintiff" to install a warm air-type heating system complete in a house on the lot described in the Complaint. The plaintiff contends such an agency can be implied from the facts in evidence.

All the defendants in their answers denied that Charles B. Douglass acted as agent for his wife. His wife in her answer alleged as a defense that she did not know plaintiff, had no dealings with it, had no knowledge that it placed any materials, or did any work on the property described in the Complaint.

"A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven." *Pitt v. Speight,* 222 N.C. 585, 24 S.E. 2d 350, and cases cited. No presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife. There must be proof of the agency. *Pitt v. Speight, supra;* 26 Am. Jur., Husband and Wife, Sec. 228; 41 C. J. S., Husband and Wife, Sec. 70.

Plaintiff offered the testimony of two witnesses: the defendant Charles B. Douglass offered no evidence. The evidence tended to show these facts: Charles B. Douglass alone signed the contract sued upon. Plaintiff rendered the bills to him only for the work done under this contract. The manager of plaintiff testified all the negotiations were with Charles B. Douglass, that he had never met Mrs. Douglass. On cross-examination he said we dealt with Charles B. Douglass; all the checks we received for the jobs were from him; in all our dealings with him we never have entered into any agreement with Mrs. Douglass, and did not know Mrs. Douglass. The plaintiff has allegation that Charles B. Douglass was acting as agent for his wife, but there is a total failure of proof of such agency, or of facts from which it can be implied. Allegation without proof is insufficient. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14. Both must concur to establish a cause of action. *Billings v. Renegar, ante,* 17, 84 S.E. 2d 268; *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

The plaintiff further contends that Olive J. Douglass ratified the contract made by her husband and plaintiff in the present case; and if she did not ratify it, that she is estopped by her conduct and acts to deny that her husband had implied authority to act as her agent.

The substance of ratification as distinguished from estoppel is that ratification confirms conduct, and estoppel exists where one is induced to act to his prejudice. 2 C. J. S., Agency, Sec. 34(b).

"The doctrine is well settled that in order that an act or contract may be the subject of ratification by one other than the one who performed the act or entered into the contract, the latter must have, at the time of

performing the act or of entering into the contract, professed, represented, purported, assumed, or undertaken to be acting as agent for, or on behalf of, the one alleged to have subsequently ratified the act or contract." Anno. 124 A. L. R. 893 *et seq.*, where the cases are assembled.

In *Flowe v. Hartwick,* 167 N.C. 448 at p. 453, 83 S.E. 841, it is said: "It is well understood that in order to a valid ratification, when an unauthorized contract has been made for alleged principal, the agent must have contracted or professed to contract for a principal and the latter must signify his assent or his intent to ratify, either by words or by conduct." See also *Rawlings v. Neal,* 126 N.C. 271, 35 S.E. 597; *Jones v. Bank,* 214 N.C. 794, 1 S.E. 2d 135; 2 Am. Jur., Agency, Sec. 222.

All the evidence shows that not only in the instant case, but that in all the transactions of plaintiff with Charles B. Douglass, that plaintiff dealt with Charles B. Douglass alone. Charles B. Douglass in all these transactions, including the present one, did not act or profess to act for his wife. There is no evidence of ratification.

This Court said in *Barrow v. Barrow,* 220 N.C. 70, 16 S.E. 2d 460: "Where a person, by words or conduct, represents or permits it to be represented that another is his agent, he will be estopped to deny the agency as against third persons, who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency exists in fact." In the present case there is a total failure of evidence to bring the action within the principle of estoppel.

An estate by entireties cannot be aliened, encumbered, nor a lien acquired upon it without the assent of both husband and wife; nor would a judgment against either be a lien upon the property. *Winchester-Simmons Co. v. Cutler,* 199 N.C. 709, 155 S.E. 611; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; *Finch v. Cecil,* 170 N.C. 72, 86 S.E. 992; *Hood v. Mercer,* 150 N.C. 699, 64 S.E. 897; *West v. R. R.,* 140 N.C. 620, 53 S.E. 477; *Bruce v. Nicholson,* 109 N.C. 202, 13 S.E. 790; *Healey Ice Mach. Co. v. Green,* 181 F. 890 (opinion by *Connor, J.,* formerly a member of this Court), affirmed 191 F. 1004, 4th C. C. A.

A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist. *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324. In that case it is said: "Mere knowledge that work is being done or material furnished does not enable the person furnishing the labor or material to obtain a lien."

The debt to plaintiff was the debt of Charles B. Douglass alone. The plaintiff with knowledge that the property in this case was owned by Charles B. Douglass and wife, Olive J. Douglass, by the entireties contracted with Charles B. Douglass alone. It must abide by the written contract it made.

The judgment below is
Affirmed.

STATE v. REEVES GATLIN.

(Filed 24 November, 1954.)

1. Criminal Law § 54b—

A verdict is the unanimous decision made by the jury and reported to the court.

2. Same—

A verdict is a substantial right.

3. Criminal Law § 54e—

Before the verdict is complete, it must be accepted by the court, and when the jury returns an informal, repugnant, or insensible verdict or one that is not responsive to the issues, the court may give additional instructions, direct the jury to reconsider and bring in a proper verdict, but in doing so, the court must act with great caution so as not even to suggest what their verdict should be.

4. Same: Automobiles § 28g—

In this prosecution for manslaughter, each defendant contended that the other was driving the automobile involved in the fatal accident. The jury returned a verdict that one defendant was not guilty of manslaughter and that the other defendant was "guilty of driving." The court immediately inquired "and guilty of manslaughter?". The jury replied, "yes." *Held:* "Guilty of driving" is no crime and the verdict is not responsive to the charge, and while the court had discretionary power to give additional instructions and have the jury redeliberate, the court was without authority to suggest to the jury what their verdict should be, and a new trial is ordered.

APPEAL by defendant from *Williams, J.*, at April Term, 1954, of CRAVEN.

Criminal prosecution upon a true bill of indictment charging defendants with manslaughter, that is, that Wayne Anderson and Reeves Gatlin, on 27 February, 1953, at and in Craven County, "did unlawfully, willfully and feloniously kill and slay one Doris Franks, contrary to the statute," etc.

Each defendant tendered a plea of not guilty to manslaughter.

The theory of the trial in Superior Court, as revealed by the evidence offered, was that the death of the child Doris Franks was proximately caused by the reckless operation of a Ford truck upon a public highway near Vanceboro, N. C.; that the truck was in charge of defendant Reeves Gatlin, and was occupied by him and defendant Wayne Anderson and

one Earl Jones; that all three of them were under the influence of intoxicating liquor; and that the truck was being driven by defendant Gatlin, or by defendant Anderson, with the consent and approval of defendant Gatlin and with knowledge of Anderson's intoxicated condition. And the evidence tends to show that Gatlin contended that Anderson was driving the truck, and that Anderson contended that Gatlin was driving it.

The case was presented to the jury upon the evidence offered by the State, and by the defendants, under the charge of the court. And the transcript of the record discloses that the jurors "for their verdict say that the defendant Wayne Anderson is not guilty of manslaughter, and that the defendant Reeves Gatlin is guilty of driving." (By the court:) "And guilty of manslaughter?" (The jury replied:) "Yes."

On the other hand, the case on appeal states: "The jury returned to the courtroom and the following colloquy took place: The defendant Wayne Anderson is not guilty of manslaughter and that the defendant Reeves Gatlin is guilty of driving. Without further statement by the jury the court directed this inquiry to them, "And guilty of manslaughter?" To which the juror replied, "Yes." To the foregoing the defendant objects and excepts. Exception No. XLIX.

Judgment: Let the defendant be confined in the State Prison at Raleigh for not less than ten (10) nor more than fifteen (15) years.

Defendant Reeves Gatlin appeals therefrom to Supreme Court and assigns error.

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

Ward & Tucker for defendant, appellant.

WINBORNE, J. While appellant brings to this Court, and discusses in brief filed here, many assignments of error, based upon exceptions appearing in the case on appeal, the one focused on exception to the verdict is well taken, and sufficient to upset the judgment from which the appeal is taken, and to require a *venire de novo*. *S. v. Lassiter,* 208 N.C. 251, 179 S.E. 891; *S. v. Cannon,* 218 N.C. 466, 11 S.E. 2d 301; *S. v. Hill,* 224 N.C. 782, 32 S.E. 2d 268; *S. v. Yow,* 227 N.C. 585, 42 S.E. 2d 661; *S. v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9.

"A verdict is the unanimous decision made by the jury and reported to the court," so declared this Court in opinion by *Walker, J.,* in *Smith v. Paul,* 133 N.C. 66, 45 S.E. 348, quoting from *James v. State,* 55 Miss. 57. See also *Sitterson v. Sitterson,* 191 N.C. 319, 131 S.E. 641.

And a verdict is a substantial right. *Wood v. R. R.,* 131 N.C. 48, 42 S.E. 462; *Sitterson v. Sitterson, supra; S. v. Perry,* 225 N.C. 174, 33 S.E. 2d 869.

Moreover, this Court in *S. v. Godwin,* 138 N.C. 582, 50 S.E. 277, in opinion by *Brown, J.,* epitomizing previous decisions of this Court, beginning with *S. v. Arrington,* 7 N.C. 571, declared: "Before a verdict returned into open court by a jury is complete, it must be accepted by the court for record. It is the duty of the judge to look after the form and substance of a verdict so as to prevent a doubtful or insufficient finding from passing into the records of the court. For that purpose the court can, at any time while the jury are before it or under its control, see that the jury amend their verdict in form so as to meet the requirements of the law. When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a proper verdict, *i.e.,* one in proper form. But it is especially incumbent upon the judge not even to suggest the alteration of a verdict in substance, and in such matters he should act with great caution." See also *S. v. McKay,* 150 N.C. 813, 63 S.E. 1059; *S. v. Parker,* 152 N.C. 790, 67 S.E. 35; *S. v. Bagley,* 158 N.C. 608, 73 S.E. 995; *Allen v. Yarborough,* 201 N.C. 568, 160 S.E. 833; *S. v. Noland,* 204 N.C. 329, 168 S.E. 412; *Baird v. Ball,* 204 N.C. 469, 168 S.E. 667; *S. v. Lassiter, supra; Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7; *S. v. Perry, supra; Edwards v. Motor Co.,* 235 N.C. 269, 69 S.E. 2d 550.

Indeed, in *Edwards v. Motor Co., supra, Johnson, J.,* writing for the Court, said: "When the findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again and bring in a proper verdict, but he may not tell them what their verdict shall be," citing *Baird v. Ball, supra.*

In the light of these principles we have no hesitancy in holding that the verdict "Guilty of driving" is no crime and is not responsive to the charge in the indictment. Hence the trial judge had the discretionary power to give further instructions to the jury and order that they retire and give further consideration to the matter, and bring in a proper verdict. But the judge was without authority to suggest to the jury what their verdict should be.

The Attorney-General, in his brief, cites and relies upon these cases: *S. v. Lucas,* 124 N.C. 825, 32 S.E. 962; *S. v. Walker,* 170 N.C. 716, 86 S.E. 1055; *S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Wilson,* 218 N.C. 556, 11 S.E. 2d 567; *S. v. Sears,* 235 N.C. 623, 70 S.E. 2d 907, as authorities supporting the validity of the manner in which the verdict was received in the instant case. However, careful consideration of the factual situations in these cases leads to the conclusion that they are not out of harmony with the principles hereinabove set forth. But if they were, this Court would not be inclined to follow them, and deviate from the salutary principles,—long safeguarded in the pages of our decisions.

For reasons stated the judgment below is stricken out. A trial anew is ordered as to appellant.

Venire de novo.

STATE v. ALFORD LINDOR SCOTT.

(Filed 24 November, 1954.)

1. Indictment § 9—

The allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect the defendant against a subsequent prosecution for the same offense.

2. Indictment § 13—

While a motion to quash is the more appropriate method of raising the question whether the bill of indictment charges the commission of any criminal offense, motion in arrest of judgment may be used to the same end.

3. Arrest § 3—

An indictment charging that defendant did unlawfully "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office . . ." is insufficient to charge the offense of resisting arrest. G.S. 14-223.

APPEAL by defendant from *Stevens, J.*, June Term 1954, WAKE. Reversed.

Criminal prosecution under two bills of indictment in which it is charged that defendant did unlawfully (1) "operate an automobile upon the public highways of Wake County while then and there being under the influence of intoxicating liquors . . ." and (2) "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office . . ."

In the court below the jury returned a verdict of not guilty under the first bill of indictment and a verdict of guilty under the second bill charging resisting an officer in violation of G.S. 14-223. Defendant in apt time demurred to the evidence under G.S. 15-173. After verdict he moved in arrest of judgment, which motion was denied. The court pronounced judgment, and defendant excepted and appealed.

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

Pittman & Staton and Edwin B. Hatch, Jr., for defendant appellant.

BARNHILL, C. J. The bill of indictment fails to meet the test set forth in *S. v. Sumner,* 232 N.C. 386, 61 S.E. 2d 84, and other decisions of like

import. The allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect the defendant against a subsequent prosecution for the same offense. This the bill of indictment appearing in this record fails to do. *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663.

While a motion to quash is the most appropriate method of raising the question whether the bill of indictment charges the commission of any criminal offense, motion in arrest of judgment may be used to the same end. *S. v. Cochran, supra.*

S. v. Raynor, 235 N.C. 184, 69 S.E. 2d 155, and *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140, are directly in point. What is said in the opinions in those cases is controlling here.

The defendant is entitled to his discharge. To that end the judgment entered in the court below is arrested.

Reversed.

IN THE MATTER OF: WOODROW W. HARRIS.

(Filed 24 November, 1954.)

Insane Persons § 17—

A person committed to a State mental institution under G.S. 122, Art. 3, may not invoke the provisions of G.S. 35-4 for a determination of the restoration of sanity by a jury trial as a condition precedent to his release under G.S. 122-46.1, the proper remedy being by *habeas corpus*, since the recovery from a mental disease after commitment would be an event taking place after commitment within the meaning of G.S. 17-33 (2), entitling an inmate to discharge under G.S. 17-32.

APPEAL from *Hubbard, Special Judge,* at September, 1954, Civil Term of WAKE.

Lunacy proceeding under G.S. 35-4.

The petitioner is an inmate of The State Hospital at Raleigh. He was committed from Granville County in 1952 under the provisions of Article 3, Chapter 122, of the General Statutes of North Carolina. On 7 July, 1954, he filed petition with the Clerk of the Superior Court of Wake County alleging he "has become and now is of sound mind and entirely competent and capable of managing his own affairs," and prayed the court to summon a jury of six freeholders to inquire into his sanity pursuant to the provisions of G.S. 35-4.

The Clerk denied the petition for want of jurisdiction, and on appeal to the Superior Court judgment was entered affirming the ruling of the Clerk. From the judgment so entered, the petitioner appeals.

Blanchard & Jordan for petitioner.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

JOHNSON, J. As suggested in the petitioner's brief, there appear to be at least two ways for a mental patient to gain dismissal from a State hospital: "(1) achieving competency or soundness of mind as described in G.S. 122-46.1 and (2) release by the Superintendent under G.S. 122-67."

G.S. 122-46.1 provides in part: ". . . Any person who has been committed to any State hospital as mentally disordered as provided by law shall be and remain a charge of such State hospital until he has been discharged from said hospital *or declared competent as otherwise provided by law.*" (Italics added.)

The petitioner insists that a lunacy proceeding by jury trial under G.S. 35-4 is permissible procedure by which he may be "declared competent as otherwise provided by law" as a condition precedent to release within the meaning of G.S. 122-46.1.

Thus, the instant appeal poses this question: May a person committed to a State mental institution under Article 3, Chapter 122, of the General Statutes, invoke the provisions of G.S. 35-4 for restoration of sanity by jury trial? The court below answered in the negative, and we approve.

It would seem that the petitioner's remedy is by *habeas corpus*. And this is so notwithstanding G.S. 17-4 (2) which provides that the application to prosecute the writ shall be denied "Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree." See also G.S. 17-34 (2). It may be doubted that these sections are applicable to *ex parte* commitments by clerks of the Superior Court under the provisions of Article 3, Chapter 122, of the General Statutes. A proceeding under this Article "seems to be neither a civil action nor a special proceeding." *In re Cook*, 218 N.C. 384, 11 S.E. 2d 142.

G.S. 17-32 provides: "The court or judge before whom the party is brought on a writ of *habeas corpus* shall, immediately after the return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same has been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, *or that the party imprisoned is entitled to his discharge,* the court or judge shall proceed, in a summary way, to hear the allegations and proofs on

both sides, and to do what to justice appertains in delivering, bailing or remanding such party." (Italics added.)

G.S. 17-33 (2) provides that a person restrained of his liberty may be discharged on return of the writ of *habeas corpus* "Where, though the original imprisonment was lawful, yet by some act, omission or *event, which has taken place afterwards,* the party has become entitled to be discharged." (Italics added.) The recovery from a mental disease after commitment to an institution would seem to be an "event which has taken place afterwards," within the meaning of G.S. 17-33 (2), entitling an inmate to discharge under G.S. 17-32.

The statement *contra* in *In re Chase,* 193 N.C. 450, 137 S.E. 305, may be treated as *dictum* rather than decision.

Affirmed.

STATE v. CLYDE RAMSEY.

(Filed 24 November, 1954.)

Larceny §§ 5, 8—

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as an evidential fact along with other facts in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt, and instruction that such presumption is not conclusive but may be overcome or rebutted by showing that the party in possession did not in fact steal or carry away the goods, is prejudicial error as placing, in effect, the burden upon defendant to rebut the presumption of his guilt.

APPEAL by defendant from *Whitmire, Special Judge,* and a jury, at 12 April, 1954, Extra Criminal Term of MECKLENBURG.

Criminal prosecution tried upon a two-count bill of indictment charging the defendant with (1) breaking and entering a building with intent to commit larceny therein, and (2) larceny of property of the value of more than $100. There was a verdict of guilty as charged in the bill of indictment, and from judgment sentencing the defendant to the State's Prison for a term of not less than seven nor more than ten years, he appeals.

Attorney-General McMullan, Assistant Attorney-General Love, and William P. Mayo and Harvey W. Marcus, Members of Staff, for the State.

Amon M. Butler and Thomas G. Lane, Jr., for the defendant, appellant.

JOHNSON, J. The defendant's chief assignment of error relates to the charge of the court on recent possession of stolen property. The challenged portion of the charge is as follows:

"Now, another rule of law that the Court calls your attention to is this: When goods are stolen, one found in possession thereof so soon thereafter that the defendant could not have reasonably got possession unless he stole them himself, the law presumes that he was the thief, and if the theft occurred in a house or building that had been broken into or unlawfully entered, then the law likewise presumes that the defendant was the one who broke and entered said house or building with the intent to commit a felony or other infamous crime therein.

"Now, that, gentlemen, is presumption of fact but not of law. It is a presumption that is weak or strong, depending upon the time between the taking and the finding in someone's possession. It is not a conclusive presumption, but is a presumption that may be overcome or may be rebutted by showing that the party in possession did not, in fact, steal or carry away the goods."

This instruction, like the one held erroneous in *S. v. Holbrook,* 223 N.C. 622 (625), 27 S.E. 2d 725 (727), is "open to interpretation that the burden was on the defendant to rebut the presumption of his guilt, whereas the presumption arising from the recent possession of stolen property 'is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' *S. v. Baker, supra* (213 N.C. 524, 196 S.E. 829)."

The doctrine of recent possession and the guiding principles for its application are explained with care and preciseness by *Chief Justice Stacy* in *S. v. Holbrook, supra,* and in *S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700. See also *S. v. Baker, supra.*

We conclude that the challenged instruction weighed too heavily against the defendant.

New trial.

STATE v. ROBERT LEE HADDOCK.

(Filed 24 November, 1954.)

Criminal Law § 62f—

Where it appears that the court revoked probation under a suspended sentence in a particular case without a hearing with respect to any violation by defendant of the terms and conditions of that judgment, the cause must be remanded.

STATE *v.* HADDOCK.

CERTIORARI to review the order of *Parker, J.,* in *habeas corpus* upon petition of Robert Lee Haddock, from PITT.

This cause is here upon a *writ of certiorari* issued by this Court under Rule 34 at the instance of Robert Lee Haddock, to review the judgment below dismissing the writ of *habeas corpus* and remanding petitioner to custody under a former judgment of the Superior Court.

The petitioner was tried at the August Term 1952 of Pitt Superior Court upon a warrant charging him with assault upon his wife, and was sentenced by the court, Honorable W. C. Harris, Judge Presiding, to eighteen months in jail. The judgment was suspended and he was placed on probation for a term of three years upon the usual conditions applicable to such cases.

At the September Term 1953 of the Superior Court of Pitt County, the petitioner entered a plea of guilty upon a warrant charging him with nonsupport, before his Honor J. Paul Frizzelle, Judge Presiding. He was sentenced by Judge Frizzelle to twelve months in jail. The sentence was suspended upon condition that the defendant pay into the office of the Clerk of the Superior Court the sum of $20.00 per week for the support of his wife and children.

The petitioner alleges in his petition for *writ of certiorari* that he complied with the judgment of Judge Frizzelle until such time as he returned to his home and resumed marital relations with his wife.

He further alleges that at the January Term 1954 of the Superior Court of Pitt County, he was brought into court by the probation officer to show cause why the order of probation entered at the August Term 1952, should not be revoked; that the Presiding Judge inquired of the defendant if he had any money, and, upon a negative response, the court told the defendant to go out and get $100.00 and have it in court by Wednesday of that term; thereupon, the defendant left the court to procure the said amount, and being unable to do so did not return before the adjournment of the court for that term, but did secure and give $25.00 to his wife, being all the money he could get.

Upon the failure of the petitioner to return to the court on Wednesday of said term, the court on Thursday, 21 January, 1954, without further hearing, entered an order to the effect that the defendant had violated the conditions of the probation judgment in that he had willfully failed to comply with the judgment imposed by Judge Frizzelle and revoked the order of probation contained in the judgment entered by Judge Harris at the August Term 1952, and directed that the eighteen months' sentence imposed in said judgment be put into effect.

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

Albion Dunn for petitioner.

PER CURIAM. The record before us seems to justify the conclusion that no hearing was held in the court below with respect to any violation of the terms and conditions of the judgment entered at the August Term 1952 of the Superior Court of Pitt County, but that the inquiry was addressed to the petitioner's noncompliance with the judgment entered by Judge Frizzelle at the September Term 1953.

We have concluded that in view of the state of the record before us, the ends of justice require the setting aside of the order entered at the January Term 1954 of the Superior Court of Pitt County, and that this cause be remanded to the Superior Court of said county for such further orders as the facts may warrant, upon another hearing, and it is so ordered.

Remanded.

T. B. RHEINHARDT AND GLENN HEMPHILL, ON BEHALF OF THEMSELVES AND SUCH OTHER CITIZENS OF GASTON COUNTY AS MAY CARE TO JOIN, v. W. HARRELSON YANCEY, MAYOR, AND ED C. ADAMS, R. A. FERGUSON, ED COFFEY, NATHANIEL BARGER, MARSHALL T. RAUCH AND A. D. DAVIS, MEMBERS OF THE CITY COUNCIL OF THE CITY OF GASTONIA, NORTH CAROLINA.

(Filed 1 December, 1954.)

1. Municipal Corporations § 3—

Where, at a meeting of the governing body of a municipality to consider the question of annexing adjacent territory, a petition, requesting a referendum, signed by more than 15% of the qualified voters resident in the area proposed to be annexed, is filed, there can be no annexation of the area unless and until a majority of the qualified voters therein vote in favor thereof in an election called and conducted as prescribed by statute, and in the absence of such election any attempted annexation by ordinance or otherwise would be void. G.S. 160-446. G.S. 160-448. G.S. 160-449.

2. Injunctions § 4g—

Ordinarily, equity has no jurisdiction to interfere with the enacting of an ordinance by the governing body of a municipality in the exercise of powers that are legislative in character.

3. Same—

Even when it appears that a proposed ordinance would be void or unconstitutional, equity will not enjoin the passage of the ordinance unless it appears that irreparable injury will result to plaintiff from its mere passage. If plaintiffs would be injured by the enforcement of such ordinance, the remedy is to enjoin such enforcement, in which action the municipality would be a necessary party.

4. Same: Municipal Corporations § 3—

This action was instituted to restrain the governing body of a municipality from passing an ordinance annexing certain territory without first

holding an election as required by G.S. 160-446. *Held:* Demurrer to the complaint should have been sustained, since equity will not enjoin the passage of the ordinance even though it would be void. If the municipality should undertake or threaten action under such ordinance which would cause irreparable injury to plaintiffs, they would not be without adequate remedy.

5. Injunctions § 8—

Where, in an action instituted solely for the purpose of obtaining an injunction, demurrer to the complaint is sustained, the temporary order issued in the cause must be dissolved.

APPEAL by defendants from *Armstrong, Presiding Judge* of the Fourteenth Judicial District, heard 19 August, 1954, in Charlotte, N. C., from GASTON.

Plaintiffs seek to restrain defendants from passing ordinance annexing to the City of Gastonia the territory described in Exhibit B of the complaint without first holding an election as required by the provisions of G.S. 160-446.

Upon the verified complaint, treated as an affidavit, Rudisill, J., signed an order restraining the defendants, their agents, attorneys and representatives, until further orders of the court, from proceeding "with the passing of any ordinance annexing the territory described in EXHIBIT B attached hereto, or any part of same to the corporate territory or to the municipal territory of the City of Gastonia, and that the said defendants are hereby forbidden to do anything further toward the annexing of said territory described in said petition and in EXHIBIT B attached hereto until further orders of this Court"; and at the time and place designated the cause came on for hearing before Armstrong, J., on return of the order to show cause "why this injunction and restraining order should not be continued to the hearing of this cause in the Superior Court at term time." The defendants then filed a "Special Appearance and Motion to Vacate Injunction," which was denied. The defendants also filed a demurrer, the ground assigned being that the complaint fails to state facts sufficient to constitute a cause of action, which was overruled. The defendants, in apt time, excepted to each of these rulings.

The "Special Appearance and Motion to Vacate Injunction" is based on a contention that the restraining order was signed before the commencement of action by issuance of summons in accordance with legal requirements; but, in view of the conclusion reached, it is unnecessary to review the facts relevant to this phase of the appeal.

The complaint, in substance, alleges:

1. The named plaintiffs are residents, qualified voters and property owners in the area of Gaston County just outside the corporate limits of

Gastonia described in Exhibit B; and the defendants are the Mayor and members of the City Council of Gastonia.

2. In an area adjacent to Gastonia, described in Exhibit A of the complaint, an election was held 2 February, 1954, pursuant to G.S. 160-445 *et seq.*, in which a majority of the participating qualified voters in the area cast their ballots in opposition to the proposed annexation.

3. Thereafter, in June, 1954, the defendants, acting as the City Council of Gastonia, proposed that the area adjacent to Gastonia described in Exhibit B be annexed, "which substantially includes the territory described in . . . Exhibit A," and caused notice thereof to be published.

4. "Pursuant to the notice," the City Council held a meeting on 20 July, 1954, at which a petition was filed signed by more than 15% (in fact, by more than 50%) of the qualified voters resident in the area described in Exhibit B requesting a referendum on the question.

5. No action was taken by the City Council at its meeting on 20 July, 1954, but plaintiffs "are informed and believe that on Tuesday night of August 3, 1954, the said City Council, including the defendants herein named, proposes to meet, and at said meeting proposes to annex the territory described in EXHIBIT B, attached hereto, without first holding an election as required by the provisions of G.S. 160-446."

6. "The annexation of the territory therein proposed is unjust, unreasonable, oppressive, dictatorial and arbitrary, and would be for the purpose of unnecessarily subjecting the residents of said proposed area to taxation, not for the extension of the privileges of a City resident to the residents of that area, but solely for the purpose of justifying a bond issue to serve the interests of those residents within the territory of the City of Gastonia as the same now exists."

The prayer for relief is "that an order issue prohibiting and enjoining the City of Gastonia, and specifically the defendants named herein as members of the City Council of the City of Gastonia, from passing any ordinance whereby the territory described in the attached EXHIBIT B shall be annexed without first holding an election in said territory as required by the provisions of G.S. 160-446, and for such other and further relief to which the plaintiffs may be entitled."

The complaint contains other allegations, diverging somewhat from the central theme, such as general allegations that the defendants, acting as such City Council, have been extravagant and wasteful in their management of the affairs of the municipality, and have failed to advertise for bids as required by G.S. 143-129 in connection with the letting of contracts for the installation of sewer lines and for street paving, on which account they find it necessary to issue bonds for additional improvements but are unable to do so except upon augmenting the present valuation of the taxable property by annexing new territory. Too, there is

the incongruous allegation that "the calling of a new election embracing substantially the same territory as that embraced by the proposal set out in EXHIBIT A attached hereto, so soon, is unreasonable, arbitrary, and is a waste of the taxpayers' money."

Defendants appeal from the judgment of the court overruling their demurrer.

O. F. Mason, Jr., O. A. Warren, and R. G. Cherry for plaintiffs, appellees.

L. B. Hollowell for defendants, appellants.

BOBBITT, J. In the exercise of its power to regulate the extension of the boundaries of a municipality, McQuillin on Municipal Corporations, 3rd Ed., Vol. 2, sec. 7.10 *et seq.*, the General Assembly in 1947 enacted "An Act to Provide for the Orderly Growth and Extension of Municipalities Within the State of North Carolina," ch. 725, 1947 Session Laws, which, now codified as G.S. 160-445 *et seq.*, bears directly upon the question presented for decision.

The procedure requires that the municipal governing body give public notice in manner prescribed, "thus notifying the owner or owners of the property located in such territory," that such governing body will meet to consider passage of an ordinance extending the corporate limits to include adjacent territory described by metes and bounds in such notice. If, at such meeting, a petition is filed with such governing body, bearing the signatures of 15% or more of the qualified voters resident in the area proposed to be annexed, requesting a referendum, "the governing body shall, before passing said ordinance, annexing the territory, submit the question as to whether said territory shall be annexed to a vote of the qualified voters of the area proposed to be annexed," G.S. 160-446. The procedure for the call and conduct of the election is prescribed. G.S. 160-448. The annexation becomes effective only if and when the majority of the qualified voters in the area proposed for annexation who vote in such election cast their ballots "For Extension." G.S. 160-449. There is no provision for any lapse of time between successive proposals for annexation or referenda. 25 N.C.L.R. 453-455.

In limine, we note that the municipality pays the costs of such election. G.S. 160-448. Thus, in the event the votes "For Extension" do not constitute a majority of the votes cast in such election, taxpayers within the present corporate limits bear the entire expense of such election. Taxpayers within the present corporate limits are not parties to this action. No question arises here as to their rights.

The statutory requirements relevant here are mandatory. Therefore, there can be no annexation of the area described in Exhibit B, under the

facts alleged, unless and until a majority of the qualified voters in the area proposed to be annexed cast their ballots "For Extension" in an election called and conducted as prescribed; and, in the absence thereof, any attempted annexation by ordinance or otherwise would be void. The gist of the complaint is that the defendants propose to pass at the meeting to be held 3 August, 1954, an annexation statute, which will be in disregard and in violation of the statutory mandate and therefore void.

The question for decision is this: Accepting as true the allegations of the complaint, are the plaintiffs entitled to an order restraining the defendants, as members of the City Council of Gastonia, from passing an ordinance, which, under the facts alleged, would be void? While the precise question seems to be one of first impression in this jurisdiction, the application of recognized general principles to the facts of this case impels a negative answer.

Ordinarily, a court of equity, being vested with judicial, not legislative, powers, has no jurisdiction to interfere with the enactment of an ordinance by the governing body of a municipality in the exercise of powers that are legislative in character. And even when it appears that the proposed ordinance would transcend the legislative powers of the municipal governing body, and would be unconstitutional or otherwise void, a court of equity will intervene and grant injunctive relief only when it appears that irreparable injury will result to plaintiffs from the mere passage of the ordinance as distinguished from injury that may result from the carrying out or enforcement thereof. If the carrying out or enforcement of the ordinance, if and when passed, will cause the injury, it is such conduct on the part of the municipality and its agents that must be enjoined. 43 C.J.S., Injunctions sec. 118; 28 Am. Jur., Injunctions secs. 177 and 178; 14 R.C.L., Injunctions sec. 139; 19 R.C.L., Municipal Corporations sec. 204; 32 C.J., Injunctions sec. 412; Anno.: 140 A.L.R. 439 *et seq.*

Upon the facts alleged, we are unable to perceive how the mere passage of the ordinance, if it should take place as plaintiffs anticipate, would, of itself, cause irreparable injury to plaintiffs. Indeed, the plaintiffs do not so allege, nor do they allege that they have no adequate remedy at law. Irrespective of the availability of an adequate remedy at law, it would seem appropriate, upon the facts alleged, that a court of equity withhold its writ of injunction, "the right arm of a court of equity," until such time as the City of Gastonia, its officials, agents, employees, etc., act or threaten to act in an attempt to effectuate annexation under color of such void ordinance. Ordinarily, equity deals with conduct, actual or threatened, not with how the members of legislative bodies vote. In reaching the conclusion stated, we are mindful of the importance of keeping in proper relation and in careful balance the power and authority vested in

our distinct, coordinate departments of government, legislative, executive and judicial; for, whatever may be the merits of plaintiffs' cause, a contrary rule would open the door to suits to restrain the adoption of ordinances to such extent as to interfere seriously with the proper functioning of the legislative body. Too, a contrary rule, if carried to its logical conclusion, would warrant, if sufficient facts were alleged, judicial restraint of members of the General Assembly from the passage of legislation alleged to be in conflict with provisions of our organic law. This cannot be done.

The complaint, failing to allege that the *passage* of the void ordinance will cause irreparable injury or facts from which such irreparable injury may be implied, was insufficient to entitle the plaintiffs to the injunctive relief sought, even though it is alleged that the present purpose of the defendants, acting as the City Council of Gastonia, is to pass an ordinance beyond the scope of its legislative powers. Should such void ordinance be passed, and should the City of Gastonia, its officials, agents, employees, etc., undertake or threaten action thereunder such as would cause irreparable injury to plaintiffs, the plaintiffs will not be without adequate remedy. It would seem that plaintiffs' action is premature. *Greenville v. Highway Com.*, 196 N.C. 226, 145 S.E. 31; *Ponder v. Board of Elections,* 233 N.C. 707, 65 S.E. 2d 377.

Statutes providing for the annexation of adjacent territory vary greatly in the several states, McQuillin, op. cit., sec. 7.28, and decisions in other jurisdictions must be considered against the background of the particular statutes. Thus, under certain of these statutes, the annexation proceeding is initiated by a petition signed by a designated number of interested parties, followed by an election, etc., and thereafter, as the final step, the ordinance is adopted. This variance in statutory provisions may account in part for the conflict in other jurisdictions as to whether the validity of an annexation proceeding may be challenged in an action by citizens and taxpayers to obtain injunctive relief or whether challenge thereof can be made only by the state in *quo warranto* proceedings. McQuillin, op. cit., sec. 7.43.

The acts of the defendants, as members of the City Council, would have significance only to the extent they are deemed to be the acts of the City of Gastonia. Should the plaintiffs' apprehension as to the passage by defendants of a void ordinance prove well-founded, it would seem that the City of Gastonia would be a necessary party to any action wherein the relief sought is to restrain its officials, agents, employees, etc.

For the reasons stated, the judgment overruling the demurrer must be reversed. This necessitates reversal of the order denying defendants' motion to dissolve the temporary restraining order. *Temple v. Watson,* 227 N.C. 242, 41 S.E. 2d 738. It is so ordered.

Reversed.

RENA HARPER MOORE, ADMINISTRATRIX OF THE ESTATE OF JAMES OLIVER HARPER, v. NETA T. BEZALLA AND MICHAEL BEZALLA.

(Filed 1 December, 1954.)

1. Jury § 4—

In an action to recover for the negligent operation of an automobile covered by a liability policy in a mutual company, policyholders as of the time of trial could have a pecuniary interest in the verdict, but it is not made to appear that policyholders as of the date of the accident would be financially affected, and therefore, when the court excludes all policyholders from the jury list, it is not error for the court to refuse to permit plaintiff, in selecting the jury, to request that all prospective jurors who were policyholders at the date of the accident to excuse themselves.

2. Automobiles § 16—

It is the duty of a pedestrian on a highway to yield the right of way to vehicular traffic.

3. Same: Automobiles §§ 18c, 18h (3)—Evidence held to require submission of issue of contributory negligence of pedestrian in failing to yield right of way.

Defendants' evidence tending to show that shortly before the accident plaintiff's intestate was intoxicated, that he was walking on the hard surface 3 or 4 feet from the edge, that he was walking away from the sun and could have seen defendant's automobile from a distance of 500 to 700 feet, and that he was struck while on the hard surface by the automobile which was being driven toward the sun so that the driver was blinded by the rays of the sun breaking through shadows of the bare limbs of trees, *is held* to require the submission to the jury of the issue of intestate's contributory negligence in failing to exercise due care for his own safety and yield the right of way as required by statute.

4. Automobiles §§ 16, 18c, 18g (2)—

Where the question of intestate's intoxication at the time of the fatal accident is germane on the issue of contributory negligence, testimony that he was intoxicated some one and one-half hours prior to the accident, when considered with the other evidence of his intoxication almost up to the time of the accident, *is held* competent as having some bearing on his condition at the time of the accident, the weight of the evidence being for the jury.

5. Appeal and Error § 39b—

Appellant may not complain of the admission of evidence upon an issue answered by the jury in his favor.

6. Evidence § 19—

A party is entitled to introduce evidence of bad character of a witness who has testified for the opposing party for the purpose of impeaching the credibility of the witness.

7. Evidence § 26½—

Where a witness for plaintiff testifies as to previous statements made by a witness for defendants in conflict with such witness' testimony upon the

trial, the court has the discretionary authority to permit defendant to recall his witness and permit him to testify in explanation and contradiction of the testimony given by plaintiff's witness.

8. Automobiles § 16—

The violation by a pedestrian of G.S. 20-174 (a) is not negligence *per se*, but is evidence to be considered along with other evidence upon the question of such pedestrian's negligence.

9. Appeal and Error § 6c (6)—

Exceptions to the statement of the contentions of a party, not objected to and brought to the court's attention in apt time, are unavailing on appeal.

10. Negligence § 20—

An instruction to the effect that if the jury were satisfied by the greater weight of the evidence that plaintiff's intestate by his own negligence contributed to his death, it would then be the jury's duty to answer that issue in the affirmative, but if the jury were not so satisfied, it would be the jury's duty to answer it in the negative, *is held* without error.

APPEAL by plaintiff from *Hall, S. J.*, July Term, 1954, RANDOLPH.

This action was instituted on 11 February, 1954, for wrongful death. The plaintiff alleges in substance:

1. That she is the duly qualified and acting administratrix of the estate of James Oliver Harper, late of Randolph County, and that she and the defendants are residents of that county.

2. The defendants are husband and wife; that on 24 December, 1953, they owned and operated a Studebaker automobile as a family purpose car.

3. On 24 December, 1953, at about 4:30 p.m. the plaintiff's intestate was walking along the public highway near Seagrove.

4. The defendant Neta T. Bezalla, driving the Studebaker, her husband being in the car with her, operated the same at a dangerous and unlawful rate of speed in excess of sixty miles per hour, "on a dangerous, narrow, curvy country road, and that as she rounded the said curve, blinded by the sun, she hit plaintiff's intestate with the car she was operating in an insouciant, negligent, careless and unlawful manner," inflicting injuries resulting in his immediate death.

5. Defendant operated the car without keeping a proper lookout, heedlessly and with willful and wanton disregard of the rights and safety of others, and in a manner likely to endanger others.

6. That the negligent acts of the defendant Neta T. Bezalla proximately caused the death of plaintiff's intestate.

The defendants answered, denying all allegations of negligence, contending the defendant Neta T. Bezalla operated the car lawfully and prudently, but that she was driving directly toward the sun which was

shining through some trees, leaving alternately black and white spots on the dark surface of the road; that plaintiff's intestate wore dark clothes at the time; that she did not see him until the accident; that she was driving on her right side of the road at about 40, or not in excess of 45 miles per hour, and was keeping a proper lookout, etc. The defendants pleaded contributory negligence on the part of plaintiff's intestate in that he walked "into the public highway" between Seagrove and Troy in a drunken condition and was proceeding eastward along said highway until he suffered the accident; that the negligent acts which contributed to his injury were:

(a) He was proceeding along the public highway intoxicated to such an extent his mental and physical faculties were impaired.

(b) He failed to keep a proper lookout.

(c) He walked on the hard surface of a much traveled highway without holding himself in readiness to get out of the way of motor vehicles traveling along the highway.

(d) He did not yield the highway to the defendants.

(e) He did not travel on the extreme left side of the highway but followed an erratic course on the highway and on a portion thereof where the defendants had no reason to expect a pedestrian.

(f) He was not in helpless condition, could have gotten off the highway, and was negligent in failing to do so.

At the call of the case, the following was entered into the record:

"STATEMENT OF PROCEEDINGS

"Out of the presence of the jury it was admitted by counsel for defendants that the automobile of the defendant Michael Bezalla was covered by a liability insurance policy of the Farm Bureau Mutual Automobile Insurance Company, and it was admitted in said pleadings that said automobile was a family purpose doctrine. (*sic*) The defendants' attorney furnished the Court and the plaintiff's attorney with a list of all policyholders of the Farm Bureau Mutual Automobile Insurance Company on the jury list for the second week of the Superior Court of Randolph County, North Carolina, whereupon his Honor, Judge C. W. Hall, directed that none of the jurors on the list furnished by the attorney for the defendants be called on the jury for the trial of this case. There was no classification as to the types of insurance policies, liability or collision, submitted with the list of policyholders on the jury by the defendants' attorney. The plaintiff's attorney, out of the presence of the jury and before passing upon said jury, requested of the Court to ask the following questions: (1) If there is any member of the jury that is a policyholder, holding an automobile liability insurance policy with the Farm Bureau

Mutual Automobile Insurance Company, as of December 24, 1953, please excuse themselves.

"The defendants' attorney objected to the above and the Court sustained the objection, and plaintiff excepted to the ruling of the Court.

"EXCEPTION No. 1.

"The plaintiff's attorney offered to introduce evidence out of the presence of the jury that any policyholder of a Farm Bureau Mutual Automobile Insurance Company as of December 24, 1953, would have a financial interest in the verdict of the case. The Court declined to hear this evidence.

"The plaintiff excepted to the ruling of the Court in declining to hear this evidence.

"EXCEPTION No. 2.

"All of the above proceedings occurred out of the presence of the jury and plaintiff excepted to the impaneling of the jury.

"EXCEPTION No. 3."

Evidence was introduced tending to show the accident occurred about 4:30 p.m. on 24 December, 1953, on the Scott Road, a hard surface highway 18 feet wide. At the time and place of the accident the *feme* defendant was driving west toward the sun, which was shining through trees without leaves, but in such a way as to leave dark places on the road caused by the shadows of the trees; that the road was somewhat "curvy." The plaintiff's intestate was walking east. From the place of the accident a motorist should be able to see a pedestrian for 500 to 700 feet, and the pedestrian should be able to see an approaching automobile for a like distance. There was evidence that immediately before and at the time of the accident, the speed of the defendants' automobile was estimated to be from 40 to 45 miles per hour. There was evidence on the part of the plaintiff that one-half mile away, shortly before the accident, the car was making 60 miles per hour. There was no evidence that the car was at any time off the hard surface of the highway. After the accident the intestate's body was lying on the north side of the highway and near the hard surface. There was a dent in the right front fender of the defendants' automobile. At the time of the impact a bottle of whiskey broke and the whiskey spilled out on the windshield. Another bottle partially filled with whiskey was found near the body.

The defendant Neta T. Bezalla admitted she did not see the plaintiff's intestate prior to the time of the impact. She contended she was prevented from doing so by the sun and the shadows on the road, the dark color of the road surface, and the dark color of Harper's clothes.

There was evidence that beginning about 3:00 p.m. and continuing until approximately the time of the accident, Harper was under the influence of liquor. B. C. Bowman testified that he passed Harper, who was walk-

ing about three or four feet on the pavement; that he was traveling by automobile and going east and that he met the Bezalla car about 300 feet beyond the point where he had passed Harper. Witness testified that Harper was staggering. He also testified he had no difficulty in seeing Harper because he was driving away from the sun. Other evidence bearing on the issues was offered by the parties. Issues of negligence and contributory negligence were both answered "Yes" by the jury. From a judgment on the verdict the plaintiff appealed.

Ottway Burton for plaintiff, appellant.
H. M. Robbins for defendants, appellees.

HIGGINS, J. The first three exceptions and assignments of error relate to the refusal of the court to permit plaintiff's counsel to state to the jury on the *voir dire,* "If there is any member of the jury that is a policyholder, holding an automobile liability insurance policy with the Farm Bureau Mutual Automobile Insurance Company, as of December 24, 1953, please excuse themselves." The record discloses the defendants had such a policy on the Studebaker. The record also discloses: "The defendants' attorney furnished the court and plaintiff's attorney with a list of all policyholders of the Farm Bureau Mutual Automobile Insurance Company on the jury list for the second week of the Superior Court of Randolph County; whereupon his Honor, Judge C. W. Hall, directed that none of the jurors on the list furnished by the attorney for the defendants be called on the jury for the trial of this case." The record also discloses that *all* the policyholders in defendants' insurance carrier had been left off the panel by order of the judge. Plaintiff's attorney offered to introduce evidence out of the presence of the jury that a policyholder of Farm Bureau Mutual Automobile Insurance Company as of 24 December, 1953, would have a financial interest in the verdict in the case. This evidence the court declined to hear. The court had been careful to remove from the panel all policyholders as of the date of the trial. If a policyholder at the date of the accident was not a policyholder *at the date of the trial and judgment,* there is nothing in the record indicating he would have any financial interest in a company in which he no longer held a policy. The refusal to permit the inquiry of the jury and to hear the evidence with respect to policyholders as of 24 December, 1953, was proper and in accordance with the decisions of this Court. *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726. The plaintiff's request to the jurors to excuse themselves related to policyholders as of 24 December, 1953, and not to agents or employees of the insurance carrier. For the distinction, see *Fulcher v. Lumber Co.,* 191 N.C. 408, 132 S.E. 9.

The plaintiff objected to the submission of the issue charging contributory negligence on the part of plaintiff's intestate. There was evidence that the defendants' automobile at no time left the hard surface or main-traveled portion of the highway, or that the automobile was ever on the driver's wrong side. The defendants were traveling toward the sun, Mr. Harper away from it. Evidence indicated he could see the approach of defendants' automobile for a distance of 500 to 700 feet if he had been alert for his own safety or observing the rule required of pedestrians in such circumstances. There was evidence that plaintiff's intestate was three or four feet on the hard surface when the witness Bowman met defendants' car 300 feet from the scene of the accident. It was a legitimate inference that he never yielded the right of way as it was his duty to do. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598; *Tysinger v. Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246; *Miller v. Motor Freight Corp.*, 218 N.C. 464, 11 S.E. 2d 300. The evidence was sufficient to require the submission of the issue of contributory negligence.

J. D. Lucas, witness for the defendants, testified he saw Oliver Harper about three o'clock and again a few minutes later. The witness was then asked the following question by defense counsel: "What was his condition with reference to being sober or drunk?" The answer was, "He was intoxicated." The question and answer were objected to on the ground the time was too remote. There was other evidence of intoxication almost up to the time of the accident. Harper's condition as to intoxication at the time of the accident was material on the question of his contributory negligence. What his condition was less than an hour and a half prior to the accident had some bearing on his condition at the time of the accident. The weight of the evidence was for the jury. Plaintiff's exception to the admissibility of this evidence cannot be sustained.

Plaintiff's exceptions 6, 7, 8 and 9 relate to the evidence offered by the defendants that the plaintiff's witness Penn Farlow was of bad character. Penn Farlow had testified for the plaintiff that shortly before the accident he saw the Bezalla car and that it was being operated in his opinion at 60 miles per hour, and that the highway was 18 feet wide. This evidence on the part of Farlow related not to the question of contributory negligence on the part of Harper, but related to the negligence of the defendants. Since the issue on which the witness Farlow gave testimony was answered in favor of the plaintiff, the objection is unavailing. Witness Farlow had testified for the plaintiff that the defendants were driving 60 miles per hour, and it was proper for the defendants to present evidence of his bad character. *Morgan v. Coach Co.*, 228 N.C. 280, 45 S.E. 2d 339. The objection to this evidence cannot be sustained.

Colon Green, a witness for defendants, testified he saw Harper on the afternoon of 24 December, 1953, about an hour before he was killed, and

about a half-mile from the place where he was killed. He was walking in the middle of the road. He testified that he saw Mrs. Bezalla pass and she was traveling about 35 or 40 miles per hour. On cross-examination, he was asked if he had not talked to Tom Maness and he testified he didn't remember, he could have. He did not remember stating that Mrs. Bezalla was making 70 miles an hour. Tom Maness was called as a witness for plaintiff on rebuttal, saying, "The best I remember, he (Colon Green) told me that she (Mrs. Bezalla) was flying, making about 70 miles an hour. He came back in a few days, may have been the next day, and wanted to know what he had told me, and I told him the best I knew." After Maness testified, Green was recalled as a witness by the defendants and permitted to testify over plaintiff's objection. When recalled, Green admitted he had talked to Maness about the accident, telling him who was run over and who the driver was. He denied the other statements attributed to him by Maness. Plaintiff's exceptions 10, 11 and 12 relate to the court's permitting Green to be recalled as a witness and to reply to the testimony of the plaintiff's witness Maness. Whether a witness may be recalled is in the sound discretion of the trial judge. The evidence of Green in explanation and contradiction of the testimony given by Maness was clearly competent. These exceptions cannot be sustained.

In the charge, the judge read to the jury G.S. 20-174, subsections (a), (b), and (e), and followed the reading with this instruction: "I instruct you, gentlemen of the jury, that the violation of that section of the statute would not constitute negligence *per se,* but would be evidence to be considered along with other evidence of negligence." The foregoing is the basis of plaintiff's exception No. 13. The charge was in accordance with the decisions of this Court, and the exception cannot be sustained. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, and cases cited.

Exceptions 14, 15, 16 and 17 relate to the statement of contentions of the parties. The statements were unobjected to and not brought to the court's attention in apt time, and, therefore, are unavailing. *Blanton v. Dairy,* 238 N.C. 382, 77 S.E. 2d 922.

Exception No. 18 is to that portion of the charge as follows: "If you are satisfied by the greater weight of the evidence that the deceased, Mr. Harper, by his own negligence contributed to his death, as I have defined contributory negligence to you, it would then be your duty to answer that second issue, 'Yes;' but if you are not so satisfied, it would be your duty to answer it 'No.'" The judge fixed the *quantum* of proof and placed the burden thereof in accordance with the decisions of this Court.

The record discloses the case was carefully tried. The verdict of the jury was supported by competent evidence.

No error.

H. HAYWOOD ROBBINS, ADMINISTRATOR C.T.A. OF THE ESTATE OF W. L. NICHOLS, DECEASED; IRMA DAVIS NICHOLS; AND SARAH LEE NICHOLS POOLE v. THE CITY OF CHARLOTTE; THE CITY COUNCIL OF THE CITY OF CHARLOTTE; AND PHILIP L. VAN EVERY, MAYOR, CLAUDE L. ALBEA, HERBERT H. BAXTER, BASIL M. BOYD, HERMAN A. BROWN, STEVE W. DELLINGER, JAMES S. SMITH AND W. EVERETT WILKINSON, MEMBERS OF THE CITY COUNCIL OF THE CITY OF CHARLOTTE.

(Filed 1 December, 1954.)

1. Municipal Corporations § 37—

The side of a street opposite the intersection of such street by a "dead-end street" has no "corner" within the meaning of the proviso of G.S. 160-173, and therefore, the owner of the lot upon one corner of the intersection is not entitled as a matter of right to have the governing authorities of the municipality zone his property for business even though the opposite corner and the area opposite the intersection have been zoned for business.

2. Statutes § 5a—

Where the words used in a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or definitely indicated by the context.

3. Statutes § 5f—

The ordinary function of a proviso of a statute is to qualify the statute to which it is engrafted so as to exclude from its scope something which would otherwise be within its terms.

4. Same—

Where the effect of a proviso engrafted in a statute is to enlarge the scope of the statute so as to give the statute a mandatory operation of extended application upon the happening of the event designated in the proviso, the proviso should be held to include no case not clearly within its terms.

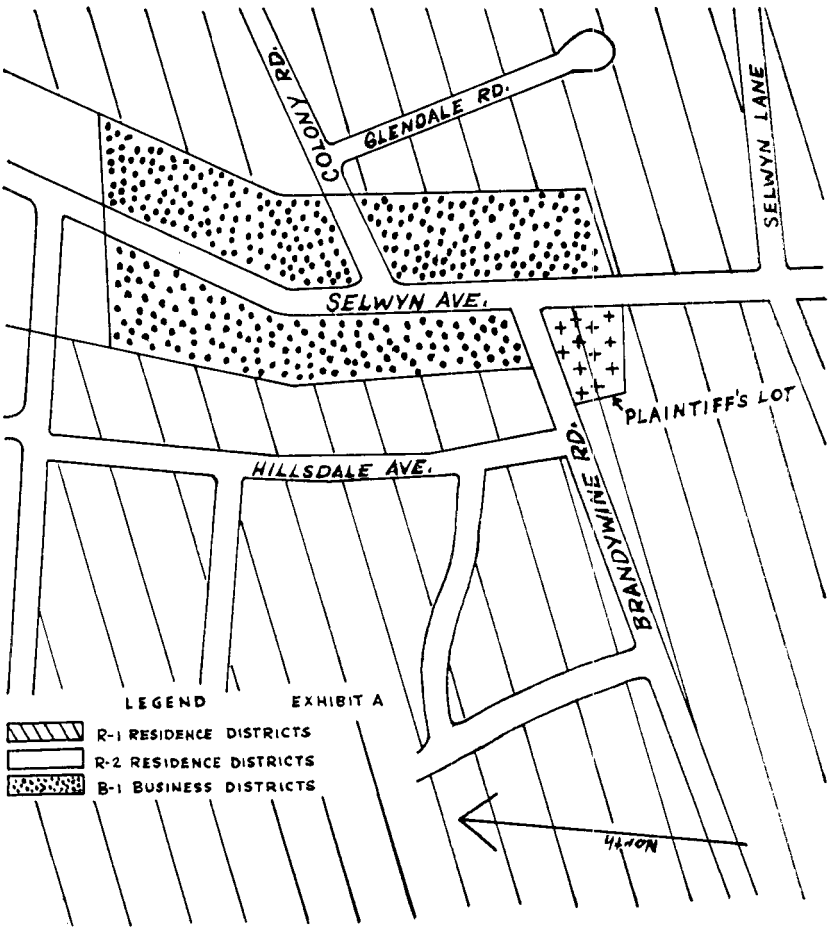
APPEAL by plaintiffs from *Patton, Special Judge,* at 10 May, 1954, Extra Civil Term of MECKLENBURG.

Civil action for writ of *mandamus* to have property in the City of Charlotte rezoned from "Residence-1" to "Business-1."

As shown on the accompanying map, Brandywine Road joins Selwyn Avenue but does not cross it. The dead-end junction thus formed is in the shape of a "T." The plaintiffs own the property at the southwest corner of the junction as shown on the map. Their property is in a "Residence-1" District under the zoning code of the City of Charlotte. Whereas the property directly across both Brandywine Road and Selwyn Avenue, including all that at the top of the "T," is zoned as "Business-1."

The plaintiffs, desiring to have their property rezoned as "Business-1," and having exhausted all their administrative remedies before the Board

of Adjustment and the City Council, instituted this action for writ of *mandamus* to compel the defendant to enact an ordinance rezoning their property as requested. The gravamen of the complaint is that since the property directly across both streets from that of the plaintiffs is now zoned as "Business-1," they are entitled as a matter of right, pursuant to the proviso of G.S. 160-173, to have their property rezoned as "Business-1." All material facts being admitted in the answer, the cause was heard below on the question of law presented by the pleadings, *i.e.*, whether the plaintiffs are entitled as a matter of right to have their property rezoned as requested. The question was resolved against the plaintiffs, and from judgment denying their petition for *mandamus*, they appeal.



H. Haywood Robbins, Harry C. Hewson, and Edwin B. Robbins for plaintiffs, appellants.

John D. Shaw for defendants, appellees.

JOHNSON, J. Simply stated, the proviso of G.S. 160-173 provides that when at any intersection of streets within a city or town the land at two or more "corners" is restricted to a designated use by municipal zoning regulation, it shall be the duty of the local governing body upon written application from the owner or owners of the property at the other corners of the intersection to rezone the "remaining . . . corners" in the same manner as the "other . . . corners for a distance not to exceed one hundred fifty feet from the property line of said intersecting additional corners." See *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880.

The single question presented by this appeal, then, is: Does the land fronting on Selwyn Avenue opposite its intersection with Brandywine Road, that is, the land along the top of the "T," constitute a corner or corners within the purview of the proviso of G.S. 160-173.

The court below answered in the negative, and this seems to be in accord with the clear meaning of the language of the proviso.

Webster's New International Dictionary (1951) defines "corner" as "The point or place where two converging lines, sides, or edges meet; an angle, either external or internal; specif.: . . . The place of intersection of two streets."

Century Dictionary, at page 1269, defines a "corner" as follows: ". . . 2. The space between two converging lines or surfaces; specifically, the space near their intersection; . . ." See also 9 Words and Phrases, Permanent Edition, p. 649; 18 C.J.S., p. 284.

"Intersection" is defined in 48 C.J.S., p. 115, as follows: "A place of crossing; the dividing line between two things; the place where two things intersect or cross; the point or line in which one line or surface cuts into another; the point where two lines or the lines in the two surfaces cross each other."

The east side of Selwyn Avenue along the top of the "T" at the dead end of Brandywine Road is a straight, unbroken line all the way from Colony Road to Selwyn Lane, with no converging side street lines to form a "corner" within the plain meaning of the proviso.

The appellants insist that in order to carry out the legislative intent "corners" as used in the proviso should be interpreted to mean the areas of land around the perimeter of a street intersection in the sense that there are three distinct areas around a "T" intersection and four around an ordinary 4-corner intersection. Hence, the appellants reason that the requirements of the proviso are met by uniform zoning of two-thirds of the areas around a "T" intersection.

However, no such interpretation of the proviso is permissible under application of the fundamental rules of statutory construction. It is elemental that the construction of statutory language in accordance with its common, ordinary meaning prevails when, as here, the words have not acquired a technical meaning and where a different meaning is not apparent or definitely indicated by the context. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *Mills Co. v. Shaw, Comr. of Revenue,* 235 N.C. 14, 68 S.E. 2d 816.

Moreover, to give to the proviso the construction urged by the appellants would lead to unreasonable or absurd results. For example: noting that the proviso provides for zoning "for a distance not to exceed one hundred fifty feet from the property line of said intersecting additional corners," let us assume a situation in which the two corners of the intersection of Brandywine Road south of Selwyn Avenue (the plaintiffs' corner and the corner directly across Brandywine from it) were zoned "Business-1" and the owner of the property at the top of the "T" should petition for like zoning, it is at once apparent that the proviso provides no formula by which any 150-foot segment could be located along the top of the "T" for the purpose of rezoning. Hence, it is manifest that the area along the top of the "T" at the dead-end intersection may not be treated as a corner within the meaning of the proviso in G.S. 160-173.

It is to be noted further that while ordinarily the function of a proviso is to limit, restrict, or qualify the statute to which it is engrafted so as to exclude from the scope of the statute something which otherwise would be within its terms, nevertheless, in the case at hand the nature of the proviso is to enlarge the scope of the statute (G.S. 160-173) by giving it a mandatory operation of extended application upon the happening of the event designated in the proviso. This being so, it is all the more manifest that the proviso should be held to include no case not clearly within its plain terms. See *Bank v. Mfg. Co.,* 96 N.C. 298, bot. p. 307 *et seq.,* 3 S.E. 363.

The judgment below will be upheld.

Affirmed.

C. C. REID, W. H. PITTMAN AND FRANK TAYLOR, TRUSTEES OF THE NORTH ROCKY MOUNT BAPTIST CHURCH, AND A. J. SILBERHORN, DEACON IN THE NORTH ROCKY MOUNT BAPTIST CHURCH, v. SAMUEL H. W. JOHNSTON, PASTOR OF THE INDEPENDENT MISSIONARY BAPTIST CHURCH, FORMER PASTOR OF THE NORTH ROCKY MOUNT BAPTIST CHURCH OF ROCKY MOUNT, NORTH CAROLINA, AND G. W. STOGLIN, P. D. ENGLISH (NOW ONE OF THE TRUSTEES OF THE INDEPENDENT MISSIONARY BAPTIST CHURCH), N. J. PUCKETT, R. F. TAYLOR, JOE TALBOTT, J. L. RAMSEY, M. L. PETERSON, S. L. DUDLEY, W. N. EZZELLE, M. D. PARKER, AND H. R. CARMICHAEL (DEACON AND CHURCH TREASURER), DEACONS, MISS MARGIE TAYLOR, CHURCH CLERK, AND MRS. M. L. PETERSON, SECRETARY, ALL FORMERLY OF NORTH ROCKY MOUNT BAPTIST CHURCH AND NOW ASSOCIATED WITH THE INDEPENDENT MISSIONARY BAPTIST CHURCH, AND CITIZENS SAVINGS AND LOAN ASSOCIATION (FORMERLY CITIZENS BUILDING & LOAN ASSOCIATION), HOME SAVINGS & LOAN ASSOCIATION, AND PEOPLES BANK & TRUST COMPANY, ROCKY MOUNT, NORTH CAROLINA: P. D. ENGLISH, HOWARD WALLACE AND R. L. TREVATHAN, TRUSTEES OF THE INDEPENDENT MISSIONARY BAPTIST CHURCH.

(Filed 15 December, 1954.)

1. Trial § 55: Appeal and Error § 40d—

In a trial by the court by agreement, the court's findings of fact are as effective as the verdict of a jury, and are conclusive on appeal if there is competent evidence to support them. G.S. 1-184.

2. Trial § 55—

In a trial by the court by agreement, the court is required to find and state only the ultimate facts. G.S. 1-185.

3. Trial § 54—

In a trial by the court by agreement, the rules as to the admission and exclusion of evidence are not so strictly enforced as in a trial by jury, since the judge is to determine what he will consider, and his rulings are subject to review with all the information before the court; nevertheless, it would be reviewable error for the judge to admit and act upon incompetent evidence in making his findings.

4. Constitutional Law § 19½: Religious Societies § 2—

The courts have no jurisdiction over purely ecclesiastical controversies, Art. I, Section 26 of the Constitution of North Carolina, First Amendment to the Constitution of the United States; the courts do have jurisdiction over civil, contractual and property rights which are involved in, or arise from, a church controversy.

5. Same—

A Missionary Baptist Church is congregational in its church polity, and a majority of its membership, nothing else appearing, is entitled to control its church property, the Baptist Associations and Conventions being purely voluntary associations without supervision, control, or governmental power over the individual congregations.

6. Same—

Notwithstanding that a Missionary Baptist Church is a self-governing unit, a majority of its membership is supreme and is entitled to control its church property only so long as it remains true to the fundamental faith, usages, customs, and practices of that particular Church, as accepted by both factions before dissension; if a minority adheres to its faith, usages, customs and practices as they obtained before dissension, such minority is entitled to hold and control the entire property of the Church.

7. Same—Part of congregation which remains true to faith, customs, usages and practices accepted by both factions prior to dissension, is entitled to control and management of church property.

The evidence in this case to the effect that the majority of the congregation of the Missionary Baptist Church in question had ceased to participate in the general programs and activities of the Association and the Baptist Conventions, had resolved that, after ceasing its affiliation with the State and Southern Associations, the Church should continue its ministry as an independent Baptist Church, had ceased to use religious literature furnished by the Convention, had given its pastor exclusive control of the pulpit, had discharged officers and Sunday School teachers who voted against such action, etc., *is held* sufficient to support the conclusion that by such acts the majority had diverted the use of the church property to customs, doctrines and practices radically and fundamentally opposed to the characteristic usages, customs, doctrines and practices recognized and accepted by both factions of the congregation before dissension arose, and judgment that the minority, which had continued to support the usages, customs, doctrines, and practices recognized and accepted by both factions prior to the dissension, were entitled to the control and management of the property, is affirmed. The conclusion of the trial court that the true congregation is that which adheres and submits to the regular order of the Church is modified in accordance with the above.

8. Religious Societies § 3: Costs § 4b—

In an action against individual defendants to determine the right to the control and use of church property the cost may be taxed against the defendants individually, notwithstanding that they are described as trustees when the title is used merely as *descriptio personae*.

APPEAL by the defendants from *Paul, Special Judge,* Special December Civil Term 1953 of NASH.

Action brought by plaintiffs for possession and control of the church property of the North Rocky Mount Missionary Baptist Church, and to restrain the defendants from interfering with the use and control of said church and its properties.

Pursuant to G. S. N. C. 1-184 a jury trial was waived. After hearing the evidence and argument of counsel the judge found the facts, stated separately his conclusions of law, and entered judgment as follows: that the individual defendants have ceased to be a part of the true congregation of the North Rocky Mount Missionary Baptist Church, and are not entitled to share in the use and possession of the church property; that

the plaintiffs and all other members of said church who adhere and submit to the regular order of the church, local and general, are the true congregation, and entitled to the use and possession of the church property; that the individual defendants be, and they are hereby enjoined from interfering with the use and possession of said church property by the true congregation.

The defendants appealed assigning errors.

Cooley & May and A. C. Bernard for Plaintiff, Appellees.

Hughes & Hines and Fountain, Fountain & Bridgers for Defendant, Appellants.

PARKER, J. The parties having expressly waived a jury trial in accordance with G. S. N. C. 1-184, the findings of fact of the trial judge are as effective as the verdict of a jury, and are conclusive on appeal, if there is competent evidence to support such findings. *Woody v. Barnett,* 239 N.C. 420, 79 S.E. 2d 789; *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464.

The judge is only required to find and state the ultimate facts under G. S. N. C. 1-185. *St. George v. Hanson, supra; Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639.

The waiver of trial by jury invested the judge with the dual capacity of judge and juror. In such cases we said in *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749, quoting from McIntosh N. C. Prac. & Proc., p. 553: "The rules as to the admission and exclusion of evidence are not so strictly enforced as in a jury trial, since the judge is to determine what he will consider, and his rulings are subject to review on appeal, with all the information before the court." However, it would be reviewable error for the judge, exercising at the same time his own and the functions of a jury, to admit and act upon incompetent evidence in finding facts. *Puffer & Sons Mfg. Co. v. Baker,* 104 N.C. 148, 10 S.E. 254.

This question is presented for decision upon the Record before us: Have the defendants, and those united with them, as against a faithful minority, diverted the property of the North Rocky Mount Missionary Baptist Church to the support of usages, customs, doctrines and practices radically and fundamentally opposed to the characteristic usages, customs, doctrines and practices recognized and accepted by both factions of the congregation of this particular church before the dissension between them arose?

Let it clearly be understood at the outset that we are not adjudicating the right of any person to a religious belief or practice. Art. I, Sec. 26, of the North Carolina Constitution, guarantees that "all persons have a

natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience." The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state, but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy. *Clapp v. Krug,* (Ky.), 22 S.W. 2d 1025; *Stallings v. Finney,* 287 Ill. 145, 122 N.E. 369; Anno. 8 A.L.R., p. 105 *et seq.;* Anno. 70 A.L.R., p. 75 *et seq.;* 45 Am. Jur., Religious Societies, Sec. 40; 76 C.J.S., Religious Societies, Sec. 86; Anno. 20 A.L.R. 2d p. 451. This principle may be tersely expressed by saying religious societies have double aspects, the one spiritual, with which legal courts have no concern, and the other temporal, which is subject to judicial control.

The North Rocky Mount Missionary Baptist Church is congregational in its church polity, is a self-governing unit, and a majority of its membership, nothing else appearing, is entitled to control its church property. *Dix v. Pruitt,* 194 N.C. 64, 138 S.E. 412; *Windley v. McCliney,* 161 N.C. 318, 77 S.E. 226; *Williams v. Jones,* (Ala.) 61 So. 2d 101; Anno. 20 A.L.R. 2d pp. 432-3; 45 Am. Jur., Religious Societies, Sec. 55; 76 C.J.S., p. 853.

This church affiliated with the Roanoke Baptist Association, the North Carolina State Baptist Convention and the Southern Baptist Convention. Such associations are purely voluntary associations for the purpose of joining their efforts for missions and similar work, but have no supervision, control or governmental power over the individual congregations, which are absolutely independent of each other. *Conference v. Allen,* 156 N.C. 524, 72 S.E. 617.

While it is true the membership of the North Rocky Mount Missionary Baptist Church is a self-governing unit, a majority of its membership is supreme and is entitled to control its church property only so long as the majority remains true to the fundamental faith, usages, customs, and practices of this particular church, as accepted by both factions before the dispute arose. *Western North Carolina Conference v. Tally,* 229 N.C. 1, 47 S.E. 2d 467; *Wheeless v. Barrett,* 229 N.C. 282, 49 S.E. 2d 629; *Dix v. Pruitt, supra; Kerr v. Hicks,* 154 N.C. 265, 70 S.E. 468; G.S. 61-2 and G.S. 61-3; 45 Am. Jur., Religious Societies, Sec. 55; 76 C.J.S., Religious Societies, pp. 853-4; Anno. 8 A.L.R. 113; 70 A.L.R. 83.

A majority of the membership of the North Rocky Mount Missionary Baptist Church may not, as against a faithful minority, divert the property of that church to another denomination, or to the support of doctrines, usages, customs and practices radically and fundamentally opposed to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension, for in such an event the real identity of the church is no longer lodged with the majority group, but resides with the minority adhering to its fundamental faith, usages, customs and practices, before the dissension, who, though small in numbers, are entitled to hold and control the entire property of the church. *Wheeless v. Barrett, supra; Dix v. Pruitt, supra; Kerr v. Hicks, supra; Highland View Baptist Church v. Walker,* (Ala.) 66 So. 2d 122; *Mt. Olive Primitive Baptist Church v. Patrick,* 252 Ala. 672, 42 So. 2d 617, 20 A.L.R. 2d 417; *Mitchell v. Church of Christ,* 221 Ala. 315, 318, 128 So. 781, 783, 70 A.L.R. 71; *Baptist City Mission Soc. v. People's Tabernacle Cong. Church,* 64 Colo. 574, 174 P. 1118, 8 A.L.R. 102; *Smith v. Pedigo,* 145 Ind. 361, 33 N.E. 777, 19 L.R.A. 433; *Same Case,* 44 N.E. 363, 32 L.R.A. 838; *Park v. Champlin,* 96 Iowa 55, 64 N.W. 674, 31 L.R.A. 141; *Franke v. Mann,* 106 Wis. 118, 81 N.W. 1014, 48 L.R.A. 856; *Hughes v. Grossman,* 166 Kan. 325, 201 P. 2d 670; 45 Am. Jur., Religious Societies, Secs. 55 and 67; 76 C.J.S., Religious Societies, pp. 853-4; Anno. 8 A.L.R. p. 113; Anno. 70 A.L.R. p. 83.

This Court said in *Wheeless v. Barrett, supra:* ". . . the title to the land in question was taken in the name of the officers and trustees of, and in trust for the City Mission of Rocky Mount, North Carolina, a non-denominational religious organization, and as so taken, shall be and remain forever for the use and occupancy of that organization for which it was so purchased, and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees of such organization for use according to the intent expressed in the conveyance. And while the deed is not shown in the record on this appeal, it may be assumed that, being made to the officers and trustees of the City Mission of Rocky Mount, North Carolina, it conveyed the land in trust for the purposes for which the organization was formed. Therefore, the attempt to divert the property to use and occupancy by a church under special charter, and later by a denominational church was without authority in law."

We said in *Dix v. Pruitt, supra:* ". . . a majority in a Baptist church is supreme, or a 'law unto itself,' so long as it remains a Baptist church, or true to the fundamental usages, customs, doctrine, practice, and organization of Baptists. For instance, if a majority of a Baptist church should attempt to combine with a Methodist or Presbyterian church, or in any

manner depart from the fundamental faiths, usages and customs which are distinctively Baptist, and which mark out that denomination as a separate entity from all others, then, in such case, the majority could not take the church property with them for the reason that they would not be acting in accordance with distinctively Baptist principles."

The Supreme Court of Alabama in *Skyline Missionary Baptist Church v. Davis,* (Ala.) 17 So. 2d 533, said: "It is familiar law that where factional differences occur in an ecclesiastical body, the rule of the civil courts in dealing with the property rights disputed between the factions is to give effect to the will of that part of the organization acting in harmony with the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute arose."

The defendants in their brief cite and rely upon *Watson v. Jones,* 80 U.S. 679, 20 L. Ed. 666. In Anno. 8 A.L.R. p. 112, it is said: "While the principles above quoted from the *Watson Case* undoubtedly furnish the general rules for the guidance of the civil courts in the determination of questions in relation to civil or property rights arising out of schisms or divisions within independent or congregational societies when no express trust is involved, they appear, when viewed in the light of actual decisions, to have been stated too broadly and without proper qualification, in that they do not make proper allowance for the possibility that the action of the majority—assuming that by the law of the society the majority rule prevails—may involve so wide a departure from the fundamental and characteristic beliefs or polity of the society that to give it effect as to property rights would involve a perversion of the property from the implied trust to which it is subject, and because they fail to recognize that in such case the real identity of the society is no longer lodged with the majority faction, but resides with the minority faction, which remains faithful to the fundamental and distinctive beliefs and polity of the society."

The facts found by the Judge and conclusions of law stated which are material for decision of this case are as follows:

FINDINGS OF FACT.

The North Rocky Mount Baptist Church was organized in 1894 as a Missionary Baptist Church. In 1895 it became affiliated with the Tar River Baptist Association, and shortly thereafter with the North Carolina State Baptist Convention and the Southern Baptist Convention, and continued such affiliations until 9 August 1953, with the exception that in 1908 the Roanoke Baptist Association was formed from a part of the area in the Tar River Baptist Association and its affiliation since 1908 has been with the Roanoke Baptist Association. During that time it sent

messengers to the meetings of these bodies, who participated in their deliberations and decisions, and its pastors attended the pastors' conferences of these associations, and participated in their deliberations and decisions, it contributed to and participated in the programs, including the co-operative program, and it used the Sunday School and Religious Literature prepared and approved by the Southern Baptist Sunday School Board, an affiliate of the Southern Baptist Convention. All this was stopped on 9 August 1953 during the pastorate of the Rev. Samuel H. W. Johnston, one of the defendants, except direct support of the Baptist Orphanage. Rev. Johnston testified we are contributing to foreign missions, though the court did not find it as a fact.

On 5 October 1894 W. C. Trevathan and wife conveyed by deed to certain named trustees and their successors ¼ of an acre of land, upon which is situate the church building of the North Rocky Mount Missionary Baptist Church, upon this special trust that the trustees shall hold and possess said land for the especial use and behoof and benefit of the Missionary Baptist Church (white) of Rocky Mount and none other. This property now has a fair value of about $250,000.00. On 18 November 1949 there was conveyed to the trustees of this church, which trustees together with A. J. Silberhorn are the plaintiffs herein, a lot of land on which is located the church parsonage. On 9 August 1953 the church owned money deposited in a local bank, and investments in a local building and loan society. The real and personal property of said church had a fair value of from $250,000.00 to $300,000.00 on 9 August 1953.

From 1894 to 1916 the North Carolina State Baptist Convention contributed funds to help pay the salary of the pastor of this church.

The above three paragraphs of findings of fact are based upon stipulations entered into by the parties at a Pre-Trial Conference, except the finding "direct support of the Baptist Orphanage," and the words "which trustees together with A. J. Silberhorn are the plaintiffs herein." As to these there is ample competent evidence to support them.

Rev. Samuel H. W. Johnston, one of the defendants, is an ordained Baptist preacher. He was formerly pastor of the Woodlawn Baptist Church in Pawtuckett, R. I., a church affiliated with the Northern Baptist Convention. After a short pastorate he differed with the doctrines, customs and practices of this church and of the Northern Baptist Convention, and instituted a movement to have this church withdraw its affiliation with that Convention and to change its customs and practices. He was unsuccessful, and resigned as pastor. With 43 members of this church he established the Emanuel Baptist Church of Pawtuckett, which affiliated with the General Association of Regular Baptist Churches. He subsequently served as pastor of Park Avenue Baptist Church in Binghampton, N. Y., a church affiliated with the General Association of Regu-

lar Baptist Churches. He also served as instructor in a seminary largely supported by the General Association of Regular Baptist Churches. He approves of the doctrines, customs and practices of the General Association of Regular Baptist Churches, and refuses to adhere to the teachings, practices and customs of the Northern Baptist Convention, the Southern Baptist Convention, the North Carolina State Baptist Convention or the Roanoke Baptist Association.

In February 1952 the North Rocky Mount Missionary Baptist Church elected Rev. Samuel H. W. Johnston as its pastor. Prior to his election he assured the church's officers it was not his purpose to have the church withdraw from the Southern Baptist Convention. Some months later there were discussions between Johnston and his Board of Deacons as to the use of Southern Baptist Convention literature in the Sunday School or the use of such literature prepared and published by the General Association of Regular Baptist Churches, as to the co-operative and other programs of the Southern Baptist Convention, as to the use by many leaders in the Southern Baptist Convention of the Revised Standard Version of the Bible, and as to the teaching permitted in the seminaries and schools of the Southern Baptist Convention. That for several months until a few days before 9 August 1953 conversations were had as to the withdrawal of the North Rocky Mount Missionary Baptist Church from the Southern Baptist Convention.

About 1 April 1953 Rev. Samuel H. W. Johnston disclosed his plan that when he got his business lined up he was going to have the North Rocky Mount Missionary Baptist Church withdraw from the Southern Baptist Convention, and that he would then run the church like he wanted to run it. That if the church did not vote to withdraw from the Southern Baptist Convention, he would resign as its pastor. That on or about 1 August 1953 G. W. Stoglin, one of the defendants, told David Lewis, a member of the church, that the plans were to form an Independent Baptist Church from the North Rocky Mount Missionary Baptist Church, and then to affiliate with the General Association of Regular Baptist Churches.

At the 11:00 a.m. service on Sunday, 9 August 1953, of this church Rev. Johnston presented to the congregation the Resolution set forth below:

"Whereas, the Southern Baptist Convention tolerates and accepts liberalism and unbelief and apostasy in some of its seminaries and schools, and

"Whereas, many of the leaders of this convention are promoting the sale and use of the Revised Standard Version and the Interpreter's Bible, and

"Whereas, the Co-operative Program forces a participating Baptist to support these schools, these leaders and their programs whether he wants to or not, and

"Whereas, the undemocratic methods of the convention prevent us from bringing about a reform from within, and

"Whereas, the North Rocky Mount Baptist Church accepts the Bible and opposes modernism which denies its trustworthiness and is an enemy of the Christian faith, therefore

"Be It Resolved, that the North Rocky Mount Baptist Church immediately withdraw from further participation in the convention program and its organization, until such time as the convention deals with and rectifies these evils.

"Be It Further Resolved, that a copy of this resolution be sent to the Southern Baptist Convention Headquarters and also to the North Carolina State Baptist Convention.

"Be It Further Resolved, that after withdrawal the North Rocky Mount Baptist Church continue its ministry in this community as an Independent Missionary Baptist Church."

Of the congregation present, 241 voted in favor of the Resolution, 144 against it, and about 200 abstained from voting. The defendants, and those united in interest with them, proposed, voted for, accepted, and approved the Resolution. The findings of fact in this paragraph are based upon stipulations entered into by the parties at a Pre-Trial Conference.

The General Association of Regular Baptist Churches is a separate and distinct organization, not associated or affiliated with the Northern or Southern Baptist Conventions, the North Carolina State Baptist Convention, or the Roanoke Baptist Association. Its headquarters are in Chicago, Ill., and it has 657 churches affiliated with it, only two of which are in the Southern states. It has its own publishing houses for the issuance and distribution of religious literature, supports and contributes to missionary work through mission boards approved by it, and supports five religious schools. It holds annual conventions, and has an active committee or council to carry out its purposes and aims. This association and its affiliated churches constitute a separate and distinct denominational organization within themselves, conducting and supporting activities, programs, institutions and practices distinctive to it, and to those who adhere to its order and doctrines.

On 9 August 1953, and subsequent thereto, the defendants, and those united in interest with them, have caused the North Rocky Mount Missionary Baptist Church to take the following action:

1. Withdraw from the Roanoke Baptist Association, the North Carolina State Baptist Convention and the Southern Baptist Convention, and

from their programs and activities, except support of the Baptist Orphanage.

2. Stop using the Sunday School and Religious Literature of the Southern Baptist Convention, and begin using the Sunday School and Religious Literature of the General Association of Regular Baptist Churches.

3. Withdraw its support from the missionaries and mission program of the State and Southern Baptist Convention, the support of which it had practiced for many years, and on at least one occasion gave its support to a mission of or approved by the General Association of Regular Baptist Churches, the first time as far as the evidence discloses such practice had been followed by the church.

4. Withdraw its support from the Baptist Schools and Seminaries, the support of which it had practiced for many years.

5. Discharge several of its church officers and Sunday School teachers for the reason that they had opposed and voted against the resolution on August 9, 1953, and "because they are not in harmony with the stand the church has taken."

6. The Board of Deacons has approved and agreed that the pastor shall have the exclusive control of the pulpit, with the power to say who shall and who shall not occupy the same, such an understanding being a departure from the custom and practice of the local church itself as well as Missionary Baptist Churches generally.

The defendants, and those united in interest with them, are in possession of all the property of the church, and that they have repudiated, and departed the doctrines, customs, practices and usages of the North Rocky Mount Missionary Baptist Church, as the same existed prior to 9 August 1953.

The plaintiffs have not repudiated or departed the doctrines, customs, practices and usages of the North Rocky Mount Missionary Baptist Church, as the same existed prior to 9 August 1953.

The use and possession of the church lot and building by the defendants for the purposes and in the manner in which it is now being used and possessed constitutes a breach of the trust imposed by the terms of the deed from Trevathan and wife to the trustees of the church.

That the real and personal property of this church belongs to, and should be awarded to, the plaintiffs who constitute a part of the true congregation: that the individual defendants have ceased to be a part of the true congregation of this church.

CONCLUSIONS OF LAW.

Property rights being involved, the Court has jurisdiction to hear and determine such rights.

That in the North Rocky Mount Missionary Baptist Church the church property belongs to the true congregation, who are entitled to its possession.

That the true congregation in church organizations is those who adhere and submit to the regular order of the church, local and general, whether a majority or minority of membership.

That the individual defendants in this action have departed from the fundamental usages, customs, doctrine, practice and organization of the North Rocky Mount Missionary Baptist Church and of the denomination, and that said defendants refuse to adhere and submit to the regular order of the church, and are, therefore, not a part of the true congregation of said church.

That the plaintiffs have remained true to the fundamental usages, customs, doctrine, practice and organization of the North Rocky Mount Missionary Baptist Church and of the denomination, and that they do adhere and submit to the regular order of the church, and that they are, therefore, a part of the true congregation.

That the defendants should be enjoined and restrained from interference with the use and possession of the church property by the true congregation.

It is apparent that the Trial Judge has designated certain matters as Findings of Fact, which should be designated Conclusions of Law.

The findings of fact stated above are supported by adequate competent evidence.

The Rev. Samuel H. W. Johnston testifying with respect to the practices, customs, doctrine and usages of Southern Baptists said, p. 411 of the Record: "If what we have seen is significant of what Southern Baptists stand for, I don't want any part of it. I'll never quit preaching the truth. I will fight this till the day I die. I will denounce evil wherever I find it, and the Baptist organization in the South is rotten to the core."

Dr. R. T. Ketcham, a national representative of the General Association of Regular Baptist Churches and editor of their official organ, testified as a witness for the defendants that his association holds to the view of premillennialism, that the millennial question has been made a test of fellowship by virtue of the fact that his association puts a premillennial interpretation on Art. 17 of the Baptist Faith and Message, and that a post millennial church has never applied for fellowship in his association.

The Conclusion of Law made in this case: "That the true congregation in church organizations is those who adhere and submit to the regular order of the church, local and general, whether a majority or minority of membership" is not a correct statement of the law, under the pleadings and facts before us.

In *Dix v. Pruitt, supra,* it was alleged in the complaint, and admitted in the answer, that the Dan River Primitive Baptist Church has at all times been conducted and governed by the rules, customs and usages which control Primitive Baptist Churches. *Brogden, J.,* speaking for the Court said: "Our case was not tried upon the theory that the association has any power to impose its will upon the local church, or to determine which faction constitutes the true church. The question with us is whether or not the independent sovereignty of the local church is limited by adherence to the principle of order, doctrine, and practice as handed down through generations of Primitive Baptist church life. Upon the record, there was sufficient evidence of such limitation to be submitted to the jury, and the jury has returned its verdict into court in accordance with law. Whether this record properly presents or reflects the proper and established church polity of Primitive Baptists, we know not."

In the instant case there is no allegation in the complaint that the North Rocky Mount Missionary Baptist Church has been at all times governed and conducted by the rules, customs and practices of Missionary Baptist Churches in general, nor have the defendants made any such admission. The Record before us discloses that the North Rocky Mount Missionary Baptist Church from the beginning has been a pure democracy and independent of any external control. It is known to all that from the beginning Baptist Churches have retained, and refused to give up their independence.

The proper conclusion of law in this case is that the true congregation of the North Rocky Mount Missionary Baptist Church consists of those members of its congregation who adhere to the characteristic doctrines, usages, customs and practices of that particular church, recognized and accepted by both factions before the dissension between them arose.

The Trial Judge made elaborate findings of fact as to the organizational and operational structure of Missionary Baptist Churches generally in this State and nation. All of these findings of fact are irrelevant and immaterial. The question for decision before the Trial Court was the same as that presented to us for decision, which question we have stated heretofore in this opinion.

The defendants contend in their brief that "an examination of this Record discloses that the only difference that exists between the plaintiffs and defendants in this action is continued cooperation and affiliation with the State and Southern Baptist Conventions." The defendants, therefore, contend that the rule that the majority of an independent or congregational society may not divert the property from the denomination to which the society belongs, or from the fundamental doctrines and tenets to which it originally subscribed, does not prevent such a majority, over the objection of a minority, from severing a voluntary ecclesiastical con-

nection of the society from another body. 45 Am. Jur., Religious Societies, p. 766; Anno. 8 A.L.R. 123; Anno. 70 A.L.R. 86; *Organ Meeting House v. Seaford,* 16 N.C. 453. In the *Organ Meeting House Case* the bill charged a part of the members composing the Lutheran Church adopted a general synod, a form of church government previously unknown to the Lutheran Church. In our opinion, as we view the evidence in the Record, far more serious differences exist.

The defendants, and those united in interest with them, have done the following things:

One. They have ceased to participate in the general programs and activities of the Roanoke Baptist Association, the North Carolina State Baptist Convention and the Southern Baptist Convention, and have withdrawn their financial support of these agencies and institutions in their Co-operative Program, except support of the Baptist Orphanage, contrary to what the North Rocky Mount Missionary Baptist Church did before the dissension in the congregation began.

Two. They have resolved that the North Rocky Mount Missionary Baptist Church, after such cessation of affiliation with the local, State and Southern associations, shall continue its ministry in the community as an Independent Baptist Church.

Three. They have stopped the use of Sunday School and Religious Literature prepared and approved by the Southern Baptist Convention, and are using Sunday School and Religious Literature prepared and published by the General Association of Regular Baptist Churches, an association, which, according to the testimony of Dr. R. T. Ketcham, its national representative and editor of its official organ, holds to the view of premillennialism, and that the millennial question has been made a test of fellowship. This is contrary to what the North Rocky Mount Missionary Baptist Church did before the dispute in the congregation arose.

Four. The Board of Deacons have approved and agreed that the Rev. Samuel H. W. Johnston shall have exclusive control of the pulpit, with power to say who shall, and who shall not, occupy the same, contrary to the custom and practice of this particular church before the dissension began.

Five. They have discharged several of the North Rocky Mount Missionary Baptist Church officers and Sunday School teachers for the reason they opposed and voted against the Resolution adopted on 9 August 1953 by an affirmative vote of 241 members against a negative vote of 144, with 200 abstaining from voting, out of an enrolled membership of approximately 1,300 persons.

Six. The Rev. Samuel H. W. Johnston has done all he could to separate himself as far as possible from the programs of the North Carolina

State Baptist Convention and the Southern Baptist Convention, until such time as certain things he called "evils" are rectified.

The plaintiffs, and those united in interest with them, have done these things:

One. Have since 9 August 1953 regularly conducted meetings elsewhere than in the North Rocky Mount Baptist Church, with an ordained minister in the pulpit.

Two. Have continued to use the Sunday School and Religious Literature prepared and published by the Southern Baptist Convention.

Three. Have continued to participate in, cooperate with, and support the programs and activities of the Roanoke Baptist Association, the North Carolina Baptist Convention and the Southern Baptist Convention.

Four. Have circumspectly and carefully done exactly what the membership of the North Rocky Mount Missionary Baptist Church did before the dispute between the factions arose.

The defendants, and those united in interest with them, by resolving that the North Rocky Mount Missionary Baptist Church shall continue its ministry in the community as an Independent Missionary Baptist Church, and by doing the things found as facts by the Trial Judge, as set forth in this opinion, and by being in possession of and using the church property for those purposes and plans have, as against the plaintiffs, and those united in interest with them, who are a faithful minority, diverted the property of the North Rocky Mount Missionary Baptist Church to the support of usages, customs, doctrines and practices radically and fundamentally opposed to the characteristic usages, customs, doctrines and practices recognized and accepted by both factions of the congregation of this particular church before the dissension between them arose.

The defendants contend that the court erred in taxing the costs against the individual defendants, for the reason that the defendants individually are not parties to the action. The court's ruling seems to be correct for it would appear that these parties are sued as individuals, and the title of the positions they hold are merely *descriptio personae.*

The evidence in the Record discloses that the Rev. Samuel H. W. Johnston was the person, who inspired and led the movement, which caused the dissension in the North Rocky Mount Missionary Baptist Church. The evidence clearly shows the purpose of this movement. David Braswell, a member of this church, testified as a witness for the plaintiffs (R., p. 196): "At the last of March or the first of April Mr. Johnston was around at my house. We were discussing the church situation in general, and he made the remark that when he got his business lined up, he was going to pull the church out of the Convention, and run it like he wanted to run it." A. J. Silberhorn, a witness for the plaintiffs and a member of this church testified (R., p. 154): "At a Deacons' meeting a

week or two before the actual voting of the withdrawal from the Southern Baptist Convention one of the Deacons asked this question of the Pastor, and I believe I can quote it in his words. He says, 'Pastor, what are we going to do after we withdraw from the Southern Baptist Convention? Don't you think we ought to have something prepared in which to present to the people?' and the Pastor answered, 'Yes, I plan that as soon as the voting is over, that I announce to the congregation that we apply for fellowship in the General Assembly of Regular Baptist Churches.'" David Lewis, a member of the church, testified as a witness for the plaintiffs that G. W. Stoglin, one of the defendants, told him prior to the meeting of 9 August 1953 (R., p. 168): "That their plans were to withdraw from the Southern Baptist Convention and State Baptist Convention, and form a new Independent Baptist Church and affiliate themselves with the General Association of Regular Baptists."

We have carefully examined and considered all the defendants' assignments of error, including the authorities cited in their brief, and the defendants have not shown prejudicial error sufficient to justify another trial of this long and bitterly contested case. The heat of conflict is over, and the time has come in the Rocky Mount Missionary Baptist Church for the exercise of the Christian graces of reconciliation, forbearance, brotherly love and unity, according to the admonition given by the Apostle Paul to the Church at Corinth.

The lower court ordered, adjudged and decreed: "That the plaintiffs and all other members of said church who adhere and submit to the regular order of the church, local and general, are the true congregation." That part of the judgment will be modified to read as follows: "That the true congregation of the North Rocky Mount Missionary Baptist Church consists of the plaintiffs and all other members of the congregation who adhere and submit to the characteristic doctrines, usages, customs and practices of this particular church, recognized and accepted by both factions of the congregation before the dissension between them arose."

We conclude that the court's findings of fact were supported by competent evidence, and that they are sufficient to sustain the judgment, as herein modified, based thereon. *Woody v. Barnett, supra.*

Judgment modified and affirmed.

CITY OF GOLDSBORO v. ATLANTIC COAST LINE RAILROAD COMPANY AND GOLDSBORO UNION STATION COMPANY.

(Filed 15 December, 1954.)

1. Statutes § 2—

Where a local statute (Chapter 397, Private Laws of 1901) giving a municipality power to improve its streets and assess abutting owners for a part of the cost, is enacted prior to the effective date of the amendment of the State Constitution, Art. II, Section 29, a subsequent local law which merely increases the jurisdiction and authority granted to the city in regard to such improvements (Chapter 215, Private Laws of 1925) does not violate the constitutional proscription.

2. Municipal Corporations § 30—

Chapter 222, Public Laws of 1931, was intended to be merged into the framework of the Local Improvement Act of 1915, Chapter 56. G.S. 160-79; G.S. 160-104.

3. Same—

Chapter 222, Public Laws of 1931, does not repeal the provisions of Chapter 397, Private Laws of 1901, or Chapter 215, Private Laws of 1925, relating to paving of streets, but the local acts will be construed as exceptions to the general statute.

4. Statutes § 12—

Ordinarily, a local statute is not repealed by a subsequent general statute upon the subject.

5. Municipal Corporations § 30—

Where municipal streets cross or run contiguous with the edge of a railroad right of way, the lands of the railroad abut the streets for the purpose of levying assessments for the improvement of the streets.

6. Same—

Legislative determination that property abutting municipal streets, including the rights of way of railroad companies, is benefited by improvement of the streets is conclusive upon the owners and the courts, and the railroad company will not be heard to contest the validity of the assessments on the ground that the railroad lands are not benefited by the improvements.

APPEAL by defendants from *Parker (Joseph W.), J.*, at April Civil Term, 1954, of WAYNE.

Proceeding before the Board of Aldermen of the city of Goldsboro by which street paving assessments were levied by the Board acting in full compliance with the machinery and powers provided in Chap. 397 of the Private Acts of 1901 and in Chap. 215 of the Private Acts of 1925 on streets which:

(a) Cross at right angles the right of way conveyed to the defendants;

(b) Cross the tracks of the defendants and are contiguous with the right of way conveyed to the defendants;

(c) Parallel and are contiguous with the right of way owned by defendant Atlantic Coast Line Railroad Company, and abut the boundaries of the tract of land owned by the Goldsboro Union Station Company.

Protests filed by defendants with the Board of Aldermen of the city of Goldsboro were overruled, and the assessments were adopted by the Board. Defendants appealed therefrom to Superior Court, to which the case was submitted and heard upon an agreed statement of facts.

The agreed facts are substantially these:

1. The city of Goldsboro is a municipal corporation organized and existing under the laws of the State of North Carolina.

2. The Atlantic Coast Line Railroad Company is a corporation legally created and organized under the laws of the State of Virginia, duly and legally authorized to engage in business in the State of North Carolina, and on the dates and at the times mentioned in the statement of facts was and is engaged in business in said State,—maintaining and operating a railway system in and through the State, and elsewhere in the United States,—a portion of its track and railway system lying in the city of Goldsboro, Wayne County, North Carolina.

3. The Goldsboro Union Station Company is a corporation legally created and organized under the laws of the State of North Carolina, and maintains and operates a railway depot, baggage and express terminal, railroad sidetracks and loading tracks in the city of Goldsboro, Wayne County, North Carolina.

4. The Atlantic Coast Line Railroad Company, by warranty deed dated 9 March, 1907, and duly recorded, obtained from F. K. Borden *et al.* a certain tract of land, situate in the city of Goldsboro, Wayne County, North Carolina, owned and utilized by it for a portion of its track and right of way through the city,—which tract of land is a strip 130 feet wide—65 feet on each side of the center line of said track, and adjoins the northern edge of Pine Street on its southern boundary and extends northwardly a distance of 4,177 feet.

5. The Goldsboro Union Station Company, by deed dated 1 July, 1908, and recorded in office of register of deeds for Wayne County, obtained from Atlantic Land and Improvement Company, a certain tract of land situate in the city of Goldsboro, Wayne County, North Carolina, owned and utilized by it for its railroad depot, baggage and express terminal, railroad sidetracks and loading tracks, plat of which is recorded in Book 96 at page 85 in the office of said register of deeds. (It being agreed that any one of the parties hereto may attach to the agreed statement of facts

and present to the court copies of any deeds, leases or maps pertinent to the lands, streets and crossings involved in this action.)

6. "The city street designated as Pine Street" crosses the tracks of Atlantic Coast Line Railroad Company from east to west,—the northern edge of the street being contiguous with the southern boundary of F. K. Borden tract of land, hereinabove described, and the southern edge being contiguous with the right of way owned in fee simple by the Railroad Company under other conveyances; and the northern edge of said Pine Street is contiguous with a part of the southern boundary of the tract of land conveyed to the Goldsboro Union Station Company by deed from Atlantic Land and Improvement Company as hereinabove set forth.

7. "The city streets designated as Chestnut and Mulberry Streets" cross (1) at right angles the right of way of the Atlantic Coast Line Railroad Company conveyed to it by F. K. Borden, *et al.*, as hereinabove set forth, and (2) the tracks of the company, from east to west. And certain part of northern edge of Chestnut Street is contiguous with southern boundary of the tract of land owned by the Goldsboro Union Station Company, and crosses the sidetracks and loading tracks of the company. And Mulberry Street grade crossing was constructed on or about the year 1909, the costs of which were paid by the Union Station Company and the Railroad Company. And about the year 1909 a grade crossing on Walnut Street extended was closed and Walnut Street was closed at the western edge of its intersection with Carolina Street. And on or about the year 1912 the grade crossing at Chestnut Street was constructed,—the costs of which were paid by the Union Station Company and the Railroad Company. And the crossings and area in question were outside the city limits of the city of Goldsboro until the extension of the city limits in year 1909. And the grade crossings at Mulberry Street and Chestnut Street have been used by the public since they were constructed during the years above set forth.

8. "The city street designated as Elm Street" crosses the tracks of the Atlantic Coast Line Railroad Company from east to west and both the northern and southern edges of the street are contiguous with the right of way owned by the Railroad Company under valid conveyances.

9. "The city street designated as Georgia Street" parallels with the right of way and the F. K. Borden tract of land, hereinabove described, and the eastern edge of said street parallels the tracks of the Railroad Company and contiguous with the western edge of the right of way of the Railroad Company between Ash and Pine Streets.

10. The Board of Aldermen of the city of Goldsboro, acting under the provisions of Chap. 397 of the Private Acts of 1901, and Chap. 215 of the Private Acts of 1925, adopted a paving program for the city on 7 August, 1950, in which program these streets were to be, and were

paved, to wit: (1) Pine Street, from Virginia Street to Griffin Street; (2) Georgia Avenue, from Ash Street to Pine Street; (3) Chestnut Street, from Carolina Street to Georgia Avenue; (4) Elm Street, from George Street to Griffin Street; and (5) Mulberry Street, from A.C.L. R.R. Company track to Georgia Avenue.

11. In full compliance with the machinery and powers provided in the two acts referred to in preceding paragraph of the Board of Aldermen adopted assessment rolls for the completed paving program:

I. In which assessment rolls the Atlantic Coast Line Railroad Company was assessed: (1) For streets crossing at right angles the right of way owned by it certain amounts on north and south sides of Chestnut Street, and of Mulberry Street; (2) For streets crossing the tracks of the Railroad Company, and contiguous with the right of way owned in fee by it, certain amounts on north and south sides of Pine Street, and of Elm Street; (3) For streets paralleling and contiguous to the right of way owned by the Railroad Company certain amounts on Georgia Avenue (a) from Ash Street to Mulberry Street, and (b) from Mulberry Street to Walnut Street, and (c) from Chestnut Street to Pine Street.

II. In which assessment rolls the Goldsboro Union Station Company was assessed: (1) For streets situate across the land and tracks of said company on north and south sides of Chestnut Street; (2) For streets contiguous with the boundaries of the tract of land owned by the company (a) on north side of Chestnut Street, and (b) on north side of Pine Street.

12. Protests of the Atlantic Coast Line Railroad Company and the Goldsboro Union Station Company to each of the assessments hereinabove set forth were duly filed with and presented to the Board of Aldermen of the city of Goldsboro at its meeting held for that purpose on 19 May, 1952, and on 2 June, 1952. From the ruling of the Board in overruling said protests, and in adopting said assessment rolls, the Railroad Company and the Union Station Company gave notice of appeal, and the matter was properly presented to the Superior Court of Wayne County, North Carolina, and said court has jurisdiction.

And as exhibits to the agreed statement of facts, the record discloses:

Exhibit A. Warranty deed from F. K. Borden, *et al.*, to the Atlantic Coast Line Railroad Company referred to hereinabove.

Exhibit B. Deed from Atlantic Land & Improvement Company, called for convenience "Improvement Company," to Goldsboro Union Station Company referred to hereinabove.

Exhibit C. Deeds from F. K. Borden and wife between dates of 17 October, 1904, and 30 October, 1912, for some of lots sold from the land shown on "Map and subdivision of land of F. K. Borden, Goldsboro, N. C.," prepared by L. J. Schwab in June, 1907, and recorded in Map

Book 2, page 2, described in reference to Mulberry, Walnut and Chestnut Streets, and Georgia and Carolina Avenues, and the railroad lines and Union Depot, all shown on said map.

The parties hereto pray the court to determine the following questions:

"(1) Are Chapter 397 of the Private Acts of 1901 and Chapter 215 of the Private Acts of 1925 valid and controlling in this matter?

"(2) Is the Atlantic Coast Line Railroad Company liable for the street assessments assessed against it for the paving on Chestnut Street and Mulberry Street, which cross at right angles the right of way conveyed to the Atlantic Coast Line Railroad Company by F. K. Borden, *et al?*

"(3) Is the Atlantic Coast Line Railroad Company liable for the street assessments assessed against it for the paving on Pine and Elm Streets, which cross the tracks of the Atlantic Coast Line Railroad Company and are contiguous with the right of way owned in fee simple by the Atlantic Coast Line Railroad Company?

"(4) Is the Atlantic Coast Line Railroad Company liable for the assessments assessed against it for paving on Georgia Avenue, which parallels and is contiguous with the right of way of the Atlantic Coast Line Railroad Company?

"(5) Is the Goldsboro Union Station Company liable for the assessments assessed against it for paving on that portion of Chestnut Street which crosses the land conveyed to the Goldsboro Union Station Company?

"(6) Is the Goldsboro Union Station Company liable for the assessments assessed against it for paving on that portion of Chestnut Street and on Pine Street, which strips are contiguous with the boundaries of the tract of land owned by the Goldsboro Union Station Company?"

The cause coming on for hearing, and being heard in Superior Court, before Judge Presiding, a jury trial being waived, judgment was entered in which it was "found, adjudged, ordered and decreed":

"1. That each and every street herein below named, and at the points designated, were, at the time of the improvements and assessments about which this controversy arose, and had been for forty or more years, a part of the regular street system of the City of Goldsboro.

"2. That all of the improvements and the assessments assessed therefor which are the subject of this controversy were made in full compliance with Chapter 215 of the Private Acts of 1925, which now constitutes a part of the Charter of the City of Goldsboro.

"3. That Chapter 215 of the Private Acts of 1925 is valid and controlling in this matter.

"4. That the Atlantic Coast Line Railroad Company is liable for and indebted to the City of Goldsboro for the assessments assessed against it

for the paving done on Chestnut and Mulberry Streets, which cross at right angles the right of way conveyed to it by F. K. Borden, *et al.*" Amount stated.

"5. That the Atlantic Coast Line Railroad Company is liable for and indebted to the City of Goldsboro for the assessments assessed against it for the paving done on Pine and Elm Streets, which cross the tracks of said Railroad, and are contiguous with the right of way owned by it in fee simple, in the . . . amount." Amount stated.

"6. That the Atlantic Coast Line Railroad Company is liable for and indebted to the City of Goldsboro for the assessments assessed against it for the paving done on Georgia Avenue which parellels and is contiguous to the right of way owned in fee by said Railroad, in the total sum" . . . stated.

"7. That the Goldsboro Union Station Company is liable for and indebted to the City of Goldsboro for the assessments assessed against it for the paving on that portion of Chestnut Street which crosses the land conveyed to it, in the total . . . sum" . . . stated.

"8. That the Goldsboro Union Station Company is liable for and indebted to the City of Goldsboro for the assessments assessed against it for the paving on that portion of Chestnut and of Pine Street, which strips are contiguous with the boundaries of the land conveyed to it in fee, in the total . . . sum" . . . stated.

"9. That all of the above assessments, from the dates of the confirmation thereof constitute a lien against the respective abutting property against which the same was assessed.

"10. That the costs of this action be paid by the defendants."

"The defendants object to the findings of fact as set forth in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the judgment and move that the same be set aside, for that the same are contrary to law and the facts as set forth in the agreed statement of facts. Motion overruled. Defendants except. (Exception #1.)

"Defendants object to the conclusions of law as set forth in the judgment. Objection overruled. Defendants except. (Exception #2.)

"Defendants object to the judgment and the signing thereof. Objection overruled. Defendants except. (Exception #3.)"

And defendants appeal to Supreme Court and assign error.

Edwin C. Ipock for plaintiff, appellee.

W. B. R. Guion and W. Powell Bland for defendants, appellants.

WINBORNE, J. The defendants, appellants, assign as error the matters to which their Exceptions 1, 2 and 3 relate,—specifying under the 2nd, error in the conclusion that Chapter 215 of the Private Acts of 1925 is

valid and controlling in this action. And while in brief filed in this Court there is no reference to any particular exception, or assignment of error, appellants arrange their argument under the general heading "The court erred in ruling that defendants are liable for assessments on the right of way," and treat the subject in three subdivisions:

"A. The authority of a municipality to make improvements on the right of way is limited by the North Carolina General Statutes 160-104";

"B. The parties assessed received no benefit from the improvements are not liable for such assessments";

"C. Chapter 215 of the Private Laws of 1925 is void under the Constitution of North Carolina."

Also appellants in their brief say that in respect to "the power and machinery of Chapter 215 of the Private Acts of 1925 . . . No question is raised on this appeal as to action of the Board in complying with that Act."

Hence the Court considers each of the three subdivisions of the subject.

(C) It is contended by appellant that Chapter 215 of Private Laws 1925 is violative of Art. II, Sec. 29, an amendment to the Constitution of North Carolina, which declares, among other things, that "The General Assembly shall not pass any local, private, or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," and that "Any local, private or special act or resolution passed in violation of the provisions of this section shall be void . . ."

In this connection, it is noted that the amendment, Art. II, Sec. 29, to the Constitution, was submitted to and adopted by the electorate and became effective on the second Wednesday after the first Monday in January, 1917, all pursuant to the provisions of Chapter 99 of Public Laws 1915.

And it is further noted that the General Assembly at the 1915 session passed "An Act Relating to Local Improvements in Municipalities," Chap. 56 of Public Laws 1915, which was incorporated in the Consolidated Statutes of 1919, as Art. 9 of Chap. 56, and later embodied in the General Statutes as Art. 9 of Chap. 160, beginning with G.S. 160-78.

This act provided that every municipality shall have the power, by resolution of its governing body, upon petition signed by at least a majority in number of the owners, who represent at least a majority of all the lineal feet of frontage of land abutting upon the street proposed to be improved, to cause local improvements to be made and to defray the expense of such improvements by local assessment, in manner specified. Sections 4 and 5, later C.S. 2706, 2707, and now G.S. 160-81 and G.S. 160-82. And in Sec. 2, later C.S. 2704, and now G.S. 160-79, it is provided that this act shall apply to all municipalities, and that it shall not

repeal any special or local law for the making of streets, sidewalks or other improvements thereby authorized, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes.

Therefore this act, Chap. 56 of P.L. 1915, did not affect Chap. 397 of Private Laws of 1901 relating to the city of Goldsboro, and the power given to the city for paving streets remained unimpaired.

This latter act, Chap. 397 Private Laws of 1901, provided in Sec. 61 "that the city of Goldsboro . . . may pave its streets and sidewalks . . .," and, in Sec. 74, "that the city of Goldsboro shall have power, in its discretion, to assess owners of land abutting on streets paved by said city with an amount not to exceed one-third of the actual cost of such paving in front of such abutting land . . ." And the act provided that all laws or clauses of laws or parts of laws in conflict with this act are hereby repealed, and that it shall take effect and be in force from and after its ratification—13 March, 1901.

And it is further noted that the General Assembly later passed an act, Chap. 215 Private Laws 1925, entitled "An Act for Street and Sidewalk Paving in the City of Goldsboro," in Sec. 1 of which it is provided in pertinent part: "The board of aldermen of the city of Goldsboro shall have power and it is hereby authorized, without any petition so to do, to pave from time to time such streets and such sidewalks in the city of Goldsboro as, in its discretion, it may deem necessary, and assess the total cost (except cost of street intersections) of such paving against the abutting land in proportion to the respective frontage of such abutting land . . . 'Frontage means that side or limit of the lot or parcel of land which abuts directly on the street or sidewalk pavement.'" And it is also provided therein "that all laws and clauses of laws in conflict with this act are hereby repealed," and that the act shall be in full force and effect from and after its ratification—10 March, 1925.

Thus it is seen that Chap. 215 of Private Laws of 1925 merely increases the jurisdiction and authority granted to the city of Goldsboro under its amended charter, Chap. 397 of Private Laws 1901, hereinabove recited. This Court has held that such an act is not violative of Art. II, Sec. 29. *Deese v. Town of Lumberton* (1936), 211 N.C. 31, 188 S.E. 857. See also *S. v. Horne*, 191 N.C. 375, 131 S.E. 753; *Williams v. Cooper*, 222 N.C. 589, 24 S.E. 2d 484; *Bd. of Managers v. Wilmington*, 237 N.C. 179, 74 S.E. 2d 749; *S. v. Norman*, 237 N.C. 205, 74 S.E. 2d 602. Compare *Provision Co. v. Daves*, 190 N.C. 7, 128 S.E. 593; *S. v. Williams*, 209 N.C. 57, 182 S.E. 711.

Now, then, does Chap. 222 of Public Laws 1931 repeal the provisions of Chap. 397 of Private Laws 1901, and Chap. 215 Private Laws of 1925, relating to paving of streets? The caption of Chap. 222, P.L. 1931, reads

as follows: "An Act to Amend Chapter 56 Article 9 thereof, of the Consolidated Statutes, so as to authorize municipalities to make local improvements on streets on rights of way of railroads, and to specially assess a part of the cost of such improvement against property abutting directly on the work, other than property belonging to railroads."

And the preamble reads: "Whereas, in some of the municipalities of the State, certain streets have been laid out, used and occupied on rights of way owned by and/or occupied by railroads, upon which street or streets it may be found desirable to make improvements as defined by Section two thousand seven hundred and three of the Consolidated Statutes, and

"Whereas, it appears that it is impossible to obtain petitions as contemplated and required by the provisions of Article nine, Chapter fifty-six, of the Consolidated Statutes, for the making of such local improvements," etc.

Then Section 1 of the act in pertinent part reads: "That Article nine of Chapter fifty-six, of the Consolidated Statutes, be amended by adding at the end thereof the following paragraph:

" 'Municipalities desiring to make street and sidewalk improvements on property owned and/or leased by railroad companies, are hereby authorized to make such improvements on any such street used as a public street, subject to the rights of any such railroad company to use and occupy the same for railroad purposes: Provided, however, that the petition or petitions contemplated and required by the provisions of the Article, need not be signed by such railroad company or companies, nor shall any part of the railroad right of way be considered as abutting property, but the said petition shall be signed by at least a majority in number of the owners of property other than the railroad right of way, who must represent at least a majority of all the lineal feet frontage of the lands, other than said railroad right of way' . . .," etc.

Indeed the 1931 act does not attempt to amend the provisions of Section 2 of the Local Improvement Act. Chap. 56 of P.L. 1915, later C.S. 2704, now G.S. 160-79. This indicates that the General Assembly intended that the act of 1931 should become a part of, and be merged into the framework of the Local Improvement Act of 1915, in application and effect as therein set forth.

Moreover, this Court in *Bramham v. Durham,* 171 N.C. 196, 88 S.E. 347, quoting from Black on Interpretation of Laws, p. 117, says: " 'A local statute enacted for a particular municipality for reasons satisfactory to the Legislature is intended to be exceptional and for the benefit of such municipality.' " And, continuing, " 'It has been said that it is against reason to suppose that the Legislature, in framing a general system for the State, intended to repeal a special act which local circumstances made necessary.' "

Hence this Court holds that neither Chap. 397 Private Laws 1901, nor Chap. 215 of Private Laws of 1925 is affected by the repealing clause in the 1931 act.

(A) Now reverting to the provisions of Chap. 397 Private Laws 1901 and Chap. 215 of Private Laws 1925, is the Board of Aldermen of the city of Goldsboro, as a part of a street paving program, empowered to assess a part of the cost upon the property of defendants as abutting property?

The answer is "Yes."

Decisions of this Court indicate that the term "abutting land," as used in these acts, is sufficiently broad in meaning to cover land owned and used for railroad purposes. An affirmative answer is supported by the case of *Kinston v. R. R.* (1921), 183 N.C. 14, 110 S.E. 645. There the city, acting under statutory authority for assessing part of cost of street paving against abutting property, made assessment against right of way, owned by the railroad company, crossed by the streets so paved. And this Court in opinion by *Hoke, J.*, approved.

(B) Lastly appellants contend that the court erred in ruling that the defendants are liable for assessment on Georgia Avenue abutting on the right of way of the Atlantic Coast Line Railroad Company,—since the eastern edge of Georgia Avenue is contiguous with the western edge of the right of way of the Railroad Company.

As to this, we find in *Gunter v. Sanford*, 186 N.C. 452, 120 S.E. 41, opinion by *Adams, J.*, it is said: "It is also established that the Legislature has the power to determine by the statute imposing the tax what property is benefited by the improvement; and when it does so its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its proper apportionment," citing *Spence v. Merchant*, 125 U.S. 345, 31 L. Ed. 763.

And this Court continued by saying: "Our own decisions are in accord with this principle," citing and quoting from decided cases.

Hence for reasons stated, the judgment below is in accord with settled principles of law, and is, therefore,

Affirmed.

STATE v. SADIE JORDAN HAMMONDS.

(Filed 15 December, 1954.)

1. Indictment and Warrant § 10—

An indictment or warrant must clearly and positively identify the person charged with the commission of the offense.

2. Indictment and Warrant § 9—

If the warrant or indictment is sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, it will be held sufficient and will not be quashed, or the judgment arrested, for mere informalities or refinements, but nevertheless, accepted and approved forms should be used, and the omission of indispensable allegation is fatal.

3. Indictment and Warrant § 10: Criminal Law § 56—

The warrant in the present case charged in one count that the named defendant did unlawfully "have in her possession a quantity of nontax-paid whiskey . . . And did unlawfully and willfully transport a quantity of nontax-paid whiskey . . ." *Held:* On appeal from conviction of illegal transportation, defendant's motion in the Supreme Court to arrest the judgment on the ground that defendant was not again named in the charge of transportation, is denied, since, considering the count as conjunctively stated, defendant was apprised that she was charged with the offense.

4. Searches and Seizures § 1: Criminal Law § 43—

Where it appears upon the *voir dire* that as a patrolman stopped defendant's car to inspect her driver's license and registration card, he saw intoxicating liquor in open paper bags in the car, the court properly admits the matter in evidence notwithstanding the patrolman was not clothed with a search warrant.

5. Criminal Law § 53b—

A charge that a reasonable doubt is one growing out of the testimony in the case is erroneous, since a reasonable doubt may also arise from lack of evidence or its deficiency.

6. Same—

The court is not required to define the term "beyond a reasonable doubt" in the absence of request, but when the court undertakes to do so, the definition must be in substantial accord with those approved by the Supreme Court.

7. Same: Criminal Law § 81c (2)—

Failure of an instruction defining reasonable doubt to charge, even contextually, that such doubt may arise from lack or deficiency of the evidence as well as out of the evidence, is error, but whether such error is prejudicial depends upon the evidence involved, and where the State's evidence is direct and amply sufficient to support the verdict, and the sole question for the jury's determination is whether to accept as true the State's evidence or that of defendant, such error is not prejudicial.

APPEAL by defendant from *Hubbard, Special Judge,* June Term, 1954, of COLUMBUS.

The defendant was tried in the Recorder's Court of Columbus County on a warrant, the pertinent parts of which are as follows: ". . . that at and in said county on or about the 2nd day of February, 1954, Sadie Jordan Hammonds did unlawfully and willfully have in her possession a quantity of tax-paid whiskey, to wit: 16 pints, and did unlawfully and willfully have in her possession a quantity of tax-paid whiskey for the purpose of sale. And did unlawfully and willfully transport a quantity of tax-paid whiskey, to wit: 16 pints, against the form of the statute in such case made and provided," etc.

The jury in the Recorder's Court convicted the defendant of transporting only. From the judgment imposed she appealed to the Superior Court of Columbus County where a trial *de novo* was had on the count charging the unlawful and willful transportation of whiskey. The jury returned a verdict of guilty as charged. Pursuant to the verdict, the court imposed judgment from which the defendant appeals, assigning error.

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

Richard E. Weaver and Nance & Barrington for defendant.

DENNY, J. The defendant moved in this Court in arrest of judgment. The motion is bottomed on the contention that the count upon which she was tried and convicted in the court below does not contain her name, and is, therefore, fatally defective. In support of her position she cites *S. v. Phelps,* 65 N.C. 450; *S. v. McCollum,* 181 N.C. 584, 107 S.E. 309; and *S. v. Camel,* 230 N.C. 426, 53 S.E. 2d 313.

There appears to be some conflict in the decisions of this Court on the question raised by the defendant's motion. In *S. v. Phelps, supra,* however, the motion in arrest of judgment was directed to a bill of indictment, purporting to charge the defendant with receiving stolen goods. The Court held that the indictment was "defective in not containing the name of the defendant in the proper place, and distinctly and positively charging him with receiving the stolen goods, etc." Certainly, a warrant or bill of indictment would be defective in any case where the defendant was not clearly and positively charged with the commission of the purported offense. *S. v. Finch,* 218 N.C. 511, 11 S.E. 2d 547.

In the case of *S. v. McCollum, supra,* the indictment contained five separate counts, and the one upon which the defendant was convicted did not contain his name. The Court said: "It is very generally held in an indictment consisting of several counts that each count should be complete in itself, . . ." The motion in arrest of judgment was upheld. While in *S. v. Camel, supra,* this Court held a separately numbered count

in a warrant which did not contain the name of the defendant, to be defective.

Notwithstanding the fact that some of our decisions would seem to support a contrary view, we think the warrant under consideration is sufficient to withstand the defendant's motion when considered in light of the provisions of G.S. 15-153. All that is required in a warrant or bill of indictment, since the adoption of the above statute, is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263; *S. v. Brady,* 237 N.C. 675, 75 S.E. 2d 791; *S. v. Loesch,* 237 N.C. 611, 75 S.E. 2d 654; *S. v. Sumner,* 232 N.C. 386, 61 S.E. 2d 84; *S. v. Stone,* 231 N.C. 324, 56 S.E. 2d 675; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604.

The function or purpose of a warrant or bill of indictment is (1) to make clear and definite the offense charged so that the investigation may be confined to that offense in order that the proper procedure may be followed and the applicable law invoked, and (2) to put the defendant on notice as to what he is charged with and to enable him to make his defense thereto. *S. v. Gregory, supra.*

It is clear that in the instant case, the defendant knew the character of the offense charged and made her defense accordingly. She was tried solely on the count charging the unlawful and willful transportation of 16 pints of tax-paid whiskey. It is true that if we consider this count as separately stated, her name does not appear in it, but we think the count should be treated as conjunctively stated; and the mere fact that the writer of the warrant placed a period at the end of the second count and started the third count as a new sentence, beginning with the conjunction "and," is a mere refinement. While we do not wish to encourage or approve carelessness in drafting warrants or bills of indictment, on the other hand, we do not look with favor upon the practice of quashing warrants or bills of indictment or arresting judgments for mere refinements or informalities that could not possibly have been prejudicial to the rights of the defendants in the trial court. *S. v. Moses,* 13 N.C. 452; *S. v. Barnes,* 122 N.C. 1031, 29 S.E. 381; *S. v. Hester,* 122 N.C. 1047, 29 S.E. 380; *S. v. Francis,* 157 N.C. 612, 72 S.E. 1041; *S. v. Ratliff,* 170 N.C. 707, 86 S.E. 997; *S. v. Carpenter,* 173 N.C. 767, 92 S.E. 373; *S. v. Poythress,* 174 N.C. 809, 93 S.E. 919; *S. v. Hedgecock,* 185 N.C. 714, 117 S.E. 47; *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338; *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; *S. v. Sumner, supra.*

This Court, in the case of *S. v. Barnes, supra,* speaking through *Clark, J.,* later *Chief Justice,* said: "It is passing strange that any prosecuting officer should by negligence or inadvertence depart, . . . from the forms so long used, and run the risk of a grave miscarriage of justice and throwing a heavy bill of costs on the public by such carelessness. The accustomed and approved forms are accessible and should be followed by the solicitors, . . . The Code, section 1183 (now G.S. 15-153), was enacted to prevent miscarriage of justice, but not to encourage prosecuting officers to try experiments with new forms, or to excuse them from the duty of ascertaining and following those which have been approved by long use or by statute. The object of the statute in disregarding refinements and informalities is to secure trials upon the merits, and solicitors will best serve that end by observing approved forms so as not to raise unnecessary questions as to what are refinements and informalities and what are indispensable allegations." The foregoing opinion was written 56 years ago, but what is said in it with respect to the drafting of warrants and bills of indictment is still applicable.

It is pointed out in *S. v. Ratliff, supra,* that neither bad punctuation nor bad grammar vitiate an indictment.

In the case of *S. v. Poythress, supra,* the defendant was charged in the complaint or affidavit with the following crimes: "1. That he engaged in the business of selling, exchanging, bartering, or giving away spirituous liquors, for the purpose of gain, directly or indirectly. 2. That he had in his possession twenty-seven pints of such liquors for the purpose of sale. 3. That he received at one time and in one package more than one quart of whiskey, to-wit: twenty-seven pints." His name appeared nowhere in the affidavit or complaint. The warrant of arrest, however, which was issued at the time the complaint was filed, contained the name of the defendant and was partly in these words: "These are therefore to command you forthwith to apprehend the said J. A. Poythress, . . . to answer the above charge, set forth in the affidavit, and be dealt with according to law." The Court said, "The complaint did not allege any offense against the defendant, as his name was not mentioned therein, but the warrant refers distinctly to the complaint, and, besides, was physically annexed to it. When this is the case, it may supply any omission or deficiency in the former, and if the two, when considered together as parts of the same proceeding, sufficiently inform the defendant of the accusation made against him, nothing else is necessary to be done."

Likewise, in the case of *S. v. Whitley, supra,* the late *Chief Justice Stacy,* in considering a question similar to that now before us, said: "The next position taken by the defendants is, that the second count in the bill of indictment is fatally defective, in that the names of the defendants are not repeated in charging the *scienter. S. v. McCollum,* 181 N.C. 584,

107 S.E. 309; *S. v. May,* 132 N.C. 1020, 43 S.E. 819; *S. v. Phelps,* 65 N.C. 450. This is a refinement which the act of 1811, now C.S. 4623 (presently G.S. 15-153), sought to remedy. *S. v. Parker,* 81 N.C. 531. It provides against quashal for informality if the charge be plain, intelligible, and explicit, and sufficient matter appear in the bill to enable the court to proceed to judgment. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. The exception is too attenuate." He then quoted with approval from the opinion of *Avery, J.,* in the case of *S. v. Shade,* 115 N.C. 757, 20 S.E. 537, as follows: " 'The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the courts unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that the indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal.' " The motion in arrest of judgment is overruled. However, this does not mean that a warrant or bill of indictment may withstand such a motion when an indispensable allegation of the offense charged is omitted. *S. v. Scott, ante,* 178; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678; *S. v. Vanderlip,* 225 N.C. 610, 35 S.E. 2d 885; *S. v. Tarlton,* 208 N.C. 734, 182 S.E. 481; *S. v. Tyson,* 208 N.C. 231, 180 S.E. 85; *S. v. May,* 132 N.C. 1020, 43 S.E. 819; *S. v. Marsh,* 132 N.C. 1000, 43 S.E. 828, 67 L.R.A. 179; *S. v. Bunting,* 118 N.C. 1200, 24 S.E. 118; *S. v. Wilson,* 116 N.C. 979, 21 S.E. 692; *S. v. Bryan,* 112 N.C. 848, 16 S.E. 909.

The defendant challenges the admissibility of certain evidence offered by the State, on the ground that the member of the Highway Patrol who arrested the defendant and seized the 16 pints of tax-paid whiskey found in her car, was not clothed with a search warrant.

The court, in the absence of the jury, heard the testimony of the patrolman and the witnesses for the defendant as to the circumstances under which the whiskey was found and seized. The testimony of the patrolman was to the effect that on the afternoon in question he was stationed at the intersection of Highways 211 and 74 at Bolton, in the County of Columbus, and was stopping all cars coming from the direction of Wilmington and checking the drivers' licenses and the equipment of the cars. The defendant's 1952 Pontiac came from the direction of Wilmington and was driven within about 100 yards of where he was stationed. He motioned for it to come on, but, instead, after remaining parked for about

five minutes, the driver turned the car around and headed back towards Wilmington. He followed it, stopped it, and requested the defendant, who was driving the car, to show him her driver's license and car registration card. She gave them to him; that he saw in the front seat between the defendant and Mr. Homer McGirt, a passenger in the car, two packages of whiskey, and that he could see on the floor board, between them, two more packages of whiskey; that "the bags were not crumpled across the top, they were open so I could see the whiskey." The court held the challenged evidence admissible. The ruling will be upheld on authority of *S. v. Moore*, 240 N.C. 749, 83 S.E. 2d 912; *S. v. Ferguson*, 238 N.C. 656, 78 S.E. 2d 911; and *S. v. Harper*, 235 N.C. 67, 69 S.E. 2d 164.

The defendant excepts to and assigns as error the following portion of his Honor's charge: "A reasonable doubt is not a vain, imaginary, captious or fictitious doubt, but it is a fair doubt, based on reason and common sense, and growing out of the testimony in the case. It is such a doubt as leaves one's mind, after a careful consideration of all the evidence, in such a condition that he cannot say he has an abiding conviction to a moral certainty of the defendant's guilt."

The vice complained of here is the instruction that a reasonable doubt "is a fair doubt, based on reason and common sense, *and growing out of the testimony in the case.*" (Italics ours.) This instruction is inexact and incomplete. A similar instruction was disapproved in *S. v. Tyndall*, 230 N.C. 174, 52 S.E. 2d 272, and held for error in *S. v. Braxton*, 230 N.C. 312, 52 S.E. 2d 895.

In *S. v. Tyndall, supra*, in speaking for the Court, the late *Chief Justice Stacy* said: "True it is, a reasonable doubt may grow out of the evidence in the case. It is also true that it may arise from a lack of evidence, or from its deficiency." What was said in regard to the definition of reasonable doubt in the *Tyndall* and *Braxton cases* has been approved in the cases of *S. v. Wood*, 235 N.C. 636, 70 S.E. 2d 665, and *S. v. Bright*, 237 N.C. 475, 75 S.E. 2d 407. While in the cases of *S. v. Wood*, 230 N.C. 740, 55 S.E. 2d 491, and *S. v. Bryant*, 231 N.C. 106, 55 S.E. 2d 922, this Court held that language similar to that complained of in the instant case was cured by the further instruction given bearing on reasonable doubt. In the present case, however, the further instruction is susceptible to the interpretation that the doubt growing out of the testimony in the case is the only doubt that the members of the jury may consider in determining whether they have or do not have an abiding conviction to a moral certainty of the defendant's guilt.

A trial judge in charging the jury in a criminal case is not required to define the term "beyond a reasonable doubt," in the absence of a request to do so. *S. v. Ammons*, 204 N.C. 753, 169 S.E. 631; *S. v. Herring*, 201 N.C. 543, 160 S.E. 891; *S. v. Steadman*, 200 N.C. 768, 158 S.E. 478;

S. v. Johnson, 193 N.C. 701, 138 S.E. 19. Even so, it seems to be well nigh the universal practice of our trial judges to define it. The law does not require any set formula in defining reasonable doubt. *S. v. Dobbins,* 149 N.C. 465, 62 S.E. 635; *S. v. Adams,* 138 N.C. 688, 50 S.E. 765; *S. v. Whitson,* 111 N.C. 695, 16 S.E. 332. But, when the trial judge undertakes to define the term, the definition given should be in substantial accord with definitions approved by this Court.

In the case of *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466, *Stacy, J.,* later *Chief Justice,* defined reasonable doubt as follows: "A reasonable doubt is not a vain, imaginary, or fanciful doubt, but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be 'fully satisfied' (*S. v. Sears,* 61 N.C. 146), or 'entirely convinced' (*S. v. Parker,* 61 N.C. 473), or 'satisfied to a moral certainty' (*S. v. Wilcox,* 132 N.C. 1137), of the truth of the charge, *S. v. Charles,* 161 N.C. 287. If after considering, comparing, and weighing all the evidence the minds of the jurors are left in such condition that they cannot say they have an abiding faith, to a moral certainty, in the defendant's guilt, then they have a reasonable doubt; otherwise not. *Commonwealth v. Webster,* 5 Cushing (Mass.), 295; 52 Am. Dec., p. 730; 12 Cyc. 625; 16 C.J. 988; 4 Words and Phrases, 155."

The above or other approved formulae may be found in scores of our decisions, among them see *S. v. Braxton, supra; S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Hege,* 194 N.C. 526, 140 S.E. 80; *S. v. Pierce,* 192 N.C. 766, 136 S.E. 121; *S. v. Steele,* 190 N.C. 506, 130 S.E. 308; *S. v. Wiseman,* 178 N.C. 784, 101 S.E. 629.

Varser, J., in speaking for this Court in *S. v. Steele, supra,* said: "We suggest, in addition to the definitions heretofore approved, for its practical terms, the following: 'A reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience, and satisfy your reason as to the guilt of the accused.' It is not 'a doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the testimony, or one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him.' *Jackson, J.,* in *U. S. v. Harper,* 33 Fed., 471."

We concede that this Court has from time to time declined to sustain exceptions to the definition of reasonable doubt in which it has been defined as "a doubt arising out of the evidence in the case," or "growing out of the evidence in the case." However, in such cases the Court has usually expressed the opinion that the entire instruction on the subject

complained of substantially conformed with its decisions in respect thereto. See *S. v. Bryant, supra; S. v. Wood, supra* (230 N.C. 740); *S. v. Williams,* 189 N.C. 616, 127 S.E. 675. Nevertheless, we have concluded that when such expression is used in defining reasonable doubt, without adding "or from the lack or insufficiency of the evidence," or some equivalent expression, it is error. But, whether or not such error will be considered sufficiently prejudicial to warrant a new trial will be determined by the evidence involved. Here the State's evidence was direct and amply sufficient to support the verdict. No circumstantial evidence was before the jury, nor could there have been any doubt as to the sufficiency of the State's evidence, if believed, to warrant a conviction. Hence, the only question before the jury was whether to accept the State's evidence as true, or that introduced on behalf of the defendant. The jury accepted the State's version of the facts, and we cannot see where the error complained of was prejudicial to the defendant in this particular case.

Even so, the identical question involved in the above exception is being presented to this Court over and over again. Many of these cases have been disposed of on other grounds. But, this particular complaint ought to be eliminated, and we, therefore, devoutly hope that all our trial judges who do not now adhere to the definition of reasonable doubt as approved herein, when using the expression "growing or arising out of the evidence in the case," will do so.

In the trial below, we find no prejudicial error.

No error.

JAMES R. HERRING AND WIFE, PATRICIA FAYE HERRING, v. C. B. CREECH AND WIFE, BESSIE L. CREECH; AND VIRGIL A. CREECH AND WIFE, IVA B. CREECH, TRADING AND DOING BUSINESS AS CREECH BROTHERS AUTO AND TRAILER SALES.

(Filed 15 December, 1954.)

1. Trover and Conversion § 2—

Proof of surrender of the chattel to the true owner is a complete defense to an action in the nature of a common law action in trover and conversion.

2. Bailment § 2—

The bailee is estopped to dispute or deny the bailor's title for the purpose of setting up title in himself.

3. Bailment § 7—

Surrender of the property to the true owner by the bailee is a complete defense to an action by the bailor for conversion. But if such third person is not the true owner, good faith or honest mistake on the part of the bailee in surrendering possession to him is no defense.

4. Same—

Where a lienholder is entitled to possession of the personalty by reason of the debtor's default, the lienholder is entitled to possession as against the bailee of the debtor, since a bailee can have no better right than his bailor.

5. Same—Nonsuit is properly entered in bailor's action for conversion when evidence discloses delivery to lienholder entitled to possession.

Plaintiffs' evidence was to the effect that they were the owners of property subject to a conditional sale contract, that they delivered the property to defendants for resale, advising defendants of the existence of the lien, that they thereafter demanded possession of the property from defendants and that defendants failed to return same or account for its value. Plaintiffs admitted default in their payments to the lienholder, entitling the lienholder to immediate possession. Defendants' uncontradicted evidence was to the effect that the property was repossessed by the lienholder or his authorized agent. *Held:* The facts, constituting a *prima facie* case, made out by plaintiffs' evidence, are explained and clarified by defendants' undisputed evidence establishing delivery of possession to the lienholder who was then entitled to possession, and nonsuit was properly entered in plaintiffs' action for conversion.

6. Trial § 22f—

Defendant's undisputed evidence which explains and clarifies plaintiff's evidence is properly considered on motion to nonsuit.

7. Trial § 23f—

Evidence supporting recovery on a theory not alleged in the pleadings cannot preclude nonsuit.

APPEAL by plaintiffs from *Martin, Special J.*, April 1954 Civil Term of NEW HANOVER.

Action by plaintiffs to recover from defendants the reasonable value of a certain ("dark blue 27-foot Zephry Glider Trailer Coach") 1950 used house trailer.

Plaintiffs allege that they, owners of the house trailer, on or about 18 October, 1952, delivered it to defendants as bailees, the terms of bailment being that defendants were authorized, during the period of thirty days from that date, to sell the trailer for $2,400.00 cash; and, if not sold, for its return to plaintiffs, undamaged. Plaintiffs allege that they made demand on defendants for their trailer 22 November, 1952, but defendants have failed to return it to plaintiffs or to account for its value.

While alleging they authorized defendants to sell the trailer for $2,400.00, plaintiffs' action is to recover from defendants $2,600.00, alleged to be the value thereof when demand was made therefor and refused, plus an additional $5,000.00 damages alleged to have been suffered by plaintiffs through their loss of the use of the trailer as their dwelling.

Evidence offered by plaintiffs tends to establish these facts:

1. Plaintiffs, husband and wife, purchased the trailer from Johnson Trailer Sales on or about 27 October, 1951. They executed a $2,100.00 note and conditional sales contract for the deferred portion of the purchase price, payable in 30 equal monthly installments of $70.00 each, payable on the second day of each month, beginning 2 December, 1951, at the office of Michigan National Bank, Grand Rapids, Michigan. The conditional sales contract, security for the $2,100.00 debt, provides that the trailer "shall at all times be and remain personalty and the title to said trailer shall remain vested in the Seller until this contract shall have been fully performed by Buyer." Also: "Any assignee shall be entitled to all of the rights of the Seller." Also: "Time is of the essence of this contract and in the event Buyer defaults on any payment, . . . then the Seller, at his or its option, may elect (1) to declare the entire sum remaining unpaid hereunder immediately due and payable and sue therefor, thereby vesting absolute title in Buyer, or (2) to repossess said trailer without notice, demand or legal process if repossession may be made without breach of the peace, and may enter upon the premises where said trailer may be and remove and hold the same absolutely as the property of Seller . . ." Also: "In case of repossession and sale of said trailer for default in payment of any part of the total time price, all sums paid on account of such price and any sums remaining from the proceeds of the sale of such repossessed trailer, after deducting the reasonable expenses of such repossession and sale, shall be applied in reduction of such price and, if the net proceeds of such sale exceed the balance due on such price, the excess shall be paid to the Buyer." Johnson Trailer Sales executed its bill of sale to plaintiffs, which contained its warranty that the trailer was free and clear of all liens except "Twenty-One Hundred Dollars due Michigan National Bank of Grand Rapids, Michigan."

2. Plaintiffs used the trailer as their dwelling, placing it near a cafe at Wrightsville Beach operated by them until shortly after 18 October, 1952. Desiring to sell the trailer, they put an advertisement in the newspaper and a "For Sale" sign on the trailer. On or about 18 October, 1952, defendants removed the trailer to their place of business under an agreement with plaintiffs by which defendants were authorized to sell the trailer for $2,395.00 and, if sold at that price, defendants would receive a commission of $200.00. Defendants were and are in the business of selling trailers and cars. The *feme* plaintiff testified: "We told him we owed the bank on the trailer, and would have to pay that after we got the money for the trailer." She testified further: "I told him our payment was due on the second of the month, and that the trailer would have to be sold in 30 days, before another payment came up, . . ." The plaintiff

James R. Herring testified: "We told him, me and my wife, the payment was 16 days behind when he came to get the trailer."

3. Before defendants took possession under the foregoing arrangement, plaintiffs had paid to the Michigan National Bank all installments to and including that due 2 September, 1952, but the installment due 2 October, 1952, was then in default, and the installment of 2 November, 1952, became due while the trailer was in the possession of defendants. No installment subsequent to that due 2 September, 1952, was paid or tendered by plaintiffs. The *feme* plaintiff testified: "We were trying to sell the trailer because we were behind on the payments; that was in October."

4. No sale was made. On Saturday, 22 November, 1952, plaintiffs got in touch with defendants to join in negotiations for a possible sale involving a trade-in of furniture, at which time defendants advised plaintiffs that Johnson Trailer Sales had repossessed the trailer the preceding Friday. The *feme* plaintiff testified: "I told Mr. Creech I was looking to him for our trailer, or the money, one, and he said if we would give him the money he would go and get the trailer, . . ." Also, Johnson Trailer Sales notified plaintiffs that they had repossessed the trailer.

5. While plaintiffs had possession of the trailer they made improvements thereon, and on 18 October, 1952, when defendants took possession of it, the trailer was reasonably worth $2,600.00.

Evidence offered by defendants tends to show:

1. The $2,100.00 note and conditional sales contract executed by plaintiffs were assigned by Johnson Trailer Sales to the Michigan National Bank. While the $2,100.00 was assigned (endorsed) without recourse, Johnson Trailer Sales agreed that they would "at any time upon demand repurchase from Michigan National Bank the trailer covered by the contract of conditional sale within referred to for the amount then remaining unpaid."

2. Johnson Trailer Sales received notice of plaintiffs' default and was authorized by the Michigan National Bank, which then held the papers, to locate and repossess the trailer. While neither plaintiffs nor defendants knew this at the time of repossession on 21 November, 1952, the *feme* plaintiff testified that she learned later that this was so. The trailer was repossessed by Johnson Trailer Sales on 21 November, 1952.

At the close of all the evidence, the court below entered judgment as of nonsuit and dismissed the action. Plaintiffs excepted and appealed, assigning errors.

W. P. Burkhimer for plaintiffs, appellants.
Aaron Goldberg for defendants, appellees.

BOBBITT, J. The complaint, in substance, alleges: (1) plaintiffs' ownership and possession of the trailer; (2) the delivery of possession by

plaintiffs to defendants as bailees upon the specific terms alleged; (3) the failure of defendants to redeliver possession to plaintiffs upon demand; and (4) the value of the trailer. Plaintiffs sue for the value of the trailer, not to recover possession thereof. Defendants, by answer, admit they do not have the trailer, alleging that Johnson Trailer Sales had repossessed the trailer as authorized by the conditional sales contract.

Plaintiffs, by their allegations, base their case squarely and solely upon defendants' failure to redeliver the trailer to plaintiffs in breach of their alleged duty to do so. There are no allegations that the trailer was in any way damaged while in defendants' possession. Nor are there allegations of negligence, fraud or connivance by the defendants in connection with the repossession of the trailer by Johnson Trailer Sales, or of any advantage accruing to defendants by such repossession.

In an action in the nature of a common law action in trover and conversion, as distinguished from an action in trespass, proof of surrender of the chattel to the true owner is a complete defense. *Hostler v. Skull,* 1 N.C. 183, Tayl. 152, 1 Am. Dec. 583; *Dowd v. Wadsworth,* 13 N.C. 130, 18 Am. Dec. 567; *Barwick v. Barwick,* 33 N.C. 80; *Pitt v. Albritton,* 34 N.C. 74; *Boyce v. Williams,* 84 N.C. 275; *Vinson v. Knight,* 137 N.C. 408, 49 S.E. 891.

In *Thompson v. Andrews,* 53 N.C. 125, this Court recognized and applied this principle in an action by bailor against bailee. The action was brought to recover the value of wheat left by plaintiff's agent at defendant's mill with instructions to keep it until plaintiff called for it, to which defendant assented. Defendant delivered the wheat to a third party (Pickard), who had demanded it as owner. It was held that delivery to the true owner was a complete defense to plaintiff's action. *Battle, J.,* for this Court, says: "If Pickard were the real owner of the article, could the plaintiff's act of bailing it to the defendant prevent Pickard from claiming it and recovering its value, if it were withheld from him by the defendant? Surely not. No man can be thus deprived of the right of demanding his property from any person who has possession of it and retains it against his will. The refusal of the possessor to deliver it upon such a demand would be evidence of a conversion, for which, if unexplained, the owner would be entitled to recover the full value of his property. If, then, the possessor cannot upon the ground of his being the bailee of another person, resist the claim of the true owner, his surrender of the article to the owner must necessarily be a defense against the action of the bailor, founded upon the charge of a conversion of the property."

An accepted principle in the law of bailments is that, in short phrase, the bailee is estopped to dispute or deny the bailor's title. A complete and accurate statement of this principle is given us by *Judge Dobie:* "The bailee is not permitted to dispute the bailor's title, at the time of the

delivery of the goods to him, by setting up in himself an adverse title to the goods as of that time." Dobie, Bailments and Carriers, sec. 14. *Peebles v. Farrar,* 73 N.C. 342, cited by appellant, illustrates the factual situation in which the principle applies. There, the plaintiff (landlord) delivered to the defendant (merchant) seven bales of cotton. The defendant agreed to store it in his yard and take care of it for the plaintiff. Thereafter, the defendant sold the cotton and applied the proceeds of sale on a mortgage debt due him by plaintiff's tenant. Plaintiff recovered from defendant the value of the cotton. The matter is put succinctly by *Pearson, C. J.:* "His Honor . . . instructed the jury that the receipt of the cotton by the defendant of the plaintiff, with an express promise on the part of the defendant that he would take care of the cotton for the plaintiff, constituted the relation of 'bailor and bailee.' There can be no doubt about that. His Honor further instructed the jury that a bailee is not allowed to dispute the title of the bailor *and set up title in himself.* This is familiar learning. The matter is too plain for discussion." (Emphasis added.) 6 Am. Jur., Bailments sec. 99; Annotation, 43 A.L.R. p. 153 *et seq.*

The law in other jurisdictions is summarized as follows: "As an exception to the general rule that a bailee is estopped to deny his bailor's title, the weight of modern authority supports the view that where a demand by the true owner, entitled to immediate possession, has been made upon the bailee, and the property has been turned over to him, the bailee, where he acts in good faith and without fraud or connivance, may show the title of the true owner and delivery to him as an excuse for the failure to redeliver to the bailor." 6 Am. Jur., Bailments sec. 107. See, also, Annotation, 43 A.L.R. p. 157 *et seq.*

If a bailee surrenders possession of a chattel to a person other than the bailor, or as authorized by the terms of the bailment, he does so at his risk and peril for neither good faith nor honest mistake will afford protection. Lawson, Bailments sec. 22 (d). The only defense is that such surrender of the chattel was to the true owner.

If Johnson Trailer Sales was entitled to repossess the trailer on 21 November, 1952, had it been in the actual possession of plaintiffs at that time, it had equal right to repossess the trailer when in actual possession of the bailee, the bailee's possession being in the right of the bailor. For, against a third party asserting ownership, "the bailee can never be in a better situation than his bailor." Story, Bailments sec. 102. Repossession by a lienholder then entitled to possession as against the bailor is a complete defense to the cause of action alleged in the complaint.

True, proof of the facts alleged in the complaint, together with defendants' admission that Johnson Trailer Sales obtained possession from defendants, nothing else appearing, is sufficient, *prima facie,* to require

submission to the jury. *Ins. Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416, and cases cited. But when the facts disclosed by plaintiffs' evidence, together with undisputed evidence offered by defendants tending to explain or make clear that which has been offered by plaintiffs, *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676, establish that the party obtaining possession was legally entitled to such possession as against plaintiffs, the *prima facie* case fades out in the light of such facts. *Morgan v. Bank*, 190 N.C. 209, 129 S.E. 585; *Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560.

Plaintiffs admittedly had defaulted in their payments and the lienholder was entitled to immediate possession. Johnson Trailer Sales repossessed the trailer. In so doing it acted for the bank and in its own behalf. It was obligated to purchase the trailer from the bank by paying therefor the amount of the unpaid balance of the $2,100.00 debt. It was authorized by the bank to make the repossession. After repossession, Johnson Trailer Sales paid the bank and got from the bank the originals of the $2,100.00 note and conditional sales contract. These were identified by Mr. Blaine Johnson, owner of Johnson Trailer Sales, offered as a witness by defendants; and these originals were offered in evidence. Plaintiffs' evidence tends to establish rather than challenge Johnson Trailer Sales' right of repossession.

If, as appellant contends, evidence tending to show that plaintiffs received prompt notice of the repossession by Johnson Trailer Sales and that plaintiffs had opportunity and ability to get the trailer by payment of the debt secured by the conditional sales contract but were unwilling to do so, is irrelevant, this is so because the cause of action alleged turns upon whether the lienholder was legally entitled to repossess the trailer rather than upon the lienholder's or the plaintiffs' subsequent conduct in relation thereto.

Conflicting evidence, (1) as to whether defendants agreed to advance payments to the lienholder in order to get additional time to sell the trailer, and (2) as to whether defendants agreed to notify plaintiffs in the event the lienholder should demand possession, is beyond the scope of the pleadings and without significance on the question presented here. Too, conflicting evidence as to whether the repossession by Johnson Trailer Sales was at night, in the absence of defendants, or in daylight, in the presence of one of the defendants, is beside the point; for the determinative question here is the legal right of Johnson Trailer Sales to repossess, not the circumstances of such repossession.

Appellants' other assignments of error have been carefully considered. However, since none deals with a matter that would affect the correctness of the judgment of the court below, discussion thereof is unnecessary.

The plaintiffs proceed on the theory they can recover from defendants the value of the trailer just as if there were no lien (in default) thereon. Such lien is much too significant to be ignored.

For the reasons stated, the judgment of the court below is

Affirmed.

SPENCER LEE HEGE AND WIFE, LAURA EDNA HEGE; H. L. BONDURANT AND WIFE, NAN V. BONDURANT; HARRY G. GARRISON AND WIFE, ELLEN B. GARRISON; FRANK E. KILLIAN AND WIFE, SARAH B. KILLIAN; ROBERT E. SLEET AND WIFE, MARY W. SLEET; S. J. MOSES AND WIFE, EDITH L. MOSES; M. D. PRATT AND WIFE, ELIZABETH H. PRATT; QUENTIN COOPER AND WIFE, ERNA S. COOPER; R. T. McMANEUS, JR., AND WIFE, BARBARA McMANEUS; DELBERT M. ALLEN AND WIFE, JULIA F. ALLEN; B. B. FARLOW AND WIFE, SHIRLEY O'B. FARLOW; JOHN M. HUNTER AND WIFE, MARY ANDERSON HUNTER; HENRY J. COOPER AND WIFE, AZILLE S. COOPER; JAMES E. McCLAIN AND WIFE, MARGARET J. McCLAIN; WILLIAM M. EDWARDS AND WIFE, JOHNNIE L. EDWARDS; E. R. GREENE AND WIFE, MARIE K. GREENE; FRED E. BRUNSON AND WIFE, HARRILEE L. BRUNSON; DEWEY S. McHUGH AND WIFE, CLARA V. McHUGH; RICHARD W. STOKER AND WIFE, JANE F. STOKER; AMERICAN TRUST COMPANY, TRUSTEE; HOLLIS P. ALLEN AND WIFE, ALMA C. ALLEN, v. CHARLES G. SELLERS AND WIFE, IRENE T. SELLERS; J. L. SIDES AND WIFE, OPHELIA M. SIDES.

(Filed 15 December, 1954.)

1. Appeal and Error § 39e—

The exclusion of evidence cannot be held prejudicial when evidence of the same import is thereafter admitted.

2. Same—

Where the record does not show what the answer of the witness would have been, appellant fails to show that the exclusion of the evidence was prejudicial.

3. Attorney and Client § 9: Evidence § 13—

It is competent for an attorney who is actively participating in the trial to testify as to matters which transpired in a conference of the parties prior to the controversy for the purpose of contradicting the testimony of a witness of the opposing party as to such matters.

4. Appeal and Error § 39e—

Where it does not appear in what way the answer of a witness would have been material or that its exclusion was prejudicial, an exception to the exclusion of the testimony cannot be sustained.

5. Reformation of Instruments § 6—

Only the parties to a deed, or those claiming in privity with them, may maintain an action to reform the deed for mutual mistake or mistake induced by fraud.

6. Same: Deeds § 16b—

One lot in a subdivision was conveyed direct from the developer to defendant grantees by deed which did not contain any restrictive covenants. The deeds to all the other lots in the development contained restrictions according to a general scheme. *Held:* The real estate agent and the grantees in the other deeds may not maintain an action against defendant grantees and the developer to reform the deed for mistake or fraud so as to have the restrictions inserted in defendant grantees' deed, since plaintiffs are strangers to the chain of title.

7. Reformation of Instruments § 10—

In order to reform a deed for mistake or fraud, the proof must be strong, cogent, and convincing.

8. Reformation of Instruments § 12—

Testimony of a stranger to the chain of title that in closing the deal for the lot, the agent of grantor gave a printed paper to the attorney for grantees which he stated contained restrictive covenants and which he stated should be attached to the deed before registration, *is held* insufficient to be submitted to the jury in an action to reform the deed on the grounds of mistake or fraud for the purpose of inserting the restrictions in the deed.

9. Deeds § 16b—

If restrictive covenants are added to a deed after the deed has been executed, such deed must be re-executed, re-acknowledged, and re-delivered after such addition.

10. Same—

A restriction of the enjoyment of property must be created in express terms or by plain and unmistakable implication.

11. Same—

Where no restrictive covenants are contained in a deed to a particular lot in a subdivision, and the recorded map shows no restrictions, the grantee therein is not bound by restrictive covenants, notwithstanding his knowledge that all the other lots in the subdivision contain restrictive covenants according to a general scheme, since such grantee is chargeable with notice only of such restrictions as appear in his chain of title, and no notice, however full or formal, can take the place of registration.

12. Deeds § 16b: Frauds, Statute of, § 9—

A restrictive covenant creates a negative easement within the Statute of Frauds, and cannot be proved by parol.

13. Deeds § 16b—

Restrictive covenants are not favored and will be strictly construed against limitation on use.

PLAINTIFFS' appeal from *McSwain, Special Judge*, 15 February, 1954, Extra Regular Civil Term, MECKLENBURG.

In the year 1948, J. L. Sides and wife, Ophelia M. Sides, began a "high-class, highly restricted residential development," known as Wooded Acres, near the City of Charlotte in Mecklenburg County. The development was laid out in 40 lots of approximately one acre each. The map of the development is recorded in Map Book 6, Pages 23 and 25, Mecklenburg Registry. Thirty of the deeds contained the following restrictions:

"1. All lots contained in this property known as Wooded Acres shall be used for residential purposes only.

"2. The property shall be owned and occupied by the white race only, except domestic servants employed by occupants. No residence erected on said property shall contain less than 1,200 square feet.

"3. No residence erected on said property shall be nearer than 50 feet to the front property line, and residences erected on corner lots must face the street having the shortest frontage. No subdivision of said lots shall be made by sale or otherwise for the purpose of creating additional lots, and only one residence shall be erected on each lot; by one residence is meant a construction designed for use and occupancy of one family.

"4. No garage apartment shall be erected on said property except as an incident to a residence to be later constructed, and such garage apartment must be located at the rear of such lot.

"5. The exterior of no building erected on said lot shall be of block type construction.

"6. A right of way is reserved for the purpose of erecting and maintaining power, telephone, and other public service facilities, together with the right of ingress, egress, and regress over same, and including also the right to trim out trees, or if necessary, to remove certain trees in order to satisfactorily construct and maintain said public service facilities."

Nine deeds omitted the racial restrictions and contained the others. The deed to Lot No. 11, from Sides and wife to C. G. Sellers and wife, contained no restrictions. It was the last deed executed. The map contains no reference to restrictions.

The defendants J. L. Sides and wife, through their agent, Carson Carpenter, made an oral agreement to sell to plaintiff Hollis P. Allen and wife, Alma C. Allen, Lots Nos. 10 and 11; they, in turn, entered into a written agreement to sell them to the defendants C. G. Sellers and wife, Irene T. Sellers. Sides and wife conveyed by deed to Hollis P. Allen and wife Lot No. 10 containing the above restrictions.

On 20 October, 1952, the plaintiff Hollis P. Allen, Carson Carpenter, and the defendant C. G. Sellers, met in the office of Mr. Frank Orr, attorney for Mr. Sellers, to close the transactions. At that time Mr. Allen delivered to Mr. Orr deed from himself and wife to Sellers and wife for

Lot No. 10. The deed contained the same restrictions as those set out in the deed from Sides and wife to Allen and wife. At the same time Carson Carpenter, agent for Mr. Sides, delivered to Mr. Orr a deed for Lot No. 11. While the deed was dated 4 August, 1952, and acknowledged on that date, the name of the grantee was left blank. At the request of Mr. Allen, Mr. Orr's secretary inserted in the Sides deed the names of Charles G. Sellers and wife, Irene T. Sellers, as the grantees.

The plaintiff, Mr. Hollis P. Allen, testified it was his understanding in parol with Sellers that the uniform restrictions should be included in the deed to Lot No. 11. Mr. Sellers testified there was no such agreement. Mr. Allen testified that Mr. Carpenter handed to Mr. Orr a typewritten paper, separate from the deed, which Mr. Carpenter said contained the uniform restrictions and was to be attached to and become a part of the deed before it was filed for registration. Mr. Orr, Mr. Sellers and Mr. Carpenter testified no such restrictions were presented or discussed. After the cancellation of a mortgage on Lot No. 10, payment of the purchase price was made, whereupon Mr. Allen delivered to Mr. Orr, for Sellers, the deed to Lot No. 10. Mr. Carpenter, as agent for Mr. Sides, delivered to Mr. Orr the deed to Lot No. 11. Mr. Orr thereupon filed both deeds for registration.

The plaintiffs, with the exception of Hollis P. Allen and wife, own lots in Wooded Acres, the deeds for which contain the uniform restrictions. They, with Mr. Allen and wife, brought this action, filed an amended complaint covering 20 pages of the record, alleging two causes of action: First, that the uniform restrictions were omitted from the deed to Lot No. 11 by mutual mistake of the parties or by mistake on the part of Sides and wife and Allen and wife, and by fraud on the part of Sellers and wife. They ask that the deed be reformed to include the restrictions. For a second cause of action, the plaintiffs allege that Sellers and wife had actual knowledge that all lots in Wooded Acres were to be sold subject to the uniform restrictions and, having bought with that knowledge, Lot No. 11 is properly subject to the restrictions, and that Sellers' attempt to open a road or street across No. 11 is in violation of restrictions and should be perpetually enjoined.

The defendants C. G. Sellers and wife filed answer, denying any agreement that Lot No. 11 should contain any restrictions or that there was any mistake or fraud on the part of any of the parties to the transaction. They allege the deed was executed in accordance with the contract, and, further, that they had no notice of the uniform restrictions; that they are charged with such notice only as appears in the documents constituting their chain of title; and that such documents are entirely free of restriction. They claim, therefore, that they are entitled to open a road or street across Lot No. 11 if they so desire.

The defendants J. L. Sides and wife filed answer in which they deny there was any intention to apply restrictions other than those which appear in the various deeds to the several lots. "That they had a right to convey one or more of the lots . . . without restrictions if they chose to do so. In this connection it is pointed out that because of the unusual topography of Lot No. 11 it was not suitable for a homesite but could only be used for something like a road . . ." They deny any agreement with Allen and wife that restrictions should apply to Lot No. 11.

The contract entered into on 25 September, 1952, between H. P. Allen, realtor-agent, and Mr. C. G. Sellers and wife, Irene T. Sellers, for Lots Nos. 10 and 11, was introduced in evidence. The pertinent parts are: "It is understood and agreed that said property will be conveyed subject to such conditions, reservations and restrictions as appear in instruments constituting chain of title and subject, also, to zoning laws. . . . This contract constitutes the final and entire agreement between the parties hereto and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained."

Much evidence was offered by the parties. However, in the view we take of the case, evaluation of the evidence is not determinative of the issues here involved, and its repetition even in substance is, therefore, unnecessary.

At the close of the evidence for plaintiffs, the defendants moved for judgment of nonsuit. The motion was denied. At the close of all the evidence, the motion was renewed with the following results: The defendants, by stipulation and agreement, were permanently enjoined from opening a street or road across Lot No. 10. The motion for nonsuit on the cause of action to reform the deed to Lot No. 11 and to impose restrictions on that lot were allowed. The temporary restraining order prohibiting the construction of a road or street over Lot No. 11 was dissolved. Judgment was signed, to which plaintiffs objected, excepted, and from which they appealed.

Francis H. Fairley for plaintiffs, appellants.

Orr & Osborne, by Frank W. Orr, for defendants Sellers and wife, appellees.

McDougle, Ervin, Horack & Snepp, by Frank W. Snepp, for defendants Sides and wife, appellees.

HIGGINS, J. During the course of the trial plaintiffs sought to prove by parol the date of the deed executed to the defendants Sellers and wife by the defendants Sides and wife. Objection to the testimony was sustained and became the basis of plaintiffs' Exception No. 7 and Assignment of Error No. 2. Ordinarily, parol evidence is incompetent to prove the

contents of a written document. However, in this case the deed itself was later introduced in evidence by the plaintiffs. The exception, therefore, is without merit.

Other exceptions, 1 through 16, were taken to the ruling of the court in sustaining objections to questions asked plaintiffs' witnesses by their counsel. These exceptions form the basis of plaintiffs' assignments of error 1 and 3. In each instance the record fails to disclose what the answers to the questions would have been. In the absence of the answer there is nothing to show that the plaintiffs were prejudiced. Therefore, the exceptions cannot be considered. *Blue v. Brown,* 178 N.C. 334, 100 S.E. 518; *Hall v. Hall,* 179 N.C. 571, 103 S.E. 136.

Exception No. 17 is to the ruling of the court in sustaining objection to a question asked plaintiff Spencer Lee Hege by plaintiffs' counsel, referring to Mr. Sides as follows: "Did he tell you he had sent that deed to Lot No. 11 to his agent, Carson Carpenter, to be delivered to Mr. Allen?" While the record shows the objection was sustained, the record also shows the following answer: "He told me he sent the deed to his agent, Mr. Carson Carpenter, to be delivered to Mr. Hollis Allen. He didn't say how the deed was sent." There is nothing to indicate the answer was made in the absence of the jury. Later on plaintiffs called Mr. Sides as a witness and he testified: "I never had any conversation with a Mr. Hollis P. Allen or with Mr. C. G. Sellers about the sale of the two lots." Mr. Sides further testified for the plaintiff: "I don't recall executing the deed, plaintiffs' Exhibit F, to Lot 11, but it was signed and acknowledged by me and my wife. I mailed or sent this deed to my agent, Mr. Carson R. Carpenter." There was, therefore, no dispute about the delivery of the deed by Sides to his agent, Carpenter. The method of delivery was immaterial. Exception No. 17, therefore, is without merit.

Plaintiffs' Exceptions Nos. 18, 19 and 20 relate to the testimony of Mr. Frank Orr, an attorney for C. G. Sellers and wife, on the ground that Mr. Orr was actively participating as attorney in the trial of the case. In passing on the propriety of Mr. Orr's testimony, it must be remembered that Mr. Allen had testified as follows: "At the closing, I think Mr. Sellers was present. I am not certain whether he was there or not; I don't think he was. I remember Mr. Carson Carpenter and Mr. Frank Orr were there at Mr. Orr's office . . . at the end of the deal the money was passed and the deeds delivered. Mr. Carpenter passed a restriction, a printed restriction across Mr. Orr's desk and made the statement, as I remember, that these were supposed to be attached to the deed before they were filed; before filing." Mr. Orr testified: "On or about October 20, 1952, Mr. Sellers, Mr. Carpenter and Mr. Allen came to my office to close the transaction. Mr. Allen had the deed for Lot No. 10. Mr. Carpenter had the deed for Lot No. 11 . . . Mr. Carpenter handed me this deed for

Lot No. 11 just exactly the way it is here . . . Mr. Allen handed me the deed for Lot No. 10 . . . In the meantime this paper, this deed for Lot No. 11 did not have the names of Mr. and Mrs. Sellers in it. Mr. Carpenter asked me to have my stenographer put those names in there and that is what I did . . . In the meantime Mr. Allen held his deed for Lot No. 10. Mr. Carpenter held the deed for Lot No. 11 until we got to the courthouse, and when Mr. Carpenter signed the mortgage and canceled it, I gave Mr. Allen the check for $3,450, he handed me the deed for Lot No. 10. Mr. Carpenter handed me this deed for Lot No. 11, I walked right in the Register's office and filed the papers for recordation and that is all that happened." Under the circumstances it was not error for Mr. Orr to testify.

Exceptions 21 and 22 relate to the action of the trial judge in sustaining objections to questions asked the defendant Sellers if he did not expect to make a profit out of his investment in lands back of Lot No. 11. It does not appear in what way the answer would have been material, or that excluding the testimony was prejudicial.

Exception No. 23 relates to the judgment of nonsuit entered at the close of all the evidence. Judgment of nonsuit was required for a number of reasons. To begin with, none of the plaintiffs were in privity of estate with either the defendants Sides or the defendants Sellers with respect to the title to Lot No. 11. This is a fatal defect in a suit to correct or reform a written instrument. In the case of *Sills v. Ford,* 171 N.C. 733, 88 S.E. 636, this Court said: "The authorities are uniform in holding that the relief of reformation of a written instrument will be granted to the original parties thereto and to those claiming under or through them in privity. In all cases of mistake in written instruments, courts of equity will interfere only as between the original parties or those claiming under them in privity." It is true that Hollis P. Allen made a contract to sell Lots Nos. 10 and 11 to the defendants C. G. Sellers and wife. He owned and could sell and convey Lot No. 10. He did not own and could not convey Lot No. 11. His negotiations to purchase Lot No. 11 from Mr. Sides through his agent, Mr. Carpenter, were entirely in parol and void under the statute of frauds. When the deed was made it was made from Sides, the owner, to Sellers, the purchaser. Allen is a stranger to the chain of title. He never had any enforceable right to Lot No. 11. He is not an owner of any of the lots in Wooded Acres. The contract entered into between H. P. Allen and C. G. Sellers and wife, Irene T. Sellers, shows upon its face that Allen was acting not as owner, but as agent for someone else. The contract states: "Through H. P. Allen, Realtor, Agent . . . has this day sold, and C. G. Sellers and wife, Irene T. Sellers, has this day purchased that certain parcel of land known as Lots Nos. 10 and 11, in Wooded Acres according to map or plat of same"

. . . "It is understood and agreed that said property will be conveyed subject to such conditions, reservations and restrictions as appear in instruments constituting chain of title and subject also to zoning laws . . . This contract contains the final and entire agreement between the parties hereto and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained."

Sides was the owner who originated the development. His deed to the defendants Sellers and wife constitutes the only conveyance in the chain of title. It contains no reservations. Mr. Sides' assertion in his verified answer was introduced in evidence, as follows: "It is denied that there was any agreement between these answering defendants and H. P. Allen and wife concerning the restrictions on either of said lots, except the reservations appearing in the deeds."

Carpenter testified there were no restrictions attached to Lot No. 11 when the deed was delivered or at any other time. Sellers and Orr testified no restrictions were attached. The recorded deed bears them out. To the contrary is the very inconclusive evidence of Allen, who says: "I remember when we got through negotiating the figures that Mr. Carpenter taking this little printed form out, and tossing it across the desk and saying, 'This should be attached before the deed is filed.' I remember that, there was a special reason why I remember it. I did not read the paper. It was similar, very similar, it was an exact copy of what I had when I bought the lot before, the first lot. I did not read it. Mr. Carpenter said there were restrictions on it. He said there were restrictions. I am going by what he said."

When a solemn document like a deed is revised by court of equity, the proof of mistake must be strong, cogent and convincing. What were the restrictions omitted? Allen did not read them. He testified Carpenter says they were restrictions. "I am going by what he said." The evidence is insufficient to show mutual mistake or a mistake induced by fraud. When a deed is executed and delivered, neither restrictions nor other material matters can be added by the parties. If restrictions are to be added it must be by another written instrument, or, if added to the original, it must be re-executed, re-acknowledged, and re-delivered after the additions.

What effect the entry of the names of the grantees after the execution and acknowledgment of the deed to Lot No. 11 by Sides and wife would have on the validity of the deed, and whether, if invalid, Allen and wife and Sides and wife are now in a position to contest its validity, are questions not presented on this record. All parties in their pleadings, evidence and briefs seem to have treated the deed as valid, contesting only the issue as to whether it is, or should be subject to restrictions.

A restriction of the enjoyment of property must be created in express terms or by plain and unmistakable implication. *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134; *Ivey v. Blythe,* 193 N.C. 705, 138 S.E. 2.

It is patent the evidence falls short of legal requirements for submission to the jury on the issue as to whether the restrictions were omitted by mutual mistake. There isn't a suggestion of fraud.

"The very essence of the doctrine allowing relief from inadvertence or mutual mistake is the desire of the law to execute the original intention and agreement of the parties." *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697.

The remaining question is whether the defendants C. G. Sellers and wife in accepting a deed without restriction, nevertheless were charged with such notice of the plans and purposes in the development of Wooded Acres as would make the uniform restrictions applicable to Lot No. 11. As has already been pointed out, no restrictions appear in the chain of title to that lot. No notice, therefore, can be found in the line of title. The recorded map shows no restrictions. "The law contemplates that a purchaser of land will examine each recorded deed or other instrument in his chain of title, and charges him with notice of every fact affecting his title which such examination would disclose. In consequence, a purchaser of land is chargeable with notice of a restrictive covenant by the record itself if such covenant is contained in any recorded deed or other instrument in his line of title, even though it does not appear in his immediate deed." *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197. Since the effective date of the Connor Act, 1 December, 1885, in matters involving the title to land it is intended that the public registry should be the source of notice. Since then it is considered not enough to send word by the mail boy. Notice, however full and formal, cannot take the place of registered documents. *Austin v. Staten,* 126 N.C. 783, 36 S.E. 338; *Hinton v. Williams,* 170 N.C. 115, 86 S.E. 994; *Blacknall v. Hancock,* 182 N.C. 369, 109 S.E. 72.

"If purchasers wish to acquire a right of way or other easement over the lands of their grantor, it is very easy to have it so declared in the deed of conveyance. It would be a dangerous invasion of rights of property, after many years and after the removal by death or otherwise of the original parties to the deed, and conditions have changed, to impose by implication upon the slippery memory of witnesses such burdens on land." *Davis v. Robinson, supra; Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867. A building restriction is a negative easement and within the statute of frauds. It cannot be proved by parol. A verbal contract for a right of easement is void under the statute of frauds. *Davis v. Robinson, supra.*

Restrictive covenants are not favored. As was said by this Court in *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619, "Further, it is to be noted that we adhere to the rule that since these restrictive servitudes are in derogation of the free and unfettered use of land, covenants and agreements imposing them are to be strictly construed against limitation on use. *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620." The courts are not inclined to put restrictions in deeds where the parties left them out.

For the reasons given, the judgment of the court below is

Affirmed.

DON THORMER, T/A DON THORMER ADVERTISING ART, v. LEXINGTON MAIL ORDER COMPANY.

(Filed 15 December, 1954.)

1. Contracts § 25a—

Where services are furnished in accordance with a contract between the parties under which defendant agrees to pay compensation therefor, but the contract fails to stipulate the amount to be paid, the measure of recovery is the reasonable value of the services rendered.

2. Quasi-Contracts § 1—

Where there is no contract between the parties, there is no obligation resting upon the one to accept material furnished by the other.

3. Quasi-Contracts § 2—

This action was instituted to recover for advertising material furnished by plaintiff. *Held:* If the material was not furnished in accordance with contract, recovery on *quantum meruit* is limited to such materials and services as are accepted and appropriated by defendant, and an instruction permitting recovery for the value of all services and materials furnished by plaintiff, regardless of whether they were accepted or not, is reversible error.

4. Same: Pleadings § 3a—

While it is the better practice to allege an express contract and an implied contract separately, the complaint in the present cause alleging that plaintiff had fully performed his agreement with defendant, and that the services and materials furnished thereunder were well worth a stated sum, *is held* sufficient to support recovery on *quantum meruit,* without amendment.

APPEAL by defendant from *McKeithen, Special J.,* April 1954 Civil Term, of DAVIDSON.

Action to recover for advertising material alleged to have been furnished by plaintiff to defendant in accordance with contract therefor.

Plaintiff is engaged in the advertising art business in Atlanta, Georgia. Defendant, in business in Lexington, N. C., sells hosiery by mail order, advertising by distribution of its catalogue. This action concerns illustrations of defendant's hosiery items, intended for use in its catalogue.

Plaintiff alleges that "the defendant contracted and agreed with the plaintiff that the plaintiff should make and provide certain advertising matter for use by the defendant in the defendant's mail order business, a statement of the services and supplies rendered by plaintiff to the defendant pursuant to said agreement being itemized" as set forth in detail. Plaintiff alleges further that he "fully performed his agreement and contract with the defendant and said services, art work and supplies are well worth the said sum of $809.00," the total of the listed items for expenses, materials and services. These allegations are denied by defendant, which sets forth its version of the agreement with particular emphasis upon its contention that only hand-drawn art illustrations were concerned.

The first contact between plaintiff and defendant was through Mr. Buice, who traveled out of Atlanta and called on defendant with the view of selling printing. There is no contention that he acted as agent either for plaintiff or for defendant. Mr. Buice was not a witness.

Mr. Shoaf, defendant's president, testified that he gave Buice an order for hand-drawn illustrative work for the price of $300.00. Mr. Thormer, plaintiff, testified that Buice asked him to make up the work; and thereupon he made up and gave pencil sketches to the photographer.

Presumably, the order given Buice was intended to be passed on to plaintiff. Be that as it may, a few days later, in September, 1952, Shoaf was in Atlanta and talked with Thormer. Their testimony is the only evidence of the arrangement made between them and is in sharp conflict.

Thormer's testimony tends to show that, in view of the short time for getting out the work, it was agreed that a photographer's assistance would be required, that photographs would be used either for tracing or retouching; and that the retouched photographs, plus an illustration, were picked up by Buice (who was making a trip to Lexington) and delivered to defendant within less than the stipulated time of three weeks. According to Thormer, there were eleven retouched photographs plus one illustration for cover use; also, some additional work, consisting of "very clean pencil line drawings"; and that there was no definite agreement as to price, it being estimated that the price would be between $300.00 and $600.00. His testimony was that the retouched photographs were of excellent quality, altogether as attractive and satisfactory as hand-drawn illustrations.

Shoaf, who is an experienced professional photographer, testified that defendant used in its catalogue not photographs, but natural art drawings; that while in Atlanta Thormer showed him rough pencil drawings he had designed for defendant, something to go by to revise and finish;

that he showed Thormer two or three pages of defendant's catalogue and told him, "If you will finish them as perfect as this your ideas will be swell"; that nothing was said in the conversation in Atlanta about photographs or about price; that, later in the Fall, he authorized an increase in price from $300.00 to $500.00 provided plaintiff would hurry and finish the work as agreed upon, that is, "complete hand-drawn, beautiful hand-printed pieces of art"; that defendant "never did receive a single piece of hand-drawn art," only air-brushed photography; and that these were not received until "around the first of December, a good two months overtime."

Defendant's testimony tended to show that it kept one piece, for which it tendered payment in the amount of $37.50, the others having been returned to plaintiff by express. Plaintiff's testimony tended to show that he did not receive any of the material.

The issues submitted to the jury were answered as follows: "1. Did the plaintiff and defendant enter into a contract, as alleged in the complaint? Answer: No. 2. If so, what amount, if any, is plaintiff entitled to recover of defendant on the contract? Answer: ..... 3. Is the defendant indebted to the plaintiff upon the *quantum meruit* for services rendered? Answer: YES. 4. If so, in what amount? Answer: $500.00."

Judgment was entered for plaintiff for $500.00, with costs. Defendant appealed, assigning as error the court's action in overruling its motions for judgment as of involuntary nonsuit and portions of the charge relating to the third and fourth issues.

Phillips & Bower for plaintiff, appellee.

DeLapp & Ward for defendant, appellant.

BOBBITT, J. When the complaint and evidence are considered, it appears that the controversy posed by the first issue is whether the advertising matter prepared by plaintiff and furnished to defendant was in accordance with their agreement; and the core of this controversy is whether the agreement related solely to hand-drawn art illustrations rather than to retouched photographs.

If the advertising matter was in accordance with their agreement, in the absence of stipulation as to price, the defendant was obligated to pay the reasonable value thereof; for it is well established that when services are rendered under an agreement that compensation therefor is to be paid, the measure of recovery is the reasonable value of the services rendered. *Turner v. Furniture Co.*, 217 N.C. 695, 9 S.E. 2d 379, where *Devin, J.* (later *C. J.*), sets forth the elements to be considered in determining the reasonable value of such services.

The first issue having been answered "No," the defendant, nothing else appearing, was under no obligation to accept and pay for the advertising matter prepared and furnished by plaintiff. *Goldston Brothers v. Newkirk,* 233 N.C. 428, 64 S.E. 2d 424.

With reference to the *third* issue, the court instructed the jury, in part, as follows: "Now, recovery on the *quantum meruit* is allowed in an action for work and labor founded on an implied promise on the part of the defendant to pay the plaintiff as much as he reasonably deserves to have for his labor and what the defendant reasonably deserves depends upon the reasonable and fair value of the plaintiff's services in the trade in which the defendant was engaged and the value of such services for one situated as was the plaintiff in his trade."

And, bearing upon the *third* issue, the court instructed the jury that plaintiff contended: "that the work was good and of a high quality; that plaintiff is a fine and skilled artist and . . . is entitled to the value of his time and the cost which he paid out; . . . that this represents the reasonable value of his services in the trade and to the plaintiff; . . . that this represents the amount which he deserves, regardless of whether or not there was any contract; . . . that the value of his time and what he put out to do this job for the defendant represents the reasonable value of his services and time . . ." etc. The instructions given convey the idea that the plaintiff was entitled to recover on *quantum meruit* the reasonable worth of all materials and services, including expenses incurred, tendered by plaintiff to defendant.

It would seem that, had the jury answered the first issue "Yes," these instructions would have been appropriate if directed to the second issue. However, since the jury answered the first issue "No," we are constrained to hold that they are incorrect; for plaintiff's right to recover for materials and services rendered, *not in accordance with contract,* is restricted to such materials and services as were accepted and appropriated by defendant. As to these, and these alone, defendant must pay, on the basis of *quantum meruit;* and the basis of liability therefor is *quasi*-contract, *i.e.,* unjust enrichment. Restatement of the Law, Restitution sec. 1. "The basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing." 12 Am. Jur., Contracts sec. 353. As stated by *Hoke, J.* (later *C. J.*): "The action of *indebitatus assumpsit,* as stated, is dependent largely on equitable principles, *Mitchell v. Walker,* 30 N.C. 243, and, in the absence of a special contract controlling the matter and unless in contravention of some public policy it will usually lie wherever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer." *Sanders v. Ragan,* 172 N.C. 612, 90 S.E. 777. It

appearing that defendant accepted and appropriated at least one of the illustrations prepared and furnished by plaintiff, plaintiff was entitled to an issue relative thereto.

Where plaintiff sues to recover for services rendered to defendant, failure to prove the alleged special contract to pay therefor precludes recovery *thereon;* but, where services so rendered are accepted by defendant, plaintiff may recover therefor upon *quantum meruit. Stokes v. Taylor,* 104 N.C. 394, 10 S.E. 566; *Morrison v. Mining Co.,* 143 N.C. 250, 55 S.E. 611; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477. The measure of such recovery, predicated on implied *assumpsit,* is the reasonable value of the services so rendered by plaintiff and *accepted* by defendant. *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561, and cases cited. Thus in *Moffitt v. Glass,* 117 N.C. 142, 23 S.E. 104, a contractor sued to recover on special contract for building a house for defendants. The jury found that the defendants did not make the contract as alleged. The defendants went into possession, not accepting the house as in conformity with the contract but accepting it as it was for occupancy and enjoyment. *Faircloth, C. J.,* says: "The plaintiff's right to a *quantum meruit* inquiry does not depend solely upon the contract, but upon the ground that he rendered service in work and labor performed, the fruits of which were received by the defendants, . . . Then the quality of the material and work and the value thereof could be ascertained." While the more orderly method of pleading would be to allege the express contract and the implied contract separately, our decisions do not so require. McIntosh, N. C. P. & P., sec. 410. The complaint here seems broad enough to support a recovery on *quantum meruit* within the principles here stated without amendment. *Jamerson v. Logan, supra.*

In *Harris v. Buie,* 202 N.C. 634, 163 S.E. 693, cited by appellant, *Clarkson, J.,* says: "When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for *quantum meruit* on an implied assumpsit." The evident meaning is that, when a special contract is *admitted* or *established,* and by its terms the *compensation is stipulated,* plaintiff's recovery must be in accordance with its stipulated terms and not otherwise.

The court properly overruled the defendant's motions for judgment as of involuntary nonsuit; but, in view of the negative answer to the first issue, the instructions relating to the third and fourth issues were in error and entitle defendant to a new trial. It is so ordered.

New trial.

MAGDALENE HUMMELL, INDIVIDUALLY, AND MAGDALENE HUMMELL, EXECUTRIX OF THE ESTATE OF CALLIE ELIZABETH HUMMELL, DECEASED, *v.* LOUIS HUMMELL, ELIZABETH HUMMELL BRIGGS, LESLIE RAY HUMMELL, WILL HICKS HUMMELL, MINOR, AND SAM DRAPER HUMMELL, MINOR.

(Filed 15 December, 1954.)

1. Wills § 33c—

Where no other time is fixed by the will and no preceding estate is created, an estate vests *eo instante* the maker's death.

2. Wills § 34b—

A devise and bequest to named children of testatrix, "or survivors," carries the estate to the named children who are living at the time of the testatrix' death as purchasers under the will, and upon the death of one of testatrix' children after the execution of the will but prior to the death of testatrix, such child is not a survivor so as to take under the will and such child's heirs and distributees cannot take through him by inheritance.

APPEAL from *Bone, J.*, August-September 1954 Term, WAYNE, by the plaintiff, individually, and as executrix; and by Louis Hummell and Elizabeth Hummell Briggs.

Callie Elizabeth Hummell, widow, died on 29 June, 1952, in the County of Wayne. She left her holograph will which was duly admitted to probate in the county of her residence. The will is as follows:

"At my death I desere everything I I possess or may possess both real & personal or mixed to be equally deveded between my children, Magdalene, Leslie Ray Louis & Elizabeth Hummell Briggs or survivors—I appoint—Magdalene, Leslie Ray, Hummell executors of my will, without bond.

"10-19-46. Callie Elizabeth Hummell."

At the time of the execution of the will the testatrix had four living children: Magdalene Hummell, Leslie Ray Hummell, Louis Hummell, and Elizabeth Hummell Briggs. At some time (the date not given) after the execution of the will and before the death of the testatrix, Leslie Ray Hummell died, leaving as his distributees and heirs at law three sons, Leslie Ray Hummell, now of age; Will Hicks Hummell, minor; and Sam Draper Hummell, minor. Magdalene Hummell qualified, and is now acting as executrix and, as such, brings this proceeding for advice and instruction by way of declaratory judgment as to the proper distribution of the estate and the determination as to who shall take under the will. The two minors are represented by a guardian *ad litem*. Judge Bone, after hearing, entered his judgment in material part as follows:

"The court being of the opinion that the beneficiaries of the will of Callie Elizabeth Hummell, deceased, are Magdalene Hummell, Louis

Hummell, Elizabeth Hummell Briggs, and the children of Leslie Ray Hummell, deceased, who are Leslie R. Hummell, Jr., Will Hicks Hummell, and Sam Draper Hummell, said parties are hereby declared to be the beneficiaries under said will, both as to real and personal estate, in the following shares: Magdalene Hummell, one-fourth share; Louis Hummell, one-fourth share; Elizabeth Hummell Briggs, one-fourth share; Leslie R. Hummell, Jr., one-twelfth share; Will Hicks Hummell, one-twelfth share; Sam Draper Hummell, one-twelfth share."

Magdalene Hummell, Louis Hummell, and Elizabeth Hummell Briggs excepted to the judgment, and from it appealed.

Dees & Dees for Magdalene Hummell, Executrix, appellant.

James N. Smith for Magdalene Hummell, Individually, appellant.

Hicks & Taylor for Leslie Ray Hummell, Will Hicks Hummell and Sam Draper Hummell and Mrs. Elizabeth Hicks Hummell, guardian ad litem for Will Hicks Hummell and Sam Draper Hummell, appellees.

HIGGINS, J. The sole question for decision here is whether the gift to the four named children *or survivors* carried the entire estate to the three children of the testatrix who survived her, or whether the children of Leslie Ray Hummell, who predeceased the executrix, took the share intended for him. It is patent the will was intended to dispose of the maker's estate. Those who take under the will, take as purchasers. By the use of the words *"or survivors"* the intention is clear the survivors shall be determined as of the date of the maker's death. This must be so for the reason that no preceding estate is given and no other time is fixed for vesting the estate. The estate vested *eo instante* the maker's death. Did it vest in Magdalene, Louis, and Elizabeth as survivors and exclude the children of Leslie Ray? Or did his children represent him and take his share? Did he have a share? It seems plain he did not have a share because he was not here to take at the time the will went into effect. His death excluded him from the will because he was not a survivor. The only way his children can take is to qualify *as survivors.* If they take at all, they cannot take by inheritance because the father died before he had any estate under the will.

The word "survivor" has been given various definitions. The word means: One who outlives another; one who outlives another person, a time or an event; one who continues to live after the death of those who comprise his group.

This Court has been called upon from time to time to determine who take as "survivors" under a will. Usually other complicating provisions appear in the will. Not infrequently survivors are to be determined at the end of a life estate or upon the happening of some contingency. How-

ever, the rules are so stated as to leave no doubt that they apply with equal force when the survivors are to be determined as of the date of the testator's death.

In the case of *Gregory v. Beasley,* 36 N.C. 25, this Court held: "There are three sets of claimants upon the share that fell to the intestate,. Mary Lucilla Gregory—first, the two surviving brothers; secondly, the two surviving brothers and the defendant, the administrator of the deceased sister, Maria; thirdly, the next of kin of Mary Lucilla, under the statute of distributions.

"The executory devise being good in law, the next of kin, as such, have, we think, no right to any of the share. It is very probable that the testator, if he could have foreseen the events which have happened, might have limited a part of this fund to the child of Maria. But this Court can only construe wills; it is not allowed to make them for testators. The testator has said that if one, or two, or three, of his children should die under age or without issue, 'for all the property to go to the *surviving ones forever.*' The meaning is that all the property, or original shares of one, two, or three of his children dying before coming of age or without issue, should go over to the child or children *then* surviving. The expression, *'surviving ones,'* shows this to be his meaning . . . Yet he says (in the clause) that if either die under age and without issue, the property is to go to the survivors, which tends to show that he did not mean to limit the contingency up to the time of the division only, but afterwards, also, if the event should occur. Mackey and Frederick, being the only children surviving at the death of their sister, Mary Lucilla, are entitled to the said share in moieties."

In the case of *Skinner v. Lamb,* 25 N.C. 155, this Court said: "The Judge was of opinion that the plaintiffs were entitled to recover these slaves. And we are of the same opinion, upon the authority of *Gregory v. Beasley,* 36 N.C. 25, and *Threadgill v. Ingram,* 23 N.C. 577; *Ferguson v. Dunbar,* 3 Bro. C. C., 469, in note (Belt's Ed.); 2 Roper on Legacies, 322. On the death of Matilda, leaving a child, the hopes and interest of the testator's brother, Thaddeus, (the ulterior legatee), were extinguished; because he could never take, unless *all* the daughters died without leaving issue. The three original legacies were vested, on the death of the testator, subject each to be divested, and go over to the survivor or survivors, on the death of either legatee without issue. In this case, Elizabeth is the only *survivor,* and must take the entire legacy that had been assigned to Orange, who died without issue. The Court regrets that the child of Matilda is excluded, but we can only construe wills, and are not authorized to alter or make them." (*Skinner v. Lamb* decided after *Gregory v. Beasley.*)

In the case of *Threadgill v. Ingram,* 23 N.C. 577, decided in 1841, this Court said: "Must not the representative deduce his title by averring that his principal was the survivor? Could the representative have any pretense of claim without such averment? We think he could not. If, therefore, the representative's principal was actually the survivor, he, the principal, must inevitably be permitted to take personally, and all chances of a perpetuity would of course cease. In the case now before the Court the superadded words ('and their heirs forever') appear to us to have been inserted only to denote the extent of the interest in the property that the survivors should take, and not as a limitation to a description of persons who might at any indefinite time claim as *heirs.* How could a person claim as heir to a survivor, if the ancestor was not *in esse* at the death of the first taker, so as to acquire the character of survivor? The thing appears absurd. It seems to us that no other presumption can arise in this case but that the testator intended a personal benefit to the survivors, and that the superadded words which he has made use of do not repel the presumption. *Hughes v. Sayer,* 1 P. W. 534.

"Secondly, John died in 1800. Did his two children or his representative take? We think they do not take. The executory devise to John, in the legacy given to Jesse, was contingent; and, as John did not survive Jesse, the executory devise never vested in him; and, therefore, there was nothing to be transmitted either to his representative or children."

And we quote from the case of *Ham v. Ham,* 168 N.C. 486, 84 S.E. 840: "It is clear that the testator used the words, 'shall go to the *others that are living,*' in the passage above quoted, in the sense of the survivors of the brothers, which would not include the children of a deceased brother, because the word 'others' plainly refers to them, the brothers, when read with what precedes it, and it is immediately followed by the expression, 'but not to any of my *other* children' which demonstrates that the word 'other' meant only children, and they could only be the sons, as it referred to the children before mentioned in the will. That this is the plain, natural, and grammatical construction is hardly arguable. This brings the case directly within the following authorities. It appeared in *Threadgill v. Ingram,* 23 N.C. 577, that a testator had bequeathed all his personal property to his four children, to be equally divided between them when his son A. arrived at the age of 21 years; and if one or two or three should die under age, or *without issue,* all the property to go to the surviving ones forever. A daughter died before her arrival at full age, leaving no children, but after A. had attained 21 years. It was held that her share went over to the survivors then living, and that a child of a sister, who had died after attaining full age, was not entitled to any part of it. *Judge Daniels* added: 'Must not the representative deduce his title by averring that his principal was the survivor? Could the representa-

tive have any pretense of claim without such averment? We think not. How could a person claim as heir to a survivor, if the ancestor was not *in esse* at the death of the first taker, so as to acquire the character of survivor? The thing appears absurd. It seems to us that no other presumption can arise in this case but that the testator intended a personal benefit to the survivors, and that the superadded words which he has made use of do not repel the presumption.' And the language of *Judge Pearson,* in *Hilliard v. Kearney,* 45 N.C. 221, is equally emphatic: 'The argument fails, because there are no words showing an intention to give a preference to such of the daughters as died leaving children, except to the extent of making the shares absolute at their deaths. . . . There is this further objection: If the words "other sisters" do not refer to the death of one, so as to be confined to the survivors, and is allowed to take in the others also, there is nothing to exclude such as had died without a child, which is absurd.'"

In the case of *Wooten v. Hobbs,* 170 N.C. 211, 86 S.E. 811, this Court said: "As a general rule only those persons can participate as survivors in a gift who are specifically included in the designation made in the will or answer the conditions annexed to the gift, and persons expressly excluded cannot share as survivors under other general conditions or designation in the will. The survivors, however, can only share in such property as is included by the will in the gift to survivors. In the absence of language showing a contrary intention, the share of a deceased beneficiary in case of survivorship will be divided among the survivors in equal shares."

The case of *Dicks v. Young,* 181 N.C. 448, 107 S.E. 220, cites with approval and includes the quotation herein given from *Threadgill v. Ingram, supra.*

In the case of *Mercer v. Downs,* 191 N.C. 203, 131 S.E. 575, this Court said: "Indeed the prevailing rule seems to be that if an estate is given by will to the survivors of a class to take effect on the death of the testator, the word 'survivors' means those living at the death of the testator; but if a particular estate is given and the remainder is given to the then survivors of a class, the words 'survivors' means those surviving at the termination of the particular estate."

We have sought in vain for authority upon which to hold the grandsons of the testatrix can share in her estate. Lapsed legacy statutes offer no help. If the will had named the four children and omitted the words "or survivors," the statutes would apply and the children of Leslie Ray would take the share intended for their father. Mrs. Hummell made the gift in her will to her four named children, *or survivors.* Only Magdalene Hummell, Louis Hummell, and Elizabeth Hummell Briggs can qualify as survivors. This construction, we think, is mandatory under

the decisions of this Court which apparently have become a stable part of the law of wills. Magdalene Hummell, Louis Hummell, and Elizabeth Hummell Briggs each take a one-third share of the estate.

Reversed.

STATE v. ERNEST C. WILLARD.

(Filed 15 December, 1954.)

1. Criminal Law § 79—

The statement in the brief of the general questions involved on the appeal, without bringing forward or mentioning in the brief any of the exceptions taken during the trial or authority in support of any particular exception, is insufficient to bring up for consideration the matters to which the exceptions shown in the record relate.

2. Automobiles § 30d: Criminal Law § 31h: Constitutional Law § 35—

In a prosecution under G.S. 20-138 it is competent for an expert witness to testify as to the results of a test of the defendant's blood, based on a sample taken less than an hour after the alleged offense with defendant's consent, as to the alcoholic content of the blood. Constitution of North Carolina, Art. I, Sec. 11.

3. Criminal Law § 31h—

A lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which he observed him.

4. Automobiles § 30d—

Evidence that defendant was intoxicated within the purview of G.S. 20-138 while driving a vehicle on the public highways of this State *held* amply sufficient to be submitted to the jury even in the absence of expert testimony as to the alcoholic content of defendant's blood.

5. Criminal Law §§ 50f, 81c (7)—

In this prosecution for drunken driving, exception to the statement of the solicitor in his argument "Don't kill my child" is not sustained, since in the absence of the factual setting of the remark it is not made to appear that the argument was an abuse of fair debate and prejudicial.

APPEAL by defendant from *Fountain, S. J.*, at 15 February 1954 Term, of GUILFORD—Greensboro Division.

Criminal prosecution upon a warrant issued out of Municipal-County Court of the city of Greensboro on affidavit charging that on 6 October, 1953, defendant at and in Guilford County "did unlawfully, willfully operate a motor vehicle on a public highway while under the influence of whiskey, narcotics, or other intoxicating beverages, against the State in such case made and provided," etc., tried in Superior Court upon appeal

thereto by defendant from judgment of said municipal County Court aforesaid.

Plea: Not guilty.

Upon trial in Superior Court the State offered evidence tending to show that on afternoon of 6 October, 1953, defendant was at the stock sale yard on S. Elm Street Extension, a public thoroughfare, south of the city of Greensboro in Guilford County. Witnesses offered by the State expressed opinion that, judging from his appearance, his actions, the manner in which he ate popcorn, and odor of intoxicant on his breath, he was then under the influence of some intoxicant. The State's evidence also tended to show that around four o'clock in the afternoon, while he was in such condition, he drove his car away from the stock sale yard; that a deputy sheriff followed in a short time, and next saw defendant about three-quarters of a mile or a mile away,—his car being parked on the side of S. Elm Street in the city limits of Greensboro, near a pick-up truck, with which his car had had a slight contact; that in the opinion of the deputy sheriff defendant was then under the influence of some intoxicant; and he arrested defendant on offense with which he stands charged. And the evidence tends to show that a city police officer was called, and defendant was taken to the police station; that at the police station the policeman told defendant that "a man would give him a blood test if he wanted one"; that "defendant said he wanted a blood test"; and that "Mr. R. B. Davis, Jr., came and drew a blood sample from the defendant."

The State offered Davis as a witness, and after examination of him, the court found as a fact that he is an expert chemist and hematologist. Objection to such finding was not made by defendant. Thereupon Davis, as such witness, was permitted, over objection of defendant, to testify, briefly stated, that on afternoon of 6 October, 1953, in response to a call he went to the Greensboro Police Department, and there saw, and had a conversation with defendant, in which he, Davis, told defendant that he did not have to take the test unless he wanted it, that there was nothing mandatory about it, and that it would be at his expense; in reply to which defendant said he wanted a blood test; that thereupon at 4:40 p.m., he, Davis, drew from defendant a sample of blood, 10 ccs; that he then made an analysis of this blood in the Doctor's Laboratory, which he owns and operates, and which is located in Piedmont Memorial Hospital building in Greensboro, testing the blood for the presence of alcoholic content, and that point two one (.21) per cent of alcohol was found in the blood.

Further, the witness Davis testified that he had made a study over a period of time as to the effect of alcohol in the blood stream upon a human being; that he had studied medical and clinical texts on the subject; that the texts he has studied concerning the effect of alcohol on the

human being are recognized authorities on the subject; and that from his studies and tests and experience he thinks he is qualified to say how and in what manner alcohol affects the human being; that in his opinion defendant was under the influence of alcohol; that having more than point one five (.15) of alcohol in his blood stream, it was his, the witness's, opinion that defendant would have been under the influence.

Then on cross-examination, and without objection by defendant, the witness Davis testified in part: ". . . What I have expressed to the jury is based on my chemical analysis of the blood. I am not an M.D. or a practicing physician . . . In my opinion it takes about 15 to 20 minutes for alcohol to commence being assimilated from the stomach into the blood stream, depending on whether there is anything in the stomach, whether the stomach is empty or whether there is any barrier there to keep the alcohol from being absorbed . . . I would say that if the amount of alcohol in a person's blood were from .05 up to but not including .15 he could or could not be under the influence of alcohol . . ."

While, on the other hand, defendant, as witness in his own behalf, admitted that on 6 October, 1953, he was at stock sales exchange, he denies that during any of the time he was there he was drinking, or eating popcorn, or staggering, or asleep in a car, but asserts that after he had parked his car on S. Elm Street, for use by his sister, he "squatted down in front of the car and drank" the remainder of a pint of whiskey from which he had taken two or three drinks in his yard three or four days before; and that this was between 10 and 15 minutes before the deputy sheriff arrived at the scene. Defendant also testified that on the way to police station the officer said to him, "If you doubt your circumstances that you are in, we will get you a doctor"; that he named Dr. Davis, and that he, defendant, thought Mr. Davis was a doctor, and first learned he was a chemist instead of a doctor in city court when he testified there as a witness.

Then on cross-examination defendant continues in part: ". . . I was sober until I got in the city jail . . . it was 4:57. When I sat there and relaxed, I felt the effects of my whiskey a little then. The blood was drawn about five minutes before then . . . Mr. Davis would not have examined me if I had known that he was not a doctor."

Defendant also offered the testimony of several witnesses tending to corroborate him as to his condition, and not drinking at the stock sale yard.

Verdict: Guilty as charged.

Judgment: Confinement in common jail of Guilford County for a period of four (4) months, to be assigned to work under the supervision of the State Highway and Public Works Commission.

Defendant excepts thereto, and appeals to Supreme Court and assigns error.

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

George A. Younce and E. L. Alston, Jr., for defendant, appellant.

WINBORNE, J. The record on this appeal contains several pages of unnumbered assignments of error based upon numerous exceptions taken by defendant upon, and in the course of the trial in Superior Court, relating in the main to testimony of the witness Davis, an expert chemist and hematologist, as to the alcoholic content in specimen of defendant's blood, and as to the effect of alcohol upon the human being when taken into the system. Yet no one of the exceptions is brought forward, or mentioned, in defendant's brief, and no reason or argument has been stated or authority cited therein in support of any particular exception. In such case, under Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at pages 562-3, all of the exceptions will be taken as abandoned by appellant.

Here appellant contents himself by stating in his brief, as questions involved, these two:

"1. Is expert testimony as to the results of a blood test taken after a defendant's arrest on a charge of driving under the influence of an intoxicating beverage admissible in the courts of this State?

"2. Did the Solicitor for the State argue improperly to the jury, under the facts of the record in this case, by saying: 'Don't kill my child'?"

This is not sufficient to bring up for consideration the matters to which exceptions shown in the record relate. But if it were, consideration of the factual situation in the case in respect to the subject matter thereof, in the light of applicable principles of law, the first question merits an affirmative answer, and the second a negative one.

It seems clear that the first question is restricted to the question of the competency of testimony of an expert, who is qualified to make a test for alcoholic content in human blood, as to results obtained upon such a test of the blood of defendant. The matter of the competency of testimony as to the effect any given quantity of alcohol found in the blood stream would have upon a human being, the defendant, is not included in the phraseology of the question. Nor does it bring into question the matter of compulsory self-incrimination. N. C. Const., Art. I, Sec. 11.

In such light it is appropriate to see what the annotators of decided cases have to say on the subject of "Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in the system": In Annotation 159 A.L.R. 209, supplementing annotation on same

subject in 127 A.L.R. 1513, it is said: "From the cases generally, it is apparent that, subject to compliance with conditions as to relevancy in point of time, tracing and identification of the specimen, accuracy of the analysis, and qualification of the witness as an expert in the field, there is rather general agreement that where the prosecution in a criminal case seeks to establish the intoxication of the accused, evidence as to the obtaining of a specimen of his body fluid at or near the time in question, evidence as to the alcoholic content of such specimen, as determined by scientific analysis, and expert opinion testimony as to what the presence of the ascertained amount of alcohol in the blood, urine, or other body fluid of an individual indicates with respect to the matter of such individual's intoxication or sobriety, is ordinarily admissible as relevant and competent evidence upon the issue of intoxication, at least where the accused furnished the specimen for the test, or submitted without objection to its taking."

Indeed, in our own reports we have *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277, a case in which numerous exceptions were taken to the admission and exclusion of evidence and in which defendant complained in this respect that while he was in jail, specimens of his blood and urine were taken for chemical analysis to determine the presence or absence of alcohol and morphine in his system, and contended that in this way he was compelled to give evidence against himself in violation of the constitutional inhibition against compulsory self-incriminaton. N. C. Const., Art. I, Sec. 11. In connection therewith, this Court, in opinion by *Stacy, C. J.,* wrote as follows: "The record fails to disclose any compulsion on the part of the officers in obtaining specimens of the defendant's blood and urine. The exceptions are therefore feckless. *S. v. Eccles,* 205 N.C. 825, 172 S.E. 415. They are not sustained. It is the rule in this jurisdiction that physical facts discovered by witnesses on information furnished by the defendant may be given in evidence, even where knowledge of such facts is obtained in a privileged manner, *S. v. Garrett,* 71 N.C. 85 (examination by physician), by force, *S. v. Graham,* 74 N.C. 646 (compelling accused to put his shoe in track), by intimidation, duress, etc. Factual information thus brought to light is competent evidence, though the declarations of the accused made at the time, if obtained by improper influence, are to be excluded. *S. v. Gatton,* 60 Ohio App. 192, 20 N.E. 2d 265."

To like effect in principle are *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, opinion by *Ervin, J.,* and *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387, opinion by *Parker, J.*

Therefore, the expert testimony as to the results of test of defendant's blood was admissible on the trial of this case on a charge of driving a

motor vehicle upon the public highways within the State while under the influence of intoxicating beverages. G.S. 20-138.

Moreover, it is not amiss to note that in this State a lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which he observed him. See *S. v. Leak,* 156 N.C. 643, 72 S.E. 567; *S. v. Jessup,* 183 N.C. 771, 111 S.E. 523; *S. v. Holland,* 193 N.C. 713, 138 S.E. 8; *S. v. Dills,* 204 N.C. 33, 167 S.E. 459; *S. v. Harris,* 209 N.C. 579, 183 S.E. 740; *S. v. Dawson,* 228 N.C. 85, 44 S.E. 2d 527; *S. v. Warren,* 236 N.C. 358, 72 S.E. 2d 763.

And as to when a person is under the influence of an intoxicant, see definition in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

In the light of these cases, there is in the present case abundant evidence, without any of testimony as to results of the blood test, to support the verdict and judgment pursuant thereto.

Now as to the second question: Defendant contends that the remark of the Solicitor is improper and prejudicial under the principles applied in *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525; and *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656. In the absence of the factual setting of the remark, it is not made to appear that it was an abuse of fair debate and prejudicial. Nor does the fact that the trial judge failed to instruct the jury in respect to it throw light upon the situation.

For reasons stated, there is in the judgment from which appeal is taken No error.

WILLIAM C. MORRELL v. BUILDING MANAGEMENT, INC., AND EASTERN MOTORS, INC.

(Filed 15 December, 1954.)

1. Wills § 33c—

A devise of property to a trustee for the benefit of testator's two sons for a period of ten years with direction that at the expiration of the ten-year period the property should go to the two sons "or to their heirs" in fee simple, *is held* to vest title in the two sons immediately upon the death of testator with the right of full enjoyment postponed until the termination of the trust, and therefore, each son became seized of a vested and transmittible estate in fee simple to a one-half interest in the *locus in quo.* Upon death of one of the sons during the trust period, his children take no interest in the property under the will.

2. Wills § 46: Estoppel § 2—

Even if the owner of a vested fee simple title cannot convey a valid and marketable title thereto during the life of a trust, his deed executed prior

to the termination of the trust will estop him and those claiming through him by deed, will, or inheritance, and his after-acquired title will "feed the estoppel" and vest the title thus acquired in his grantee.

APPEAL by plaintiff from *Martin, Special J.*, March Term 1954, NEW HANOVER. Modified and affirmed.

Civil action to recover a one-half undivided interest in and to the real property described in the complaint or for judgment decreeing that plaintiff is the owner of a one-half undivided interest in said property, and for an accounting for the rents and profits derived therefrom.

Felix J. Meeks, Sr., died testate 21 December 1941. At the time of his death he was seized and possessed of the land in controversy. In his will he devised said property (215 and 217 North Third Street, Wilmington, N. C.) in trust to one Demasco S. Carr for the use and benefit of his two sons, Felix J. Meeks, Jr., and William R. Meeks. The trustee was directed to rent said property and pay the net income derived therefrom monthly to his said sons.

The section of his will creating the trust, directing the trustee in respect to the execution thereof, and providing for its termination and the distribution of the *corpus* of the estate contains the provision now at issue, which is as follows:

". . . It is my wish and desire, and I so direct, that the aforesaid trust shall run for a period of ten years from the date of my death, and at the expiration of said ten year period, the property herein mentioned shall go to my two sons, Felix J. Meeks, Jr., and William R. Meeks, or their heirs, in fee simple, share and share alike."

On 4 January 1946, within the ten-year period fixed for the continuance of the trust, William R. Meeks executed and delivered to Broadfoot Iron Works a deed sufficient in form to convey a one-half undivided interest in and to the *locus*, reserving unto himself, however, the income therefrom during the ten-year period of the trust; and Broadfoot Iron Works thereafter conveyed said one-half undivided interest to the defendant Building Management, Inc. On 6 March 1946, Felix J. Meeks, Jr., and wife conveyed the other one-half undivided interest to Broadfoot Iron Works, and on 16 July 1949, Broadfoot Iron Works conveyed the *locus* to defendant Building Management, Inc.

William R. Meeks died intestate 6 May 1947, within less than ten years after the death of the testator and prior to the termination of the trust. He left surviving one son, the plaintiff herein, as his sole heir at law. The son's name was changed from William R. Meeks to William C. Morrell by order of the Circuit Court of Jackson County, Missouri, at Kansas City. He claims a one-half interest in the *locus in quo* as a devisee under the terms of the will.

When the cause was called for trial in the court below the parties waived trial by jury and agreed that the judge presiding should hear the evidence, "make the findings of fact, conclusions of law and render judgment thereon." Thereupon, after hearing the evidence and argument of counsel, the court found the facts, and, upon the facts found and the stipulations entered into by the parties, concluded that upon the death of the testator his two sons named in his will "became seized of a vested and transmittible estate in fee simple in remainder to a one-half undivided interest in the *locus in quo*, the complete enjoyment of possession of which was postponed until the termination of the trust estate, there being no condition precedent which prevented the immediate vesting of the estate in remainder upon the death of Felix J. Meeks, Sr." It thereupon entered judgment that the defendant Building Management, Inc., is vested with a good and indefeasible fee simple title to the property described in the fourth paragraph of the complaint. Plaintiff excepted and appealed.

Kellum & Humphrey and McClelland & Burney for plaintiff appellant.
Hogue & Hogue for appellee Building Management, Inc.

BARNHILL, C. J. This cause was tried in the court below on the theory that the testator devised to his two sons an estate in remainder—either vested or contingent. The plaintiff contended that whatever estate was devised was contingent, as to each son, upon whether he survived the trust, and that since plaintiff's father died prior to the expiration of the trust, he took nothing under the will; that the words "or their heirs" created another class of devisees who should take the share of a son in the event the son should die prior to the date set for the distribution of the *corpus* of the estate. That is to say, he contended that the roll must be called as of that date to ascertain who are the devisees; that he is the sole heir of William R. Meeks, and that as such he became the owner of one-half of the *corpus* at the expiration of the trust.

On the other hand, the defendants contend that William R. Meeks, immediately upon the death of the testator, was vested with title to one-half of the *corpus* in remainder in fee, subject only to the terms of the trust which merely postponed the enjoyment thereof.

The parties, both in their briefs and oral arguments, pursue the appeal to this Court upon the same assumption.

But the will creates no prior estate, less than a fee, with limitation over to the two sons such as would make the estate devised to them an estate in remainder, either vested or contingent. Hence the law of remainders and future interests has no application here.

"Where an active trust is created for the use and benefit of named beneficiaries, or there is a gift of all or a part of the income therefrom to

the beneficiaries, pending final division, or there is other language in the will evidencing a clear intent that a beneficial interest in the estate shall vest in the parties named immediately upon the death of the testator, with directions to the trustees to divide and deliver the estate at a stated time in the future, the interest vests immediately upon the death of the testator and the date of division merely postpones the complete enjoyment thereof." *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713. This rule, to be followed in the construction of wills, is now settled law in this jurisdiction. *Williams v. Smith,* 57 N.C. 254; *Fuller v. Fuller,* 58 N.C. 223; *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420; *Robinson v. Robinson,* 227 N.C. 155, 41 S.E. 2d 282; *McQueen v. Trust Co.,* 234 N.C. 737, 68 S.E. 2d 831; *Jackson v. Langley,* 234 N.C. 243, 66 S.E. 2d 899; *Weill v. Weill,* 212 N.C. 764, 194 S.E. 462; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *Pridgen v. Tyson,* 234 N.C. 199, 66 S.E. 2d 682; see also 57 A.J. 807; 69 C.J. 595; 2 Simes Future Interests 103.

The will under consideration creates no contingent future interest. The beneficiaries of the trust are named in the will and were persons in being at the time the will took effect and the estate was created. They were, under the terms of the will, to have and receive the income from the property monthly, and upon the termination of the trust, they were to receive their respective shares, freed of the trust provisions. Thus there is no postponement of the vesting of their title to the property. Instead, title thereto vested in them immediately upon the death of the testator. The trust merely served to postpone their right to the full enjoyment of the estate devised until its termination.

Even if we should conclude that in view of the fact the sons were to receive only the income from the estate during the life of the trust, neither son could convey a valid and marketable title to his share of the property during the life of the trust—and we do not so conclude—this would not affect the result. The deed executed by William R. Meeks would operate as an estoppel against him and those claiming by or through him by deed, will, or inheritance.

When a grantor conveys land to which he has no title or a defective title at the time of the conveyance, but who thereafter acquires title to the property, his after-acquired title "feeds the estoppel" and, by operation of law, vests the title thus acquired in the grantee. *Croom v. Cornelius,* 219 N.C. 761, 14 S.E. 2d 799; *Thames v. Goode,* 217 N.C. 639, 9 S.E. 2d 485; *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561; *Bell v. Adams,* 81 N.C. 118; *Benick v. Bowman,* 56 N.C. 314.

The judgment entered in the court below will be modified by striking out the words "in remainder" as used in the court's conclusion of law therein contained so that it will read ". . . that at the death of Felix J. Meeks, Sr., William R. Meeks, Sr. became seized of a vested and trans-

mittible estate in fee simple to a one-half undivided interest in the *locus in quo,* the complete enjoyment of possession of which was postponed until the termination of the trust estate, there being no condition precedent which prevented the immediate vesting of the estate upon the death of Felix J. Meeks, Sr." As so modified said judgment is affirmed.

Modified and affirmed.

LUTHER LEE MINTZ, PETITIONER, v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA, RESPONDENT.

(Filed 15 December, 1954.)

1. Criminal Law § 17c—

A plea of *nolo contendere* has the effect of a conviction by a jury, or a plea of guilty, for the purposes of the case in which it is entered.

2. Evidence § 2—

The courts will take judicial notice of the county seat of a county of this State.

3. Automobiles § 34b—

An official notice and record of "revocation of license" for the specified reason of "conviction of involuntary manslaughter" mailed to a driver by the Department of Motor Vehicles, *is held* to show that the license was revoked under G.S. 20-17 rather than suspended under G.S. 20-16, and does not support a finding by the trial court that the license was suspended under the latter statute.

4. Same—

A plea of *nolo contendere* to a charge of manslaughter resulting from the operation of an automobile supports the revocation of the driver's license under the mandatory provisions of G.S. 20-17.

5. Same—

The right of appeal under G.S. 20-25 is granted only when the Department of Motor Vehicles exercises its discretionary power under G.S. 20-16; no appeal lies where the Department revokes a license in accordance with the mandatory provisions of G.S. 20-17, and the lower court acquires no jurisdiction by an attempted appeal and the entire proceeding is void *ab initio.*

6. Same—

Where the Department of Motor Vehicles revokes a driver's license under the mandatory provisions of G.S. 20-17, the Department will not be estopped from denying that it was acting under the provisions of that statute by reason of a letter subsequently written to the licensee granting him a hearing under G.S. 20-16 (c), since in such instance a hearing is not authorized by law.

APPEAL by respondent from *Martin, Special Judge,* April Civil Term 1954 of NEW HANOVER.

Petition to compel the respondent, Commissioner of Motor Vehicles of North Carolina, to restore petitioner's automobile driver's license allegedly suspended for manslaughter resulting from the operation of a motor vehicle.

The facts were these: Petitioner had a chauffeur's license to operate motor vehicles on the highways of the State issued to him by the State Department of Motor Vehicles, which license had not expired. At the January 1954 Criminal Term of the Superior Court of Pender County, petitioner, with the consent of the Solicitor and Court, entered a plea of *nolo contendere* to a charge of manslaughter resulting from the operation of an automobile by petitioner. The Court entered judgment that the defendant pay a fine of $250.00 and the costs. Shortly thereafter the petitioner received the following notice through the mails:

"Form DL-44

NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES
STATE HIGHWAY PATROL
RALEIGH

Ren. Ch.
L. C. Att.
Mar. 19, 1954
B January 8, 1954

OFFICIAL NOTICE AND RECORD OF REVOCATION OF LICENSE:

Name of Licensee—Luther Lee Mintz
Address of Licensee—Route #2, Box 515,
Wilmington, N. C.
was: Rt. 2, Box 224
Driver's License No. Ren: Ch: 35991
(33 w m 200 6-0 brn-gry)
Date of Revocation—January 7, 1954

"You may apply for a new license—January 7, 1955—provided you have complied with the Safety Responsibility Act.

"Convicted of—Involuntary Manslaughter
Date of Conviction—January 7, 1954
Name of Court—Superior Court
Location of Court—Burgaw, N. C.

"The above named person will take notice that the law forbids said person to drive a motor vehicle upon the highways of the State during the period of revocation. (s) JAMES R. SMITH, *Colonel*
Commanding
State Highway Patrol."

Upon receipt of this notice petitioner requested a hearing from the Department of Motor Vehicles. His lawyers received a letter dated 3 March 1954 from Charles A. Speed, Major Director, Safety Division, State Highway Patrol, stating that upon petitioner's request and pursuant to the provisions of G. S. N. C. 20-16(c) the Department afforded him an opportunity for a hearing on 12 March 1954 in Wilmington, New Hanover County, the county of petitioner's residence. After said hearing the Department, by letter dated 16 March 1954, notified petitioner it had determined to allow petitioner's license to remain revoked.

Whereupon the petitioner filed his petition in the Superior Court of New Hanover County, in which he alleged that his chauffeur's license was suspended by the Department. Respondent answered denying that he suspended the chauffeur's license of petitioner, and alleged that the said license was revoked under the mandatory provisions of G. S. N. C. 20-17.

The trial judge heard the evidence, made findings of fact, and entered judgment.

The sole evidence bearing upon the question as to whether the chauffeur's license of petitioner was suspended under the provisions of G. S. N. C. 20-16, or revoked under the mandatory provisions of G. S. N. C. 20-17, was the above notice sent to petitioner by the State Department of Motor Vehicles and the letter from the Department dated 3 March 1954. The trial judge found as a fact that the petitioner's chauffeur's license was suspended by the respondent under G. S. N. C. 20-16 for one year from 7 January 1954 because of his plea of *nolo contendere,* and ordered the respondent to restore to petitioner his chauffeur's license.

Respondent excepted and appealed, assigning error.

Harry McMullan, Attorney General, and Samuel Behrends, Jr., Member of Staff, for the State.

John C. Wessell and Elbert A. Brown for Petitioner, Appellee.

PARKER, J. This decisive question is presented for determination: Was the chauffeur's license of petitioner *suspended* by the State Department of Motor Vehicles pursuant to the provisions of G. S. N. C. 20-16, or was his license *revoked* under the mandatory provisions of G. S. N. C. 20-17? If the Department acted pursuant to G. S. N. C. 20-16, the case of *Winesett v. Scheidt, Comr. of Motor Vehicles,* 239 N.C. 190, 79 S.E. 2d 501, controls, and the decision of the lower court was correct. If the Department revoked petitioner's license under G. S. N. C. 20-17, *Fox v. Scheidt, Comr. of Motor Vehicles, ante,* p. 31, 84 S.E. 2d 259, controls, and the lower court should be reversed.

G. S. N. C. 20-16 is captioned: "AUTHORITY OF DEPARTMENT TO SUSPEND LICENSE," and provides: "(a) The Department shall have authority to suspend the license of any operator or chauffeur without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee: 1. Has committed an offense for which mandatory revocation of license is required upon conviction; 2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage, which accident is obviously the result of the negligence of such driver . . ." Subsection (c) of this section provides that upon a suspension of license of any person by the Department, the person, whose license was suspended, upon request shall be given a hearing, and upon such hearing, after hearing the evidence, the Department shall either rescind its order of suspension, or good cause appearing therefor, may extend the suspension of such license.

G. S. N. C. 20-17 is headed: "MANDATORY REVOCATION OF LICENSE BY DEPARTMENT" and reads: "The Department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction for any of the following offenses when such conviction has become final: 1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle." Other cases specified in this section requiring mandatory revocation are omitted as not relevant.

It is true that the Official Notice and Record of Revocation of License mailed to the petitioner does not state that the Department acted under G. S. N. C. 20-17, but throughout the word, *revocation, and not suspension,* is used, and the reason specified for the revocation is *conviction of involuntary manslaughter* 7 January 1954, Superior Court, Burgaw, North Carolina: these words conform with the language of G. S. N. C. 20-17 and not with G. S. N. C. 20-16. A plea of *nolo contendere* has all the effect of a conviction by a jury, or a plea of guilty, for the purposes of that case only. *Fox v. Scheidt, Comr. of Motor Vehicles, supra;* and *Winesett v. Scheidt, Comr. of Motor Vehicles, supra.* The petitioner makes no contention that his conviction had not become final. We take judicial notice that Burgaw is the county seat of Pender County. *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757. It seems plain, and we so hold, that the Department revoked the chauffeur's license of petitioner under the mandatory provisions of G. S. N. C. 20-17. There is no evidence to support the trial judge's finding of fact that petitioner was notified by the Department that his chauffeur's license was suspended under G. S. N. C. 20-16. While the letter of the Department dated 3 March 1954 states that pursuant to G. S. N. C. 20-16(c), a hearing was granted petitioner, the evidence as to the action of the Department was mandatory revocation under G. S. N. C. 20-17, and not suspension under G. S. N. C. 20-16.

The Record in *Winesett v. Scheidt, Comr. of Motor Vehicles, supra,* shows that Winesett in his Petition, paragraph 5, alleged: that the Department sent him notice in writing through the U. S. Mails "that his said operator's license to operate motor vehicles on the public highways of North Carolina was suspended," and that "said notice stated that the cause of suspension was G. S. 20-16(1) . . ." Scheidt, the respondent, in his answer to the Petition, paragraph 5, stated: "That the allegations contained in Paragraph 5 of the Petition are admitted."

We said in *Fox v. Scheidt, Comr. of Motor Vehicles, supra:* "G. S. N. C. 20-25, which gives the right of appeal, expressly excepts a right of appeal when such cancellation is mandatory. 'No right accrues to a licensee who petitions for a review of the order of the Department when it acts under the terms of G. S. 20-17, for then its action is mandatory.' *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696."

Although the Department gave petitioner a hearing under G. S. N. C. 20-16(c), such a hearing was not authorized by law, because that subsection applies to a suspension of a driver's license under G. S. N. C. 20-16, and not to a mandatory revocation under G. S. N. C. 20-17.

The right of appeal to the Court under G. S. N. C. 20-25 is granted only when the Department exercises its discretionary power. *In re Revocation of License of Wright,* 228 N.C. 584, 46 S.E. 2d 696. Therefore, the lower court had no jurisdiction of the present proceeding for the Department revoked petitioner's license under the mandatory provisions of G. S. N. C. 20-17, and the entire proceeding was void *ab initio.*

The revocation of the chauffeur's license of the petitioner by the Department under the mandatory provisions of G. S. N. C. 20-17 was the exercise of a governmental or sovereign right prescribed by the General Assembly in the interests of public safety upon the highways of the State, and respondent is not estopped by the letter of the Department dated 3 March 1954 granting petitioner a hearing from asserting that the revocation was done under the mandatory provisions of that section. *Henderson v. Gill, Comr. of Revenue,* 229 N.C. 313, 49 S.E. 2d 754; *Washington v. McLawhorn,* 237 N.C. 449, 75 S.E. 2d 402.

When the Department of Motor Vehicles suspends or revokes a driver's license to operate a motor vehicle, all its records, including the notice mailed to, or served upon, the licensee, should state explicitly whether it acts under the provisions of G. S. N. C. 20-16, or the provisions of G. S. N. C. 20-17.

The recent decision of *Fox v. Scheidt, Comr. of Motor Vehicles, supra,* is controlling. Under its authority the judgment of the lower court is reversed, and the proceeding will be dismissed with the costs taxed against the petitioner. It is so ordered.

Reversed.

MRS. FREDA M. LOVING v. EARLE WHITTON AND RICHARD D. GIBSON.

(Filed 15 December, 1954.)

1. Negligence § 9—

Foreseeability is an essential element of proximate cause, and proximate cause is a prerequisite of liability for negligence.

2. Automobiles § 8i—

The driver of a car along the dominant highway has the right to assume that the driver along the servient highway will obey the mandates of our traffic regulations and stop or yield the right of way before entering the intersection in the absence of any fact or circumstance sufficient to put him on notice to the contrary.

3. Same: Automobiles §§ 18a, 18d—Upon facts alleged, negligence of driver along servient highway was sole proximate cause of collision.

In this action by a guest against the drivers of both cars involved in a collision at the intersection of a dominant and servient highway, the complaint alleged that the driver along the servient highway, approaching from the other driver's left, failed to stop at the stop sign but proceeded into the intersection directly in front of and in the path of the driver along the dominant highway. There was no allegation that there was anything to put the driver along the dominant highway upon notice that the driver along the servient highway did not intend to stop before entering the intersection. *Held:* The demurrer *ore tenus* entered by the driver along the dominant highway must be sustained notwithstanding allegations of his negligence in failing to maintain a proper lookout, in failing to give notice or warning of his approach to the intersection, and in traveling at a speed greater than reasonable and prudent under the circumstances, since the negligence of the driver along the servient highway, upon the facts alleged, constitutes the sole proximate cause of the collision and insulates any prior negligence of the other driver.

4. Torts § 6—

The second provision of G.S. 1-240 is designed for the protection of the defendant or defendants in a case where plaintiff elects to sue some, but not all, of the alleged joint tort-feasors, and is not applicable when plaintiff sues all of them.

5. Torts § 6—

Where plaintiff sues both the joint tort-feasors and the complaint fails to state a cause of action against one of them, the other has no right to insist that the first be retained in the action for the purpose of enforcing contribution.

6. Pleadings § 31—

Where plaintiff fails to allege a cause of action against one of the defendants joined as a joint tort-feasor, such defendant's exception to the action of the court in striking certain allegations of his answer setting forth a prior judgment in an action instituted by him against the other defendant, establishing the negligence of the other defendant as the sole cause of the collision, is without merit.

APPEAL by defendant Gibson from *Patton, Special J.*, March A Term 1954, MECKLENBURG.

Civil action to recover compensation for personal injuries sustained in a motor vehicle intersection collision, heard on a motion to strike made in the court below and upon a demurrer *ore tenus* interposed in this Court.

East Seventh Street is an arterial or through street. Intersecting Laurel Avenue is a servient highway having signs erected thereon requiring motorists to stop before entering East Seventh Street. Whitton did not yield the right of way—in addition to the ordinance, Gibson was to Whitton's right. A collision in the intersection resulted. Plaintiff, a passenger on Whitton's automobile, received serious personal injuries. She now sues both motorists as joint tort-feasors to recover compensation therefor. Summons herein was issued 21 May 1953.

On 29 March 1952, Gibson instituted an action against Whitton to recover compensation for property damages and personal injuries sustained by him as a result of the collision. In this action the jury found that the collision was proximately caused by the negligence of Whitton, and that Gibson was not guilty of any act of contributory negligence.

In his answer filed in this cause, Gibson pleads as a defense the sole negligence of Whitton as a bar against any recovery against him (Gibson), and in that connection alleges in his first further answer and defense that this fact has been adjudicated in the action instituted by him against Whitton.

In a second further answer and cross action he pleads in some detail the verdict and judgment in the action instituted by him against Whitton, the adjudication therein of the issue of negligence in his favor, the primary liability of Whitton by reason thereof, and the sole negligence of Whitton as finally adjudicated in that action. For other detailed facts, see *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196.

Whitton moved to strike paragraph 2 of the first further answer and all of the second further answer and cross action save and except paragraph 9 thereof. The motion was allowed and defendant Gibson appealed.

When the case was called for argument in this Court, Gibson demurred *ore tenus* to the complaint for that the complaint fails to state a cause of action against him, and that instead the facts alleged disclose that the negligence of Whitton was the sole proximate cause of the collision and the injury sustained by plaintiff as a result thereof.

Tillett, Campbell, Craighill & Rendleman for plaintiff appellee.

Helms & Mullis, Wm. H. Bobbitt, Jr., and Cochran, McCleneghan & Miller for defendant appellee Earle Whitton.

Francis H. Fairley and Robinson & Jones for defendant appellant Richard D. Gibson.

BARNHILL, C. J. On the question raised by the demurrer *or tenus* interposed in this Court by the defendant Gibson, the essential determinative facts alleged by plaintiff may be summarized without quoting verbatim the several allegations of negligence contained in the complaint. These facts, for the purpose of decision of this question, are admitted by the demurrer and must be treated as facts agreed.

She alleges that (1) East Seventh Street is an arterial or through street, (2) Laurel Avenue is a servient highway, and (3) Whitton, traveling on Laurel Avenue, and Gibson, going east on East Seventh Street, approached the intersection of the two streets at approximately the same time.

Then, as to Whitton she alleges that he failed to stop his vehicle "at the stop sign which had been erected at said intersection, and on the contrary and in violation of the traffic ordinances of the City of Charlotte, he proceeded to drive said Cadillac automobile into said intersection and directly in front of and into the path of the DeSoto automobile driven by the defendant Gibson," and that he "drove the said Cadillac automobile in a careless and negligent manner, in that he failed to maintain a proper lookout, failed to keep said Cadillac automobile under proper control, failed to yield the right-of-way to the defendant Gibson who was approaching said intersection at approximately the same time . . . and he carelessly and negligently operated said Cadillac automobile at a speed that was greater than was reasonable and prudent under the conditions then and there existing," and "carelessly and negligently drove said Cadillac automobile in front of and into the path of the automobile driven by the defendant Gibson" "so that there occurred a collision between said two automobiles."

She alleges that defendant Gibson "drove his said DeSoto automobile in a careless and reckless manner, in that he failed to maintain a proper lookout, failed to keep said DeSoto automobile under proper control, failed to give any notice or warning of his approach to said intersection, and he drove said DeSoto automobile at a speed that was greater than was reasonable and prudent under the conditions then and there existing and at a speed in excess of 35 miles per hour in a residential district, and he carelessly and negligently drove said DeSoto automobile into the right side of the automobile driven by the defendant Whitton with great force and momentum."

She alleges further that the alleged negligence of the two defendants concurred in causing the collision of the two vehicles as the result of which she sustained certain personal injuries.

These allegations bring this case within the line of decisions represented by *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Butner v. Spease,* 217

N.C. 82, 6 S.E. 2d 808; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; and *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361. See also *Aldridge v. Hasty,* 240 N.C. 353; *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; and *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197.

"Proximate cause is a prerequisite of liability for negligence and foreseeability is an essential element of proximate cause. Hence, in the final analysis, reasonable foreseeability on the part of the original actor of the subsequent intervening act and resultant injury is the test." *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295, and cases cited.

There is no allegation that Gibson, in the exercise of due care, should have observed that Whitton did not intend to stop in ample time for him (Gibson) to decrease his speed or stop and avoid the collision. *Matheny v. Motor Lines, supra; Brown v. Products Co.,* 222 N.C. 626, 24 S.E. 2d 334. In the absence of any fact or circumstance sufficient to put Gibson on notice that Whitton did not intend to stop at the intersection or yield the right of way, Gibson had the right to assume that Whitton would obey the mandates of our traffic regulations and yield the right of way to him. He was traveling on the through highway. He and Whitton approached the intersection at approximately the same time when Whitton, without stopping, drove his vehicle "into said intersection and directly in front of and into the path of" the automobile he was driving.

Under the circumstances detailed in the complaint, irrespective of his speed or failure to keep a proper lookout, Gibson could not have avoided a collision with the Whitton vehicle. As between Gibson and Whitton, or a passenger on Whitton's vehicle, the conduct of Gibson may not be held to constitute one of the proximate causes of the collision. The conduct of Whitton made the collision inevitable, insulated any prior negligence of Gibson, and constitutes the sole proximate cause of the collision. *Aldridge v. Hasty, supra; Reeves v. Staley, supra.*

The second provision of G.S. 1-240 is not applicable to the facts in this case. That provision is designed for the protection of the defendant or defendants in cases where the plaintiff elects to sue some but not all of the alleged joint tort-feasors. Here plaintiff sues all. Even if she stated a good cause of action against both, the liability of each would be determined by the verdict on the issues directed to her cause of action. Then, if Whitton should be required to pay the whole judgment, he could protect himself by following the procedure prescribed by the first provision of G.S. 1-240. It follows that Whitton has no right to insist that Gibson be retained as a party defendant in this action for the purpose of enforcing contribution, and that Gibson's exception to the judgment of the court below striking certain allegations in his answer is without merit.

In the event plaintiff fails to apply for and obtain leave to amend within the time allowed by law, G.S. 1-131, defendant Gibson is entitled to judgment that he go hence without day. It is so ordered.

Demurrer *ore tenus* sustained.

STATE v. ROBERT J. KLEIMAN AND NELLA WYATT.

(Filed 15 December, 1954.)

1. Fornication and Adultery § 1—

A single act of illicit sexual intercourse does not constitute fornication and adultery as defined by G.S. 14-184, the offense being habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other. However, the duration of the association is immaterial if the requisite habitual intercourse is established, and it has been held that a period of two weeks is sufficient to constitute the offense.

2. Fornication and Adultery § 4—

In a prosecution under G.S. 14-184, the acts of illicit intercourse may be proved by circumstantial evidence, and it is not required that even one such act be directly proven.

3. Fornication and Adultery § 1—

In a prosecution under G.S. 14-184, it is not required that the State prove that the male defendant and his wife were separated.

4. Fornication and Adultery § 4—Evidence of defendants' guilt of fornication and adultery held sufficient to be submitted to jury.

Evidence tending to show that the male defendant rented the dwelling, that the *feme* defendant and her two young children moved therein, that for a period of some sixteen days the car of the male defendant was habitually seen parked at the premises during the evenings and the male defendant was seen frequently leaving the premises late at night or in the mornings, and that when officers went to the dwelling early in the morning of the sixteenth day, they were admitted by the *feme* defendant after some delay and found the male defendant standing nude in a closet, *is held* sufficient to be submitted to the jury in a prosecution of fornication and adultery. Failure of the State's evidence to show, except by inference, that the wife of the male defendant was not at the dwelling at the time is immaterial.

5. Fornication and Adultery § 5—

The instruction as to the elements of the offense of fornication and adultery under G.S. 14-184 *held* without error.

APPEAL by defendants from *Whitmire, Special J.*, 10 May (1954) Criminal Term, of GUILFORD.

Criminal prosecution on bill of indictment charging fornication and adultery, under G.S. 14-184. Defendants pleaded Not Guilty.

The State offered the testimony of two police officers of Greensboro and of M. P. Brown, who lived at 2804 Robinhood Drive, tending to establish these facts:

1. Defendants were married, but not to each other. In October, 1953, defendant Kleiman and his wife, and *feme* defendant and her husband, had lived in separate portions of a duplex house.

2. On 5 March, 1954, Brown's wife, who had charge of the rental of the dwelling at 2806 Robinhood Drive, separated from the Brown home by a driveway, rented the premises (furnished) to defendant Kleiman. The *feme* defendant had called Mrs. Brown with reference thereto. On the date mentioned, at the request of the defendant Kleiman, Brown went over and gave instructions as to lighting the furnace and as to the purchase of fuel oil.

3. Upon rental of the premises by defendant Kleiman, the *feme* defendant and her two young boys, ages 2 and 4, moved in. They lived there until 21 March. Brown, who got off work around 6 p.m., saw the *feme* defendant there three or four times a week and observed the children in the yard. He saw others, men and women, go in and out of the house, both day and night.

4. Defendant Kleiman drove a black Chrysler car. Brown saw defendant Kleiman on the premises some six or eight times between 5 March and 21 March, going in and out of the house; and on one occasion he observed him leave the house one morning between 6:30 and 7 o'clock and drive away in the black Chrysler. On other occasions he saw the black Chrysler parked at the house. It was so parked on the evenings during the week preceding the arrest.

5. Early Sunday morning, 14 March, the house was dark except for a bathroom light. A police officer, observing the house, heard a door opening about 3:20 a.m.; then a dim light came on in the front room; someone came out and got in the Chrysler car; the car choked while being backed out into the street; the door was opened and the light came on in the car so that the driver could be recognized. "It was Mr. Kleiman." On other occasions he had seen the Chrysler parked at the house.

6. Between midnight and 5:30 a.m. on 21 March, 1953, the officers watched the house closely. During this time the Chrysler was parked there. About 3 a.m. a couple came out of the house, got in a car and drove away. Shortly afterwards, another couple drove up, went into the house, leaving shortly after 5 a.m. In just a few minutes, the lights in the house went out. The officers went up to the house. They heard the voices of a man and a woman in the back bedroom. They knocked at the front door. After noises of scrambling about inside the house, the *feme* defendant

said: "Who is it?" Identifying themselves as officers, they asked her to open the door. She was heard running back, away from the door, saying, "Just a minute, I've got my baby." No baby was there. There were two bedrooms. The two boys, asleep, occupied one bedroom. The *feme* defendant and the officers went to the other bedroom. The sheets and pillows on the bed were rumpled. *Feme* defendant's clothing consisted of "a very thin, transparent nightgown." *Feme* defendant told them no man was there. After searching elsewhere in the house, one of the officers opened the door to the bedroom closet. "Mr. Kleiman was standing there completely nude." The two defendants and the two children were the only persons in the house. Defendants were placed under arrest.

7. Other evidence, which need not be recounted, together with that narrated above, indicates rather plainly that the defendants had engaged in sexual intercourse on this occasion.

8. "I noticed male and female clothing in the closet where we found Mr. Kleiman. There were several pieces of male and female attire and clothing. I saw shoes around. I saw a shaving kit, razor, shaving soap in the bathroom, only the regular toilet goods that are used in a bathroom." Another officer saw more than one suit of men's clothing.

The jury returned verdicts of Guilty as charged. Thereupon, the court pronounced judgment, as to each defendant, from which defendants appeal, assigning as errors (1) the overruling of their motions to dismiss as of nonsuit, and (2) designated portions of the charge.

Attorney-General McMullan, Assistant Attorney-General Bruton, and Harvey W. Marcus, Member of Staff, for the State.

Harry R. Stanley for defendants, appellants.

BOBBITT, J. The only evidence before the court and jury was that offered by the State. The sole inquiry, as to nonsuit, is whether this uncontradicted evidence, and every reasonable inference to be drawn therefrom, considered in the light most favorable to the State, is sufficient for submission to the jury. *S. v. Ritter,* 239 N.C. 89, 79 S.E. 2d 164, and cases cited.

While conceding the evidence shows an act of illicit sexual intercourse on 21 March, 1954, defendants contend it does not show that they did unlawfully, "lewdly and lasciviously associate, bed and cohabit together," as charged in the bill of indictment.

A single act of illicit sexual intercourse is not fornication and adultery as defined by G.S. 14-184, *S. v. Ivey,* 230 N.C. 172, 52 S.E. 2d 346; for, as stated in *S. v. Davenport,* 225 N.C. 13, 33 S.E. 2d 136, " 'Lewdly and lasciviously cohabit' plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to

each other, constitutes the offense, and in plain words draws the distinction between single or non-habitual intercourse and the offense the statute means to denounce."

But, as stated further by *Seawell, J.*, in the opinion in the *Davenport case:* "It is never essential to conviction that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence." And, as stated by *Davis, J.*, in *S. v. Rinehart,* 106 N.C. 787, 11 S.E. 512: "From the very nature of the offense, it is usually proved by circumstances—rarely by positive and direct evidence of the adulterous acts. It is not necessary that the defendant should have been seen bedding and cohabiting together."

True, as contended by defendants, the evidence shows the association between defendants only between 5 March and 21 March. Ordinarily, the duration of the association, as an element of the offense, is immaterial. In *S. v. McDuffie,* 107 N.C. 885, 12 S.E. 83, an instruction that habitual illicit sexual intercourse for two weeks was sufficient to constitute the offense, was approved.

Defendants insist that the State's evidence does not show that defendant Kleiman and his wife were separated but that inferences to be drawn therefrom point in the other direction. This, as an element of the offense, is immaterial; for in *S. v. Guest,* 100 N.C. 410, 6 S.E. 253, where the conviction was affirmed, the adulterous association was in the home where the *feme* defendant and her husband resided.

Defendants insist that the State failed to show that Mrs. Kleiman did not live at 2806 Robinhood Drive. This contention is without force or merit. Certainly there is no evidence that she did live there or was ever seen there. The evidence tending to show what persons were seen at the house, together with the evidence that the *feme* defendant and defendant Kleiman made arrangements for the rental of the house, tends to negative any idea that Mrs. Kleiman was in any way involved at 2806 Robinhood Drive.

Conceding that the events of 21 March, *standing alone,* would have been insufficient, and conceding that the circumstances as to what transpired from the rental of the house until 21 March, *standing alone,* would have been insufficient, yet when considered in combination the evidence was sufficient to carry the case to the jury; for all that occurred on 5 March and thereafter must be considered and its significance determined in the light of what occurred on 21 March.

The exceptions to the charge are without merit. The exceptions, in the main, relate to portions of the charge wherein the court was reviewing contentions. Aside from the rule that any error in the statement of

contentions should be called to the attention of the court when it occurs, *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608; *S. v. Stone, post,* 294, careful consideration fails to disclose prejudicial error. Indeed, the argument advanced in support of these exceptions is in effect addressed to the insufficiency of the evidence for submission to the jury.

Included in the portions of the charge to which exceptions were taken are these instructions of law: "In this connection, the Court charges you that one act of sexual intercourse is not sufficient to sustain a conviction in a case of this kind. Lewdly and lasciviously means simply habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other." Again: "So that you are instructed that if you find from the evidence beyond a reasonable doubt that the defendants, not being married to each other, engaged in sexual intercourse with each other with such frequency between March 5th and March 21st that these relations were habitual, then it would be your duty to return a verdict of guilty as charged." These instructions, together with others not quoted, are in conformity with defendants' and our view of the law. Furthermore, the court instructed satisfactorily upon the rules applicable to the consideration of circumstantial evidence.

The case was one for the jury. It seems to have been tried fairly and in accordance with well established principles. No prejudicial error is shown.

No error.

FLOYD E. CLAPP AND WIFE, MYRTLE CLAPP, GRADY W. CLAPP AND WIFE, ANNIE CLAPP, AND GRADY W. CLAPP, ADMINISTRATOR OF THE ESTATE OF D. D. A. CLAPP, DECEASED, v. ERNEST E. CLAPP AND WIFE, CARRIE CLAPP, VICK CLAPP (SINGLE), HATTIE CLAPP FRIDDLE AND HUSBAND, CLYDE FRIDDLE, HARVEY CLAPP AND WIFE, BESSIE CLAPP, VERDA CLAPP (SINGLE), LUCILLE CLAPP SHANKLIN AND HUSBAND, CLAUDE SHANKLIN, AND NANCY M. CLAPP (WIDOW).

(Filed 15 December, 1954.)

1. Wills § 4: Frauds, Statute of, § 9—

An oral contract to convey or devise real estate is void by reason of the Statute of Frauds. G.S. 22-2.

2. Pleadings § 13—

New matter set up by answer not relating to a counterclaim, G.S. 1-159, or new matter relating to a counterclaim not actually served on plaintiff, G.S. 1-140, will be deemed as generally denied by operation of law.

3. Partition § 4a—

The defense of sole seizin set up in the answer to a petition for partition stands denied by operation of law as effectively as if specific denial had been interposed by formal reply.

4. Partition § 4b—

Defendants' answer to the petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants. Upon the hearing, defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement. *Held:* The judicial admission effectively removes the defense from the field of issuable matters, since the alleged agreement is void under the Statute of Frauds, and it was not required that the clerk transfer the issue to the civil docket. G.S. 1-399.

5. Pleadings § 25½—

A solemn judicial admission effectively removes the fact admitted from the field of issuable matters.

6. Partition § 4d: Executors and Administrators § 13a—

Where, in a proceeding for the sale of lands to make assets to pay debts of the estate and for partition among the heirs at law, it is denied that the decedent left no personal funds with which to pay debts, but admitted that the lands could not be actually divided without injury to all or some of the tenants in common, order of sale for partition is proper. The court must then determine whether decedent left a personal estate, and may direct that the proceeds of sale be converted into assets to pay debts only if it is determined that the decedent left no personal estate or that the personalty is insufficient to pay the debts. G.S. 28-81 *et seq.*, G.S. 46-22, G.S. 1-276.

7. Executors and Administrators § 13b—

Where the petition for sale of lands to make assets with which to pay debts of the estate alleges that the decedent left no estate so far as could be ascertained, it is sufficient on this aspect, and demurrer on the ground that the petition failed to set forth the value of the estate, as near as may be ascertained, and the application thereof, is properly overruled.

APPEAL by defendants from *Clarkson, J.*, at 31 May, 1954, Regular Term of GUILFORD.

Special proceeding to sell the landed estate of D. D. A. Clapp, deceased, for the purpose of making assets with which to pay her debts and for partition.

In addition to other jurisdictional facts required by G.S. 28-86, the plaintiffs allege in substance:

1. That the decedent "left no personal estate so far as can be ascertained . . . with which to satisfy and discharge her . . . debts, . . ."

2. That the amount of the debts of the decedent is approximately $750.

3. That the decedent's landed estate, consisting of a single tract, is valued on the tax books at $2,060, but will sell for a sum substantially in excess of the tax valuation.

4. That while the parties to the proceeding, the owners of the land, desire to hold their interests therein in severalty, actual partition cannot

be made without injury to some or all of them, and that a sale for partition is necessary.

The defendants answered, denying the nonexistence of personal property sufficient to pay the debts, but admitting that actual partition of the land cannot be made without injury to some or all of the owners thereof. The defendants also interposed the plea that a 55-acre portion of the land is owned in fee simple by the defendant Vick Clapp by virtue of an agreement by which the decedent during her lifetime agreed, for a valuable consideration, "to pass, convey, devise or give the home tract of . . . approximately 55 acres to . . . Vick Clapp."

When the cause came on for hearing before the Clerk, the defendants requested permission to present evidence in support of the issues raised by the pleadings. Whereupon the Clerk inquired of the defendants' counsel if he had any written contract or document to evidence conveyance or devise of the land claimed by Vick Clapp. To the inquiry the record discloses: "counsel answered 'no' but stated he intended to bring suit against the estate of D. D. A. Clapp, deceased, for breach of a contract to convey or devise the real estate referred to in defendants' answer." Thereupon the defendants' motion was overruled and judgment was entered appointing a commissioner and directing sale of all the land described in the petition. The defendants excepted and appealed to the Superior Court.

When the cause came on for hearing before Judge Clarkson, the defendants through counsel admitted in open court that there was no "written contract or document to convey or devise any of the real estate" claimed by the defendant Vick Clapp. Whereupon Judge Clarkson entered judgment dismissing the defendants' appeal and affirming in all respects the judgment previously entered by the Clerk.

The defendants appeal.

Frazier & Frazier and Chas. M. Ivey, Jr., for petitioners, appellees.

Henderson & Henderson and Robert S. Cahoon for defendants, appellants.

JOHNSON, J. An oral contract to give or devise real estate is void by reason of the statute of frauds, G.S. 22-2, which provides that "all contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing . . ." *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331; *Daughtry v. Daughtry,* 223 N.C. 528, 27 S.E. 2d 446; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477. *Cf. Clark v. Butts,* 240 N.C. 709, 83 S.E. 2d 855. And it is settled law that a party may rely on the statute of frauds under a general denial. *Luton v. Badham,* 127 N.C. 96, 37 S.E. 143; *Winders v. Hill,* 144 N.C.

614, 57 S.E. 456; *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760; *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561.

Also, it is provided by statutes that new matter set up by answer, not relating to a counterclaim (G.S. 1-159), or new matter relating to a counterclaim not actually served upon the plaintiff (G.S. 1-140), will be deemed as generally denied by operation of law. *Askew v. Koonce,* 118 N.C. 526, 24 S.E. 218; *Smith v. Bruton,* 137 N.C. 79, 49 S.E. 64; *Miller v. Grimsley,* 220 N.C. 514, 17 S.E. 2d 642; McIntosh, N. C. Practice and Procedure, section 478.

Accordingly, the defendants' plea of sole seizin as to the 55-acre home tract, set up as new matter in the answer, stood denied by operation of law as effectively as if specific denial had been interposed by formal reply.

And conceding as we may that the plea of sole seizin raised an issue of fact and conferred on the defendants the right to require the Clerk to transfer the cause to the civil issue docket for jury trial (G.S. 1-399), nevertheless, it would seem that the issue of fact so raised was eliminated and the necessity for jury trial removed when the defendants conceded by solemn admission, first made to the Clerk and later reiterated in response to an inquiry of the presiding Judge in term time, that their plea of sole seizin is not supported by any written contract or document to convey or devise the land claimed. A judicial admission, like the one here made, effectively removes the admitted fact from the field of issuable matters. Wigmore on Evidence, Third Edition, Vol. IX, sections 2588, 2590, and 2594; Stansbury, North Carolina Law of Evidence, sections 166 and 167; 20 Am. Jur., Evidence, sections 557 and 592.

Therefore, in view of the defendants' disclosure to the court, amounting to a judicial admission, that their claim of sole seizin is within the statute of frauds and for that reason void, the judgment of the Clerk, as approved by the presiding Judge, directing sale of all the land is free of prejudicial or reversible error and will be upheld.

We have not overlooked the defendants' denial of plaintiffs' allegation that the decedent left no "personal estate . . . with which to satisfy and discharge her . . . debts . . ." On the pleadings as presently cast, this denial raised a question of fact on which the defendants are entitled to be heard and to offer evidence. And unless and until this question be determined adversely to the defendants, the court below may not convert the proceeds to be derived from the sale of the land into assets for the purpose of paying the debts of the decedent. This is necessarily so for the reason that ordinarily realty may not be sold until the personalty has been shown to be insufficient to pay the debts of the decedent and the costs and charges of administration. *Parker v. Porter,* 208 N.C. 31, 179 S.E. 28; *Moseley v. Moseley,* 192 N.C. 243, 134 S.E. 645.

However, in the case at hand the petition alleges, and the judgment as entered decrees, that the land be sold for the dual purpose of making assets under G.S. 28-81 *et seq.*, and for partition under G.S. 46-22, and it is noted that the answer admits the land sought to be sold is incapable of actual partition without injury to some or all of the parties interested. Therefore, with the plea of sole seizin eliminated from the case by judicial admission, the plaintiffs were entitled upon the allegations of the pleadings to sale for partition. The judgment below will be treated as having been entered for that purpose, and as so modified will be affirmed.

Pending the sale, or final confirmation thereof, the court, pursuant to G.S. 1-276, may hear the question whether the decedent left a personal estate and, if so, proceed to determine the application thereof to the payment of her debts.

The defendants demurred *ore tenus* in this Court for failure of the petition to state facts sufficient to constitute a cause of action. The demurrer has been considered. It is without merit. The challenge is that the "petition fails to set forth . . . as required by G.S. 28-86 . . . the value of the personal estate, as near as may be ascertained and the application thereof." The plaintiffs' allegation that the decedent "left no personal estate so far as can be ascertained . . .," suffices to overthrow the demurrer.

Modified and affirmed.

DOROTHY BROWNING v. VIRGINIA BRITT HUMPHREY.

(Filed 15 December, 1954.)

1. Appeal and Error § 6c (3)—

An exception to the finding of facts which does not point out any particular finding to which the exception is taken, is a broadside exception and does not raise the question of the sufficiency of the evidence to support the findings or any one or more of them.

2. Appeal and Error § 40d—

Where the evidence is not in the record, it will be presumed that the findings of fact are supported by evidence.

3. Bastards § 12—

The mother of an illegitimate child is its natural guardian, and has a legal right to its custody, care, and control if a suitable person, even though others may be able to offer more material advantages for the child. The right of a mother to the custody of her illegitimate child is not absolute, but must yield to the best interests of the child, and the mother may forfeit or relinquish her right.

4. Same—

The mother signed a consent for the adoption of her illegitimate child while in the hospital where it was born, withdrew her consent about a month later, and a few months after the child's birth wrote that she was giving the custody permanently to the respondent. Respondent furnished the sole support and maintenance for the child for some eight years. The court found that the best interests of the child would be promoted by permitting him to remain in the custody of the respondent, and awarded custody to respondent. *Held:* The decree awarding custody of the child to respondent is proper.

APPEAL by petitioner from *Clifton L. Moore, Resident Judge,* April Term 1954 of NEW HANOVER.

Special proceeding by petitioner to obtain the custody of her seven year old illegitimate son from the respondent, who is not related by blood to the child.

The judge found these facts: In 1946 while petitioner's husband was serving overseas in the Army, she became pregnant with this child by another man. She attempted to make arrangements for its adoption after birth, so that her husband would not learn of her misconduct. Pursuant to an agreement between petitioner and respondent, they went to Norfolk, Virginia, where petitioner entered a hospital under respondent's name. When the child was born 24 May 1947, the child was turned over to respondent by petitioner. In the hospital petitioner signed a consent for its adoption, but withdrew it about a month later. In September 1947 petitioner wrote respondent and the Norfolk Welfare Department that she was giving the child to respondent permanently. This child has lived with, been supported by, maintained and cared for by the respondent since his birth. That respondent has a comfortable four-room house in a public housing area in Wilmington, and the child has a room to himself. Respondent has been a good home maker, and has given the child excellent care. Respondent is intelligent and has devoted herself fully to the rearing of the child. The child is making satisfactory progress in school work, and is well adjusted to his schoolmates and to his home. The respondent is a fit and suitable person to have the custody of the child, and his welfare "will be best promoted by permitting him to remain in the custody of the respondent."

Whereupon the judge awarded custody of the child to respondent.

The petitioner excepted to the findings of fact, ruling of the court, and to the signing of the judgment, and appealed.

J. H. Ferguson for Petitioner, Appellant.

No Counsel for Appellee.

PARKER, J. The sole exception is to the signing of the judgment, the ruling of the court, and to "the finding of facts." "This is a broadside exception which merely challenges the sufficiency of the facts found to support the judgment entered." *Warshaw v. Warshaw,* 236 N.C. 754, 73 S.E. 2d 900.

This exception fails to point out the particular finding of fact to which exception is taken. This is not sufficient to raise the question that there is no evidence to support the findings, or any one or more of them. *Vestal v. Vending Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427.

R., p. 16, states: "Thereafter the petitioner and the respondent gave oral testimony and offered witnesses . . ." This evidence is not in the Record. Therefore, it is presumed that there was sufficient evidence to support the findings. *Vestal v. Vending Machine Co., supra,* and cases therein cited.

It is well settled law in this State, and it seems to be universally so held, that the mother of an illegitimate child is its natural guardian, and, as such, has the 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. *Wall v. Hardee,* 240 N.C. 465, 82 S.E. 2d 370; *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35; *In re Shelton,* 203 N.C. 75, 164 S.E. 332; *Ashby v. Page,* 106 N.C. 328, 11 S.E. 283; Anno. 51 A.L.R. 1507; 7 Am. Jur., Bastards, Sec. 61.

We said in *In re Foster,* 209 N.C. 489, 183 S.E. 744: "The right of the mother to the custody and care of such child, which the law recognizes, and which in proper cases the courts will enforce, may, however, be forfeited or relinquished by her. The right is not universal or absolute. *Brickell v. Hines,* 179 N.C. 254, 102 S.E. 309. It must yield to the best interests of the child, as determined by the mother, or by the courts. *Atkinson v. Downing,* 175 N.C. 244, 95 S.E. 487."

In the instant case petitioner in the hospital where the child was born signed a consent for its adoption, though she withdrew it about a month later; and a few months after the child's birth, petitioner wrote respondent and the Norfolk Welfare Department that she was giving the child permanently to the respondent. It would seem that by such acts petitioner relinquished her right to its custody in the future. Respondent has furnished the sole support and maintenance for the child. Undoubtedly she loves the child as if he were her own flesh and blood. What was said in *In re Foster, supra,* would seem to be controlling: "The circumstances as disclosed by the record under which she surrendered her child and agreed to its adoption by a stranger excite sympathy for her, but cannot be invoked to restore to her rights which she voluntarily relinquished."

In *Wyness v. Crowley,* 292 Mass. 461, 198 N.E. 758, the third headnote succinctly and accurately states the question decided. It reads: "Where mother informed physician that she would be physically and financially unable to care for infant and requested him to find foster parents therefor, and mother gave written consent to adoption of infant, and delivered infant to foster parents, mother could not withdraw consent to adoption before entry of final decree especially where infant had been in care of foster parents for one and one-half years and foster parents were willing and able to rear child (G. L. (Ter. Ed.) c. 210, Sections 2, 4, 5, 5A, 6)."

The seventh headnote in *Appeal of Weinbach,* 316 Pa. 333, 175 A. 500, is as follows: "In proceeding for adoption of illegitimate child, opposed by child's mother, evidence including evidence that mother signed paper authorizing a bureau to place child for adoption sustained finding that mother had abandoned child, and warranted orphans' court decree that child's welfare would be promoted by adoption (1 P.S., Sec. 2 (c))."

The judge below did not find that petitioner was a suitable person to have the custody of the child.

The judgment is

Affirmed.

IN THE MATTER OF J. D. POWELL.

(Filed 15 December, 1954.)

1. Criminal Law § 62e—

While cumulative sentences may be imposed on conviction of, or plea of guilty to, two or more offenses charged in separate counts in the same indictment, such sentences must be based upon separate and distinct criminal offenses.

2. Larceny § 1: Receiving Stolen Goods § 1a—

While the crimes of larceny and receiving stolen property knowing it to have been stolen, are different offenses and not degrees of the same offense, the offense of receiving presupposes that the property in question had been stolen by some person other than the one charged with receiving, and therefore, a person cannot be guilty both of stealing property and of receiving the same property knowing it to have been stolen.

3. Criminal Law §§ 62a, 62e—

Upon defendant's plea of guilty to a count of larceny and to a count of receiving the same property knowing it to have been stolen, defendant was given an active sentence of twelve months on the count of receiving and an eight years suspended sentence on the count of larceny. *Held:* The dual punishments may not be upheld on the theory that the composite of the two is within the maximum allowed by statute for either of the offenses, since a sentence must be active in full or suspended in full.

4. Criminal Law §§ 62a, 62f—

Defendant pleaded guilty to a count of larceny and a count of receiving the same property knowing it to have been stolen. The court gave defendant an active sentence on the count of receiving and a suspended sentence on the count of larceny. After serving the full sentence imposed on the count of receiving, the suspended sentence was ordered placed in effect for alleged violations of the terms of probation of the sentence for larceny. *Held:* The sentence on the count of receiving will be treated as the valid sentence of the court, and defendant's confinement on the sentence imposed on the larceny count is invalid.

PETITION for *certiorari*.

At the September Term, 1950, of the Superior Court of Rowan County the petitioner, J. D. Powell, hereinafter called the defendant, stood accused in three separate criminal cases of the following offenses, all alleged to have been committed 9 June, 1950: (1) larceny, (2) receiving stolen property knowing it to have been stolen, (3) reckless driving, and (4) driving while drunk. The charges of larceny and receiving were included in a two-count bill of indictment and each count relates to one and the same article of property; namely, a 1941 Ford truck belonging to one S. R. Secrest. The charges of reckless driving and driving while drunk were laid in separate warrants. In each case the defendant entered a plea of guilty as charged. Whereupon Judge Gwyn, then presiding, ordered all the cases consolidated for judgment, which was pronounced in substance as follows: On the receiving count the defendant was given an active prison sentence of twelve months, to run concurrently with an unexpired prison sentence of about twelve months he was then serving. On the larceny count it was directed that the "defendant be confined in the State's Prison for a term of eight (8) years," judgment suspended and defendant placed on probation for a period of eight years upon certain enumerated conditions, the terms of which are omitted as not being pertinent to decision. The judgment is silent as to the charges of reckless driving and driving while drunk.

Upon completion of the active sentence imposed on the receiving count, the defendant was released from prison. Following this, and on 12 February, 1952, he was brought by the Probation Officer before Judge Clement, then presiding over the Superior Court of Rowan County, for alleged violations of the terms of his probationary suspended sentence. Judge Clement found the defendant had violated the conditions of probation in various particulars and entered judgment directing that the eight-year suspended sentence be placed in effect. He is now serving this sentence.

On 27 September, 1954, the defendant, challenging the validity of the eight-year sentence and his imprisonment thereunder, petitioned Judge Rudisill, Resident Judge of the Fifteenth Judicial District, for writ of *habeas corpus*. Upon return of the writ, Judge Rudisill, being of the

opinion the defendant's sentence and confinement were legal and valid, by order dated 2 October, 1954, denied his application for relief. Following this, the defendant forwarded his petition, with copy of Judge Rudisill's order, to this Court. The petition was accepted and treated as a petition for writ of *certiorari* to review the proceedings below. On 4 November, 1954, we allowed the petition and, on being advised the defendant was unable to employ counsel, designated John R. Jordan, Jr., Esq., of the Raleigh Bar, as counsel for the defendant.

R. Brookes Peters and L. J. Beltman for the State.

John R. Jordan, Jr., by Court appointment, for the defendant.

JOHNSON, J. It is settled law that cumulative sentences may be imposed on conviction or plea of guilty of two or more offenses charged in separate counts of the same indictment. *S. v. Moschoures,* 214 N.C. 321, 199 S.E. 92; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Charis,* 232 N.C. 83, 59 S.E. 2d 348. However, jurisdiction to inflict separate, cumulative punishments in such cases is dependent upon the fact that distinct violations of the law have been committed, and in order that separate offenses charged in one indictment may carry separate punishments, they must rest on distinct criminal acts. 15 Am. Jur., Criminal Law, sections 451 and 470.

The crimes of larceny and receiving stolen property knowing it to have been stolen are different offenses, and not degrees of the same offense. 52 C.J.S., Larceny, section 5. This is explained in detail by *Denny, J.,* in *S. v. Brady,* 237 N.C. 675, 75 S.E. 2d 791. It suffices here to note that the crime of receiving presupposes, as an essential element of the offense, that the property in question had been stolen by someone *other than* the person charged with the offense of receiving. Therefore, it is manifest that a person cannot be guilty both of stealing property and of receiving the same property knowing it to have been stolen. If the one is true, the other cannot be. See *Bargerser v. State,* 95 Fla. 404, 116 So. 12; *Commonwealth v. Haskins,* 128 Mass. 60; *In re Franklin,* 77 Mich. 615, 43 N.W. 997; 32 Am. Jur., Larceny, section 155; Annotation, 80 A.L.R. 171, p. 174. Accordingly, a plea of guilty, as here, of stealing property and of receiving the *same property* knowing it to have been stolen will not support separate, cumulative sentences.

Nor may the dual punishments here imposed be sustained on the theory that the composite of the two is within the maximum allowed by statute for either of the offenses charged. This is so for the reason it was not within the power of the court below to impose sentence active in part and suspended in part. Where a single offense is involved, the sentence must be made active in full or suspended in full. We do not sanction the split-

sentence. It is in effect, as explained by *Seawell, J.*, in *S. v. Lewis*, 226 N.C. 249, 37 S.E. 2d 691, an anticipatory pardon or parole, violative of the provisions of the Constitution of North Carolina appertaining to pardons and paroles. *See also* 15 Am. Jur., Criminal Law, sections 382 and 389.

Since the defendant could not be guilty of both larceny and receiving, the court below had power to impose punishment on only one count in the bill of indictment. Nevertheless, the court gave the defendant an active sentence of twelve months on the receiving count and an eight-year suspended sentence on the larceny count. He has served in full the sentence imposed on the receiving count. This we treat as the valid sentence of the court. The defendant's present confinement is under the sentence imposed on the larceny count, which must be treated as invalid. See also *S. v. McBride*, 240 N.C. 619, 83 S.E. 2d 488.

It necessarily follows that the defendant 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 Clerk of the Superior Court of Rowan County and to the Director of Prisons, with direction that the defendant be discharged immediately from custody.

Error and remanded.

ROBERT PAGE JONES v. EDITH JONES, ALIAS ADA BENNINGTON JONES.

(Filed 15 December, 1954.)

Evidence § 38—

Where a witness testifies that she had received a paper under seal which had been lost, it is error for the court to permit her to testify to the effect that the paper was a decree of divorce from her former husband, it being required that it be shown that the original record, rather than a mere copy thereof, had been lost or destroyed as the foundation for the admission of secondary evidence of its contents, since otherwise the record itself, being in existence, is the only evidence admissible to prove its contents.

PLAINTIFF'S appeal from *Clarkson, J.*, 31 May, 1954, Civil Term, GUILFORD Superior Court, Greensboro Division.

The plaintiff instituted this suit in the Superior Court of Guilford County on 25 January, 1954 for the purpose of annulling the marriage contract entered into between the parties on 7 August, 1927, upon the ground that at the time the parties entered into the contract the defendant had a living husband, Benton F. Jones, to whom she had been lawfully married and from whom she was not divorced. The plaintiff further alleged that he and the defendant separated on 4 December, 1953, and

since the date of the separation had been living continuously separate and apart; that both parties are residents of Guilford County, North Carolina. The plaintiff further alleged that in the year 1950 the parties adopted Paulette Page Jones, now six and one-half years of age, who has resided with the defendant since the separation; that the plaintiff is the proper person to have the sole custody and control of said child.

The defendant answered, admitting her marriage to the present plaintiff on the date alleged and her former marriage to Benton F. Jones in Cedar Springs, Virginia, on 17 January, 1917. She also admitted the separation from the present plaintiff on the date alleged. The other allegations of the complaint were denied. By way of further defense, she alleges that she and Benton F. Jones lived together in the State of Virginia after their marriage in 1917 and then separated. "That after the defendant and Benton F. Jones had been separated for two years or more, the defendant in this action retained an attorney and paid him a fee of $150.00 to institute for her an action against Benton F. Jones for an absolute divorce; that a divorce action was instituted. The deposition of this defendant was taken and she received some time later a certified copy of the divorce decree; that the defendant is informed and believes and therefore alleges, that she was granted a valid and absolute divorce from Benton F. Jones prior to August 7, 1926." She alleges that she is a fit person to have the custody of Paulette Page Jones; that she and the plaintiff entered into a separation agreement under the terms of which the defendant was given sole custody and control of Paulette Page Jones, and the plaintiff agreed to pay the defendant the sum of $50.00 per month for the support of the child; that the plaintiff has failed to live up to said promises; that since April, 1954, the child has been staying in a home in or near Atlanta, Georgia, maintained by the Christian Church; that the plaintiff has contributed only $50.00 to the support of Paulette in the year 1954 and that otherwise he is not a fit, proper, or suitable person to have custody of the child.

Plaintiff offered testimony tending to show that Benton F. Jones is now living near Wytheville, Virginia, and that after the separation the defendant lived in Roanoke, Virginia; that the defendant admitted since the separation from the plaintiff that she did not have a divorce from Benton F. Jones. Defendant testified in her own behalf, stating that she employed an attorney in Roanoke, Virginia, about the year 1922, paid him $150.00, gave a deposition to the attorney, and later received a document with a seal on it which she left at the home of Dr. Porter on leaving Roanoke; that the paper was lost and has been lost for more than 20 years. Over objection she was permitted to testify as to the contents of the document.

The following issues were submitted to the jury, with the answers indicated:

"1. Did the defendant marry the plaintiff at Winston-Salem, North Carolina, on or about August 7, 1926? Answer: Yes.

"2. If so, at the time the defendant married the plaintiff, did the defendant have a living husband from whom she had never been divorced, as alleged in the complaint? Answer: No."

Judgment was entered according to the jury's verdict, from which the plaintiff appealed.

Robert A. Merritt, Wharton, Poteat & Wharton, and William M. Poteat for plaintiff, appellant.

Jordan & Wright, by Luke Wright, for defendant, appellee.

HIGGINS, J. The question in dispute in the case below was whether the defendant had obtained a divorce from her former husband. She was permitted to testify that she paid a lawyer in Roanoke, Virginia, the sum of $150.00, gave a deposition, and that later she obtained a paper with a seal on it which she left at Roanoke, Virginia, twenty or twenty-five years ago and had not seen since. The court, over objection, permitted her to testify as to her recollection of the contents of the document. She said: "The best I recall, it was Ada Bennington Jones *vs.* or something like that, Benton F. Jones . . . I don't remember what it was exactly, except something about me being divorced by the State of Virginia." The court evidently admitted this testimony over objection on the theory that the defendant had laid the foundation for the introduction of parol testimony to prove the contents of a lost document. However, his Honor overlooked the fact that the paper could be nothing more than a copy of an original record of the Circuit Court of Virginia. The contents of a court record cannot be proved by parol upon the mere showing that some copy of it has been lost or destroyed.

In order to admit secondary evidence of the contents of a court record, it is necessary that the foundation be laid by showing the original record has been destroyed, or lost. "The record itself in the former action, being in existence, is the only evidence admissible to prove its contents." *Gibson v. Gordon,* 213 N.C. 666, 197 S.E. 135; *Gauldin v. Madison,* 179 N.C. 461, 102 S.E. 851; *Little v. Bost,* 208 N.C. 762, 182 S.E. 448.

"The proceedings of courts of record can be proved by their records only; that is by reason of the vagueness and uncertainty of parol proof as to such matters, and of the facility which the record affords of proving them with certainty. Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth." *S. v. Norris,* 206 N.C. 191, 173 S.E. 14.

It is unnecessary to examine other questions raised by the appeal. New trial.

STATE v. BILLY STONE.

(Filed 15 December, 1954.)

1. Criminal Law § 53b—

The court's instruction to the jury in this case on defendant's evidence of an alibi *is held* correct and not subject to attack on the ground that it placed the burden on defendant to produce evidence to raise a reasonable doubt as to his guilt.

2. Same—

Construing the instruction as to the permissible verdicts contextually with the rest of the charge *it is held* that the jury could not have been misled as to the burden of proof.

3. Criminal Law § 78e (2)—

Where a misstatement of a contention is not brought to the trial court's attention in apt time, the matter is not subject to attack or review on appeal.

APPEAL by defendant from *McKeithen, S. J.*, at March "A" Criminal Term, 1954, of ROBESON.

Criminal prosecution upon a bill of indictment charging that on 28 November, 1953, at and in Robeson County, defendant "did unlawfully, willfully and feloniously make an assault upon and on Evelyn Musselwhite, with the felonious intent the said Evelyn Musselwhite to rape, ravish and carnally know, violently and against her will 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 to the charge contained in the bill of indictment.

Upon trial in Superior Court the State offered evidence tending to support the charge set out in the bill of indictment,—the details of which need not be recited, for by so doing no useful purpose would be served.

On the other hand, while defendant did not testify upon the trial, he offered the testimony of several witnesses tending to show that he was elsewhere at the time the alleged crime was committed as charged in the bill of indictment, that is, tending to show an alibi.

The case was submitted to the jury in the light of the evidence so offered by the State and by the defendant.

Verdict: "Guilty as charged in the bill of indictment."

Judgment: Confinement in the Central Prison at Raleigh and assigned to work as provided by law for a term of not less than four (4) nor more than seven (7) years.

Defendant appeals therefrom, and assigns error.

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

F. D. Hackett and Robert Weinstein for defendant, appellant.

WINBORNE, J. The record and case on appeal reveal that defendant (1) did not make motion for judgment as of nonsuit, either when the State first rested its case, or at the close of all the evidence, and (2) did not except to any matter of evidence adduced at the trial in Superior Court. Three assignments of error, based upon four exceptions to portions of the charge of the court to the jury, are treated in brief of defendant, and are presented here for consideration by the court.

I. Exceptions 2 and 3: The portions of the charge to which these exceptions, 2 and 3, relate are attacked by defendant for that, as he contends, they cast upon him the burden of producing evidence sufficient to raise a reasonable doubt as to his guilt. It appears by comparison that these portions of the charge are in substantial accord with the text on the subject of "Alibi" appearing in 15 Am. Jur. 14, Sec. 314 of Criminal Law, in 8 R.C.L. 224, Sec. 220 of Criminal Law, and in Wharton's Criminal Evidence 1-2 Tenth Edition 674-675, Sec. 333 of Chap. VIII, Evidence in Criminal Cases—Burden of Proof. Indeed, the charge as so given, read textually, seems to be in harmony with recent decisions of this Court. See *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844. What is said on the subject in these cases, if followed, would be an apt guide to a correct charge.

II. Exception 5: This exception is directed to the portion of the charge in which the court instructed the jury as to what verdicts the jury might find. Taken in context with that which precedes, and that which follows the instruction to which the exception relates, it does not seem that the jury could have misunderstood the rule as to burden of proof. Hence the Court holds that, in the instruction so given, prejudicial error is not made to appear.

The instruction, in the light of the evidence offered by the State, is favorable to defendant. See *S. v. Jackson,* 199 N.C. 321, 154 S.E. 402; *S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885.

III. Exception 6. It is stated in brief of defendant filed on this appeal: "The charge of the court in giving as one of the State's contentions that 'the State contends that you should believe what W. G. Britt

says about it and that you should believe that for one reason at least when he was brought here by the defendant and was defendant's witness, only the State elected to put him on the stand,' is highly prejudicial to the defendant in that there was no evidence upon which to base such a contention, and its harmful effect is obvious."

In this connection the case on appeal fails to show that the attention of the court was called to the misstatement, if it were such. On the other hand, the case on appeal does show that, after stating the contentions of the State and of the defendant, the trial court "asked counsel for statement of any further contentions, and none were requested." The State, therefore, takes the position, and rightly so, that the misstatement, if any, is not now subject to attack or review on appeal, citing *S. v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608.

In the *Lambe case* this Court, in opinion by *Ervin, J.*, declared: "Under the appellate practice which obtains in this jurisdiction, it is not incumbent upon a litigant to except at the trial to errors in the instructions of the judge as to applicable law, or in the instructions of the judge as to the contentions of the parties with respect to such law. It is sufficient if he sets out his exceptions to errors in such instructions for the first time in his case on appeal. . . . The rule is otherwise, however, where the judge misstates the evidence, or the contentions of the parties arising on the evidence. When that occurs, the litigant must call the attention of the judge to the misstatement at the time it is made, and thus afford the judge an opportunity to correct it before the case is given to the jury. Furthermore, he must note an immediate exception to the ruling of the judge in case his request for the correction of the misstatement is refused. If this course is not pursued, the misstatement of the evidence or of the contentions based thereon is not subject to attack or review on appeal," citing cases. See also *S. v. Lea*, 203 N.C. 13, 164 S.E. 737, and *S. v. Harris*, 209 N.C. 579, 183 S.E. 740.

After careful review on assignments of error presented, the case is held to be free from prejudicial error, and the judgment on verdict rendered must stand.

No error.

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; AND PRITCHARD PAINT & GLASS COMPANY, CROSS-DEFENDANTS.

(Filed 15 December, 1954.)

1. Torts § 6—

The original defendant is not entitled to set up in his cross action against additional defendants joined for contribution 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. G.S. 1-240.

2. Appeal and Error § 51a—

Decision on appeal becomes the law of the case and is controlling when the identical question is thereafter presented.

APPEAL by original defendants from *Patton, Special J.,* October Term 1954, MECKLENBURG. Affirmed.

Civil action to recover compensation for personal injuries, here on former appeal, *Hobbs v. Goodman,* 240 N.C. 192.

A statement of the essential facts is a part of our opinion on the former appeal. After that opinion was certified to the trial court, plaintiff filed an amended complaint as against the original defendants, and defendants Goodman filed an answer thereto in which they allege, or attempt to allege, a cross action under G.S. 1-240 against the additional defendant trustees and the Pritchard Paint & Glass Company, for contribution, and procured an order retaining defendant trustees as defendants and making the Pritchard Paint & Glass Company, a corporation, an additional defendant.

The trustees and the Glass Company demurred upon substantially the same grounds as upon the former appeal. The demurrers were sustained, and defendants Goodman appealed.

McDougle, Ervin, Horack & Snepp and Robinson & Jones for defendant appellants Goodman.

Pierce & Blakeney and R. E. Wardlow for defendants Hackney and Patterson, appellees.

Cochran, McCleneghan & Miller for defendant Pritchard Paint & Glass Company, appellee.

BARNHILL, C. J. While the language used in the amended complaint is somewhat more redundant and repetitious in nature than that used in the original complaint, this is due in part to the fact plaintiff, in her amended complaint, gives a more particular and detailed description of the object that fell and struck her as she passed by the defendants' store

building and in her allegations of negligence. In the oirginal complaint the object is described as an advertising sign supported by a steel brace and bar, and in the amended complaint as "a wooden beam flanged on two sides with metal . . . which was attached to and a part of a sign or other part of the front of the defendants' store building and under the sole control of the defendants." Thus she continues to tie her cause of action to the falling of the sign or some part thereof. The cause of action first stated and the one alleged in the amended complaint are identical. There is no fact or circumstance alleged that so much as suggests that the additional defendants are or were joint tort-feasors or are in any wise liable for the injuries received by plaintiff.

Likewise, the defendants rest their prayer for contribution upon the allegation "that the object which fell and struck the plaintiff was not the advertising sign of these defendants, or any part thereof, or any attachment thereto, but, on the contrary, was a portion of an awning cover which had been installed by or on behalf of the owners of the building . . ." The allegations of negligence made against the defendant trustees are the same. As to the Glass Company, negligent installation and failure to inspect are asserted.

Thus it appears that in substance we now have before us the identical case that was here at the Spring Term (*Hobbs v. Goodman*, 240 N.C. 192). Decision here is controlled by the principles of law there discussed. It is still the law of this case on the questions raised on this appeal. Hence the judgment entered in the court below must be

Affirmed.

STATE v. WILBUR FLOYD.

(Filed 15 December, 1954.)

1. Criminal Law § 53d—

Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto. G.S. 1-180.

2. Assault § 14a—

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussel over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error.

3. Assault § 8d—

An assault with intent to kill, without averment of the infliction of serious injury, is a misdemeanor.

4. Same—

An assault on a female committed by a man or boy over eighteen years of age is not a simple assault according to the usually accepted meaning of that charge. It is a misdemeanor punishable in the discretion of the court.

APPEAL by defendant from *Hubbard, Special Judge,* May "A" Criminal Term 1954 of ROBESON.

Criminal prosecution upon a bill of indictment charging the defendant with assaulting his wife, Mamie Floyd, with a deadly weapon with intent to kill inflicting a wound to the body.

The defendant pleaded Not Guilty. The only evidence offered by the defendant was the testimony of his wife. Mamie Floyd gave testimony tending to show: She had been drinking. She was at John Bell's house. Her husband said "let's go home," and as she didn't want to go, she took a pistol out of her pocketbook, and pointed it at her husband to scare him. She had her hand on the trigger. Her husband grabbed the pistol, and in the tussle the pistol went off, and hit her in the shoulder. Her husband did not shoot her: she shot herself.

Verdict: guilty of simple assault. Judgment: 30 days imprisonment.

Defendant excepted, and appealed, assigning error.

Harry McMullan, Attorney General, and Claude L. Love, Assistant Attorney General, for the State.

F. D. Hackett and Robert Weinstein for Defendant, Appellant.

PARKER, J. The defendant assigns as error the failure of the Judge to comply with G.S. 1-180, in that he did not state any of the evidence introduced by the defendant, and did not explain the application of the law to the defendant's evidence.

G.S. 1-180 requires the judge in his charge to the jury to declare, and explain the law arising on the evidence given in the case, but he is not required to state such evidence, except to the extent necessary to explain the application of the law thereto.

Stacy, C. J., speaking for the Court said in *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53: "In interpreting this statute the authoritative decisions are to the effect that it 'confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case'; and further, that the requirements of the statute 'are not met by a general statement of legal principles which bear more or less directly, but

not with absolute directness, upon the issues made by the evidence.' *Williams v. Coach Co.*, 197 N.C. 12, 147 S.E. 435; *S. v. Groves*, 121 N.C. 563, 28 S.E. 262."

This rule applies in civil cases, as well as in criminal. *Brannon v. Ellis*, 240 N.C. 81, 81 S.E. 2d 196.

The judge stated in his charge: "I have not been requested to do so, and will not do so, in the absence of request, either recapitulate the evidence in this case, or state the contentions of the parties." There was a failure by the judge to state any evidence in the case, either for the State or the defendant: and a failure to declare and explain the law arising on the defendant's evidence. This Court said in *Brannon v. Ellis, supra:* "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." A statement of the evidence solely in the form of contentions is not sufficient. *Brannon v. Ellis, supra.*

The defendant's defense was based on the theory that the shooting of his wife was accidental, or by misadventure, caused by the tussle over the pistol which she had pointed at him with her hand on the trigger; that all that he did was done in self-defense, and that he was not guilty. The defendant had a substantial legal right to have the judge to declare and explain the law arising on this evidence of his presented to the jury. *S. v. Wingler*, 238 N.C. 485, 78 S.E. 2d 303; *S. v. Bright*, 237 N.C. 475, 75 S.E. 2d 407; *S. v. Williams*, 235 N.C. 752, 71 S.E. 2d 138; *S. v. Banks*, 204 N.C. 233, 167 S.E. 851. The failure to so charge was prejudicial error. *S. v. Brady*, 236 N.C. 295, 72 S.E. 2d 675; *S. v. Ardrey, supra.*

G.S. 14-32 provides that "any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony . . ." The judge instructed the jury that they could return a verdict of guilty as charged in the bill of indictment, that is guilty of an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. However, the indictment does not charge the infliction of a serious injury. Incidentally, an assault with intent to kill is a misdemeanor. *S. v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140; *S. v. Silvers*, 230 N.C. 300, 52 S.E. 2d 877.

The Court further instructed the jury they could find the defendant guilty of a simple assault. "An assault on a female, committed by a man or boy over 18 years of age, is not a simple assault according to the usually accepted meaning of that charge. It is a misdemeanor punishable in the discretion of the Court. *S. v. Jackson*, 226 N.C. 66, 36 S.E. 2d 706." *S. v. Church*, 231 N.C. 39, 55 S.E. 2d 792.

It would seem from all the evidence before us in the Record that if an assault was made upon Mamie Floyd, a deadly weapon was used.

For the reasons given the defendant is awarded a New trial.

STATE v. GEORGE VANCE SMITH.

(Filed 15 December, 1954.)

1. Indictment and Warrant § 9—

An indictment or warrant must be complete in itself and must contain all the material allegations which constitute the offense charged.

2. Parent and Child § 12: Criminal Law § 56—

In a prosecution under G.S. 14-322, a warrant charging that defendant willfully failed and refused to provide adequate support for his named lawful children, is fatally defective in failing to aver that defendant had willfully abandoned them, and motion in arrest of judgment should have been allowed.

3. Parent and Child § 9—

Abandonment of children by their father is a continuing offense, and therefore, termination of a prosecution in defendant's favor will not preclude a subsequent prosecution.

APPEAL by defendant from *Burgwyn, S. J.*, at 7 June, 1954, Term of NEW HANOVER.

Criminal prosecution begun in New Hanover County Recorder's Court upon warrant on affidavit of Geneva Durden charging "that on the 3rd day of May, 1954, 'and for 4 yrs. prior thereto' . . . and in the county of New Hanover George V. Smith did unlawfully and wilfully fail, refuse and neglect to provide adequate support for his lawful children (naming them) and on the body of the affiant begotten, in violation of the G. S. of N. C. '14-322,' against the form of the statute in such cases made and provided," etc., tried in Superior Court on appeal thereto from judgment of Recorder's Court.

Verdict in Superior Court: Guilty as charged in the warrant.

Upon coming in of verdict, among other things, defendant moves in arrest of judgment. The motion was denied, and defendant excepted.

Judgment: Imprisonment for a term of six months in common jail of New Hanover County and assigned to work the public roads, etc., the jail sentence being suspended upon condition that he pay the sum of $20.00 per week in the office of the Clerk of Court of New Hanover County for the support and maintenance of his four minor children, naming them, and the cost of this action.

It is also provided in the judgment that if, in proceeding therefor then pending, the custody of the children be awarded to him by final judgment in said cause, then and in that event this judgment shall become inoperative and of no effect; otherwise it is to remain in full force and effect, and this cause is retained for future orders.

To the signing of judgment defendant objected, excepted, and, in open court, gave notice of appeal and appeals to the Supreme Court, and assigns error.

Attorney-General McMullan, Assistant Attorney-General Moody, and Harvey W. Marcus, Member of Staff, for the State.

W. P. Burkhimer for defendant, appellant.

WINBORNE, J. Among the many assignments of error brought up by defendant for consideration, the one, Number 24 based upon exception Number 29, to denial of his motion for arrest of judgment is well taken. The motion should have been granted.

The General Statute 14-322 in pertinent part reads: "If any father . . . shall willfully abandon his . . . child or children . . . without providing adequate support for such child or children, he . . . shall be guilty of a misdemeanor . . ."

Thus, to constitute a violation of this criminal statute the father must have willfully abandoned his child or children, without providing adequate support for such child or children.

Testing the offense charged against defendant in instant case by the provisions of the statute, the essential element of "willful abandonment" is lacking. It is settled that a charge in a warrant or bill of indictment must be complete in itself, and contain all the material allegations which constitute the offense charged. *S. v. May,* 132 N.C. 1020, 43 S.E. 819. Hence in the absence of such averment the warrant is defective, and will not support the judgment. Therefore, the motion in arrest of judgment should have been allowed.

However, it is provided in G.S. 14-322 that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitation until the youngest living child shall arrive at the age of eighteen years.

Defendant is, therefore, amenable to further prosecution if the State elects so to do.

For reasons stated the judgment is arrested,—and defendant is released therefrom.

Judgment arrested.

JAMES H. FAISON, SR., v. JOHN WESLEY CRIBB AND ROBERT BATTS.

(Filed 15 December, 1954.)

Damages § 1a—

Where the allegations and theory of trial disclose that plaintiff was relying on future damages as a part of his recovery, a charge that he is entitled to recover in one lump sum for all injuries past, present, and prospective, without instructing the jury that the amount awarded for future losses should be based on the present cash value or present worth of such losses, must be held for prejudicial error.

APPEAL by defendant Cribb from *Burgwyn, Emergency Judge,* and a jury, at June Term, 1954, of NEW HANOVER.

Civil action in tort involving collision of two automobiles and a bicycle at a street intersection in the City of Wilmington, North Carolina.

The bicyclist instituted the action against both automobile operators. The action was dismissed as in case of nonsuit as to the defendant Batts, but was submitted to the jury as to the defendant Cribb on issues of negligence and damages. These were answered in favor of the plaintiff, and he was awarded damages in the sum of $10,250.

From judgment based upon the verdict the defendant Cribb appeals, assigning numerous errors but bringing forward assignments which relate only to the charge of the court.

McClelland & Burney and Lonnie B. Williams for appellant.

W. P. Burkhimer for appellee.

JOHNSON, J. On the issue of damages the court charged that the plaintiff was entitled to recover in one lump sum for all injuries, past, present, and prospective, without instructing the jury that the amount awarded should be based upon the present cash value or present worth of the future losses.

The charge as given is similar to that in *Lamont v. Hospital,* 206 N.C. 111, 173 S.E. 46. In that case this Court in awarding a new trial said: "This charge is defective in that it fails to limit plaintiff's recovery for future losses to the present cash value or present worth of such losses." See also *Daughtry v. Cline,* 224 N.C. 381, 30 S.E. 2d 322, 154 A.L.R. 789; Annotations: 77 A.L.R. 1439, p. 1446; 154 A.L.R. 796, p. 799.

In the case at hand the plaintiff's allegations and the theory of the trial disclose that he was relying upon future damages as a substantial part of his recovery. This being so, we are constrained to the view that the inadvertence of the able judge who presided below in failing to apply the doctrine of the *Lamont case* must be treated as prejudicial error. See

concurring opinion of *Barnhill, J.*, now *C. J.*, in *Daughtry v. Cline, supra* (224 N.C. 381, bot. p. 386, 30 S.E. 2d 322, p. 324).

We refrain from discussing the other assignments of error since the questions presented may not arise on retrial.

New trial.

STATE OF NORTH CAROLINA v. OLLEN B. HARRELL, ALIAS JAMES HARRELL, ALIAS JIMMIE HARRELL, AND STATE-WIDE BAIL, INC.

(Filed 15 December, 1954.)

Arrest and Bail § 8—

Neither the solicitor nor the court is under duty to advise the surety on an appearance bond of the progress of the case in court, the surety being entitled only to notice of default given by service of the *sci. fa.*

APPEAL by State-Wide Bail, Inc., from *Fountain, Special J.*, August Term 1954, CUMBERLAND. Affirmed.

Criminal prosecution, heard on motion of defendant's surety on his appearance bond to vacate and set aside judgment absolute on the bond. The motion was denied and said surety appealed.

Charles L. Abernethy, Jr., for appellant, State-Wide Bail, Inc.

Coy E. Brewer and Robert H. Dye for plaintiff appellee.

PER CURIAM. At the December Term 1953, the court did nothing more than to accept defendant's plea of guilty to a bill of indictment charging the crime of embezzlement. There is nothing in the record which indicates or suggests that the defendant was taken into custody or that defendant's appearance bond, which is admittedly continuing in nature, was discharged. Neither the solicitor nor the court was duty bound to keep appellant advised of the progress of the case in court. It was only entitled to notice of default which was given by the service of a *sci. fa.* Hence, appellant's answers assert no valid grounds for vacating the judgment absolute. The judgment denying the motion must be affirmed on authority of *S. v. Dew*, 240 N.C. 595.

Affirmed.

MAGGIE TEW SMITH, ADMR'X. OF EDNA BERNICE SMITH, DECEASED, *v.* CUMBERLAND COUNTY BOARD OF EDUCATION AND N. C. STATE BOARD OF EDUCATION.

(Filed 15 December, 1954.)

State § 3b—

Evidence tending to show that a fourteen-year-old pupil on a school bus was assaulted by another pupil who had been designated by the principal as "bus captain" but who was not an employee of the State or the Board of Education, that she immediately jumped up and rushed to the front door of the bus, jerked the door open, and jumped to her fatal injury, and that the driver did not see anything that happened until she was going out the door, *is held* insufficient to support a finding of negligence on the part of the driver of the bus, and nonsuit is proper.

PLAINTIFF and defendants appeal from *Moore, J.*, March Term, 1954, of CUMBERLAND.

This is a claim for wrongful death under the State Tort Claims Act, Chapter 1059, Session Laws of 1951, now codified as Article 31, Chapter 143 of the General Statutes of North Carolina.

The testimony tends to show that James E. Williams, a bus driver employed by the Board of Education of Cumberland County, was driving a school bus owned by the State of North Carolina, on the afternoon of 23 October, 1950, accompanied by one Clifton Godwin, a pupil who had been designated as "bus captain" pursuant to a local arrangement. Godwin was not an employee of the defendant State agency, or of the State of North Carolina, but had been given authority by the principal of the school to assist the driver in maintaining order and discipline on the bus; to assist in protecting the children as they dismounted from the bus, and to report infractions of the rules and other misbehavior on the bus.

On the afternoon in question, all the pupils had gotten off the bus except James E. Williams, Clifton Godwin, and Edna Bernice Smith, the latter a 14-year-old girl. She was sitting midway of the bus. Clifton Godwin asked her for his pencil and when he reached to get the pencil, he placed his hands on her in a familiar and unbecoming manner. She jumped up and rushed to the front of the bus, jerked the door of the bus open and jumped out while the bus was traveling at a speed of about 28 miles per hour. She died a few minutes thereafter. There is no evidence that she made any outcry when she was assaulted or that she spoke to Godwin or the driver. The driver testified that he did not see anything that happened until he saw the girl "going out the door."

The hearing Commissioner, among other things, found as a fact that it was the duty of the bus driver to prevent students from leaving the bus while it was in motion; that in failing to discover the assault and prevent

Edna Bernice Smith from jumping from the bus, the driver was guilty of negligence which was the proximate cause of her death.

Based on the above finding of fact and conclusion of law, an order was entered in favor of the plaintiff in the sum of $5,000. The defendants appealed to the Full Commission and the award was affirmed by a majority vote. The Chairman of the Commission dissented.

The defendants appealed to the Superior Court of Cumberland County and duly filed their exceptions to the findings of fact and conclusions of law found by the hearing Commissioner and adopted by the Full Commission.

The court below overruled the defendants' exception No. 4 to finding of fact No. 5, to the effect that the negligence on the part of the bus driver proximately caused the death of the deceased. The defendants excepted to this ruling on the ground that the finding is not supported by the evidence. The court, however, sustained the defendants' exception to the failure of the hearing Commissioner and the Full Commission to find that the deceased was guilty of contributory negligence. Whereupon, the court entered judgment reversing the order of the Industrial Commission awarding judgment to the plaintiff, and directing that the costs be taxed against the plaintiff. The plaintiff and defendants appeal, assigning error.

J. Shepard Bryan for plaintiff.

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

PER CURIAM. We have carefully considered the evidence introduced before the hearing Commissioner and have concluded that the finding of negligence against the driver of the bus is not supported thereby. Therefore, the defendants' exception No. 4 should have been sustained. While the ruling of the court below on the defendants' exception with respect to the failure of the hearing Commissioner and the Full Commission to find that the deceased was guilty of contributory negligence resulted in a verdict for the defendants, we affirm the result on the ground that the evidence does not support the finding of negligence on the part of the driver of the bus rather than upon the conclusion that the deceased was contributorily negligent. As regrettable as the death of this young girl may be, we can find no legal basis for sustaining an award in favor of the plaintiff.

Modified and affirmed.

GEORGE VANCE SMITH, JR., v. GENEVA LEWIS SMITH (DURDEN).

(Filed 15 December, 1954.)

Divorce and Alimony § 19—

In determining the right to custody of the children as between divorced parents, decision is rightly made to turn upon the best interests of the children, and the findings of the court in regard thereto are conclusive when supported by evidence, the weight to be given the conflicting testimony being for the court.

APPEAL by plaintiff from judgment of 5 July, 1954, rendered by *Moore, J.*, Resident Judge of the Eighth Judicial District, in Chambers in Burgaw, N. C., from NEW HANOVER.

Motion in cause to determine custody of the four minor children of plaintiff and defendant.

At December 1951 Civil Term, on the ground of two years' separation, plaintiff obtained a judgment of absolute divorce. The cause was retained for further proceedings relating to the children.

It appears that plaintiff and defendant were married 17 July, 1936, and separated in February, 1949, and in June, 1950, defendant took the children and left the State. While the defendant and the children were outside the State, this action was instituted and the divorce judgment obtained. The service of process on defendant was by publication under G.S. 1-98. Both plaintiff and defendant remarried.

The defendant and the children returned to North Carolina in the Summer or Fall of 1953. On 5 June, 1954, plaintiff moved that he be awarded custody of the children. The hearing was on 12 June, 1954. Judgment was signed 5 July, 1954. Incorporated therein are findings of fact, including the following:

"5. That petitioner is not a fit and suitable person to have the custody of said children, his home is inadequate for their care and upbringing, and his home environment is ill suited for the rearing of children."

"6. That the respondent is a fit and suitable person to have the custody, care, nurture and rearing of said children, her home is well kept and has three bedrooms, and the home environment is good."

"7. It is for the best interest of said children that their permanent custody be awarded to the respondent."

Thereupon, the court awarded the permanent custody of the children to defendant, allowing plaintiff restricted privileges of visitation.

Plaintiff excepted and appealed, assigning errors.

W. P. Burkhimer for plaintiff, appellant.

Robert E. Calder for defendant, appellee.

PER CURIAM. It will serve no useful purpose to narrate the accusations and recriminations between plaintiff and defendant concerning their past misconduct. Decision as to custody, in the light of all circumstances, was rightly made to turn upon what is now for the best interests of the children. *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918. The weight to be given the conflicting evidence was for determination by the court below. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133. Competent evidence supports the findings of fact, the findings of fact support the judgment, and no prejudicial error is shown. Hence, the judgment will be

Affirmed.

VERNEL VAMPLE v. SALLIE McNEILL AND SUSIE BROWN.

(Filed 15 December, 1954.)

Executors and Administrators § 2a—

The Superior Court of a county which first issues letters of administration acquires jurisdiction, and letters to administer the estate may not thereafter be entered in another county even though petition of a creditor to administer the estate was pending therein at the time of the issuance of the letters.

PETITIONER'S appeal from *Sharp, Special Judge,* 12 July, 1954, Civil Term, GUILFORD—Greensboro Division.

Peter Woodard died intestate in Guilford County on 26 February, 1954. His next of kin are Susie Brown, sister, who resides in Scotland County, and Sallie McNeill, a half-sister who resides in Moore County. Prior to November, 1953, Peter Woodard, then 65 or 70 years old, lived in Scotland County, North Carolina, where he owned a farm, farm machinery, livestock, etc. In November he rented his farm and equipment, left Scotland County and went to the County of Guilford to the home of the petitioner, Vernel Vample, who is his illegitimate son. He remained at the home of Vernel Vample until the date of his death.

On 1 April, 1954, Vernel Vample filed with the Clerk Superior Court of Guilford County a petition alleging that Woodard died in Guilford County, leaving respondents, his sisters, who were entitled to administer on his estate; but that more than 30 days had elapsed since his death and neither of the respondents had administered. Citations were issued requiring them to appear before the Clerk Superior Court of Guilford County within 20 days and show cause why they should not be deemed to have renounced their right to administer on the estate. The petitioner alleged that he was a creditor of the estate and was filing the petition as

such. The petition did not allege that Woodard at the time of his death was domiciled in Guilford County. Neither of the respondents appeared before the Clerk of Guilford County, although the attorney for Susie Brown wrote a letter enclosing a brief on behalf of the respondents and calling the clerk's attention to the failure of the petition to allege that at the time of his death Woodard was domiciled in Guilford County; and contending that he was domiciled in Scotland County; that Susie Brown had never renounced her right to qualify as administratrix. It was alleged that she in fact had qualified as such in Scotland County on 14 April, 1954.

On 24 June, 1954, pursuant to notice, the Clerk Superior Court of Guilford County held a hearing, took testimony, at which hearing the respondents did not appear.

On 7 July, 1954, the Clerk of Guilford Superior Court entered his order to the effect that Susie Brown and Sallie McNeill were deemed to have renounced their right to administer on the estate of Peter Woodard and that letters of administration would be issued to some suitable person.

The respondents appealed from the clerk's order to the Judge in Term, and on 23 July, 1954, the hearing was held before Sharp, S. J. Findings of fact were made by Judge Sharp. Judgment was entered setting aside the clerk's order upon the ground that the Superior Court of Scotland County, having issued letters of administration to Susie Brown on 24 April, 1954, had acquired jurisdiction. The petitioner appealed.

Harry R. Stanley for petitioner, appellant.

PER CURIAM. On the authority of *Tyer, Administratrix, v. Lumber Co.*, 188 N.C. 274, 124 S.E. 306, the judgment of the court below is

Affirmed.

STATE v. OTIS ANGUS SILER.

(Filed 15 December, 1954.)

APPEAL by defendant from *Armstrong, J.*, and a jury, at May Term, 1954, of MOORE.

Criminal prosecution tried on appeal from County Recorder's Court upon a warrant charging the defendant with driving a motor vehicle on a public road while under the influence of intoxicating liquor in violation of G.S. 20-138.

From a verdict of guilty and judgment imposing penal servitude of four months, the defendant appeals.

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

Seawell & Wilson for defendant, appellant.

PER CURIAM. This case involves 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. Prejudicial error has not been made to appear. The verdict and judgment will be upheld.

No error.

MRS. JOHN IRVIN v. JULIETTA A. OLSEN, EVERETT N. OLSEN, J. B. BLAND AND RUTH W. BLAND.

(Filed 15 December, 1954.)

APPEAL by plaintiff from *Sharp, S. J.*, at 7 June, 1954, Extra Civil Term, of MECKLENBURG.

Civil action begun 3 June, 1954, for the purpose, as alleged in the complaint of plaintiff, of setting aside a deed from defendants Olsen to defendants Bland, conveying certain land in Mecklenburg County, N. C., on the ground that it was made with fraudulent intent to defeat the rights of plaintiff against *feme* defendant Olsen in her action for alienation of the affections of her husband, pending at the time said deed was executed.

Defendants Bland, in apt time, demurred to the complaint for that it fails to state against them facts sufficient to constitute a cause of action on numerous grounds.

The demurrer was sustained by the court and from judgment in accordance therewith, plaintiff appeals to Supreme Court, and assigns error.

McRae & McRae for plaintiff, appellant.

O. W. Clayton for defendants, appellees.

PER CURIAM. The judgment sustaining the demurrer is, in the light of facts presently alleged, accordant with applicable principles of law in such cases. Hence the judgment is

Affirmed.

STATE v. DIFFIE STALEY.

(Filed 15 December, 1954.)

APPEAL by defendant from *Clarkson, J.*, May Term, 1954, of GUILFORD (High Point Division).

This is a criminal prosecution tried upon a bill of indictment charging the defendant with an assault with intent to commit rape.

The prosecuting witness, a niece of the defendant who was born on 13 January, 1942, testified that the defendant had sexual intercourse with her in October 1953; that she didn't mind having such relations with him; that she had done so before on other occasions and that she had had such relations with her grandfather before she had them with the defendant. Her evidence as to what occurred on the occasion complained of was corroborated by two of her brothers, one aged seven and the other thirteen. The seven-year-old brother testified: "We all got mad with Uncle Diffie." However, it is not clear from the evidence whether they got mad with him on account of his treatment of the prosecutrix or because of something else.

The defendant testified in his own behalf and vigorously denied that he had ever had sexual intercourse with the prosecuting witness. The grandfather likewise testified that he had never had any such relations with his grandchild; that his grandchildren came to his home and he treated them like members of the family; that this is the first time in his life he has had any accusation made against him; that he and his wife have lived together for nearly fifty years, and that he had too much respect for himself and his Heavenly Father to have any such relations with one of his grandchildren; that he was the father of the defendant. Five witnesses testified that both the defendant and his father were men of good character.

The jury returned a verdict of guilty. The court imposed a sentence of not less than five nor more than seven years in the State's Prison. The defendant appeals, assigning error.

Attorney-General McMullan, Assistant Attorney-General Bruton, and William P. Mayo, Member of Staff, for the State.

Seawell & Wilson for defendant.

PER CURIAM. We have carefully examined the defendant's assignments of error, particularly with respect to those directed to the charge of the court. But when the charge is considered contextually, as it must be, we are unable to find any prejudicial error. We do feel, however, that

the evidence disclosed on this record is of such a nature as to warrant an immediate and thorough investigation of the case by the Board of Paroles.

No error.

MRS. LILLIAN M. WELLING v. CITY OF CHARLOTTE.

(Filed 14 January, 1955.)

1. Trial §§ 22a, 22b—

On motion to nonsuit, plaintiff's evidence, and so much of defendant's evidence as explains and makes clear that offered by plaintiff, will be considered in the light most favorable to plaintiff.

2. Municipal Corporations § 14a—

A city or town is not an insurer of the safety of its streets or sidewalks, but is required to exercise ordinary and reasonable care to maintain its streets and sidewalks in a reasonably safe condition, and is liable only for such injuries as are proximately caused by defects of such character that injury to travelers therefrom may be reasonably anticipated, and of which the city has actual or constructive notice.

3. Same—

A person traveling on a street or sidewalk is required to exercise due care to discover and avoid obstructions and defects, the care being commensurate with the danger or appearance thereof.

4. Negligence § 17—

In an action to recover damages for negligent injury, plaintiff must show failure of defendant to exercise due care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of the injury.

5. Negligence § 5—

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all of the facts as they existed.

6. Negligence § 19a—

Negligence and proximate cause are questions of law, and when the facts are admitted or established, the court must say whether they do or do not exist.

7. Municipal Corporations § 14a—Nonsuit should have been entered on evidence in this action to recover for fall on sidewalk.

The evidence tended to show that plaintiff was walking along a crowded sidewalk on a bright, sunshiny morning, that her heel caught in a hole in the sidewalk, and that she fell to her injury. There was no evidence as to how long the hole had existed except expert opinion testimony from appearances that the hole had been there a year or more. The evidence further tended to show that plaintiff had walked along the sidewalk in ques-

tion for a number of years, had not noticed any hole, and that at the time plaintiff fell she was not looking where she was going because the crowd blocked her view of the sidewalk. *Held:* Nonsuit should have been allowed upon defendant municipality's motions therefor aptly made.

APPEAL by defendant from *McKeithen, S. J.*, at 8 March, 1954, Special Civil Term, of MECKLENBURG.

Civil action to recover for personal injury allegedly sustained as proximate result of negligence of defendant.

The facts are admitted in the pleadings: Plaintiff is a resident of Mecklenburg County. Defendant is a municipal corporation created by the General Assembly of North Carolina, charged with certain administrative duties,—particularly the duties of maintenance, upkeep and supervision of sidewalks within said city for the use of the public. And the sidewalk on the easterly side of N. Tryon Street between Sixth and Seventh Streets in the city of Charlotte is under the maintenance, supervision and upkeep of the defendant.

And plaintiff alleges in her complaint in pertinent part: "4. That on Sunday, February 24, 1952, between 12 o'clock noon and 1:00 o'clock P. M., the plaintiff, on leaving services at the First Baptist Church located on N. Tryon Street, was in the process of walking in a southerly direction along the sidewalk located on the east side of said N. Tryon Street between Sixth and Seventh Streets; that the plaintiff was walking in company with many persons who had attended said church services; and while she was thus walking the heel of her shoe was caught in a hole which was in the surface of said sidewalk, causing her to fall with great force and violence to the hard surface of said sidewalk and injuring her as hereinafter alleged . . .

"6. That the injuries and damage sustained by the plaintiff were due to, caused and occasioned by, and followed as a direct and proximate result of the negligence of the defendant, in that the defendant carelessly and negligently allowed said sidewalk to become and remain in a dangerous and unsafe condition, so that it was unsafe for pedestrians such as the plaintiff to use, and the defendant knew that said condition of said sidewalk existed, or should have known of the existence of said unsafe condition in said sidewalk, for that said condition had existed for some time previous to February 24, 1952, and the defendant City negligently and in violation of its duties failed to repair said sidewalk and place same in a reasonably safe condition for persons to walk on and failed to post any notice or warning whatsoever of the dangerous and defective condition of said sidewalk . . .

"8. That by reason of the negligence of the defendant as herein set out the plaintiff has been injured and damaged in the sum of $40,000."

Defendant, answering, avers: That as to those matters and things set forth in paragraph 4 of plaintiff's complaint, it does not have sufficient knowledge or information upon which to form or base a belief as to the truth of same; and, that the allegations of paragraphs 6 and 8 of the complaint are untrue and are denied.

And by way of further answer and defense, defendant alleges "that if plaintiff was injured as alleged in the complaint and if such injury was caused by the negligence of defendant, which negligence is specifically denied, the plaintiff by her own negligence in not keeping a proper lookout as to where she was walking and observing and walking around or stepping over said hole contributed to her injury if such hole existed in said sidewalk as alleged in the complaint which is denied, the plaintiff by her action was contributorily negligent, which is specifically pleaded in bar of any recovery of plaintiff herein."

Upon trial in Superior Court, plaintiff, as witness for herself, testified on direct examination, in pertinent part, as follows: ". . . On Sunday, February 24, 1952, I went to Sunday School and Church at the First Baptist Church, located on N. Tryon Street next to the Library. The church is on the right-hand side of N. Tryon Street coming from the Square, and is located between 6th and 7th Sts., on the east side of N. Tryon Street. On that Sunday morning I rode up in an automobile of my next door neighbor . . . they let me off on 7th Street. After attending Sunday School and Church, I came out with the crowd and left the church by going out a little side door and started up the street to the Square to catch a bus. A very large crowd goes to the First Baptist Church and the sidewalk was crowded. The people on the sidewalk had been to church, and I would say about 2,050 or more . . . I started walking . . . and just as I got to the Baptist Book Store, I felt my heel go down in a hole and I started to fall. There were two ladies just a step ahead of me, and I made a grab at them, but they stepped away and I fell to the sidewalk . . . I broke my leg. There were so many people in front of me, I couldn't see what I had stepped into. There were so many people around me when I was lying on the sidewalk, I did not observe what I had stepped into . . . I was carried to the Presbyterian Hospital in an ambulance . . . At the time of the accident I was 64 years old . . . On Sunday, the day of the accident, I was just wearing low-heel oxfords, they were not very high . . . they were the same shoes that I customarily wore downtown shopping."

Then on cross-examination, plaintiff continued in pertinent part: "I have been a member of the First Baptist Church for something over ten years . . . Over the past ten years I have been walking from the Square to the church when I would go on the bus. I did not ride the bus too often, I just could not say how often. When I did go on the bus, I walked

from the Square on the east side of N. Tryon Street to the church. During that period of time I had not noticed the hole in which I got my heel next to the Book Store, I had not seen the hole."

And plaintiff continued: "As well as I can remember Sunday, February 24, 1952, after Church let out, it was a nice, bright, sunshiny day. I came out of the side door of the church with the crowd. The crowd could not scatter very well, there were so many people . . . All the people that came out of the church on this Sunday morning were not walking, some were standing on either side of me, and in the front and back, it was very crowded when I walked up the sidewalk, but I was not pushed around. I thought I had room to reasonably walk up the street. I was not walking with any special friend, I had just left from talking to them. I was not talking to anyone as I walked up the street . . . going to the Square, near the building. There were people on both sides, of course, walking, people in front and behind too. I was in the middle of the crowd . . . I could not watch the sidewalk, the people were very close together . . . If I had looked down, I could not have seen where my foot was going, the people were too close. I was not looking down, they were too close to one another. I had been in the habit occasionally of walking up that sidewalk and I thought the sidewalk was in good condition, I had never seen the hole. I had walked the sidewalk, but I just didn't look to see whether I was walking in the same spot or not. I was not crippled and never was one to feel along. I walked as I pleased, and I thought the sidewalk was reasonably fit for people to use for sidewalk purposes."

Then plaintiff was asked this question, to which she answered as indicated: "Q. And if on that Sunday morning you had been looking down, you possibly might have seen the hole mightn't you? A. I don't know whether I would or not, I guess I would."

Plaintiff also introduced Miss Brayboy as a witness. On direct examination she gave this narrative: ". . . I am a student nurse at Presbyterian Hospital and have been for two and a half years. On Sunday February 24, 1952, I attended services at the First Baptist Church of Charlotte. After church, I was walking down the street toward the Square . . . I did not see Mrs. Welling fall . . . I had an opportunity to observe the sidewalk at the point where Mrs. Welling was lying. There was a broken place in the cement and it was jagged around . . . I did notice that you could see the dirt under the cement . . . The hole went completely through the surface of the cement down in the dirt . . . Mrs. Welling said that she had fallen, got her foot hung in the cement. She did not say how . . ." The witness identifies photographs, plaintiff's Exhibits 7, 8 and 9, as depicting and representing the scene of the accident—showing two holes in the sidewalk at the corner of the Baptist Book Store. She identifies Exhibit 9 as picture of the hole on east side

of N. Tryon Street, between Sixth and Seventh Streets, at the corner of the Baptist Book Store building on Sunday morning, February 24, 1952, taken the day following the accident, and that the hand and feet shown are hers. The index finger of the hand is resting on a stick of some kind inserted in the hole nearer to the building.

Then under cross-examination, the witness continued: "I was a member of the First Baptist Church and customarily went to church there. I usually walked from the Square to the Church on the sidewalk on the east side of the block between Sixth and Seventh Streets . . . I had never noticed the hole I have talked about. I walked up the sidewalk just like people do. I thought the sidewalk could have been better, but it was all right . . ."

Plaintiff also offered as witness Curtis Halfhill, accepted by the court as an expert engineer, who testified that on 27 February, 1952, he made an examination, and made a drawing (sketch known as plaintiff's Exhibit 10) from measurements and on the spot photographs. (Exhibit 10 was admitted in evidence for purpose of illustrating the testimony of the witness and not as substantive evidence.) Then the witness stated that this sketch is a graphic illustration of the condition of the sidewalk at that time, and that these holes actually existed in the sidewalk just in front of the pilaster at the northwest corner of the Baptist Book Store, with about an inch or slightly more in depth going completely through the concrete, the concrete slab being quite thick there, and showing down into the dirt; that these two holes were "jagged in plan but in profile they were rounded off"; that as you look upon them it would appear jagged, but looking at the edges carefully, then the edges would be rounded off as it gets when it's worn and aged, and that in his opinion "the holes had been there perhaps two to three years"; that he roughly examined the bottom of these holes and at the bottom were pieces of concrete that had been pushed down into the soil below, and then water and moisture had floated the soil back over them, so it appeared to be just complete dirt; that actually there were particles and pieces of concrete below there; that he observed stone and pulverized cement, and sand, and so on, asphalt pieces; that the edges were rounded as the stone might be rounded, or other concrete would be rounded from weathering; and that "it would take probably more than a year considering normal foot traffic" for the edges of the concrete to become weathered.

Then on cross-examination the witness Halfhill continued: "As I saw the sidewalk up there on February 27, in front of the Baptist Book Store, the center portions of the sidewalk as shown on plaintiff's Exhibit 7 were reasonably fit to be used as a sidewalk, and if people would be walking and kept in the direction they were going and would vary from one side to the other they would be walking on sidewalk reasonably fit to be used

for sidewalk"; that "the hole immediately in front of the pilaster in front of the Baptist Book Store is over a drain pipe"; that "the drain pipe was far enough below the hole in the sidewalk that there was dirt over that"; that he, the witness, "did not see the drain pipe," but "could feel it by pushing through the dirt," "some inches below there . . . probably 3 or 4 inches"; that "the sidewalk slopes to the curb, and the drain line empties just below . . . the curb line"; that the hole as he has drawn it was as he saw it; and that on 27 February he could easily see the hole next to the Baptist Book Store. (Note in looking at Exhibit 10, drawn to scale, ¾ inch to equal one foot, the sidewalk in front of the book store is 12 feet wide from building line to curb. And the two holes are represented: "Hole in asphalt" nearer to, and within 1′ 4″ of the building line; and the other "hole in concrete" is 1′ 4″ away from the building line; dimensions over-all 4½″ by 4½″, though not square.)

At the close of plaintiff's evidence, motion of defendant for judgment as of nonsuit was overruled, and defendant excepted. Exception 1.

Defendant then offered witnesses: Lloyd G. Richey, one of them, testified in pertinent part: ". . . I . . . am the City Engineer of the city of Charlotte. The maintenance of sidewalks and streets comes under the jurisdiction of the City Engineer. Prior to February 24, 1952, I had never received notice of any holes in the sidewalk in front of the Baptist Book Store on N. Tryon Street. The sidewalks in the city . . . are inspected by my department approximately once a year. We have periodic inspections, but no set specified time in between. There are approximately 300 miles of sidewalk in the city . . ."

Then on cross-examination, the witness continued in part: ". . . One city block would be two blocks of sidewalk total length . . . It is my estimate that we get around to making an inspection about once a year of particular sidewalks. It is possible that a hole could exist in a sidewalk for a year before it would be discovered. I did not personally examine the hole in the sidewalk on the east side of N. Tryon Street near the northwest corner of the Baptist Book Store building; I had someone else examine it. The existence of the hole was reported to me. My employees were not at all sure that that was where the accident happened, the general location was all we had. As a result of the report made by these employees shortly thereafter, we patched the hole."

And Ernest G. Davis, another witness for defendant, testified in pertinent part: "I am maintenance engineer of the city of Charlotte. Shortly after February 24, 1952, upon instructions from Mr. Richey, I inspected the sidewalk in front of the Baptist Book Store . . . I found close to the building two small holes, the hole closest to the building was a hole best described as about square, about 4 inches across each way, that is, from side to side, it would be about 4 inches . . . When I saw the hole, it was

filled practically flush with the level of the sidewalk with silt and dirt. I took a screwdriver and raked the dirt out of the hole and made my measurements. The hole was about one inch deep. After I scratched the dirt out concrete was at the bottom of the hole. The hole did not extend through the sidewalk to the ground underneath. The hole as shown on Mr. Halfhill's map, plaintiff's Exhibit 10, does not reflect the condition of the sidewalk as I found it when I inspected it . . . on February 28, 1952. My inspection showed the hole to be . . . 4 inches square. Mr. Halfhill's map shows the hole not that size at all, but larger on one side here, greater than 4 inches square . . . I was directed to go there, and went there on February 28, 1952. The photograph, plaintiff's Exhibit 8, fairly depicts and represents the location of the holes in front of the store . . . The two holes were very close together . . . approximately the same size. The hole nearest the building was more square in size than the other hole . . . looked to me as if a 4 by 4 piece of wood might have been placed in the walk while the cement was wet and set up around it. I had that impression on my first look . . . one side of it was of a broken nature, the north side . . . the hole furtherest from the building was fairly close to an old asphalt patch . . . I assume that the sidewalk on N. Tryon Street between Sixth and Seventh is used by a great many people. Such sidewalks are not as busy as some others. There are other blocks on this same N. Tryon Street that have more pedestrian traffic than in this particular block. I would say that within a block of the particular location you would find the busiest sidewalk from the point of view of pedestrian traffic . . . the location in front of the Baptist Book Store is a little more than a block from the Square . . . and the Square is commonly referred to and known as the center of the city and its shopping area. I would say that the heaviest pedestrian traffic is within one block of the Square in all directions."

Defendant renewed its motion for nonsuit. Motion overruled. Exception 2.

The case was submitted to the jury, and upon verdict favorable to plaintiff, the court entered judgment in accordance therewith.

Defendant excepts thereto, Exception 3, and appeals therefrom to Supreme Court, and assigns error.

Tillett, Campbell, Craighill & Rendleman for plaintiff, appellee.
John D. Shaw for defendant, appellant.

WINBORNE, J. Did the trial court err in overruling defendant's motions for judgment as of nonsuit aptly made? After careful review, and consideration of the evidence offered by plaintiff and so much of defendant's evidence as is favorable to plaintiff, or tends to explain and make

clear that which was offered by the plaintiff, all as shown in the case on appeal, and in the light most favorable to plaintiff, *Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543, this Court is constrained to hold that demurrer to the evidence, or motion for judgment as of nonsuit, renewed at the close of all the evidence, G.S. 1-183, should have been sustained "if not upon the principal question of liability . . . then upon the ground of contributory negligence." See *Burns v. Charlotte*, 210 N.C. 48, 185 S.E. 443; *Houston v. Monroe*, 213 N.C. 788, 197 S.E. 571; *Watkins v. Raleigh*, 214 N.C. 644, 200 S.E. 424; *Gettys v. Marion*, 218 N.C. 266, 10 S.E. 2d 799; and *Walker v. Wilson*, 222 N.C. 66, 21 S.E. 2d 817.

A city or town is not an insurer of the safety of its streets. *Fitzgerald v. Concord*, 140 N.C. 110, 52 S.E. 309; *Oliver v. Raleigh*, 212 N.C. 465, 193 S.E. 853; *Ferguson v. Asheville*, 213 N.C. 569, 197 S.E. 146; *Houston v. Monroe, supra; Watkins v. Raleigh, supra; Gettys v. Marion, supra; Walker v. Wilson, supra*, and numerous other cases.

The liability of a city or town for injuries from defects or obstructions in its streets is for negligence which is the proximate cause of the injury. As stated in *Walker v. Wilson, supra*, opinion by *Denny, J.*, "The liability of a municipal corporation for injuries from defects or obstructions in its streets is for negligence and for negligence only; it is not an insurer of the safety of travelers, and is not liable for consequences arising from unusual or extraordinary circumstances which could not have been foreseen, but is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition for travel by those using them in a proper manner." 43 C.J., Municipal Corporations, Sec. 1785, p. 998.

Indeed, as stated by this Court, opinion by *Hoke, J.*, in *Fitzgerald v. Concord, supra:* "The town, however, is not held to warrant that the condition of its streets . . . shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that the defect existed and an injury has been caused thereby. It must be further shown that the officers of the town might have discovered the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." This principle is applied in *Gettys v. Marion, supra*, in opinion by *Barnhill, J.*, now *C. J.*, in this manner: "The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive . . . The existence of a condition which causes injury is not negligence *per se* . . ."

On the other hand, a person traveling on a street is required in the exercise of due care to use his faculties to discover and avoid defects and obstructions, the care being commensurate with the danger or appearance thereof. *Russell v. Monroe*, 116 N.C. 720, 21 S.E. 550; *Rollins v. Win-*

ston-Salem, 176 N.C. 411, 97 S.E. 211; *Ferguson v. Asheville, supra; Watkins v. Raleigh, supra.* He is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect which is visible and obvious. *Pinnix v. Durham,* 130 N.C. 360, 41 S.E. 932; *Watkins v. Raleigh, supra.*

Moreover, in this action, as in all civil actions for the recovery of damages for injuries allegedly resulting from actionable negligence, "The plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owes the plaintiff, under the circumstances in which they are placed; and, second, that such negligent breach of duty was the proximate cause of the injury,—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84. See also *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326, and cases cited.

And the principle prevails in this State that what is negligence is a question of law, and, when the facts are admitted or established, the Court must say whether it does or does not exist. "This rule extends and applies not only to the question of the negligent breach of duty, but also to the feature of proximate cause." *Hicks v. Mfg. Co.,* 138 N.C. 319, 50 S.E. 703; *Lineberry v. R. R.,* 187 N.C. 786, 123 S.E. 1; *Murray v. R. R., supra.*

In *Lineberry v. R. R., supra,* this Court in opinion by *Clarkson, J.,* said: "It is well settled that where the facts are admitted, and only one inference may be drawn from them, the Court will declare whether an act was the proximate cause of the injury."

In the light of these principles, the following is an outline of the evidence offered on the trial of this case. On Sunday, 24 February, 1952, plaintiff, in going from First Baptist Church to the Square, stepped into a hole located in the sidewalk on east side of North Tryon Street between Sixth and Seventh Streets in close proximity to the corner of a building. But there is no direct evidence as to how long this hole had been there. For ten years, plaintiff, in attending the First Baptist Church, had walked from the Square on the sidewalk in question, and had not noticed the hole. For two and a half years, plaintiff's witness, the student nurse, who came to assistance of plaintiff at time she fell, had customarily attended services at the First Baptist Church and usually walked from the Square to the Church on the sidewalk in question, and had never noticed the hole she talked about seeing there on Sunday, 24 February, 1952, after plaintiff fell. She had "walked up the sidewalk just like people do," and she "thought the sidewalk could have been better, but it was all

right." When, then, was the hole made? The only evidence as to this came from the expert engineer, Mr. Halfhill, who gave it as his opinion, from appearances, "the hole had been there perhaps two or three years," and that "it would take probably more than a year, considering normal foot traffic, for the edges of the concrete to become weathered." He testified that he examined the place on 27 February, 1952, and "he could easily see the hole."

"Sunday, February 24, 1952, after church let out, it was a nice, bright, sunshiny day."

Thus it was the duty of plaintiff, in the exercise of due care, to use her faculties to discover and avoid defects and obstructions, the care being commensurate with the danger or appearance thereof. But the sidewalk was crowded with people, who had just come out of the church. Some were standing on either side of her, and in front and back, when she walked up the sidewalk toward the Square. She testified: "I could not watch the sidewalk, the people were very close together . . . If I had looked down, I could not have seen where my foot was going, the people were too close. I was not looking down, they were too close up to one another . . . I was not crippled and never was one to feel along. I walked as I pleased, and I thought the sidewalk was reasonably fit for people to use for sidewalk purposes."

Thus it appears that plaintiff had put herself in a position in which she could not, and did not attempt to use her faculties to discover and avoid defects and obstructions, as it was her duty to do in the exercise of due care.

Under all the circumstances, however unfortunate and regrettable the occurrence may be, the city is not liable therefor.

Hence the judgment below is

Reversed.

STATE v. ALBERT TRACY BECKER.

(Filed 14 January, 1955.)

1. Automobiles § 18g (4)—

It is competent for a person of ordinary intelligence and experience to express an opinion from his observation of a car as to its speed, and while such witness's opportunity to judge generally relates to the weight of his testimony rather than to its admissibility, where the witness has no reasonable opportunity to judge the speed of the car, his testimony in regard thereto is without probative force.

2. Same—

The witness testified that she first saw defendant's car when it was only 15 feet away, and that she then looked toward her husband, who was in front of her, and saw him shove her son out of the pathway of the car before it struck her and her daughters. Other evidence established that defendant's car came to a complete stop within 8 or 10 feet after the impact. *Held:* Under the circumstances and in the light of the physical facts the witness's testimony that the car was traveling at a speed of 55 miles per hour when she saw it, is without probative value.

3. Automobiles § 18g (5)—

The physical facts at the scene of the accident may speak louder than the testimony of the witness.

4. Automobiles § 28c—Evidence held insufficient to be submitted to the jury in this prosecution for manslaughter.

The evidence tended to show that the fatal accident occurred in a residential area near a stadium, that cars were parked along the street, that defendant's car left tire marks visible for a distance of fifty-two feet, and that it skidded some distance before the impact, but without testimony as to the length of the skid marks, and without evidence of probative value contradicting defendant's testimony that he was proceeding in his proper traffic lane at a legal rate of speed, that he slowed as he entered the intersection and put on his brakes as quickly as he could when he saw some pedestrians crossing the street ahead of him, but was unable to stop before striking some of the pedestrians, fatally injuring one of them. *Held:* Conceding that the evidence is sufficient to support the view that defendant was not keeping a proper lookout under the conditions as they existed at the time, the evidence is not sufficient to show culpable negligence on his part, and his motion to nonsuit in this prosecution for manslaughter should have been allowed.

5. Negligence § 23—

Culpable negligence in the law of crimes is more than actionable negligence in the law of torts, and culpable negligence is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequence or a heedless indifference to the rights and safety of others.

PARKER, J., dissents.

APPEAL by defendant from *Fountain, Special Judge,* February Term, 1954, of GUILFORD (Greensboro Division).

Criminal action tried upon a bill of indictment charging the defendant with manslaughter.

The evidence for the State discloses that on the evening of 8 August, 1953, about eight o'clock, Samuel W. Phillips, his wife, two daughters and a son, and Weldon Bolen were on their way to a ball game which was in progress at World War Memorial Stadium in the City of Greensboro. Mr. Phillips lives near Guilford College and had driven Mr. Bolen's car. He parked the car on Bagley Street some two and a half blocks west of

the intersection of Bagley Street and Summit Avenue. They proceeded from there on foot toward the Stadium which is located about two blocks east of the intersection of Bagley Street and Summit Avenue. Bagley Street west of the intersection with Summit Avenue is thirty feet wide, east of the intersection it is eighty feet wide. The additional width of this street is used as parking space. Summit Avenue is sixty feet wide. It has four lanes for traffic in addition to parking space on both sides of the street. Mr. Phillips and his family undertook to cross Summit Avenue from the northwestern intersection of Bagley Street with the avenue to the northeastern intersection of these streets. By reason of the greater width of Bagley Street east of the avenue they had to proceed at an angle of about forty-five degrees across Summit Avenue in a northeasterly direction. Mr. Phillips took his small son by the hand and started across the street and as he and his son, who was seven years of age, reached a point beyond the center of the street, he first noticed the defendant's car when he heard the screaming of the tires. He gave his son a shove and jumped, and as he jumped he turned to the right and the car brushed his right leg. The boy was not touched by the car. Mrs. Phillips and the two little girls were behind Mr. Phillips. All three of them were hit by the defendant's car. Mrs. Phillips and the younger daughter, aged four, were injured; the older daughter, aged six, was fatally injured and died about three hours later. Mr. Bolen had already crossed the street when the accident occurred.

Mr. Phillips testified that while he was traveling the western half of Summit Avenue he looked back to his right twice to see whether or not any traffic came into view and was approaching on Summit Avenue from the south. That he was close to the center line when he looked the second time; that he could see a distance of seven to eight hundred feet to the south on Summit Avenue at that time and he saw no traffic approaching; that he did not stop when he looked at that time, but proceeded on toward the northeast corner of Bagley Street. That he saw nothing in view. That he had traveled about five feet from the center of Summit Avenue east toward the northeast corner of Bagley Street and Summit Avenue when he heard the screaming of tires. This witness testified that the defendant's car came to a complete stop within eight or ten feet after it struck his wife and children.

Mrs. Phillips testified that when she and her two daughters reached the northwest intersection of Bagley Street and Summit Avenue, she stopped and looked both ways to see if there were any cars coming. That she did not see any traffic approaching from either direction. That she then started across the street behind her husband; he was about five feet in front of her. "I was struck by the car. When I first noticed the car it looked to be about 15 feet from me. He had his brakes on. He was

sliding when I first saw him. He had his lights on. At that time, I and my children were about the center of the street." This witness was permitted to testify over the objection of the defendant that in her opinion the defendant's car was traveling fifty-five miles per hour when she saw it approaching her. That when she saw the car approaching she stopped; that she and her two children were at a standstill at the moment the three of them were hit. On cross-examination Mrs. Phillips testified, "As I approached the center of the street and from the time I left the curb on the northwest corner until the time I arrived about the center of the street, I continued looking right and left. I did not observe any traffic approaching from my right or from the south as I approached the center of the street. I can see a distance of some 700 to 800 feet south on Summit Avenue; nothing to obstruct the view there. I say that I arrived about the center of the street and heard the screaming of brakes. Up to that time I had not observed any traffic approaching from the south. I looked to my left and when I heard the screaming of brakes, I looked back to my right and he was almost on me, and I was right about the center at that time. . . . I could have been a foot or two beyond the center line. When I heard the screaming of tires, I saw my husband give the little boy a shove and I thought he had room to go between us and that is why I stopped. At the time I saw my husband give the little boy a shove, I had seen the automobile. . . . I do not know how far the car traveled after we were struck. I don't know whether the car came to a stop almost immediately after striking us or not. I always walk kind of fast to get across the street as soon as I can, but you can't walk too fast with two children. The game had already started, but we were not in too much of a hurry to get over to the game to see if traffic was coming or not. I continued looking both ways and I can't understand why I didn't see this car. The car was in the street, but I just didn't see it until I heard the brakes crying."

John R. Dixon, a police officer of the City of Greensboro, reached the scene of the accident immediately after it occurred. He testified the street lights were burning; that one is located in the center of Summit Avenue about the southern curb line of Bagley Street; that the other one is in the center of the avenue a little to the north of the northern portion of the intersection. The lights at the stadium are not focused to throw the light over on Summit Avenue. They are shielded to focus the light on the playing field. That the defendant's car was in the driving lane immediately east of the center line headed north. The front of the car was a little further to the right than the rear of the car. That he observed some skid marks; that those skid marks led up to the wheels of the defendant's car; that he found distinctive tire marks leading up to the car. The length of the tire marks was fifty-two feet from the front of the

defendant's Chevrolet automobile; that the automobile was about sixteen feet long. Automobiles were parked on either side of Summit Avenue to the north and south of Bagley Street except for the no-parking spaces. Twenty-five feet from the northeast intersection of these streets were reserved for a bus stop, and a similar space on the avenue at the southeast intersection of the streets was also designated as a bus stop. While eighty feet north of the northwest intersection of the streets on the west side of Summit Avenue were reserved for such purpose; that there is no pedestrian lane marked off at this street intersection across Summit Avenue. This witness further testified that the collision took place in a residential area; that the highway was dry at that time and the surface of Summit Avenue in that intersection is fairly smooth; there is asphalt top. That there is no traffic control signal there at that point and there were no traffic officers out there on this occasion directing traffic; that he talked with the defendant; that the defendant said he never did see the people he struck until after they were hit; that he slowed down his car about the time he entered the intersection for some pedestrians that he saw in the street, that was when he applied his brakes; that his car moved about ten feet from where the injured parties were struck. The officer stated that he noticed an odor on the defendant's breath. He had an odor of some type of alcohol on his breath. "I smelled the odor of alcohol on Mr. Becker's breath there, and, of course, observed his condition. After this accident occurred, I told him to take his car and go on home and that I was citing him on a charge of careless and reckless driving. I did not issue a process for driving intoxicated because it was my opinion that he was not under the influence of intoxicants."

The defendant testified that on the night in question he was driving a 1951 model two-door Chevrolet; that he had left his home on Percy Street to go to his mother-in-law's house to get his son. That he entered Summit Avenue from the west on Percy Street, two blocks south of Bagley Street; that he was proceeding north on Summit Avenue at a speed of between thirty and thirty-five miles per hour; that the headlights on his car were burning and in proper condition at the time; that as he approached the intersection of Bagley Street he was in the lane for traffic next to the center line. "I approached Bagley Street going north and I noticed some figures in front of me, and I applied my brakes and there were two figures that went off slightly to the right at that point. . . . As I approached and saw these people, I applied my brakes immediately. I didn't have time for a horn, they appeared so suddenly. . . . When the collision occurred, my car was still moving. . . . It seemed to me just as soon as I struck them, I stopped. . . . It took a couple of seconds to fully realize what had happened." On cross-examination the defendant testified that as he came down Summit Avenue he did notice

that there were cars parked solidly up to within fifty feet of Bagley Street. He did not notice cars which were parked north of Bagley Street on Summit Avenue until after the accident; that his lights were on low beam and did not reflect that far. That he did not hear any noise, the public address system or any cheering coming from the direction of the Stadium. "As I approached that intersection, it did not dawn on me at all that there was a ball game going on. . . . It's pretty hard to judge how far I was from Mr. Phillips when I first saw him. . . . I'd say that I was somewhere in the vicinity of the southern corner of Bagley Street when I first saw them to apply my brakes. There is a certain amount of reaction time involved after I saw the man. I clamped down on my brakes at the first instant. . . . I was looking straight ahead and had my eyes on Mr. Phillips and his son. . . . I don't know what part of my vehicle struck Mrs. Phillips and the children (the police officer testified there were no marks on the car to show what part of it struck Mrs. Phillips and the two girls). I was not looking straight ahead when I struck them . . . Mr. Phillips and his son had just gotten by the car. . . . My eyes were diverted in that direction . . . I applied my brakes to the best of my ability to avoid hitting these people."

The defendant admitted that earlier in the afternoon, between the hours of two and five o'clock, he drank two or three cans of beer at his home. Several witnesses testified that the reputation and character of the defendant is good. Whereupon, the State recalled the defendant for further cross-examination, and he testified that he had been an alcoholic and that he voluntarily requested his physician to make arrangements for him to enter the Rehabilitation Center at Butner. That he took the full course of treatment at that institution over a period of twenty-eight days and was discharged as cured. That he had been to Butner only once and that was a month or so before this accident. That since he left Butner he drank an occasional beer.

Verdict: Guilty of involuntary manslaughter.

Judgment: Imprisonment in the State's Prison for a term of not less than five years nor more than seven years. The defendant appeals, assigning error.

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

Adam Younce for defendant.

DENNY, J. The defendant's assignment of error No. 3 challenges the correctness of the ruling of the court below in refusing to sustain his motion for judgment as of nonsuit interposed at the close of the State's evidence and renewed at the close of all the evidence.

As a basis for consideration of the above assignment of error, we have endeavored to set forth a comprehensive and accurate statement of the pertinent parts of the evidence adduced in the trial below.

The result of this accident is indeed regrettable, irrespective of what happens to the defendant. However, his conviction should not be upheld unless the record discloses evidence of culpable negligence on his part.

As a preliminary question and before disposing of the above assignment of error, we shall consider the assignment of error based on the exception to the admission of the evidence of Mrs. Phillips as to the speed of the defendant's car at the time of the accident. Mrs. Phillips testified that in her opinion the defendant's car was traveling fifty-five miles per hour when she first saw it at a point fifteen feet from her. She also testified that after she saw the car only fifteen feet away, she looked toward her husband and saw him shove her son out of the pathway of the car before it struck her and the girls. It is a mathematical fact that a car traveling fifty-five miles an hour travels eighty-one feet per second. The undisputed evidence on this record, if Mrs. Phillips was correct in her estimate of the distance between her and the car when she first saw it, is that the car stopped within twenty-five feet of that point. It would seem as a matter of common knowledge and experience that it would have been a physical impossibility for the defendant to have stopped his car in so short a distance if at the time in question it was traveling at such a rate of speed. *Ingram v. Smoky Mountain Stages,* 225 N.C. 444, 35 S.E. 2d 337. As the late *Chief Justice Stacy* said in *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659, "Physical facts speak their own language and are often heard above the voices of witnesses." *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88.

There is no controversy as to the general rule applicable to the admission of evidence as to speed. *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394; *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828; *S. v. Roberson,* 240 N.C. 745, 83 S.E. 2d 798.

In 5 Am. Jur., Automobiles, section 651, page 860, *et seq.,* it is said: ". . . it is generally held that one of reasonable intelligence and ordinary experience in life is presumed to be capable, without proof of further qualification, to express an opinion as to how fast an automobile which came under his observation, was going at a particular time. . . . The question as to the opportunity of the witness to judge, under the particular circumstances, the speed of an automobile, has been held, as a general rule, to go to the weight of his testimony rather than to its admissibility. . . . *But where a witness has had no reasonable opportunity to judge the speed of an automobile, it is error to permit him to testify in regard*

thereto," citing Anno. 70 A.L.R. 547. (Italics ours.) See also Anno. 94 A.L.R. 1192.

In *Davidson v. Beacon Hill Taxi Service,* 278 Mass. 540, 180 N.E. 503, the witness was not allowed to give his estimate of the speed of a taxi which struck the plaintiff. Upon appeal the Court said: "The undisputed evidence of the witness was to the effect that he ran out of the alley into the street, and saw the defendant's taxicab for the first time when it was 15 feet away. The intervening time from when he first saw it until the plaintiff was struck could have been at most only a few seconds. During that time he was running to escape being struck. It is inconceivable that he could have had any intelligent opinion as to the speed of the taxicab in these circumstances. His estimate of its speed was too unreliable and untrustworthy to aid the jury upon that question. It was of no value as evidence." *Bowling Green-Hopkinsville Bus Co. v. Edwards,* 248 Ky. 684, 59 S.W. 2d 584; *Challinor v. Axton,* 246 Ky. 76, 54 S.W. 2d 600; *Mutti v. McCall,* 14 La. App. 504, 130 So. 229.

In our opinion, under the facts and circumstances disclosed by the evidence of Mrs. Phillips, she had no reasonable opportunity to judge the speed of the defendant's car, and her evidence with respect thereto was without probative value.

When the above evidence is disregarded, there is nothing to contradict the evidence of the defendant that he was proceeding north on Summit Avenue in the proper traffic lane at a legal rate of speed and saw Mr. Phillips and his son come into view and enter his lane of traffic about the time he entered the southern margin of the intersection of Summit Avenue and Bagley Street. True, the tires of the defendant's car left marks visible for a distance of fifty-two feet from the front of the car at the point where it was stopped. The wheels of the car skidded for some distance before the impact. The officer did not testify as to the length of the skid marks as compared with the tire marks. According to defendant's testimony, he slowed down as he entered the intersection and put on his brakes as quickly as he could when he saw some pedestrians ahead. These turned out to be Mr. and Mrs. Phillips and their children.

It is settled law with us that "a want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669; *S. v. Whaley,* 191 N.C. 387, 132 S.E. 6; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724.

In the case of *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580, this Court, speaking through *Adams, J.,* said: "Ordinary negligence is based on the theory that a person charged with negligent conduct should have known the probable consequences of his act; culpable negligence rests on the assumption that he knew the probable consequences but was intentionally, recklessly, or wantonly indifferent to the results."

If it be conceded that the evidence on this record is sufficient to support the view that the defendant was not keeping a proper lookout under the conditions as they existed at the time of the accident, in our opinion it is not sufficient to show culpable negligence on his part. *S. v. Lowery, supra; S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; *S. v. Tankersley,* 172 N.C. 955, 90 S.E. 781, L.R.A. 1917C, 533.

The defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

PARKER, J., dissents.

ALLIANCE COMPANY v. STATE HOSPITAL AT BUTNER.

(Filed 14 January, 1955.)

1. State § 3a—

The State may prescribe such terms and conditions as it sees fit, subject to constitutional limitations, in waiving its governmental immunity to suit for negligence, and our State Tort Claims Act, G.S. 143, Art. 31, permits recovery against the State only for such injuries as are proximately caused by negligence of a state employee while acting within the scope of his employment when there is no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted. G.S. 143-291.

2. Statutes § 5a—

Where the words of a statute are clear, certain, and intelligible, they must be given their natural or ordinary meaning.

3. Master and Servant § 1—

The relationship of employer and employee must be created by contract, express or implied, and the word "employee" when used in this connection means one who works for wages or salary in the service of an employer.

4. State § 3a—

The word "employee" as used in the State Tort Claims Act must be given its ordinary meaning in construing the statute.

5. Evidence § 2—

The courts will take judicial notice of the fact that the "Umstead Youth Center" is a state penal institution authorized under and by virtue of Chapter 297, Session Laws of 1949, and maintained for the purpose of receiving and detaining youthful and first term prisoners, G.S. 148-49.2.

6. State § 3a: Master and Servant § 1—

A prisoner detained at a state penal institution is not an employee of the state within the meaning of the State Tort Claims Act, and the state may not be held liable under that statute for negligent injury inflicted by such prisoner while his services are made use of, which is the meaning of the word "employed" as used in G.S. 148-49.3.

7. State § 3a—

The legislative intent and purpose in enacting the State Tort Claims Act must be ascertained from the wording of the statute, and the rule of liberal construction cannot be applied to enlarge its scope beyond the meaning of its plain and unambiguous terms.

PARKER, J., dissenting.

BOBBITT, J., concurring.

APPEAL by defendant, State Hospital at Butner, from *Moore (Clifton L.) J.*, at July Term, 1954, of GRANVILLE.

Proceeding instituted before North Carolina Industrial Commission under State Tort Claims Act, Article 31 of Chapter 143 of General Statutes, on claim of plaintiff, Alliance Company, for damages in sum of $73.19 against State Hospital at Butner, a State agency, because of negligence of one Isaac Robert Jestes, an inmate at Umstead Youth Center, in operation of a hospital truck.

Upon hearing before the Deputy Hearing Commissioner the parties stipulated and agreed as follows:

"(1) That the accident giving rise to this claim occurred in Granville County, Butner, North Carolina, at the new Youth Center construction site, on 22 April, 1952, at 10:30 a.m.

"(2) That the State-owned vehicle involved therein was operated at the time by Isaac Robert Jestes, an inmate of the Umstead Youth Center, an agency of the State of North Carolina. Said person was acting at the time in performing the duties assigned to him by his superiors.

"(3) That the damages sustained by the claimant arose as a result of the negligence of said person at the time and place set forth above.

"(4) There was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted.

"(5) That the claimant has been damaged in the amount of $73.19 as a result of such negligent act of such person.

"(6) That this claim was filed with the Industrial Commission within the time prescribed by law.

"(7) The only question for determination being: Was said Isaac Robert Jestes, an inmate of the Umstead Youth Center, a State employee acting within the scope of his employment at the time of the accident?"

Thereupon the Deputy Hearing Commissioner found the facts to be in accord with the facts above stipulated, and entered the conclusion of law: That "Isaac Robert Jestes, inmate of the Umstead Youth Center, was not, at the time of the accident giving rise hereto, a 'State employee', 'acting within the scope of his employment', as such terms are used in G.S. 143-291 which makes the State of North Carolina liable for negligent acts of a 'State employee while acting within the scope of his employment.' Therefore, there was no negligence on the part of a State employee."

And in accordance therewith the Deputy Hearing Commissioner entered an order denying the claim. Thereupon claimant appealed to the North Carolina Industrial Commission, sitting as the Full Commission, assigning specific error on the part of the Hearing Commissioner. And the Commission, so sitting upon such appeal, adopted as its own the findings of fact and conclusions of law of the Hearing Deputy, and affirmed the order denying the claim.

The claimant appealed to Superior Court, assigning specific error as on appeal from Hearing Deputy.

The cause being heard in Superior Court upon the record of the Industrial Commission, and arguments of counsel for the respective parties, the Presiding Judge sustained exceptions to the failure of the Full Commission to find that Isaac Robert Jestes was a "State employee" within the meaning of G.S. 143-291. And then, after briefing his view on question as to whether Isaac Robert Jestes was a "State employee" within the meaning of G.S. 143-291, upon the facts in this case, the Judge ordered and adjudged that plaintiff recover of defendant the amount claimed and the cost of "the action."

Defendant excepted to the judgment, and particularly to the rulings of the court sustaining exceptions to rulings of the Industrial Commission, and appeals to Supreme Court and assigns error.

Attorney General McMullan, Assistant Attorney General Love, Gerald F. White, Member of Staff for the State.

E. K. Powe for Plaintiff Appellee.

WINBORNE, J. The question involved on this appeal, as stated in briefs of appellant and of appellee, substantially the same, as framed by appellant, reads: "Is an inmate of the Umstead Youth Center, who performs duties assigned to him, a State employee within the meaning

of the language used in the Tort Claims Act, codified as Article 31 of Chapter 143 of the General Statutes of North Carolina?"

In this connection it is noted that the Tort Claims Act, Section One of Chapter 1059, of 1951 Session Laws, codified as above stated, constitutes the North Carolina Industrial Commission a court for the purpose of hearing and passing upon claims against the State Board of Education, the State Highway and Public Works Commission, and all other departments, institutions, and agencies of the State, and prescribes the machinery by which claims may be presented, considered and determined, and describes claims which are recognized as enforceable against such State agencies. And "when the State gives statutory consent to be sued, it may prescribe such modes, terms and conditions as it sees fit, subject of course, to any limitation or restriction in this regard in its own Constitution. It may . . . limit the right to sue to certain specific causes, and when it does so it can be sued only in the manner and upon the terms and conditions prescribed." 49 Am. Jur. 315, States, Territories and Dependencies, Sec. 97.

The Industrial Commission is empowered to "determine whether or not each individual claim arose as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted"; and "if the Commission finds that there was such negligence on the part of a State employee while acting within the scope of his employment which was the proximate cause of his injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid . . . and by appropriate order direct the payment of such damages by the department, institution or agency concerned . . . ." G.S. 143-291.

The wording in the statute is clear, certain and intelligible. Therefore, the words used must be given their natural or ordinary meaning. *Borders v. Cline,* 212 N.C. 472, 193 S.E. 826; *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d, 433, and cases cited therein.

In the *Cab Company* case, *Johnson, J.,* stated that "it is an accepted rule of statutory construction that ordinarily words of a statute will be given their natural, approved, and recognized meaning."

Thus it appears basically that a claim, to be recognizable within the purview of the Tort Claims Act, must arise "as a result of a negligent act of a State employee while acting within the scope of his employment." Manifestly, the word "employee" in the connection used, means "one who works for wages or salary in the service of an employer"—Webster's New International Dictionary. The relation of employer and

employee is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied. *Hollowell v. Dept. of Conservation and Development,* 206 N.C. 206, 173 S.E. 603. And the word "employment" indicates a contractual relationship. These words are found in common use in statutes in this State, and decisions of this Court. Hence, it will be assumed that the General Assembly intended to give to them their ordinary meaning.

The question now arises as to whether an inmate of the "Umstead Youth Center" is an employee of the State. To answer this question it is necessary to determine what is the "Umstead Youth Center." The stipulation of the parties describes it as an "agency of the State of North Carolina." But as to what sort of an agency it is, the record is silent. However, this Court will take judicial notice of the fact that a penal institution, commonly known as "Umstead Youth Center," authorized under and by virtue of Chapter 297 of 1949 Session Laws, was established at Camp Butner, and is maintained by the State.

Turning then to the 1949 Act, codified as Article 3A of Chapter 148 of General Statutes of North Carolina, it is seen that the General Assembly authorized and empowered the State Hospital Board of Control "to convert the old 'Prisoner of War' camp, located on its property at Camp Butner, into a modern prison camp or guard-house, with a capacity of one hundred (100) for the purpose of receiving and detaining such youthful and first term prisoners as may be sent it by the State Highway and Public Works Commission under such rules and regulations as may be jointly adopted by the State Highway and Public Works Commission and the North Carolina Hospitals Board of Control." And the General Assembly declared in Section 2 of the Act (G.S. 148-49.2), that for the purposes of this act or article "a 'youthful offender' and a 'first term offender' is a person (1) who, at the time of imposition of sentence, is less than 25 years of age, and (2) who has not previously served a term in any jail or prison." Furthermore, in Section 3 (G.S. 148-49.3) the act described those received at the camp as "prisoners." Therefore, it follows as a matter of law (1) that the State agency, or institution, at Camp Butner, at which a "youthful offender" or a "first term offender" is received, within the meaning of the act, is a prison, and (2) that the inmates thereof are prisoners detained there for the purpose for which it was created, and are not employees of the State of North Carolina. Indeed the word "employed," in the sense it is used in G.S. 148-49.3, means to make use of the services of the "prisoners," and not in the sense of hiring them for wages.

It is contended by appellee that under rule of liberal construction the wording of the Tort Claims Act is sufficiently broad to embrace the inmate in question as a State employee. However, this Court, in *Bor-*

ders v. Cline, supra, speaking to the subject under a liberal construction of the North Carolina Workmen's Compensation Act to effectuate the legislative intent and purpose, to be ascertained from the wording of the act, declared that "the rule of liberal construction cannot be carried to the point of applying an act to employments not within its stated scope, or not within its intent or purpose, or of supporting a strained construction to include an occupation or employment not falling within it." What is said there is applicable here. However, it is not here necessary to pass upon the question as to rule of construction in a statute waiving immunity.

The case of *Lyon & Sons v. Board of Education,* 238 N.C. 24, 76 S.E. 2d, 553, cited and relied upon by appellee is distinguishable in factual situation from case in hand. There the basic claim, on which right of subrogation was predicated, was clearly within the purview of the Tort Claims Act.

Other authorities cited by appellee have been duly considered and, while persuasive, are not deemed controlling.

For reasons stated the judgment from which this appeal is taken is Reversed.

PARKER, J., dissenting. The case of *Washington v. State* (Supreme Court, Appellate Division, Third Department, Nov. 15, 1950) 100 N. Y. S. 2d 620, decided a question of law quite similar to the question before the Court here. The *Per Curiam* opinion is as follows:

"PER CURIAM. Claimant has had judgment against the State for injuries sustained by him while an inmate of Great Meadow Prison when he was thrown from a load of hay which he was helping to load. The horses drawing the load, driven and controlled by a fellow inmate, started suddenly, causing claimant to lose his balance. The Court of Claims has found that claimant's injuries resulted solely from the negligence of the driver and without contributory negligence on the part of the claimant.

"On this appeal the appellant does not question the findings as to negligence or lack of contributory negligence, but asserts that the Court of Claims was without jurisdiction under subd. 2, Sec. 9 of the Court of Claims Act, because a fellow inmate is not an 'officer or employee' of the State and that therefore the State is not responsible for the negligence of such inmate.

"Both claimant and the driver of the hay wagon were under the immediate control, supervision and direction of a prison guard who was an employee of the State. They were directed to perform their particular assignments. The guard was present when the injuries occurred. No one contends that an inmate of a state prison is an employee of the

State under ordinary circumstances. However, when the State undertakes to perform one of its functions through the medium of such inmates and directs them, as it did here, to perform certain duties under the immediate supervision of a State employee, then the State makes such inmates its agents and employees while in the performance of such duties, at least to the extent of rendering the State liable for their tortious acts in the performance of such duties. The responsibility of the State under such circumstances has been recognized before. *Sullivan v. State of New York,* 257 App. Div. 893, 12 N.Y.S. 2d 504 (3rd dept.), affirmed 281 N.Y. 718, 23 N.E. 2d 543.

"Judgment unanimously affirmed, with costs."

Sullivan v. State, supra, is reported as follows in the Court of Appeals of New York:

"Appeal from Supreme Court, Appellate Division, Third Department, 257 App. Div. 893, 12 N.Y.S. 2d 504.

"Action by Henry Sullivan against the State of New York for injuries sustained by claimant whose right thumb, index, middle, and ring fingers were amputated when he was cleaning a bread slicing machine while a convict imprisoned in Great Meadow Prison.

"A civilian official had control of an electric switch that motivated the device, and a convict directed claimant's activities. The machine could be stopped by a switch thereon and also by one located on the general switchboard in another room. Claimant was injured during the first day he worked at bread slicing. On several prior occasions the machine had stopped without known cause, and the convict then in charge had notified the civilian guard. On the day of the injury the machine again ceased to function without known cause, and the convict in charge directed claimant to clean the machine, but did not turn off the switch thereon nor instruct the claimant to do so. During the cleaning it started without known cause, and the injuries resulted.

"From a judgment of the Appellate Division, 257 App. Div. 893, 12 N.Y.S. 2d 504, reversing a judgment of the Court of Claims which dismissed the claim and awarding claimant $6,000, defendant appeals. Affirmed."

G.S. 148-49.3 reads:

"Employment and supervision of prisoners.—Prisoners received at Camp Butner Prison shall be employed in work on the farm, workshops, the upkeep and maintenance of the property located at Camp Butner or in such other similar work as may be determined by the State Hospitals Board of Control and the State Highway and Public Works Commission. The said prisoners to be under the general supervision of the agents and employees of the State Highway and Public Works Com-

mission or of such employees of the State Hospitals Board of Control as may be agreed upon by the two State agencies."

I think that the legislative attitude in enacting a Tort Claims Act, or waiving a State's immunity from suit, is accurately reflected by *Cardozo, J.'s* statement in *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28 (quoted with approval by *Vinson, C. J.*, in the opinion he wrote for the U. S. Supreme Court in *U. S. v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 94 L. Ed. 171): "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity, as exemplified by Tort Claims Acts enacted by the Congress and the Legislatures of various states. The purpose of such acts is to relieve the legislative branch of the government from the judicial function of passing upon tort claims against the State.

In the case here it was stipulated that Jestes, an inmate of the Umstead Youth Center, a State agency, was operating a State owned vehicle, and acting at the time in performing duties assigned to him by his superiors, and while doing so he negligently inflicted injury upon claimant, who was not guilty of contributory negligence. By virtue of G.S. 148-49.3 the State *employed* him to do this work. The caption of this statute is "Employment and *Supervision*," and the words used by the General Assembly in the act are "shall be employed." Webster's New International Dictionary defines employee: "One employed by another; one who works for wages or salary in the service of an employer; - disting. from official or officer." When the State employed Jestes to do this work, it necessarily made him a State employee, while in the performance of such duties, at least to the extent of rendering the State liable for his tortious act in the performance of such duties under the State Tort Claims Act.

I vote to
Affirm.

BOBBITT, J., concurring. Under the Tort Claims Act, G.S., Ch. 143, Art. 31, the basis of liability is "a negligent act of a State *employee* while acting within the scope of his employment." (Italics added.) Ordinarily, a prisoner is not considered "a State employee." "Employed," as used in G.S. 148-49.3, indicates the activities in which the prisoners at Camp Butner are to engage, rather than their relationship to the State. Such prisoner, when acting for the State and as directed by his superior, may rightly be considered an agent of the State.

Is "employee" synonymous with "agent?" An employee is an agent, but an agent is not necessarily an employee.

In my opinion, our Tort Claims Act should be strictly construed. This is in accord with the rulings of most courts. 49 Am. Jur., States, Territories, and Dependencies, sec. 97; 81 CJS, States, sec. 215. Waiver of immunity beyond the provisions of the Act as strictly construed is a matter for determination by the General Assembly.

Under strict construction, the claimant cannot recover in this proceeding.

STATE v. LEROY THOMAS.

(Filed 14 January, 1955.)

1. Criminal Law § 33—

A confession in a criminal action is voluntary in law if, and only if, it was in fact voluntarily made.

2. Same—

The competency of a confession is a preliminary question for the trial court, and the court's ruling thereon is not subject to review if supported by any competent evidence.

3. Same—

The mere fact that the defendant was in jail under arrest, and was there questioned by several officers does not render his confession incompetent.

4. Same—

It is not essential to the competency of a confession that the officers should have cautioned the defendant that any statement made by him might be used against him, and should have informed him that his refusal to answer could not thereafter be used to his prejudice.

5. Same—

The fact that officers, while questioning defendant, state that if defendant told them anything, to tell the truth, does not render defendant's confession incompetent.

6. Same—

Where the trial court duly hears testimony for the state and for the defendant upon the preliminary inquiry as to the voluntariness of the defendant's alleged confession, the trial court's finding that the confession was voluntary is conclusive on appeal when supported by competent evidence, and no error of law or legal inference is made to appear.

7. Criminal Law § 52a (2)—

An extrajudicial confession of guilt made by defendant must be corroborated by other evidence tending to establish the *corpus delicti* in order to be sufficient to sustain a conviction.

8. Arson § 1—

In order to prove the *corpus delicti* in a prosecution for arson, the state must show not only the burning of the house or other structure, but also that the burning was caused by criminal means.

9. Arson § 7—

The *corpus delicti* may be established by direct or by circumstantial evidence.

10. Same—Defendant's confession and evidence aliunde establishing the corpus delicti held sufficient to be submitted to the jury.

In addition to defendant's extrajudicial confession, the State's evidence tended to show that the defendant and his wife were separated, that the wife had gone to live with her sister and brother-in-law, that she had taken their bedclothing, over which the parties had disputed, and stored them in a closet of the house occupied by her brother-in-law, that there was animosity between the brother-in-law and defendant, that on the night of the fire all the lights were out of the house occupied by the brother-in-law, and the inmates thereof were apparently asleep, that defendant was seen leaving the house about midnight, and that about 5 or 10 minutes thereafter fire was seen coming from the closet, which spread to the house, burning it down. There was also evidence that shortly after the house burned defendant was asked why he had burned it, and that defendant did not deny the accusation. *Held:* The evidence *aliunde* the confession is sufficient to establish the *corpus delicti*, and the confession, corroborated by the other evidence, is sufficient to sustain conviction.

APPEAL by defendant from *Gwyn, J.*, July Term, 1954, of GUILFORD. No error.

Criminal prosecution upon a bill of indictment charging the defendant LeRoy Thomas with unlawfully, wilfully, feloniously and maliciously attempting to set fire to and burn a dwelling house, the property of Banks Marley, by setting fire to bedclothing in the said dwelling house with the intent and purpose to set fire thereby to the said dwelling house.

The defendant pleaded not guilty.

Verdict: Guilty as charged in the bill of indictment. Judgment: Imprisonment in the State's Prison.

Defendant excepted and appealed, assigning error.

Harry McMullan, Attorney General; Ralph Moody, Asst. Attorney General; and Charles G. Powell, Jr., Member of Staff, for the State.

E. L. Alston, Jr., for Defendant, Appellant.

PARKER, J. The defendant has two assignments of error, which pose two questions for decision. *One.* Was an alleged confession made by the defendant properly admitted in evidence? *Two.* Should his motion for judgment of nonsuit made at the conclusion of the State's evidence—the defendant introduced no evidence—have been allowed?

First, the Voluntariness of the Defendant's Confession.

Thurman Jones, a deputy sheriff of Guilford County, testified for the State that he arrested LeRoy Thomas, the defendant, on a warrant charging him with the capital crime of arson, and that he questioned him that same afternoon, while he was fingerprinting him, and immediately afterwards.

At this point in Thurman Jones' testimony counsel for the defendant requested the court "for a finding of fact as to whether or not any purported conversation was voluntary." Whereupon, the court sent the jury to their room, and the following testimony was elicited in their absence. Thurman Jones gave testimony tending to show: The defendant was not drunk, and had been in custody only a few minutes. He did not handcuff, or strike or otherwise mistreat the defendant. No one pointed a pistol or weapon at the defendant. He neither promised defendant any reward, nor gave him any inducement to make a statement, nor did anyone in his presence. Neither did he, nor anyone in his presence, make any threats against the defendant. The defendant had been in his presence all the time since he had been in custody. He did not tell the defendant if he confessed, it would go lighter on him, or if he didn't confess, he could convict him any way. He did not tell the defendant if he confessed he might get 10 years; if not, he might get life or the gas chamber. The only thing he told the defendant was: "Thomas, this is a serious charge. You know you couldn't do that, and get by with it without someone seeing you." To which the defendant replied: "I know it. When I left the house they turned the car lights on me as I went down the street." After the fingerprinting was finished, he went into a room and talked to the defendant in the presence of two officers. "We told him if he told us anything to tell the truth, if he would not tell the truth, not to tell anything at all." The defendant said he "wanted to tell the truth about it," and then made a statement. We did not tell him that what he said might be used against him, or that he did not have to talk.

LeRoy Thomas, the defendant, testified: That he was questioned by two officers, one of whom was Mr. Riley—Thurman Jones was not one of them—from 7:30 to 2:30 the Saturday he was arrested. On Sunday evening he was questioned by one man, who came from Raleigh; so he was told. One of the deputy sheriffs told him something like "It will be better for you if you confess, and it will be bad on you if you don't confess. We got you. We got three witnesses see you down there at the house at this time. We can prove you did it. You might as well make a confession." They did not tell me what would happen to me if I did not confess, but they were beating on the desk at me. They said: "Be better if you make a confession, and plead guilty to it, you would

come out better—might get out in 8 or 10 years, and then again you might not make no time."

Betty Warren testified for the State that she took down what the defendant said—not the questions. Three deputy sheriffs were questioning the defendant.

At this point the jury was recalled into the courtroom, and the court held that the statement made by the defendant was competent, and admitted it in evidence.

The defendant contends that he testified Mr. Riley and another officer questioned him, and that one of them told him it would be better for him if he confessed; that this evidence was not refuted, though Mr. Riley was in the courtroom and was pointed out by him; and therefore the statement was not voluntary.

The substance of Thurman Jones' testimony was to the effect that the defendant was not told, if he confessed, that it would be better for him, or that the officers used any such words to him as were testified to by the defendant.

A confession in a criminal action is voluntary in law if, and only if, it was in fact, voluntarily made. *S. v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. The Court said in *S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684: "The competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N.C. 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603, and the Court's ruling thereon is not subject to review, if supported by any competent evidence. *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11."

The mere fact that the defendant was in jail under arrest, and was there questioned by several officers does not render his confession incompetent. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Stefanoff,* 206 N.C. 443, 174 S.E. 411.

It is not essential to the competency of the defendant's confession that the officers should have cautioned him that any statement made by him might be used against him, and should have informed him that he was at liberty to refuse to answer any questions, or to make any statement, and that such refusal could not thereafter be used to his prejudice. It suffices if the statement were voluntary. The questioning by the officers was not a judicial proceeding. *S. v. Lord,* 225 N.C. 354, 34 S.E. 2d 205; *Lyons v. Oklahoma,* 322 U.S. 596, 88 L. Ed. 1481. As to the rule in a judicial proceeding, see *S. v. Dixon,* 215 N.C. 438, 2 S.E. 2d 371; *S. v. Grier,* 203 N.C. 586, 166 S.E. 595.

The statement to the defendant by the officers that if he told them anything, to tell the truth, did not make the statement incompetent. "The rule generally approved is, that 'where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no

tendency to induce him to make an untrue statement, his confession, in either case, is admissible.' " *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620.

The record discloses that the trial judge made due preliminary inquiry into the voluntariness of the confession allegedly made by the defendant. After hearing Thurman Jones and Betty Warren for the State, and the defendant for himself, the trial judge found that the confession was voluntary, and admitted it in evidence. This ruling cannot be disturbed on this appeal, because it is supported by competent evidence, and no error of law or legal inference appears. *S. v. Rogers, supra; S. v. Brooks,* 225 N.C. 662, 36 S.E. 2d 238.

Second, the Sufficiency of the Evidence.

The defendant contends that the State did not introduce any evidence *aliunde* the defendant's confession of sufficient probative value to withstand his motion for judgment of nonsuit under the rule set forth in *S. v. Cope,* 240 N.C. 244, 81 S.E. 2d 773.

The general rule is well settled that a naked extra-judicial confession of guilt by a defendant charged with crime, uncorroborated by any other evidence, is not sufficient to sustain a conviction. *S. v. Cope, supra;* Anno. 127 A.L.R. 1131, where the cases are assembled.

The overwhelming weight of authority requires that the evidence corroborating the confession must relate to and tend to establish the *corpus delicti.* Anno. 127 A.L.R. 1134, where the cases are cited.

Whitfield, C. J., speaking for the Court in *Spears v. State,* 92 Miss. 613, 46 So. 166, 16 L.R.A. (N.S.) 285, said: "The *corpus delicti* in a case of arson consists, not only in the proof of the burning of the house or other thing burnt, but of criminal agency in causing the burning." A note in 16 L.R.A. (N.S.) 285, states: "However, in accordance with the rule laid down in *Spears v. State,* it is now universally recognized by all the courts that the *corpus delicti* in arson consists of both elements, that is not only the burning, but also the criminal agency causing it." And on p. 286 of the same note it is said: ". . . it naturally follows that there can be no conviction of arson without satisfactory proof, either by direct or circumstantial evidence, not only that the building was burned, but also that it was burned through some criminal agency, and was not an accidental or other providential cause." To the same effect see Anno. L.R.A. 1916 D 1299 *et seq.* Proof of *corpus delicti* in arson.

The *corpus delicti* may be established by direct or by circumstantial evidence. *S. v. Cope, supra;* 23 C.J.S., Criminal Law, p. 185.

In *Davis v. State* (Ala.), 37 So. 676, evidence that the prosecutor's house was burned in his absence, that no dynamite or other explosive substance was in his house when he left it, that there were tracks from the house to where a mule had been hitched, and mule tracks from there

to where defendant lived, that the mule tracks corresponded with the defendant's mule, and the finding of tufts of mule's hair that corresponded with the hair of defendant's mule, was held sufficient evidence of the *corpus delicti* to render admissible evidence of defendant's confession that he set fire to the house.

In *Com. v. McCann,* 97 Mass. 583, the Court said: "The fact that the barn had been burned was proved by other evidence. There was evidence of the hostility of the defendant towards the occupant of the property destroyed, and of her threats against him within a few hours before the fire. This was not, therefore, a case requiring the judge to instruct the jury whether uncorroborated confessions will warrant a conviction. *Commonwealth v. Tarr,* 4 Allen, 315."

The State's evidence tended to show these facts: The house in which Rufus Chapman and his wife and children lived was owned by Banks Marley. It was destroyed by fire on Saturday night, 3 April, 1954. Rufus Chapman is a brother of the defendant's wife, Rosa Belle. Their mother and their sister, Thelma Marcus, lived in a house on the same side of the street 15 or 20 feet from the Chapman house. Prior to the night of the fire the defendant and his wife had fallen out, and for a week or two before the fire she had been living with her mother. The Monday before the fire Rosa Belle had moved all the furniture and bedclothes belonging to defendant and her away from the house where they had lived, and stored the bedclothes, including sheets, quilts and blankets, in a closet on the back porch of the Chapman home. On Thursday night before the fire the defendant and his wife were on the Chapman back porch fussing over the bedclothes. She gave defendant two sheets and two blankets. The defendant was drinking. Chapman asked him to leave. He said he would, but he was coming back.

On Thursday before the fire defendant was at Thelma Marcus' home talking to his wife. He said "he was coming down there on Saturday to the house where his wife was between 4:00 and 6:00 o'clock, and when he left, it wouldn't be nobody left but him."

On Thursday night before the fire the defendant went to Jesse Corbett's house about 9:00 p.m. He was about half drunk. He said he had fallen out with his wife. Referring to Rufus Chapman and Rosa Belle he said: "I am going to get even with them people."

About a week before the fire Rufus Chapman had a warrant issued against the defendant for shooting at him. Chapman took up the warrant, and paid the costs.

On the night of the fire Thelma Marcus and George Curry went to the movies. They returned to her home, and about midnight were sitting in a car with the lights out in the space between the house in which she lived and the Chapman house. In 10 or 15 minutes they saw the

defendant come from behind the house and between the houses with a bedspread under his arm. When defendant came in front of the car, they cut the lights on him, and he started running. In about five minutes George Curry left, and Thelma Marcus went in her home. She was fixing her bed, and her mother hollered "Magnolia" (the defendant's wife) "your house is on fire." Thelma went outside. There were no lights on in the Chapman house. Fire was coming from the closet on the back porch. She called Magnolia. Everyone there seemed asleep. After Thelma broke the glass, Magnolia opened the door, and they took out six children who were asleep inside. It was a wooden house, and burned down fast.

When Rufus Chapman got home his house was falling in. He saw the defendant sitting on the back of a car in Jesse Corbett's yard. Jesse Corbett asked the defendant why he burned the house down. Defendant made no reply. Chapman asked him, "what you burn up the house for, what you set my children afire for?" The defendant replied he didn't burn it down. Chapman responded he did, and the defendant jumped on him.

George Curry saw the defendant in the earlier part of the evening of the fire, and he was drinking.

About a month before this closet caught fire from some hot ashes Chapman's wife had taken up.

Saturday night after the fire Jesse Corbett went to the defendant's house. He was in bed with all his clothes on but his shoes. He was not asleep. Corbett asked him "what he burned the house up for?" The defendant looked straight at him, and did not speak. He didn't deny it. The defendant "looked groggy; he was pretty drunk."

The defendant made the following statement in substance to the officers: That on Saturday night, 3 April, 1954, he went to the Chapman house. There were no lights in the house. He went to the closet on the back porch and got out a spread or quilt. When he started to leave, he decided if he couldn't have the rest of the stuff, his wife couldn't have it, so he struck a match, set a quilt on fire, and stayed until it was burning good. He left the burning quilt hanging in the closet. In leaving the car lights were turned on him. He went to his room, stayed a few minutes, and decided to go back to the house. In going back he met his mother-in-law, who cursed him, and accused him of burning up the house, which was then on fire. He then went back to his house. On Sunday he went on Market Street, and asked someone if they had a warrant for him, and that person said he didn't know. In respect to the fire, he said he thought the children would get out. He said he burned the house down out of meanness.

There is this evidence *aliunde* the defendant's confession: Immediately before the fire the lights were out in the Chapman house, and the inmates apparently asleep. The defendant and his wife had separated, fussed over their bedclothes, and most of these bedclothes were stored in a closet on the back porch of the Chapman house. About midnight the defendant was seen leaving the back of the houses occupied by Chapman and his wife and mother, with a bedspread under his arm. In 5 or 10 minutes fire was coming from this closet which spread to the house, burning it down. There was evidence of animosity on the part of defendant against Rufus Chapman and his wife. Shortly after the house burned up, Jesse Corbett asked defendant why he burned the house up, and the defendant never denied it.

In our opinion, and we so hold, there is evidence *aliunde* the defendant's confession that the house occupied by Rufus Chapman burned down, and that the defendant was the criminal agency causing the burning. Therefore, the extra-judicial confession of the defendant is corroborated by other evidence sufficient to sustain the conviction.

In the trial below we find

No error.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF HILDA SMITH DUKE, DECEASED.

(Filed 14 January, 1955.)

1. Wills § 23a: Evidence § 41—Declaration introduced for purpose of showing state of mind and not to prove truth of matters therein declared, does not come within hearsay rule.

The will in suit left all testatrix' property to her husband. Caveators offered evidence tending to show that bad relationship existed between testatrix and her husband. The husband died prior to the trial. *Held:* It was competent for a witness to testify that after the execution of the paper writing, the husband directed the witness to prepare a will for him leaving all of his property to his wife, and stated after the papers had been drawn that they were just as he wanted, since the declaration of the husband is competent as tending to show the state of his mind in refutation of the charges of the bad relationship between him and his wife, and was not introduced for the purpose of proving the contents of the husband's will, in which event it would have been incompetent under the hearsay rule and under the best evidence rule.

2. Wills § 24: Trial § 28—

Where all the evidence tends to show that the paper writing propounded was executed in accordance with the formalities required by law, and there is no evidence *contra*, it is proper for the court to charge the jury that if they believe the evidence and find all the facts to be as the evidence

tends to show, and by its greater weight, to answer the issue in the affirmative. Such charge does not constitute a directed verdict, since it is made to rest upon the findings of the jury upon the evidence offered.

APPEAL by caveators from *Frizzelle, J.*, at June Term, 1954, of LENOIR.

Issue of *devisavit vel non*, arising by reason of caveat to purported will of Hilda Smith Duke, probated in common form.

In caveat filed, the caveators, brothers, sisters and nieces of Hilda Smith Duke (also referred to hereinafter as Hilda S. Duke and as Mrs. Duke), set forth, among others, these pertinent facts: That Hilda Smith Duke, late of Lenoir County, died 5 December, 1952; that on 15 December, 1952, one B. R. Tenney presented to the court a paper writing, and on 4 February, 1953, Garland L. Duke, through his attorney Guy Elliott, requested that the same be probated as the last will and testament of the said Hilda S. Duke, "the same being in words and figures as set out in the paper writing hereto attached, marked Exhibit 'A,' and asked to be taken as a part hereof" (but in the record it is not shown as attached or at any other place); that the said Garland L. Duke alleges that the paper writing was the last will and testament of the said Hilda S. Duke, and procured the same to be admitted to probate in common form as such on 20 February, 1953; that Garland L. Duke renounced his alleged right to qualify as executor of the estate of said Hilda S. Duke in favor of First Citizens Bank and Trust Company, and, on 26 February, 1953, procured its appointment as administrator *c.t.a.* of her estate; and that the said paper writing, of which Exhibit A is a copy, is not the last will and testament of the said Hilda S. Duke, now deceased, for that: "(a) As these caveators are informed and believe and, upon such information and belief, aver, the execution of the said paper writing and the signature of the said Hilda S. Duke thereto was obtained by Garland L. Duke through undue and improper influence, intimidation and duress practiced and exercised upon the said Hilda S. Duke by her said husband, Garland L. Duke.

"(b) At the time of the purported execution of the said paper writing by the said Hilda S. Duke, she, the said Hilda S. Duke, was, by reason of disease and both mental and physical weakness and infirmities, not capable of executing a last will and testament, which condition had existed for several months prior to April 28, 1952, and continued until the death of the said Hilda S. Duke."

The record shows that the issue was duly transferred to Superior Court for trial; that upon the motion of caveators at 15 June, 1953 Term, it being made to appear to the court that Garland L. Duke, one of the parties interested in the action and upon whom citation had been served, had died leaving him surviving Clyde Lewis Duke, an infant son, and that First Citizens Bank and Trust Company having been appointed both

administrator of the estate of the said Garland L. Duke, deceased, and as general guardian of said infant, the court entered an order making it, in both capacities, party to the proceeding, which was accordingly done.

Thereafter the issue came on for trial when and where the propounders offered evidence tending to show the formal execution of the paper writing as the last will and testament of Hilda Smith Duke, signed by her, and subscribed in her presence by two witnesses, Guy Elliott, who prepared the paper writing, and Sally Willoughby Smith, wife of James M. Smith, brother of Hilda S. Duke. Upon cross-examination of the latter witness by attorneys for caveators, she expressed opinion that between 1 April, 1952, and the date of death of Hilda S. Duke, she, the said Hilda S. Duke, did not possess sufficient mental capacity to know who were the natural objects of her bounty, the nature and extent of her property and the legal effect of signing a paper writing disposing of her property by will (quoting the witness) "because she has been sick so long . . . and with the medicine and all that she was taking, and all, I really don't think so." And on re-direct examination this witness, after stating that Hilda S. Duke "was suffering from cancer . . . internal," testified: "She didn't tell me immediately after she had executed the will who she had left the property to. She told me at that time, she said, 'I wanted him to have something,' and said, 'but like everything was, all of it was in my name, and if I hadn't done something he could not have gotten anything.' "

Thereupon, over objection and exception by caveators, propounders introduced in evidence the will in question.

And thereupon Guy Elliott, recalled to the witness stand, testifying to other matters, expressed opinion that at the time Hilda Smith Duke executed the will she had mental capacity to know the nature of her property, the natural objects of her bounty, such as her husband, and the effect and import of making a will.

And on cross-examination this witness further testified that Clyde Lewis Duke was the child of Mr. Duke by a former marriage; that the will of Mrs. Duke purported to give to Mr. Duke all the property that she owned; that Mrs. Duke was in hospital on several occasions and that Mr. Duke was in and out of Veterans Hospital on several occasions,—"had a throat operation one time."

The propounders having rested their case, the caveators offered the testimony of B. R. Tenney, and of many other witnesses, tending as they contended, to support the allegations on which the caveat is grounded.

This testimony tended to show, among other things, that Mr. Duke, the husband, was afflicted with cancer of the throat; that he assaulted his wife, and otherwise mistreated and punished her; that he tried to get her to sign over her property to him, and threatened her because she would

not do so, and that the relationship between them was bad. (The details of which would serve no useful purpose.)

And when the caveators rested their case, the propounders offered testimony of several witnesses who expressed opinion that Mrs. Hilda Smith Duke, during the months of April and May 1952 had mental capacity to know the nature and extent of her property, the natural objects of her bounty and the legal effect of any paper writing disposing of her property. And the testimony offered by propounders tended to controvert the testimony offered by caveators in respect to the treatment of Mrs. Duke by her husband, and as to the relationship between them.

And the witness Guy Elliott, being recalled to the stand, was asked this question, to which he replied as shown: "Q. Did you ever write a will for Mr. Garland Duke; and, if so, when? A. As I recall, I had a message from Mr. Duke that he wanted a will prepared, giving everything that he owned to his wife, and that she be named his administratrix without bond. The will was prepared in my office. I read it over, and handed it to my secretary and told her that if Mr. Duke came in, in my absence, to deliver it to him, and to caution him about the witnesses. When I returned to the office, he had been there and procured the will, so she said. A day or two, maybe three or four days after that, I don't remember how long now, but soon afterwards, I met Mr. Duke on the street, in front of the Caswell Hotel, and I thanked him for the business and asked him if he signed it, if it was witnessed. He said, yes, it was all fixed, and he had put it in his papers, and it was just like he wanted it. I have refreshed my mind about the date, and the copy that I have in my office is dated September 5, 1952."

Caveators entered objection to the question, and moved to strike the answer, both of which were overruled, and they excepted to each ruling. Exceptions 7 and 8.

The case was submitted to the jury upon these issues, which were answered by the jury as indicated:

"1. Was the paper writing propounded as the last will and testament of Hilda Smith Duke executed in accordance with the formalities required by law? Answer: Yes.

"2. Did Hilda Smith Duke have sufficient mental capacity, at the time of the execution of said paper writing, to make and execute a valid will? Answer: Yes.

"3. Was the execution of said paper writing procured by undue influence as alleged? Answer: No.

"4. Is the paper writing propounded, and every part and clause thereof, the last will and testament of Hilda Smith Duke, deceased? Answer: Yes."

Thereupon the court, by judgment entered, ordered, adjudged and decreed that "the paper writing dated the 28th day of April, 1952, propounded for probate and every part thereof is the last will and testament of Hilda Smith Duke and the same is hereby admitted to probate in solemn form," and directed the administrator *c.t.a.* to proceed with its duties as by law provided.

Caveators except thereto, and appeal to Supreme Court and assign error.

Owens & Langley, Allen & Allen, and L. J. Phipps for propounders, appellees.

Jones, Reed & Griffin for caveators, appellants.

WINBORNE, J. While caveators, the appellants, bring up and present for decision four or more assignments of error, only two require express consideration, and in them prejudicial error is not made to appear.

The first assignment of error so presented in brief of caveators is based upon exceptions Numbers 7 and 8, in respect to the testimony of the witness Guy Elliott last given as shown in the foregoing statement of the case. As to this, the caveators contend that declarations of Garland L. Duke, a beneficiary under the will of Hilda Smith Duke, are incompetent as hearsay and self serving declarations, and that they are also incompetent under the best evidence rule.

At the outset, the setting under which the testimony was offered must be kept in mind. Here the caveators had offered testimony tending to show that bad relationship existed between the testatrix, Mrs. Duke, and her husband, and that he was the beneficiary under her will.

And it is manifest that propounders were countering with declaration of the husband as tending to show his state of mind in refutation of the charges of bad relationship between him and his wife. For this purpose the declaration was competent. We find it declared in Stansbury's N. C. Evidence, Section 141, that "If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." *S. v. Griffis,* 25 N.C. 334, m.p. 504; *Falls v. Gamble,* 66 N.C. 346, m.p. 455.

In the *Griffis case* the Court in opinion by *Gaston, J.,* said: "The testimony to which the defendant has excepted is not liable to the objection that it is 'hearsay evidence.' It was not offered to show the truth of what the defendant's father had said, but simply to prove the fact that he made such a declaration. If that fact became material or relevant to the inquiry before the jury, certainly testimony of the fact was proper."

Indeed, in 57 Am. Jur. 300, Section 419, the author states: "The declarations of a beneficiary may be admissible on the issue of undue

influence under an exception to the hearsay rule, such for example, as one applicable where the declarant is dead"; and that "they may also be admissible when they are offered, not as proof of the fact asserted, but as original evidence establishing a state of mind . . ." And again in Section 422, page 302, it is said: "A declaration of the beneficiary is also admissible, not under any exception to the hearsay rule, but as original evidence, to show the attitude, affection or relation between the declarant and the testator."

Moreover, the author continues: "While in some cases the declarations of a beneficiary have been held inadmissible because made after the execution of the will, the general rule is that in the absence of some other reason for the exclusion of the declaration, the mere fact that it was made after the execution of the will does not render it inadmissible." See also Anno. 167 A.L.R. 13.

Furthermore, the best evidence rule is not applicable here. The purpose of the declarations is not to show the contents of a will of Garland L. Duke, but to show the fact that he expressed the desire to make a will naming his wife as the beneficiary, a manifestation of his state of mind, and attitude toward his wife.

The second assignment of error, No. 4, presented in brief of caveator appellants, based upon Exception 10, is to this portion of the charge: "The court instructs you the burden of that issue is upon the propounders to satisfy the jury upon the evidence and by its greater weight that the said paper writing propounded as the last will and testament of Hilda S. Duke was executed in accordance with the formalities required by law; and the propounders have offered such evidence and the court is not aware of any evidence to the contrary, and therefore instructs the jury that if you believe the evidence and all of the evidence and find the facts to be as all of the evidence tends to show, and by its greater weight, it would be your duty to answer that first issue 'Yes.' "

While this Court has held that on the issue of *devisavit vel non* a motion for judgment as of nonsuit, or for a directed verdict, will not be allowed, *In re Will of Ellis*, 235 N.C. 27, 69 S.E. 2d 25, and cases cited, this Court has also held in the case of *In re Will of Evans*, 223 N.C. 206, 25 S.E. 2d 556, that a charge, similar to the one now under consideration, does not constitute a directed verdict.

The record supports the statement of the court that the propounders have offered evidence that the paper writing propounded as the last will and testament of Hilda S. Duke was executed in accordance with the formalities required by law, and that the court is not aware of any evidence to the contrary. Hence it was proper for the court to give the instruction quoted above. The verdict is made to rest upon the finding of the jury upon the evidence offered.

Other assignments require no express consideration. Prejudicial error does not appear. Indeed, the case appears to have been fairly presented to the jury upon conflicting evidence, and the jury has resolved the case in favor of the validity of the will.

Hence in the judgment from which appeal is taken, there is

No error.

L. B. GALLIMORE, W. F. PAGE, D. R. SAUNDERS, T. C. VAUGHN, H. B. BARGER, O. L. RUTH, C. A. BROWN, R. I. McCLUSKEY AND T. R. YORK, TRUSTEES OF THE NORTH CAROLINA CONFERENCE OF THE PILGRIM HOLINESS CHURCH OF AMERICA, *v.* STATE HIGHWAY AND PUBLIC WORKS COMMISSION (OF THE STATE OF NORTH CAROLINA).

(Filed 14 January, 1955.)

1. Pleadings § 30—

Whether the clerk of the Superior Court has jurisdiction on a motion to strike under G.S. 1-153, *Quaere?*

2. Appeal and Error § 40f—

Since the prejudicial effect of objectional allegations in a pleading ordinarily arises from a reading of such allegations to the jury, it would seem that such allegations could not be prejudicial in a hearing before the clerk.

3. Same—

The denying or granting of a motion to strike allegations from a pleading under the provisions of G.S. 1-153 will not be disturbed on appeal unless it is made to appear that appellant was prejudiced thereby.

4. Same—

Upon appeal from a ruling upon a motion to strike, the Supreme Court will not undertake to chart the course of the trial in advance of the hearing.

5. Eminent Domain § 8—

Compensation recoverable by a landowner for the taking of his property by eminent domain for highway purposes, is the difference between the fair market value of the property as a whole immediately before the taking, and the value of the remainder immediately after the taking, less general and special benefits.

6. Same—

In estimating the fair market value of land before and after the appropriation of a portion thereof, all capabilities of the property and all uses to which it is adapted, which affect its value in the market, are to be considered, and not merely its value for that use to which it had been applied by the owner.

7. Same—

Where property of an educational institution is taken for highway purposes, it should be determined whether the remaining property is more valuable for institutional purposes than for any other use, since elements of depreciation when the property is used for educational purposes may not obtain if the property is put to some other use.

8. Eminent Domain § 18c—

In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, G.S. 136-19, any evidence which aids the jury in fixing a fair market value of the remaining land, and its diminution by the burden upon it, including everything which affects the market value of the land remaining, is competent.

9. Eminent Domain § 18b—

In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, it is not required that petitioners allege with particularity the various respects in which the property has been adversely affected by the new highway, G.S. 40-12, and since evidence in support of all elements of damage recoverable is competent under the general allegation of damage, petitioners are not prejudiced by an order striking from the petition allegations relating to particular elements of damage.

10. Eminent Domain § 8—

Where part of the property of an educational institution is taken for highway purposes, the ascertainment of the fair market value of the remaining lands for educational purposes does not depend upon the actual availability of one or more prospective purchasers for that purpose, but the existence of a buyer for such purpose, who is able and willing to buy, but under no necessity to do so, will be assumed.

APPEALS by petitioners and respondent from *Fountain, Special Judge,* 19 July, 1954, Civil Term of FORSYTH.

The petitioners, Trustees of the North Carolina Conference of the Pilgrim Holiness Church of America, as owners of described lands in Kernersville Township, Forsyth County, instituted this special proceeding to recover compensation for the taking and appropriation of a portion of their property by the State Highway and Public Works Commission, respondent, for use for public highway purposes.

The appeals relate solely to rulings on respondent's motion to strike designated portions of the petition.

Petitioners own an acreage tract located one-half to three-fourths of a mile east of the city limits of the Town of Kernersville. They constructed buildings and various improvements thereon, making the property suitable for the school site and campus of the Pilgrim Bible College, an Agency of the Pilgrim Holiness Church. This institution is conducted on the property, offering high school, junior college and theological courses. Respondent has relocated U. S. Highway #421 and in doing so has con-

structed a new highway through petitioners' property. The petitioners seek compensation for the appropriation of a portion of their property for such highway purposes, alleging that the decrease in fair market value caused thereby "is at least $44,032.37."

Respondent moved under G.S. 1-153 to strike designated allegations of the petition, principally allegations in paragraphs 6 and 7 thereof. The clerk ruled thereon. Respondent excepted to all rulings adverse to its contentions and forthwith appealed to the Superior Court.

In the Superior Court, the judge, upon respondent's motion, remanded the proceeding to the clerk for further proceedings in conformity with law (*Abernathy v. R. R.*, 150 N.C. 97, 63 S.E. 180), the order providing that respondent's exceptions to the clerk's order were preserved for hearing at a later date. Thereafter, before the clerk, the parties entered into a stipulation providing that in the event of an appeal, upon conclusion of the proceedings before the clerk, the Superior Court judge would first hear and dispose of respondent's exceptions to the clerk's order disallowing in part the motion to strike. Commissioner appointed by the clerk assessed damages to petitioners' property at $14,072.00. The clerk confirmed their report. Respondent excepted and appealed.

There has been no trial *de novo* before a jury as to the award to which petitioners are entitled as compensation for respondent's said appropriation of their property for highway purposes. Judge Fountain heard the motion to strike *de novo* rather than on exceptions to the clerk's order; and to the rulings incorporated in an order signed by Judge Fountain, both petitioners and respondent excepted and appealed.

York & Boyd for petitioners, appellants.

R. Brookes Peters and Blackwell, Blackwell & Canady for State Highway and Public Works Commission, respondent, appellant and appellee.

BOBBITT, J. Does the clerk have jurisdiction to rule on a motion to strike interposed under G.S. 1-153? Disposition of these appeals does not require an answer to this question. However, we note that this statute provides: "Any such motion to strike any matter out of any pleading may, upon ten days' notice to the adverse party, be heard out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district." Too, the prejudicial effect of objectionable allegations in a pleading ordinarily arises from the reading of such allegations to the jury even though evidence in support thereof is not admitted. *Privette v. Privette*, 230 N.C. 52, 51 S.E. 2d 925; *Light Co. v. Bowman*, 231 N.C. 332, 56 S.E. 2d 602. Hence, the prejudicial effect of objectionable allegations in a petition filed under G.S. 40-12 ordinarily

would not arise unless and until the proceeding comes to the Superior Court for trial *de novo* by a jury on the issue of damages.

As stated by *Ervin, J.*, in *Hinson v. Britt*, 232 N.C. 379, 61 S.E. 2d 185: "This Court does not correct errors of the Superior Court unless such errors prejudicially affect the substantial rights of the party appealing. Hence, the denying or overruling of a motion to strike matter from a pleading under the provisions of G.S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party." Conversely, if a motion to strike irrelevant or redundant matter from a pleading is erroneously allowed the ruling will not be disturbed unless it is made to appear that the pleader will be prejudiced on account thereof.

And it has been held consistently that, upon appeal from a ruling on a motion to strike, this Court will not undertake to chart the course of the trial in advance of the hearing. *Daniel v. Gardner*, 240 N.C. 249, 81 S.E. 2d 660, and cases cited therein.

The respondent brought no condemnation proceeding. Instead, as authorized by statute, it seized and appropriated a portion of petitioners' property for public use for highway purposes. Unable to agree as to what constituted just compensation, petitioners seek to have the amount of their recovery determined by special proceeding in accordance with G.S. 136-19. *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182.

The procedure in such special proceeding is that prescribed in G.S. Ch. 40, entitled, "Eminent Domain." G.S. 40-12 specifies the necessary allegations of such petition. In brief, these consist of allegations that petitioners own the property appropriated and pray that commissioners be appointed to ascertain and determine the amount of compensation "which ought justly to be made." G.S. 40-17. The respondent, by answer, may challenge the allegations of petitioners on which they seek to recover compensation. G.S. 40-16. These statutes do not seem to contemplate that petitioners allege with particularity the various respects in which their property has been adversely affected by the new highway. There is no requirement that petitioners do so.

Upon confirmation of the report of the commissioners, exceptions thereto may be entered; and, upon appeal, the issue as to the amount of damages or compensation is for determination *de novo* by a jury at term time. G.S. 40-19; G.S. 40-20; *Proctor v. Highway Com.*, 230 N.C. 687, 55 S.E. 2d 479.

Just compensation, to which the landowner is entitled, is the difference between the fair market value of the property *as a whole* immediately before and immediately after the appropriation of a portion thereof for highway purposes. *Abernathy v. R. R.*, 150 N.C. 97, 63 S.E. 180; *Light*

Co. v. Carringer, 220 N.C. 57, 16 S.E. 2d 453. Where the appropriation is for highway purposes, the general and special benefits, if any, accruing to the landowner from the location and construction of the new highway, must be taken into consideration. G.S. 136-19; *Highway Com. v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314; *Proctor v. Highway Com., supra.* In short, damages are to be awarded to compensate for the loss sustained by the landowner. *Light Co. v. Moss,* 220 N.C. 200, 17 S.E. 2d 10. In *Abernathy v. R. R., supra, Connor, J.,* expresses the gist of the rule: "The compensation must be full and complete and include everything which affects the value of the property taken and in relation to the entire property affected."

In paragraph six of the petition, petitioners have alleged in separately numbered paragraphs fourteen elements or items of damage to their property; to each they assign a specific amount; and in paragraph seven they summarize and tabulate the items, "hereinabove fully alleged," the total of the fourteen items being $44,032.37, the amount of compensation the petitioners seek to recover. Except in minor particulars, these allegations were stricken.

It would unduly encumber this opinion to consider in detail each of the challenged fourteen paragraphs of paragraph 6. Careful consideration impels the conclusion that the order of Judge Fountain does not and will not prejudice either petitioners or respondent in the trial *de novo* before a jury of the issue as to the award to which petitioners are entitled.

"Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant and should be heard; any evidence which does not measure up to this standard is calculated to confuse the minds of the jury, and should be excluded. This is as far as we can safely go in the present state of the case." *Abernathy v. R. R., supra.*

Since the petitioners, without setting forth in their petition the specific elements they contend caused a diminution in fair market value, may offer evidence within the rule quoted in the preceding paragraph, they are in no way prejudiced by the ruling of Judge Fountain. Neither G.S. 136-19 nor G.S. 40-12, nor any decision to which our attention has been called, requires such particularization as a prerequisite to the introduction of relevant evidence. The petitioners may offer all competent evidence relevant to the issue to the same extent as if the stricken allegations were now in the petition.

While we refrain from charting the course of the trial and from anticipating questions of evidence that may arise, it may be helpful to call attention to the matters discussed below.

This is not an action for damages based on tort but a special proceeding under the statute for just compensation. *Abernathy v. R. R., supra.*

Hence, evidence as to noise and smoke, etc., as in *R. R. v. Armfield,* 167 N.C. 464, 83 S.E. 809, injury to a spring, as in *Brown v. Power Co.,* 140 N.C. 333, 52 S.E. 954, or the appropriation of a portion of church property "used for hitching horses," and the frightening of horses and the distraction of worshippers by the noise of passing trains, as in *R. R. v. Church,* 104 N.C. 525, 10 S.E. 761, or damage on account of the ponding of surface waters, and the necessity for additional fencing of cultivated land, as in *R. R. v. Wicker,* 74 N.C. 220, or injury to a spring, the requirement of additional fencing, and the inconvenience of having a field cut in two, as in *Freedle v. R. R.,* 49 N.C. 89, was not relevant as a basis for the recovery of special damages. As pointed out by *Walker, J.,* in *R. R. v. Mfg. Co.,* 169 N.C. 156, 85 S.E. 390, such adverse effects are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property.

In *R. R. v. Church, supra,* the adverse effects shown tended to show a decrease in the fair market value of the land for church purposes. It was noted in the opinion by *Merriman, C. J.,* that the property was of trifling value for purposes other than as a place of worship. It followed that any circumstances that depreciated its fair market value for church purposes adversely affected the property in respect of the use for which it was most valuable.

In estimating the fair market value, before and after the appropriation of a portion thereof, "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner." *Barnhill, J.* (now *C. J.*), in *Light Co. v. Moss, supra;* also see *Brown v. Power Co., supra.*

Careful consideration of these principles is appropriate in this case. Many of the elements of damage alleged in the petition concerned the adverse effect of the appropriation of a portion of petitioners' land upon the continued use of the property as the school site and campus of an educational institution. It may be that the property of petitioners was and is more valuable for institutional purposes than for any other use to which it might be applied. Determination of this fact would seem relevant. If perchance the property involved has a greater fair market value for another purpose adverse effects relating solely to use for institutional purposes would seem to be lacking in materiality. By way of illustration: Instances come to mind where a college, orphanage or other institution owns acreage, now within the heart of a city but far beyond the city limits when acquired. It may be that in such case the fair market value today is much greater for subdivision and development for business and resi-

dential purposes than for institutional purposes. For institutional purposes, the congestion in its present location may be a disadvantage rather than an advantage. Since the fair market value both before and after the taking of a portion thereof for a street would be greater for purposes other than for institutional use, evidence relating to elements that would affect the fair market value only for institutional purposes would seem irrelevant.

Difficulty is encountered when one undertakes to determine the fair market value of property now constituting the school site and campus of an educational institution. The reason is that there will be few, if any, prospective purchasers for such property for such use. Even so, the application of our concept of fair market value does not depend upon the actual availability of one or more prospective purchasers, but assumes the existence of a buyer who is ready, able and willing to buy but under no necessity to do so. *Brown v. Power Co., supra; Light Co. v. Moss, supra.* "Of course, the market value of a church could not be determined by saying just what somebody would give for that piece of property, because the ordinary citizen does not want to own a church, but what would a congregation that desired a church give for the church. In like manner, a college campus must have its value determined by what somebody who wanted a college would give for the property with that campus." *Producers Wood Preserving Co. v. Com'rs of Sewerage* (Ky.), 12 S.W. 2d 292.

On respondent's appeal, we do not perceive that the respondent has been materially prejudiced by Judge Fountain's ruling adverse to its contention.

For the reasons stated, the judgment of Judge Fountain, in respect of both appeals, is affirmed.

Petitioners' appeal: Affirmed.

Respondent's appeal: Affirmed.

STATE v. MARION GORDON.

(Filed 14 January, 1955.)

1. Homicide § 16—

The intentional killing of a human being with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice, constituting it murder in the second degree.

2. Same—

The requirement that the killing of a human being with a deadly weapon must be intentional in order for the presumptions from such killing to

arise does not import that defendant must have intended to kill, but only that he should have intentionally used the deadly weapon.

3. Same—

Where the State's evidence tends to establish an intentional killing of a human being with a shotgun, and defendant does not contend that the gun was discharged accidentally, but defends solely on the ground that he killed in self-defense, the presumptions from an intentional killing with a deadly weapon obtained, and it is incumbent upon the defendant to satisfy the jury of the truth of facts justifying or mitigating the killing.

4. Homicide § 27h—

Where, in a prosecution for murder in the second degree, the State's evidence tends to establish the intentional killing of a human being with a deadly weapon by defendant, and defendant defends solely upon the plea of self-defense, nonsuit is properly denied, and the cause is properly submitted to the jury upon the question of defendant's guilt of murder in the second degree, guilt of manslaughter, or not guilty.

5. Homicide § 18—

Where, upon the *voir dire*, the State's evidence discloses that at the time of making the declarations, declarant was in an obviously critical condition and stated he would "never make it," and that shortly thereafter he died, *is held* sufficient predicate for the admission of his statements as dying declarations.

6. Same—

The admissibility of statements as dying declarations is for the trial court to decide, and its decision is reviewable only for the purpose of determining if there was any evidence tending to show the facts essential to admissibility.

7. Same—

Proper predicate having been laid for the admission of declarant's statements as dying declarations, testimony of such declarations, including a declaration that declarant was not doing anything to defendant when defendant shot him, is properly admitted, and the fact that the declarations were made in response to questions of an officer spontaneously asked in regard to the *res gestae* does not render them incompetent, the court having excluded a declaration as to a conclusion of declarant that defendant had no cause or reason to shoot him, and limited the declarations to the *res gestae*.

8. Criminal Law § 78—

Assignments of error to the charge must be predicated upon exceptions previously noted in the case on appeal.

9. Criminal Law § 79—

Assignments of error not supported by argument or authority cited in the brief are deemed abandoned.

APPEAL by defendant from *Gwyn, J.*, 8 March, 1954 Term, of FORSYTH.

Criminal prosecution on bill of indictment charging the defendant with the first degree murder of Joseph Boyles. Upon call of the case for trial, the Solicitor announced that the State would not ask for a verdict of guilty of murder in the first degree, but would ask for a verdict of guilty of murder in the second degree.

During the afternoon of Monday, 15 February, 1954, the defendant shot the deceased. The defendant used his single-barrel, sixteen-gauge shotgun. The shooting occurred on the defendant's premises, the deceased and the defendant being the only persons there. From 6 p.m., or thereabout, the deceased was in the City Hospital, Winston-Salem, where he was under the constant attention of doctors and nurses. An emergency operation was performed. Early Tuesday morning he died, the cause of death being the shotgun wounds inflicted by the defendant.

The jury returned a verdict of Guilty of Murder in the Second Degree. Thereupon, the court pronounced judgment that defendant be confined in the State's Prison for a term of not less than six (6) years nor more than eight (8) years, from which the defendant appealed, assigning errors.

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

Buford T. Henderson for defendant, appellant.

BOBBITT, J. When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. In *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387, where the defense was that an *accidental* discharge of the shotgun caused the death of the deceased, it was stated that the presumptions arise only when there is an *intentional killing* with a deadly weapon; and since the *Gregory case* it has been often stated that these presumptions arise only when there is an intentional killing with a deadly weapon. But the expression, *intentional killing,* is not used in the sense that a specific intent *to kill* must be admitted or established. The sense of the expression is that the presumptions arise when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted. *S. v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147; *S. v. Wingler,* 238 N.C. 485, 78 S.E. 2d 303; *S. v. Jones,* 188 N.C. 142, 124 S.E. 121. A specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. *S. v. Quick,* 150 N.C. 820, 64 S.E. 168. The presumptions do not arise if an instrument, which is

per se or may be a deadly weapon, is not intentionally used as a weapon, *e.g.*, from an accidental discharge of a shotgun.

The defendant's plea is self-defense. There is neither evidence nor contention that the shotgun discharged accidentally. The defendant's testimony and contention is that he shot the deceased when under the reasonable apprehension that it was necessary to do so in order to protect himself from death or great bodily harm. The State offered plenary evidence and the defendant admitted that death proximately resulted from shotgun wounds so inflicted. Support of the defendant's plea of self-defense arises out of the defendant's evidence, principally his own testimony, not out of the State's evidence. Under these facts, the presumptions arose; and so it was incumbent upon the defendant to satisfy the jury of the truth of facts which justified or mitigated the killing in accordance with legal principles too well settled to warrant reiteration.

From the foregoing, it appears that there was no error in overruling the motions for judgment as in case of nonsuit; and, under the court's instructions, it was for the jury to determine, in accordance with their findings as to facts, whether the defendant was guilty of second degree murder or manslaughter or not guilty. The case was properly submitted to the jury in this manner.

The defendant insists that the court erred in the admission of testimony of the sheriff, a State's witness, as to declarations made by deceased. The facts necessary for an understanding of this assignment of error are set out below.

In the hospital Emergency Room, between 6 and 6:30 p.m., Dr. Glod, a medical expert, found the condition of deceased to be as follows: Located in the upper left abdomen, there was a ragged wound, four to five inches in diameter. His intestines were outside his abdominal cavity. He was suffering from profound shock. By intravenous fluids and blood transfusions he was prepared for an emergency operation. At operation it was found that there were severe, multiple perforations of the upper five feet of his small intestines, with perforations through the area where blood is supplied to these intestines and multiple perforations to the left side of his large bowel. His left kidney was completely shattered along the lower half. He had a deep wound in his muscles in the back, right below the kidney, with shattering of the lateral portions of his spine in that area. The wound extended to a point approximately two inches from the surface of the skin in the back and contained wadding and numerous metallic pellets. There was no wound of exit. During and after the operation he was given approximately sixteen pints of blood. Dr. Glod remained with him constantly until he died, some eight and one-half hours after the operation, as the result of this gunshot wound.

E. G. Shore, high sheriff of Forsyth County, testified that he saw the deceased in the hospital Emergency Room about 7 o'clock p.m. and then talked with him. This was their only conversation. The doctors and nurses were working in and out of the room while he was there. The deceased was conscious.

Upon objection to testimony as to their conversation, the court, in accordance with the approved practice, excused the jury. In the absence of the jury, the sheriff testified: "I said to him, 'Joe, you are seriously wounded, and you may not survive.' He said to me, he says, 'Sheriff, I will never make it. I can't make it.' I says, 'Now, if you have got any statement to make, tell me the truth, because it may be your last one.'" Upon this testimony, particularly the deceased's statement that he knew he would not make it, the court ruled that the sheriff's testimony as to the declarations of the deceased, relating to the *res gestae,* would be competent.

Upon the return of the jury, the sheriff was asked what conversation he had with Boyles in the hospital Emergency Room. After repeating substantially the same testimony he had given in the absence of the jury, he continued: "And I said, 'Did this man have any cause or reason to shoot you?' He says, 'None whatsoever.'" It is noted that defendant did not object to this question, but promptly moved that the answer be stricken. The court immediately allowed defendant's motion. It is apparent that both the motion and the ruling were addressed to the declaration of deceased to the effect that defendant had no cause to shoot him; for the court, in explanation of the ruling, pointed out that such declarations were admissible only when the testimony itself could have been given by the declarant, if living, as a witness in court, and therefore must relate to facts and circumstances, not conclusions.

The record as to what then transpired is as follows:

"THE SOLICITOR: What was said there about who did the shooting? A. I asked him if Marion Gordon shot him, and he said he did. Q. Did he tell you where he was at the time Marion shot him? A. Yes sir, he did. Q. Where did he say he was? A. Up near the barn. Q. Did he make any statement to you about whether he was doing anything at all to Marion Gordon? OBJECTION OVERRULED and defendant, in apt time, excepts—EXCEPTION NO. 1. A. He said he was not. THE COURT: The Court allows the character of the question, so far as any leading is concerned. Did you say he said he was at the barn, Sheriff? A. Yes Sir. THE SOLICITOR: Did he tell you where he was standing at the time he was shot by Marion Gordon? A. He said he was standing just outside of his automobile. Q. What inquiry did you make, Sheriff, about what, if anything, he was doing to Marion Gordon at the time? A. I asked him if he was doing anything to Marion Gordon, and he said he was not."

The further testimony of the sheriff relates to his observations at the scene where the shooting occurred and is not pertinent to the assignment of error under discussion.

It does not appear that the defendant objected to any of the foregoing questions except: "Q. Did he make any statement to you about whether he was doing anything at all to Marion Gordon?", to which the witness answered, "He said he was not." It appears further that substantially the same question was later asked, and a like answer given, without objection. But, without regard to whether the defendant may be considered as having made an objection to each question invoking testimony as to the declarations of deceased, the testimony given was competent. In *S. v. Williams,* 168 N.C. 191, 83 S.E. 714, the dying declaration of the deceased that the defendant had shot him, without cause, was held properly admitted. See: *S. v. Beal,* 199 N.C. 278, 154 S.E. 604. Here, the court excluded testimony to like effect, carefully limiting the testimony to facts and circumstances comprising the *res gestae.* Under the facts disclosed here, we approve the rulings of the court. Certainly, under the *Williams case,* no error prejudicial to the defendant is shown.

Defendant, in his brief, bases his position upon the proposition the evidence failed to disclose a sufficient predicate for the admission of any testimony by the sheriff as to declarations of the deceased. The necessary basis for the admission of such evidence has been stated often.

In *S. v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156, *Seawell, J.,* said: "The conditions under which such evidence may be admitted have been variously stated, but the summary, by *Adams, J.,* in *S. v. Collins,* 189 N.C. 15, 126 S.E. 98, is sufficiently clear: 'The rule for the admission of dying declarations is thus stated: (1) At the time they were made the declarant should have been in actual danger of death; (2) he should have had full apprehension of his danger; (3) death should have ensued. *S. v. Mills,* 91 N.C. 581, 594.' For the sake of completeness, although not important in the case at bar, we might add to this a fourth condition that the declarant, if living, would have been a competent witness to testify as to the matter. *S. v. Beal,* 199 N.C. 278, 297, 154 S.E. 604."

Defendant insists the declarations should have been excluded as incompetent because made in answer to interrogatories calculated to lead the deceased to make particular statements. A rule to this effect is embodied in a Texas statute. Vernon's Texas St. 1948, Article 725, subd. 3. The several Texas decisions cited by defendant must be read with the statute in mind. In *People v. Kane,* 213 N.Y. 260, 107 N.E. 655, L.R.A. 1915F 607, Ann. Cas. 1916C 685, cited by defendant, the Court pointed out that this was the rule, independent of a statute such as that of Texas, applying to statements of the wounded person in regard to his hope of recovery just as much as to statements respecting the identity of his assailant. In

the New York case, the admission of the dying declarations in the case under consideration was approved; but the court took occasion to disapprove the use by officers of a questionnaire, calling for a "Yes" or "No" answer by the declarant to questions printed thereon, *e.g.*, "Do you now believe that you are about to die?"—"Have you any hope of recovery from the effects of the injury that you have received?"—"Are you willing to make a true statement as to how and in what manner you came by the injury from which you are now suffering?"

It is to be noted that no uncertainty exists in this case as to the identity of the assailant. Furthermore, it would appear that under the facts here the declarations would have been deemed competent under the Texas and New York cases; for here the circumstances are such that the inquiry was not perfunctory, by filling out a questionnaire, to be kept available in the event the injured man perchance took a turn for the worse, but as nearly spontaneous as declarations by one under the circumstances could be.

The facts concerning his then obviously critical condition, at the time of his declarations and continuously thereafter until his death, together with his conscious statement that he would "never make it," furnish ample basis for the ruling of the court admitting evidence as to his declarations. It is to be noted that the admissibility of the evidence was for the court to decide, his decision being reviewable only for the purpose of determining whether there was any evidence tending to show the facts essential to admissibility. Stansbury, N. C. Evidence, secs. 8 and 146; *S. v. Poll*, 8 N.C. 442; *S. v. Jordan, supra.*

Two assignments of error are directed to the charge. Whether these assignments of error sufficiently particularize wherein it is contended the court failed to charge correctly, *S. v. Dilliard*, 223 N.C. 446, 27 S.E. 2d 85, need not be decided, for we find that they are not based on exceptions previously noted in the case on appeal and must be disregarded. *Moore v. Crosswell*, 240 N.C. 473, 82 S.E. 2d 208.

No reason or argument is stated and no authority is cited in appellant's brief bearing upon the other assignments of error. Hence, they are deemed to have been abandoned. *S. v. Bittings*, 206 N.C. 798, 175 S.E. 299.

The procedure as to taking exceptions, bringing them forward in the assignments of error, and preserving them as required by Rules 19 (3), 21 and 28 of the Rules of Practice in the Supreme Court, 221 N.C. 554, 558 and 562, is set forth in detail in *Rawls v. Lupton*, 193 N.C. 428, 137 S.E. 175. The distinctive character of assignments of error, as distinguished from exceptions, is pointed out by *Barnhill, C. J.*, in *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785. As *Denny, J.*, expressed it in *S. v. Britt*, 225 N.C. 364, 34 S.E. 2d 408: "An argument unsupported by

exception is as ineffective as an exception without argument or citation of authority. *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576."

The jury, upon which primary responsibility for decision rested, rejected defendant's plea and evidence of self-defense. The verdict and judgment, no prejudicial error appearing, will be upheld.

No error.

CITY OF GREENSBORO, AND ROBERT H. FRAZIER, M. A. ARNOLD, WILLIAM B. BURKE, J. A. CANNON, JR., E. C. FAULCONER, WILLIAM M. HAMPTON, AND BOYD R. MORRIS v. HERMAN AMASA SMITH, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF GREENSBORO AND SUBSCRIBERS TO GREENSBORO WAR MEMORIAL FUND, AND GREENSBORO WAR MEMORIAL FUND COMMISSION, S. I. STEWART, SR., CHARLES T. HAGAN, BEN CONE, E. D. BROADHURST, JR., J. E. SMITH, J. C. McLAUGHLIN, MRS. C. HENRY SIKES, ALLEN C. McSWEEN, FIELDING L. FRY, W. M. YORK, RALPH L. LEWIS, PAUL C. SHU, ORTON A. BOREN, C. M. VANSTORY, JR., AND W. H. SULLIVAN, SR., COMMISSIONERS.

(Filed 14 January, 1955.)

1. Statutes § 5a—

The ascertainment of the legislative intent is the objective of statutory construction.

2. Same—

Ordinarily, words of a statute will be given their natural, approved, and recognized meaning.

3. Same—

The language of a statute must be read contextually, and when its meaning is ambiguous, resort may be had to the subject matter and the objects and purposes sought to be accomplished.

4. Same—

The law in effect at the time of the passage of an act may be considered in ascertaining the legislative intent.

5. Taxation § 4—

Auditoriums, playgrounds, and recreation centers are not necessary municipal expenses within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and a city may not borrow money, levy or collect taxes therefor without an approving vote of the people, but such purposes are public purposes for which it may appropriate various surplus funds not derived from taxes.

6. Municipal Corporations § 8e—

The memorial authorized by Ch. 436, Session Laws of 1945, must consist primarily of an auditorium, and if a playground and recreational facilities are included in the project they must be incidental and subordinate to the

auditorium, and any "other activities" included therein must be limited to those which constitute public purposes within the purview of the decisions of the Supreme Court.

7. Same—

The authority of the Memorial Commission created under the provisions of Ch. 436, Session Laws of 1945, to direct the disbursement of funds donated for the Memorial is subject to the limitations that the disbursements be consonant with the purpose of the act, and also that the entire cost of the project shall not exceed the aggregate of the donated funds, plus such additional amounts, if any, as the city may be authorized and may see fit to appropriate by way of supplement thereto.

8. Appeal and Error § 5—

Adjudication of whether a municipality has power to supplement funds for a war memorial with moneys derived from sources other than taxation should not be made in the absence of the factual data as to the source and character of such funds.

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

APPEAL by plaintiffs from *Phillips, J.*, 11 October, 1954 Civil Term of GUILFORD, Greensboro Division.

The City of Greensboro, and the members of its City Council, and the Greensboro War Memorial Fund Commission, and its members, and Herman Amasa Smith, for and on behalf of himself and in the representative capacities indicated above, through their pleadings, asked the court to construe Ch. 436, Session Laws of 1945, entitled "An Act To Authorize City Of Greensboro To Establish A War Memorial Fund And A War Memorial Fund Commission; To Acquire And Hold Property Incidental To The Construction Of A War Memorial," hereinafter called the Act, and to enter a declaratory judgment defining their respective duties thereunder.

This cause was here at Fall Term 1953, *Greensboro v. Smith*, 239 N.C. 138, 79 S.E. 2d 486, upon appeal by (original) defendant Smith. The error, for which the cause was remanded, was that the Commission, then attempting to exercise authority, was an illegally constituted body. The proceedings of such Commission being invalid, consideration of the questions posed relating to the War Memorial was deferred until the Commission was appointed and acted as a legally constituted body.

After the cause was remanded, these pertinent events, embodied as findings of fact in the judgment, transpired:

1. The City Council appointed fifteen (15) persons as members of the Commission, to serve five (5) years from date of appointment, to wit, 1 March, 1954.

2. On 9 March, 1954, the Commission organized and after public hearings adopted a resolution selecting the Wendover Avenue site for the

Memorial and, subsequently, after a second public hearing, reaffirmed the selection of said site, more than eight (8) members voting for such resolution on each occasion.

3. On 2 June, 1954, the Commission adopted a resolution requesting the City to approve employment of architects to design the Memorial and requested approval of expenditures of $1,000.00 to defray expenses of furniture for an office and an additional sum of $500.00 for incidental expenses. The City Council took no action on this request.

4. The Commission and its fifteen (15) members were made additional parties.

5. The plaintiffs filed an amendment to their original complaint, the original defendant (Smith) answered the amendment, and the new parties answered the original complaint and the amendment thereto.

6. A jury trial was waived and the court found the facts, made conclusions of law, and entered judgment. The plaintiffs excepted and appealed.

All parties joined in the prayer that the court provide by its judgment the answers to the six questions posed in the amended complaint. The court did so, *seriatim*. Appellants challenge three of the answers so given.

It is established by portions of the judgment (paragraphs 1, 4 and 5), unchallenged by assignment of error, (1) that the Commission is now legally constituted and has selected the Wendover Avenue property as the site for the Memorial, in compliance with the Act and the opinion on the first appeal; and (2) that the City Council has the authority and duty to expend from the funds donated for the Memorial such amounts as the Commission determines to be necessary to pay the incidental expenses of the Commission, and to approve the employment of architects and to pay their compensation in connection with the designing and construction of the Memorial and its furnishings and equipment within the funds available for such purpose; and (3) that the City of Greensboro, in awarding contracts for the construction, furnishing, and equipment of the Memorial, shall do so in compliance with General Statutes, Ch. 143, and other laws applicable to the expenditure by municipalities of public funds for public purposes.

Appellants challenge, by assignments of error, paragraphs 2, 3 and 6 of the judgment, wherein it is ordered, adjudged and decreed:

"2. That the provisions of Chapter 436 of the Session Laws of 1945 do not impose upon the City Council of the City of Greensboro any duty, discretionary or otherwise, to determine that the construction of the War Memorial and the furnishing and equipment thereof as designed by the said Commission on a site selected by the Commission is *(a) possible within the funds available or (b)* deemed advisable under all the relevant circumstances, it being the responsibility solely of said Commission to

select a site for said Memorial and to design or plan the same so that it can be constructed and equipped within the funds then available.

"3. It is not the duty of the City Council of the City of Greensboro to determine in the exercise of its discretion or otherwise whether the Memorial designed by the Commission complies with the descriptive requirements set forth in Chapter 436 of the Session Laws of 1945 since all matters relative to the design and plan for such Memorial are by said Act left to the judgment and discretion of said Commission."

"6. The City of Greensboro now has the lawful right to supplement the funds of the Greensboro War Memorial Fund by appropriations from available funds, not otherwise appropriated, and derived from sources other than *ad valorem* taxes."

It is noted that the major portion of the Act is quoted in the statement of facts preceding this Court's opinion relating to the first appeal. Reference is made thereto and to the Act itself.

Herman C. Wilson, City Attorney, and L. P. McLendon for plaintiff City of Greensboro, appellant.

Horace R. Kornegay for defendant Smith, appellee.

Charles T. Hagan, Jr., and William M. York for defendant Greensboro War Memorial Fund Commission, appellee.

BOBBITT, J. In the construction of the Act our chief concern is to ascertain the legislative intent. As stated by *Stacy, C. J.*, in *Trust Co. v. Hood, Comr. of Banks*, 206 N.C. 268, 173 S.E. 601: "The heart of a statute is the intention of the law-making body."

Rules of statutory construction relevant here are stated succinctly by *Johnson, J.*, in *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433, as follows:

"It is an accepted rule of statutory construction that ordinarily words of a statute will be given their natural, approved, and recognized meaning. *Commissioners of Johnston County v. Lacy*, 174 N.C. 141, 93 S.E. 482; *Randall v. Richmond and Danville Railroad Co.*, 107 N.C. 748, 12 S.E. 605; 50 Am. Jur., Statutes, Sec. 238.

"It is also an accepted rule of construction that in ascertaining the intent of the Legislature in cases of ambiguity, regard must be had to the subject matter of the statute, as well as its language, *i.e.*, the language of the statute must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter. *Gill v. Board of Com'rs. of Wake County*, 160 N.C. 176, top p. 188, 76 S.E. 203; *Spencer v. Seaboard Air Line R. Co.*, 137 N.C. 107, p. 119, 49 S.E. 96; 50 Am. Jur., Statutes, Sec. 292."

And, in endeavoring to give the Act meaning in accord with its language and purpose, it must be borne in mind that when the legislation was passed the law in this jurisdiction, as set forth in the next paragraph hereof, was well established.

The acquisition, establishment and operation of an auditorium, G.S. 160-283, *Adams v. Durham,* 189 N.C. 232, 126 S.E. 611, and of playground and recreation centers, G.S. 160-155 *et seq., Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702; *Greensboro v. Smith,* 239 N.C. 138, 79 S.E. 2d 486, are not "necessary expenses" within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, for which a municipal corporation may borrow money or levy and collect taxes, without an approving vote of the people, but are public purposes for which a municipal corporation may appropriate available surplus funds not derived from taxes or a pledge of its credit. *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. 2d 281.

The Greensboro War Memorial Fund Commission, hereinafter called the Commission, was established to provide a suitable memorial in the City of Greensboro to perpetuate the memory of the men and women of Greensboro who gave their lives for their country in World War II. The statute determines that an auditorium is a desirable and suitable memorial; but "the Commission may, in its discretion, also include playground and recreation centers and other activities as a part of such memorial."

The Commission created by the Act is a single purpose agency. Its members serve without compensation. Its task is to solicit funds for such Memorial, to designate the site, to determine the plans for its construction and for the furnishing and equipping thereof; and, thirty days after completion of the Memorial, the Commission terminates. The Commission has no authority or duty in respect of the upkeep, operation or management of the Memorial. When the Memorial is completed, and the time to use it has arrived, the Commission will be *functus officio.*

The Act manifests a legislative intent that the Memorial shall consist primarily of an auditorium. "Playground and recreation centers and other activities," if included at all, are not to be in lieu of an auditorium but are to be incidental and subordinate thereto.

Moreover, the Act manifests a legislative intent that the Memorial shall be a facility for use, requiring upkeep, operation and management. The Act contemplates that donations for the Memorial, by citizens of Greensboro and other interested persons, shall be made to the City of Greensboro and kept in a separate fund "until such time as a location is selected and the remainder held until the construction of said memorial is possible and deemed advisable." The quoted provision contemplates that the purchase price of the site selected is to be paid from such separate (donated) fund and the remainder held until the Memorial is constructed. The

title to property purchased for the Memorial will vest in the City of Greensboro. Construction contracts will be made by the City of Greensboro, in its name. The Commission handles no funds and is not vested with the title to any property. Upon completion of the Memorial, the City of Greensboro will be responsible for its upkeep, operation and management the same as if the property had been purchased with municipal funds. This will be possible only if the use is for a public purpose. In view of the foregoing, we hold that the words "other activities" used in Art. 2, sec. 1, of the Act, and included in the quotation above, used in association with "auditorium" and "playground and recreation centers," refer only to such "other activities" as may also constitute public purposes within the meaning of our decisions.

It appears that campaigns for the solicitation of gifts of funds and property in 1944 and 1946 resulted in subscriptions in the total amount of $893,108.85, all but $37,162.92 having been paid to the City of Greensboro, and that these funds are now held in separate account for such Memorial. While these donated funds are public funds of the City of Greensboro, the General Assembly has provided that they are to be disbursed by the City of Greensboro *as directed by the Commission,* subject only to these limitations: (1) the Memorial shall consist primarily of an auditorium, but incidental and subordinate thereto there may be playground and recreation centers or other *public purpose* facilities; (2) the entire cost of the Memorial, including the cost of the site, architect's compensation, furnishings and equipment, incidental expenses of the Commission, etc., shall not exceed the aggregate of such donated funds, plus such additional amounts, if any, as the City Council may be authorized and may see fit to appropriate by way of supplement thereto. Subject to these limitations, the Commission has the authority and the duty to determine what the Memorial shall be, where it shall be, when construction thereof shall commence, and all other matters for decision incident to the construction and completion of the Memorial. On the other hand, the plaintiffs have no responsibility or duty incident to the construction of such Memorial provided the determinations made by the Commission are within the scope of its authority and duty as outlined herein.

It appears from the original complaint that the City of Greensboro had purchased property on Wendover Avenue, presumably that selected by the Commission as the site for the Memorial; that it was purchased with funds derived from the sale of other real estate; and that such property is now owned by the City of Greensboro. It does not appear whether the parties contemplate that the City of Greensboro is to be reimbursed from the separate (Memorial) account to the extent of the cost of this property. It should be noted that, while the Commission has authority within the limitations stated to direct the expenditure of the donated

funds, the Commission has no authority whatever over any municipal property other than the donated funds. So, after the Commission has determined the site, the plan and design of the Memorial, etc., the City Council, since the Memorial is to be one usable only for a public purpose, may determine whether it has and will appropriate surplus municipal funds and property, derived from sources other than taxation or a pledge of its credit, by way of supplement in connection with the establishment of the Memorial and, upon its completion, for its upkeep, operation and management.

The general conditions under which the City of Greensboro may supplement the donated funds in the establishment and maintenance of the Memorial are sufficiently indicated. No adjudication is appropriate in the absence of factual data as to the source and character of the "available funds derived from sources other than *ad valorem* taxes." Hence, paragraph 6 should be deleted.

In conformity with the foregoing, the judgment is modified in these respects, viz.:

1. The words "(a) possible within the funds available or (b)," now appearing in paragraph 2 of the judgment, are stricken therefrom.

2. A proviso, "provided, the Memorial as determined by the Commission shall consist primarily of an auditorium, although, incidental and subordinate thereto, there may be playground, recreational or other public purpose facilities," is added to and made a part of paragraphs 2 and 3 of the judgment.

3. Paragraph 6 of the judgment is stricken therefrom.

As modified, the judgment of the court below is affirmed.

Modified and affirmed.

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

JOSEPH KOTTLER v. OLIVER V. MARTIN AND WIFE, CARRIE F. MARTIN.

(Filed 14 January, 1955.)

1. Vendor and Purchaser § 5a—

In North Carolina there is no statute which requires the exercise or acceptance of an option to be in writing.

2. Vendor and Purchaser § 19a—

Whether tender of the purchase price is a prerequisite to the exercise of an option depends upon the agreement of the parties as expressed in the instrument.

3. Same—

The lease in suit granted lessee, in consideration of the payment of all rentals theretofore due, the right to elect to purchase the land at a specified price at any time during the term of the lease. *Held:* Tender of the purchase price was not prerequisite to the exercise of the option, but notice by lessee to lessors during the term of the lease is sufficient, and entitles lessee to deed upon payment of the purchase price stipulated.

APPEAL by defendants from *Sharp, Special Judge,* March Civil Term 1954 of CABARRUS.

Civil action to enforce specific performance of an option to purchase certain real property described in a lease dated 20 October 1950 by and between Joseph Kottler, the plaintiff, and Oliver V. Martin and wife, Carrie F. Martin, the defendants, and duly recorded in the office of the Register of Deeds of Cabarrus County.

In the lease and option the defendants are the parties of the first part, and the plaintiff is the party of the second part. The pertinent parts of the lease and option are:

"WITNESSETH: That subject to the terms and conditions hereinafter set forth, said parties of the first part do hereby let and lease unto the said party of the second part and said party of the second part does hereby accept as tenants of said parties of the first part a certain tract or parcel of land, lying and being in Cabarrus County, N. C., and described as follows:" (Description of land omitted).

"Party of the second part shall take possession of the property on or before the 20th day of October, 1950 and shall pay to parties of the first part the sum of $50.00 per month for the first year, the sum of $60.00 per month for the second and third years, payable the 20th day of each month beginning October 20th, 1950.

"Unless sooner terminated by the prior sale and purchase of said premises as hereinafter set forth, this contract shall exist for and continue until October 20th, 1953.

"And it further agreed that provided all rentals theretofore due have been paid, party of the second part may at any time during the term of this lease elect to purchase said property at the sum of $6700.00. If the sale is made during the first year the sum of $10.00 per month, the time party of the second part has paid rent, shall be counted as part of the purchase price and if made during the second and third years the sum of $30.00 per month shall be counted as part of the purchase price. If the purchase is made at the end of the three years of this lease then the total of $820.00 shall be given as credit toward the purchase price of $6700.00. For every month's rent paid during the first year the sum of $10.00 per month shall be given credit toward the purchase price and $30.00 per month during the second and third year."

At the close of the plaintiff's evidence the defendants moved for judgment of nonsuit. The motion was overruled, and the defendants excepted. This is their exception No. One.

The defendants offered no testimony.

The plaintiff and the defendants, through their counsel, stipulated and agreed that the jury should answer the issues submitted to them as appears below:

"1. Did the defendants execute and deliver to the plaintiff the option in writing as described in the complaint? Answer: Yes.

"2. Did the plaintiff notify the defendants of his election to exercise the option during the lease period? Answer: Yes.

"3. Was the plaintiff ready, able and willing to comply with the terms of the option as alleged in the complaint? Answer: Yes.

"4. Has the plaintiff been, up to and including the present time, ready, able and willing to comply with the terms of the option to purchase the real property described in the option in accordance with the terms of said option? Answer: Yes.

"5. Has the plaintiff ever offered to the defendants in cash or in certified checks the purchase price specified in the option? Answer: No.

"6. Have the defendants ever tendered to the plaintiff a deed for the real property described in the option? Answer: No."

The court entered judgment upon the verdict as follows:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants comply with the terms of the contract as set forth in the pleadings and execute and deliver to the plaintiff a good and sufficient warranty deed for the real property described in the option, upon the payment to them by the plaintiff of the purchase price as set forth in said agreement, (the amount being $5897.99, making allowance for rent and taxes); and that the defendants be reimbursed for *ad valorem* taxes paid for the year 1953 in the amount of $22.01.

"It appears to the court that the sum of $5897.99 has been deposited in the office of the Clerk of the Superior Court since the 20th day of October 1953, and that the additional sum of $22.01 has this day been paid into the office of the Clerk, making a total of $5920.00 due the defendants, and that the said sum is available to the defendants in discharge of the plaintiff's obligation under the terms of this judgment."

The defendants excepted to the ruling of the court as contained in the judgment, and to the signing of the judgment. This is their exception No. Two.

The defendants appeal, assigning error.

John Hugh Williams for Plaintiff, Appellee.

Hartsell & Hartsell and William L. Mills, Jr., for Defendants, Appellants.

PARKER, J. The essence of the defendants' argument is this: the option must be construed strictly in favor of the makers, and since the plaintiff stipulated that the jury should answer the issue: "Has the plaintiff ever offered to the defendants in cash or in certified checks the purchase price specified in the option?": "No," the plaintiff is not entitled to specific performance, because tender of the purchase price was essential.

The general rule governing the question presented for decision is thus stated in 55 Am. Jur., Vendor and Purchaser, Sec. 41: "Where the option by its express terms requires that the payment of the purchase money or a part thereof accompany the optionee's election to exercise the option, the making or tender of the payment specified, unless waived by the optionor, is a condition precedent to the formation of a contract to sell. On the other hand, the terms of the option may require merely that notice be given of the exercise thereof, and may not require the payment of the purchase money in order to exercise the option. . . . Whether the purchase price or a part thereof must be paid or tendered in order to exercise an option is, therefore, a matter of construction of the particular option involved." See Anno. 101 A.L.R. 1432.

"Where an option contract provides for payment of all or a portion of the purchase price in order to exercise the option, to entitle the optionee to a conveyance he must, as a rule, not only accept the offer but pay or tender the price within the prescribed time, but payment or tender is not essential unless it is a condition precedent." 66 C.J., Vendor and Purchaser, Sec. 24 (2).

"The 'exercise' of an option is merely the election of the optionee to purchase the property." 66 C.J., Sec. 21. "Except where required by statute to be in writing, an option may be exercised or accepted orally unless the contract requires a written acceptance, in which case a verbal notice is not sufficient." 66 C.J., Sec. 22. In North Carolina there is no statute which requires the exercise or acceptance of an option to be in writing, and the option in the case here makes no such requirement.

This Court said in *Winders v. Kenan,* 161 N.C. 628, p. 634, 77 S.E. 687: "The acceptance must be according to the terms of the contract, and if these require the payment of the purchase money or any part thereof, precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy or that the party will take the property does not change the relations of the parties." This case was an action to compel specific performance. The instrument provided that "upon the payment of $10,000, $2,000 of which is to be paid 1 April 1905, and the remainder in four annual payments, etc." It was held that the right to buy could not be exercised until payment or tender of the purchase price is made.

In *Gaylord v. McCoy,* 161 N.C. 685, 77 S.E. 959, the instrument provided "and it is further understood and agreed that if the said George O. Gaylord and his heirs and assigns shall not demand of the undersigned parties the deed herein provided for, and tender payment as herein provided for, on or before 3 November 1909, then this agreement to be null and void, etc." Tender was held to be required.

Hudson v. Cozart, 179 N.C. 247, 102 S.E. 278, was an action to enforce specific performance of a contract to convey a parcel of land, pursuant to an option to purchase the same. The option provided for the execution and delivery of a deed on 15 March 1916, provided, and upon condition that the purchase price was paid in cash on the same day. Tender of the money was held essential.

For other cases where the contract required that the payment of the purchase money, or a part thereof, accompany the optionee's election to exercise the option, and that payment or tender is requisite see: *Trogden v. Williams,* 144 N.C. 192, 56 S.E. 865; *Land Co. v. Smith,* 191 N.C. 619, 132 S.E. 593 (which cites as its sole authority *Hudson v. Cozart, supra*).

Trust Co. v. Frazelle, 226 N.C. 724, 40 S.E. 2d 367, was a civil action to enforce specific performance of an option to purchase certain real property described in a lease. The option contained these words: "The party of the second part agrees to pay the purchase price upon receipt of said deed." In this case the Court said: "The defendants also contend that there was no tender of the purchase price as required under the decisions of this Court, citing *Land Co. v. Smith,* 191 N.C. 619, 132 S.E. 593, and similar cases. We do not so hold. The option does not require payment or tender of the purchase price until a deed for the premises is delivered to the plaintiff."

See Anno.: 101 A.L.R., p. 1437 *et seq.* for cases holding tender or payment not necessary.

The option in this case provides that the plaintiff "may at any time during the term of this lease elect to purchase said property at the sum of $6,700.00." The lease here does not provide when the payment of the purchase price is to be made. The jury found, according to stipulation of the parties, that the defendants have never tendered to the plaintiff a deed for the property described in the option. It is to be observed that the option right involved here is not a mere offer without consideration of the privilege of purchasing the property within a specified time which might have been withdrawn at any time by the lessors before acceptance. Here there was a valuable consideration moving from the lessee to the lessors; the payment by the lessee of all rentals theretofore due was the consideration for his irrevocable right to purchase the leased premises at the specified price, if he should elect to do so. Therefore, payment or tender of the purchase price by the plaintiff is not requisite under the

language of the option, until a good and sufficient deed for the real property described in the option is tendered by the defendants to the plaintiff.

Cates v. McNeil, 169 Cal. 697, 147 P. 944, was an action wherein a lease provided that the lessee, after having paid the rent for a specified number of years should then have the option to purchase the property at a specified price per acre. What the Court said in this case is appropriate here: "There is nothing in the option clause which requires payment of the price of the land to be made or tendered when the option right is exercised in order to constitute an acceptance. Payment may or may not be made an essential condition to the exercise of such a right, just as the parties see fit to provide for in the option agreement. But nothing is said about payment in the option clause here. It is not even mentioned. What the respondents acquired under the option clause was an irrevocable right of option to purchase the property at a specified price if they should at the end of ten years elect to do so, and all that was necessary on their part to do, as far as the terms of the option are concerned, in order to constitute a binding contract for the sale and purchase of the premises, was to give notice of their acceptance of the right. This they did. Payment of the purchase price at that time was not a condition required by the option, and it is not for the court to incorporate terms in it which the parties to it did not incorporate or even mention. Of course, payment would be essential before respondents would be entitled to a conveyance of the land, but that is a matter pertaining to the performance of the contract of purchase and sale which has been created by the acceptance."

The plaintiff and the defendants stipulated that the jury should find by its verdict that the plaintiff notified the defendants of his election to exercise the option during the lease period, that the plaintiff is ready, able and willing to comply with the terms of the option, and that the defendants have never tendered a deed for the premises to the plaintiff.

In accord with the jury's verdict it is the duty of the defendants to prepare and tender to the plaintiff a good and sufficient deed for the real property set forth in the option. *Crotts v. Thomas,* 226 N.C. 385, 38 S.E. 2d 158, and cases cited.

The assignment of error as to the denial of the defendants' motion for judgment of nonsuit is overruled. The assignment of error as to the signing of the judgment is without merit, because the judgment is supported by the record. *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555.

In the trial below we find

No error.

STATE v. RAY YOUNG RUMFELT.

(Filed 14 January, 1955.)

1. Automobiles § 35—

The *prima facie* rule of evidence created by G.S. 20-162.1 is applicable to prosecutions for violation of G.S. 20-162.

2. Same—

G.S. 20-162.1 creates no criminal offense, but prescribes that when the *prima facie* rule of evidence therein set forth is relied upon by the State in a criminal prosecution, the punishment shall be a penalty of $1.00.

3. Same—

The violation of G.S. 20-162 by parking within 25 feet from the intersection of curb lines at an intersection of highways within a municipality is a misdemeanor, G.S. 20-176, notwithstanding that the *prima facie* rule of evidence created by G.S. 20-162.1 is invoked. The word "penalty" is used in the latter statute in the broad sense of punishment and not in the sense of a penalty recoverable in a civil action.

4. Criminal Law § 65—

Where defendant is convicted of an offense constituting a crime or misdemeanor he is properly charged with the costs.

APPEAL by defendant from *Frizzelle, J.*, November 1954 Term of WAKE.

Criminal prosecution upon a warrant charging the defendant with a violation of G.S. 20-162, relating to the parking of an automobile within twenty-five feet from the intersection of curb lines at an intersection of highways within the Town of Cary.

This action originated in the Recorder's Court of Cary, Meredith and House Creek Townships, in which court the defendant was adjudged guilty and ordered to pay the costs. He appealed to the Superior Court, where he pleaded not guilty and was tried *de novo* by a jury upon the original warrant, as amended.

The State offered evidence tending to show the following facts: U. S. Highway No. 1 runs east-west through the Town of Cary, and is known as Chatham Street. Academy Street crosses Chatham Street. Both streets have built up curb lines which intersect. About 1:56 p.m. on 23 October 1954 L. E. Midgette, Chief of Police of the Town of Cary, found a 1949 DeSoto Automobile bearing State license X-61128 parked on the North side of Chatham Street about 15 feet from the intersection of the curb lines of Academy and Chatham Streets. Both of these streets are hard surfaced and main streets in the town—regularly used and maintained by the town.

By agreement between the Solicitor and counsel for the defendant the State introduced in evidence a certificate from the State Department of

Revenue showing that the defendant was the registered owner of the automobile with State license N. C. X-61128. "It was stipulated and admitted by the defendant that the automobile in question was owned by and registered in the name of the defendant."

The defendant offered no evidence.

The jury returned a verdict of guilty. Judgment: "That the defendant pay a penalty of $1.00 and the costs."

Defendant excepted and appealed, assigning error.

Harry McMullan, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.

Vaughan S. Winborne and Samuel Pretlow Winborne for Defendant, Appellant.

PARKER, J. The defendant assigns as error the refusal of the trial court to allow his motion for judgment of nonsuit made when the State rested its case. The defendant contends that G.S. 20-162.1 prescribes that "any person convicted pursuant to this section shall be subject to a penalty of $1.00," and therefore does not set out a criminal act triable in the criminal courts of the State; but in specific words imposes a penalty to be recovered in a civil action.

The amended warrant upon which the defendant was tried and convicted by a jury in the Superior Court charges a violation of G.S. 20-162. G.S. 20-176(a) provides that "it shall be unlawful and constitute a misdemeanor for any person to violate" G.S. 20-162; and (b) states "unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment: Provided, that upon conviction for the following offenses . . . violation of 20-162 . . . the punishment therefor shall be a fine not to exceed fifty dollars ($50.00) and not less than ten dollars ($10.00), or imprisonment not to exceed thirty days for each offense."

In reversing a conviction in the Superior Court in *S. v. Scoggin,* 236 N.C. 19, 72 S.E. 2d 54, this Court said in 1952: ". . . we should not, in the absence of a legislative rule of evidence to the contrary, consider mere ownership of a motor vehicle, parked in violation of a city ordinance, and no more, sufficient to sustain a criminal conviction . . ."

It seems apparent that as a result of the decision in the *Scoggin Case,* and the language quoted above therefrom, the General Assembly at its 1953 Session enacted the statute which is now G.S. 20-162.1 and which is captioned, "*Prima Facie* Rule of Evidence for Enforcement of Park-

ing Regulations," to establish "a legislative rule of evidence" in respect to "cases concerned solely with violation of statutes or ordinances limiting, prohibiting or otherwise regulating the parking of automobiles or other vehicles upon public streets, highways, or other public places." A violation of G.S. 20-162 presents the type of case to which the *prima facie* rule of evidence set forth in G.S. 20-162.1 is applicable.

G.S. 20-176 in plain and exact words declares that a violation of G.S. 20-162 is a misdemeanor and prescribes the punishment, which is greater than that imposed in G.S. 20-162.1. G.S. 20-162.1 creates no criminal offense, but prescribes that when the *prima facie* rule of evidence therein set forth is relied upon by the State in a criminal prosecution, the punishment shall be a penalty of one dollar. There can be no doubt that this action is a criminal action prosecuted by the State to punish the defendant for a violation of its criminal law. When we consider the words "fine" and "penalty" as used in G.S. 20-176, and the word "penalty" as used in G.S. 20-162.1, it is clear that the General Assembly considered and used the word "penalty" in G.S. 20-162.1 as equivalent to the word "fine," and imposed the payment of one dollar for a violation of its criminal law. This one dollar was exacted of the defendant who was found guilty by a jury of a misdemeanor.

The word "penalty" has many different shades of meaning. In *Huntington v. Attrill*, 146 U.S. 657, 36 L. Ed. 1123, it is said: "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offenses against its laws. *United States v. Reisinger*, 128 U.S. 398, 402 (32:480, 481); *United States v. Chouteau*, 102 U.S. 603, 611 (26:246, 249)." See also *Weideman v. State*, 55 Minn. 183, 56 N.W. 688; 23 Am. Jur., Forfeitures and Penalties, Sec. 27.

"The term 'penalty' in its broadest sense includes all punishment of whatever kind, and in the broad sense it is a generic term which includes fines as well as all other kinds of punishment." 36 C.J.S., Fines, p. 781.

We said in *S. v. Addington*, 143 N.C. 683, 57 S.E. 398: "In ordinary legal phraseology, it is said, the term 'fine' means a sum of money exacted of a person guilty of a misdemeanor, or a crime, the amount of which may be fixed by law or left in the discretion of the Court, while a penalty is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do something which is required to be done. (Citing authorities)."

S. v. Briggs, 203 N.C. 158, 165 S.E. 339, relied upon by the defendant is distinguishable. The defendant was tried in a criminal action for violation of a statute which read: " 'That no other person than said weighers shall weigh cotton or peanuts sold in said town or township, under a

penalty of $10.00 for each and every offense, said penalty to be paid by the buyer and applied to the school fund of said county, upon connection (conviction), of the offender before any justice of the peace of said county.'" This Court held that that statute did not create a criminal act. In the instant case G.S. 20-176 prescribes that a violation of G.S. 20-162 is a misdemeanor.

S. v. Snuggs, 85 N.C. 541, is the case of an indictment for illegally issuing a marriage license—the defendant being a Register of Deeds. The statute prescribed that a person who violated the statute "shall forfeit and pay $200 to any person who shall sue for the same." This Court rightly held that the statute created the offense, fixed the penalty, and prescribed the method of enforcement, and that the indictment charged no indictable offense. The *Snuggs Case* is not in point. To like effect see *S. v. Loftin,* 19 N.C. 31. See also *S. v. R. R.,* 145 N.C. 495, p. 540, 59 S.E. 570.

We said in *Board of Education v. Henderson,* 126 N.C. 689, 36 S.E. 158: "To our minds there is a clear distinction between a fine and penalty. A 'fine' is the sentence pronounced by the court for a violation of the criminal law of the State; while a 'penalty' is the amount recovered—the penalty prescribed for a violation of the statute law of the State or the ordinance of a town. This penalty is recovered in a civil action of debt." *Finance Co. v. Holder,* 235 N.C. 96, 68 S.E. 2d 794 (counterclaim for recovery of penalty for alleged usury); and *Smoke Mount Industries, Inc., v. Fisher,* 224 N.C. 72, 29 S.E. 2d 128 (counterclaim for overtime under Federal Fair Labor Standards Act) are types of civil actions to recover penalties. The judgment of the lower court that the defendant pay a penalty of one dollar was a sentence pronounced by the court for the violation of a statute, which violation is specifically declared by the General Assembly to be a misdemeanor.

The trial court correctly denied the defendant's motion for judgment of nonsuit.

The defendant's only other assignment of error is that the trial court erred in taxing the defendant with the costs.

Art. IV, Sec. 1, of the North Carolina Constitution, prescribes that "every action prosecuted by the people of the State as a party, against a person charged with a public offense for the punishment of the same, shall be termed a criminal action."

G.S. 1-5 reads in part: "A criminal action is—1. An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof."

The defendant was convicted of a violation of G.S. 20-162, which violation constituted a misdemeanor by virtue of G.S. 20-176.

G.S. 6-45 prescribes that "every person convicted of an offense, or confessing himself guilty, or submitting to the court, shall pay the costs of the prosecution."

This assignment of error is without merit.

The charge of the court is not in the Record, and is presumed to be free from error. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481.

In the trial below we find

No error.

MATILDA P. DRUMMONDS v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 14 January, 1955.)

Insurance § 34d—Nonsuit in action for disability benefits under group policy held proper for failure of proof of disability at time of termination of employment.

Plaintiff's evidence tended to show that she had suffered from asthma and high blood pressure for sometime prior to her discharge, but her medical expert witness testified to the effect that while such ailments would constitute a handicap, he was unable to state that plaintiff was totally and permanently disabled therefrom at the time of her discharge, and plaintiff herself swore under oath in applying for unemployment benefits after her discharge that she was able to work. *Held:* Nonsuit was properly entered in her suit upon her certificate under a group policy to recover for total and permanent disability, since her evidence fails to show that she was totally and permanently disabled at or before the date of the termination of her employment.

APPEAL by plaintiff from *Paul, Special Judge,* May Term, 1954, of FORSYTH.

This is an action to recover total and permanent disability benefits under a group insurance policy issued by the defendant to cover the employees of R. J. Reynolds Tobacco Company. From judgment of involuntary nonsuit, the plaintiff appeals, assigning error.

Elledge & Johnson for plaintiff.

Womble, Carlyle, Martin & Sandridge for defendant.

DENNY, J. The plaintiff for some years prior to 4 May, 1953, had been in the employ of R. J. Reynolds Tobacco Company as a "strip preparer." The group policy and the individual certificate issued and delivered by the defendant to plaintiff, in accordance with the terms thereof, were in full force and effect on 4 May, 1953, on which date the employ-

ment of the plaintiff with R. J. Reynolds Tobacco Company was terminated.

The insurance policy provides as follows: "In the event that any Employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the Society will, in termination of all insurance of such Employee under the policy, pay equal monthly Disability-installments, the number and amount of which shall be determined by the Table of Installments below; . . ."

It was further provided in the policy and certificate that insurance upon the life of an employee shall automatically cease upon the termination of employment with the employer in the specified classes of employees.

It was admitted that the plaintiff was under the age of 60 at the time of the institution of this action. But before she would be entitled to recover under the provisions of the policy, she must show that she was totally and permanently disabled by injury or disease on or before the 4th day of May, 1953. There is no contention that the plaintiff is suffering from an injury, but from disease.

The plaintiff was 44 years of age at the time of her discharge. According to the record she was discharged for "willfully abusing her fellow employees, cursing on the job, cursing her fellow employees, failure and refusal to work where she was told to work."

Prior to 4 May, 1953, the plaintiff had been working in the Strip Preparation Department for seven or eight years. Her base pay was $1.10 an hour with a 5c differential for working at night, which made her pay $1.15 an hour. As disclosed by the employment records of R. J. Reynolds Tobacco Company, the plaintiff was away from her job 3.1 hours on 20 April, 1953, when she was excused to attend a funeral. She was out 4 days in March, 1953; the reason for her absence is not disclosed. She lost 6 days in February, 1953, at which time she was sick. She was out 5 days in the week ending 12 January, 1953; cause is not disclosed. She lost no time in December, 1952. During November, 1952, she was out 2 days. During the month of October, 1952, she was out one week on a paid vacation, but lost no time on account of illness. In September, 1952, she was excused for one day, while she lost only one day in August, 1952, and that was on account of sickness in her family. She was given a medical examination by some member of the Tobacco Company's medical staff from time to time, and was last examined by its Director, Dr. R. W. Bunn, on 7 April, 1953. Dr. Bunn testified that he gave her "a pretty

thorough examination." The examination disclosed that her blood pressure was 182/110, and that her condition otherwise was good. He approved her for work and testified that in his "opinion she was able to work."

Dr. H. T. Allen, who examined the plaintiff several times over a period of years and was a witness for the plaintiff, testified that her blood pressure on 13 May, 1953, was 215/160; that the day before the trial in May, 1954, it was 180/110. Dr. Allen was asked whether or not in his opinion the plaintiff was totally and permanently disabled from engaging in any gainful employment on 4 May, 1953, and he answered: "I don't think I am able to." He was then asked: "What is your opinion as to her condition and ability to carry on any gainful occupation on May 4, 1953, and whether or not she would be continuously prevented for life from engaging in any gainful work?" He answered: "Well, now, when a person's blood pressure is that high and running high for some time, it is hard to say just how a person is going to come out. They may be all right one week and a few weeks later may feel bad. Actually, I don't know of anybody who knows just exactly what would be the status of one's condition, to enable him to work. All I can say is that they'd be under a handicap."

The medical testimony also discloses that the plaintiff, in addition to suffering from high blood pressure, was afflicted with asthma.

The record further discloses that at the time the plaintiff was discharged, she asked Mr. Parks, a Line Foreman, if he would give her a job in his home, but, she testified "he didn't give me a job." Thereafter, on 2 June, 1953, she appeared in a hearing before a Claims Deputy for the Winston-Salem District of the North Carolina Unemployment Compensation Commission to determine whether or not she was entitled to receive unemployment benefits. She was put under oath and testified that she was able to work; that she had no physical handicaps or disabilities. When asked if she had anything wrong with her health, she replied, "I have bronchial asthma and that don't bother me but at times, and that is all." She was then asked, "Did that ever keep you away from your job?" Her reply was, "No, sir."

The plaintiff has not been gainfully employed since her discharge from the Tobacco Company.

We think the evidence supports the view that the plaintiff is suffering from asthma and high blood pressure, and did suffer from these ailments for several years before her employment was terminated. Moreover, we think her evidence supports the conclusion that her disability is permanent. However, it does not support the crucial averment which is essential to recovery, to wit: that she was *totally and permanently disabled* from engaging in any gainful employment on or before 4 May, 1953.

Therefore, the ruling of the court below to the effect that the evidence was insufficient to justify submission of the case to the jury, will be upheld. *Johnson v. Assurance Society,* 239 N.C. 296, 79 S.E. 2d 776; *Ford v. Insurance Co.,* 222 N.C. 154, 22 S.E. 2d 235; *Jenkins v. Insurance Co.,* 222 N.C. 83, 21 S.E. 2d 832; *Lee v. Assurance Society,* 211 N.C. 182, 189 S.E. 626; *Carter v. Insurance Co.,* 208 N.C. 665, 182 S.E. 106; *Hill v. Insurance Co.,* 207 N.C. 166, 176 S.E. 269; *Boozer v. Assurance Society,* 206 N.C. 848, 175 S.E. 175; *Thigpen v. Insurance Co.,* 204 N.C. 551, 168 S.E. 845.

Judgment affirmed.

STATE v. ELIZABETH H. POOLOS.

(Filed 14 January, 1955.)

1. Criminal Law § 81c (3): Appeal and Error § 39e—

Exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified if permitted to answer, even though the question be asked on cross-examination and be a proper question asked for the purpose of impeaching the credibility of the witness by showing that she was mentally and emotionally unstable.

2. Criminal Law § 81c (1): Appeal and Error § 38—

The burden is upon appellant not only to show error, but also to show that the alleged error was prejudicial.

APPEAL by defendant from *Sharp, Special Judge,* October Term, 1954, of FORSYTH.

The defendant was tried and convicted in the Municipal Court of the City of Winston-Salem, upon a warrant charging her with unlawfully and willfully maintaining and operating a place, structure, and building for the purpose of prostitution, and assignation, etc. From the judgment entered she appealed to the Superior Court of Forsyth County where she was tried *de novo* on the original warrant. The jury returned a verdict of guilty, and from the judgment imposed she appeals to this Court, assigning error.

Attorney-General McMullan, Assistant Attorney-General Moody, and William P. Mayo, Member of Staff, for the State.

Eugene H. Phillips and B. C. Brock for defendant.

DENNY, J. There is no contention on the part of the defendant that the State's evidence is insufficient to support the verdict. She contends,

however, that the court committed prejudicial error by sustaining objections by the State to certain questions propounded by her counsel in cross-examining the State's witnesses.

Counsel for defendant, in cross-examining Anne Shuler, one of the State's witnesses, asked her if on one occasion she had tried to commit suicide by eating some bobby pins. The State objected to the question and the court sustained the objection. The defendant duly excepted to the court's ruling and assigns it as error.

The record does not disclose what the reply of the witness would have been if she had been permitted to answer; consequently, it is impossible for us to know whether the ruling was prejudicial to the defendant or not. We think the question propounded was a permissible one for the purpose of impeaching the credibility of the testimony of the witness. Even so, the burden is upon the appellant not only to show error but to show that such error was prejudicial to her. We cannot assume that the answer of the witness would have been in the affirmative. *In re Will of Wilder,* 205 N.C. 431, 171 S.E. 611; *S. v. Brewer,* 202 N.C. 187, 162 S.E. 363; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *Simpson v. Tobacco Growers,* 190 N.C. 603, 130 S.E. 507; *Snyder v. Asheboro,* 182 N.C. 708, 110 S.E. 84; *In re Ross,* 182 N.C. 477, 109 S.E. 365. Suppose the witness had been permitted to answer the question and had replied in the negative, the defendant would have been bound by the answer. *Clark v. Clark,* 65 N.C. 655; *S. v. Roberts,* 81 N.C. 605; *S. v. Morris,* 109 N.C. 820, 13 S.E. 877; *S. v. Cagle,* 114 N.C. 835, 19 S.E. 766; *S. v. Wilson,* 217 N.C. 123, 7 S.E. 2d 11; *S. v. Broom,* 222 N.C. 324, 22 S.E. 2d 926; *S. v. King,* 224 N.C. 329, 30 S.E. 2d 230. Furthermore, the question was not propounded for the purpose of showing bias, interest, or hostility of the witness as was the case in *S. v. Hart,* 239 N.C. 709, 80 S.E. 2d 901, but the defendant states in her brief that the question was asked for the purpose of impeaching her credibility as a witness by showing that she was mentally and emotionally unstable. Stansbury on Evidence, Witnesses, section 48, subsection 3.

This Court held in the cases of *Etheridge v. R. R.,* 209 N.C. 326, 183 S.E. 539; *S. v. Huskins,* 209 N.C. 727, 184 S.E. 480, and pointed out in *S. v. Wray,* 217 N.C. 167, 7 S.E. 2d 468, that the general rule that where a question is propounded to a witness and an objection thereto is sustained, in order for an exception thereto to be considered on appeal the record must show what the witness would have answered if the objection had not been interposed, does not apply to a question propounded on cross-examination. The citation relied upon to sustain this exception to the general rule is *S. v. Martino,* 192 P. 507 (N. Mex.). The only reason given by the New Mexico Court to support its decision in this respect was that counsel in cross-examining a witness is not charged with the knowl-

edge of what the witness would have answered if the objection had not been made.

We do not think this reasoning is sound, for, after all, it is not what the attorney knew or did not know that is determinative of the question. Here, as in other similar situations, it is what the witness would have said in response to the question, if she had been permitted to answer, that would enable us to determine whether the appellant was prejudiced by the ruling below.

The last cited case and our decisions in accordance therewith are in direct conflict with an otherwise unbroken line of decisions by this Court on the identical question under consideration. Hence, *Etheridge v. R. R., supra,* and *S. v. Huskins, supra,* are disapproved in so far as they are in conflict with this opinion and other decisions of this Court on the question involved.

Except for the above cases, we have been unable to find a single instance where this Court has made any distinction between a question propounded on direct examination and one on cross-examination with respect to the general rule that an exception will not be considered on appeal where an objection has been sustained, unless the record discloses what the witness would have said if he had been permitted to answer. A few other jurisdictions do make such a distinction. See 3 C.J., Appeal and Error, section 737, page 827.

Among the cases in which this Court has declined to consider exceptions propounded on cross-examination because the record did not disclose what the answer would have been had the witness been permitted to answer, are the following: *S. v. Leak,* 156 N.C. 643, 72 S.E. 567; *Stout v. Turnpike,* 157 N.C. 366, 72 S.E. 993; *Steeley v. Lumber Co.,* 165 N.C. 27, 80 S.E. 963; *S. v. Lane,* 166 N.C. 333, 81 S.E. 620; *Brimmer v. Brimmer,* 174 N.C. 435, 93 S.E. 984; *Smith v. Myers,* 188 N.C. 551, 125 S.E. 178; *S. v. Collins,* 189 N.C. 15, 126 S.E. 98; *S. v. Brewer,* 202 N.C. 187, 162 S.E. 363, 81 A.L.R. 1424; *Hammond v. Williams,* 215 N.C. 657, 3 S.E. 2d 437. See also *Howard v. Manufacturing Co.,* 179 N.C. 118, 101 S.E. 491; *Newbern v. Hinton,* 190 N.C. 108, 129 S.E. 181, and Wigmore on Evidence, 3rd Edition, Vol. I, section 20, page 362.

In *Snyder v. Asheboro, supra,* this Court said: "Since the record fails to disclose what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness."

Likewise, *Winborne, J.,* in the case of *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909, said: "The record does not show what the answer of the witness would have been if permitted to answer. Compe-

tency of the testimony is not, therefore, presented by the assignments of error. *Barbee v. Davis,* 187 N.C. 78, 121 S.E. 176, and cases cited."

The exception is overruled.

We have carefully examined the remaining exceptions and assignments of error, and, in our opinion, no error has been made to appear that would warrant a new trial. The verdict and judgment of the court below will be upheld.

No error.

WARREN J. REDD v. MECKLENBURG NURSERIES, INC.

(Filed 14 January, 1955.)

1. Trial § 23a—

Where the evidence is conflicting upon the determinative issue, nonsuit is properly denied.

2. Appeal and Error § 39e—

Where it is stipulated that if the jury should find that the contract alleged existed between the parties, plaintiff would be entitled to recover a stipulated sum, whether an officer of defendant considered the amount theretofore paid plaintiff full compensation for his services, is immaterial, and exclusion of testimony of the officer to this effect cannot be prejudicial.

3. Appeal and Error § 22—

The Supreme Court is bound by the record.

4. Appeal and Error § 39e—

The exclusion of testimony cannot be prejudicial when the same evidence is thereafter brought out from the same witness on cross-examination.

5. Trial § 31d—

Where the court fully and correctly charges upon the burden of proof, an excerpt from the portion of the charge defining greater weight of the evidence as "evidence that has a greater weight upon your minds than the evidence of defendant" will not be held prejudicial, certainly when the court thereafter instructs the jury that if the evidence of the plaintiff and defendant have equal weight in their minds to answer the issue in the negative, the burden of proof being on plaintiff.

6. Trial § 32—

A party desiring greater elaboration in the charge on a particular point must appropriately tender a request therefor.

7. Appeal and Error § 39b—

Where, upon the stipulations of the parties, their rights are dependent upon the answer to the first issue, any error in the charge relating to a subsequent issue, which is mere surplusage, cannot be prejudicial.

REDD *v.* MECKLENBURG NURSERIES.

APPEAL by defendant from *Whitmire, S. J.*, 12 April, 1954 Extra Civil Term, MECKLENBURG.

Plaintiff sued for commissions he alleged were due him by reason of his having procured from Marsh Realty Company a contract for shrubbery and landscaping. He alleged the defendant agreed to pay him 25 per cent of the contract price as compensation for his services in securing the contract and supervising the work; that he procured the contract for which the defendant was paid $12,300.00; that he supervised the job until he was discharged by the defendant; that he was due as commissions the sum of $3,075.00, upon which $300.00 had been paid.

The defendant admitted the plaintiff was employed, but contended his duties consisted of "obtaining small contracts for planting, lawn work, and the sale of shrubbery, and in supervising the work on such orders as he obtained. It is specifically denied that the plaintiff was authorized to solicit the contract described in the complaint."

Plaintiff testified he had a contract with the defendant; that he was to be paid 25 per cent of the contract price for shrubbery and landscaping on orders obtained by him. It was a part of his duty to supervise the job; that he went over the grounds with Mr. Broadway, of Marsh Realty Co., when "he called me to come and pick up the plans and give him a figure on the landscaping and shrubbery work, which I did . . . the figure we made him was $12,500.00, and he told us we could have the contract for $12,300.00. Mr. W. C. Daniels (president of the defendant) approved this contract before it was made." The plaintiff further testified he supervised the work until his discharge by the defendant and that he was paid $300.00, leaving a balance due on his contract of $2,775.00. Testimony tending in part to corroborate the plaintiff was offered.

Mr. W. C. Daniels, president of the defendant, testified in substance: The defendant employed the plaintiff in 1946 as general superintendent of the nursery on a salary, and about September, 1947, changed him to a commission basis. He was paid 33⅓ per cent on plants sold at retail prices. On lawn work without shrubbery, he was paid 20 per cent, and on combination orders, 27 per cent. He was never paid any other commission except 10 per cent for supervising. He was only paid 10 per cent on the Oak Crest job, which was comparable to the Marsh job, "because we did not permit him or any other salesman to make bids on any work of this kind where plans were made by landscape architects and put out for bids. We figured 20 per cent profit and if we bid higher it is practically impossible to get the larger jobs." . . . "We discharged Mr. Redd because we did not think it was a good idea to have a man in our employ who was trying to hire our key men." Mr. Redd was paid $300.00 which was a liberal estimate of 10 per cent commission on the work done up to the time he was discharged. Mr. Redd did not procure the contract for

Marsh Realty Company job. There was other testimony tending in part to corroborate Mr. Daniels.

The parties entered into the following stipulation: "It is stipulated and agreed by plaintiff and defendant that: First, that the defendant is a corporation engaged in the nursery and landscaping business. Second, that on August 15, 1950 the plaintiff was in the general employment of the defendant. Third, that on or about August 15, 1950 a contract was entered into by and between Mecklenburg Nurseries, Inc., and the Marsh Realty Company, acting as agent for Weyland Homes, Inc. Fourth, that the agreed contract price of said contract was $12,300. Fifth, that during the month of March, 1951 the defendant paid to the plaintiff the sum of $300.00.

"It is further stipulated and agreed that if the jury answer the first issue in favor of the plaintiff, then the plaintiff would be entitled to judgment in the sum of $2,775.00, with interest and costs, but if the jury answer the issue in favor of the defendant, then the plaintiff shall take nothing of the defendant and the plaintiff will be taxed with the costs."

Motion was made for nonsuit at the close of the plaintiff's evidence and renewed at the close of all the evidence. To the refusal of the court to sustain the motion, the defendant excepted. The court submitted the following issues, which the jury answered as indicated:

"1. Did the plaintiff and the defendant contract and agree that on all contracts solicited and procured by the plaintiff for the defendant, the plaintiff was to receive a commission of 25 per cent? Answer: Yes.

"2. Did the plaintiff solicit and procure the contract between defendant and Marsh Realty Company? Answer: Yes."

From judgment on the verdict, the defendant appealed.

B. Irvin Boyle and Robert D. Potter for plaintiff, appellee.

Orr & Osborne, by Frank W. Orr, for defendant, appellant.

HIGGINS, J. On the issues submitted to the jury, the evidence was in conflict and, therefore, presented a jury question. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Powell v. Lloyd*, 234 N.C. 481, 67 S.E. 2d 664. The motion for nonsuit at the close of all the evidence was properly overruled. For the same reason, the formal exceptions to the refusal to set aside the verdict and to the signing of the judgment were also properly overruled. The other assignments of error relate to the admissibility of evidence and to the charge of the court.

The witness W. C. Daniels, president of the defendant, on direct examination was asked this question: "Well state whether or not, Mr. Daniels, you considered the check for $300.00 to Mr. W. J. Redd as full payment for his work on the Weyland Homes job." Plaintiff's objection was sus-

tained. If permitted to answer, the witness would have said, "I did." Refusal of the court to permit the question and answer constitute the defendant's Assignments of Error Nos. 2 and 3.

It was stipulated by the parties that if the jury answered the first issue, "Yes," that is, that the parties had a contract for 25 per cent as claimed by the plaintiff, the court should render judgment for $2,775.00. It was immaterial, therefore, whether Mr. Daniels considered $300.00 in full payment for plaintiff's work. According to the stipulation, the plaintiff was entitled to recover $2,775.00 if the jury found he had the contract claimed, otherwise he could recover nothing. Assignments of Error Nos. 2 and 3 cannot be sustained.

The defendant's witness, Harold Daniels, was asked this question: "Do you know the rule of the company with reference to salesmen making bids on jobs put out on bids by architect's plans?" Answer: "Yes, sir." "What is the rule of the company?" The objection to the question was sustained. The record does not contain the answer witness would have made to the question had he been permitted to answer. The further question was asked: "Does the rule apply to all of the salesmen?" Objection to the question was sustained, but the witness' answer appears to have been, "Yes, sir." Whether excluded or not, the record does not disclose. Then the following appears as the further testimony of the witness: "The contract arrangement with Mr. Redd and the Mecklenburg Nurseries was the same as my contract with the company. On straight shrubbery sales, retail prices, they were 33⅓ per cent. On combination jobs, 27 per cent. On straight lawn jobs they were 20 per cent. And on two instances Mr. Redd was paid 10 per cent for supervising on the Weyland Homes job (the one in question) and the Oak Crest project." There is nothing in the record to indicate the statement was made in the absence of the jury. However, the defendant, in its brief, treats the statement as having been excluded. We are bound by the record. However, even though the evidence had been excluded, the exclusion would not be reversible error because the same evidence was brought out from the same witness on cross-examination, so that the defendant had the full benefit of it. Error in the exclusion of testimony, therefore, does not appear.

Two exceptive assignments of error are made to the charge: The first lifts out of context that part of the charge as follows: "Now, by the greater weight of the evidence the law simply means that by evidence that has a greater weight upon your minds than the evidence of the defendant." Immediately preceding, the court had charged fully and correctly upon the burden of proof, and immediately after charging as above, further charged: "If the evidence of the plaintiff and the defendant have equal weight in your minds, then your decision would have to be in the negative, or for the defendant, since the burden of proof is on the plain-

tiff." It does not appear that the jury was, or could have been misled, or could have misunderstood the charge. If the defendant desired a more complete definition of greater weight of the evidence, it should have made the request by appropriate prayer. *Wilson v. Casualty Co.*, 210 N.C. 585, 188 S.E. 102. The charge as given seems to be in substantial accord with *Hodges v. R. R.*, 122 N.C. 992, 29 S.E. 939; *Supply Co. v. Conoly*, 204 N.C. 677, 169 S.E. 415; *Arnold v. Trust Co.*, 218 N.C. 433, 11 S.E. 2d 307.

The defendant assigns as error four paragraphs of the court's charge relating to the second issue: "Did the plaintiff solicit and procure the contract between defendant and Marsh Realty Company?" In view of the stipulation, it does not appear necessary to decide whether the exception is broadside or whether the charge contains a correct statement of the law. Under the terms of the stipulation, the second issue is immaterial and need not have been submitted. It may be treated as surplusage. The stipulation contains the following: "It is further stipulated and agreed that if the jury answer the first issue in favor of the plaintiff, then the plaintiff would be entitled to a judgment in the sum of $2,775.00, with interest and costs, but if the jury answer the issue in favor of the defendant, then the plaintiff shall take nothing of the defendant and the plaintiff will be taxed with the costs."

Under the stipulation, the case was decided by the first issue which the jury found for the plaintiff upon competent evidence and under a charge free from prejudicial error. After the jury answered the first issue in favor of the plaintiff, it was the duty of the court, under the stipulation, to render judgment for the plaintiff.

No error.

MRS. LILLIAN ENSLEY HART v. QUEEN CITY COACH COMPANY AND MRS. ROBERT EMERSON FULTZ AND DR. ROBERT EMERSON FULTZ.

(Filed 14 January, 1955.)

1. Process § 10—

The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under G.S. 1-105, is conclusive on appeal if such finding is supported by evidence.

2. Same—

The broad purpose of G.S. 1-105 is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to

answer for a negligent injury inflicted while the nonresident was using the highways of this State.

3. Same—Member of Armed Services does not acquire residence here solely because stationed here for period under military orders.

The evidence tended to show that a member of the Armed Services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons he and his wife had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, *is held* sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to service of summons under G.S. 1-105.

APPEAL by cross-action defendants, Fultz, from *Gwyn, J.*, September Civil Term, 1954, DAVIDSON.

The plaintiff instituted a civil action in the Superior Court of Davidson County against the Queen City Coach Company for personal injuries sustained by her in a bus accident that occurred on 4 January, 1954, in Onslow County. The Queen City Coach Company filed an answer and cross-action against Mrs. Robert Emerson Fultz and Dr. Robert Emerson Fultz, alleging the automobile negligently operated by them ran into the bus, causing it to turn over, injuring the plaintiff, and asking that Dr. and Mrs. Fultz be made parties defendant.

The Clerk Superior Court of Davidson County entered an order making Dr. and Mrs. Fultz parties defendant. Upon failure to obtain personal service in Onslow County, service of the summons, copies of the complaint and answer, and cross-action of the Queen City Coach Company was made on the Commissioner of Motor Vehicles. Dr. and Mrs. Fultz entered a limited or special appearance and moved to dismiss the service upon the ground that they were at the time of the accident residents of the State of North Carolina. Affidavits were filed by the Coach Company and by Dr. and Mrs. Fultz, setting forth in substance the following:

Dr. Fultz is a native of Dinwiddie County, Virginia. He had voted an absentee ballot in that county in 1943. He had never voted or registered for any election elsewhere. Mrs. Fultz is a native of South Carolina. She has never registered or voted in any election. From the time of their marriage until 10 July, 1947, they resided in Dinwiddie County, Virginia. On that date Dr. Fultz entered upon active duty as an officer in the United States Navy. Some time prior to 17 November, 1952 (date not given), Dr. Fultz was assigned to active duty at Camp Lejeune, near Jacksonville, North Carolina. He remained on active duty there until nine days after the accident, when he was transferred to Ports-

mouth, Virginia, where he was on duty at the time process was served on the Commissioner of Motor Vehicles. His entire stay in North Carolina was incident to naval orders. Mrs. Fultz moved with him to North Carolina and returned with him to Virginia. They filed a joint federal income tax return with the director for the collection district of North Carolina for the taxable year 1952, and for the year 1953 they filed a like return with the director for the collection district of Virginia.

Upon the hearing, Judge Gwyn found facts in substance as recited above, and concluded as a matter of law that Dr. and Mrs. Fultz were nonresidents of the State of North Carolina at the time of the accident; that they were using the highways of North Carolina, and that the service on the Commissioner of Motor Vehicles was legal service and brought the defendants into court. Dr. and Mrs. Fultz excepted and appealed.

Carpenter & Webb for Dr. and Mrs. Fultz, appellants.

Shearon Harris; Walser & Brinkley, by Don A. Walser, for plaintiff, appellee.

HIGGINS, J. The critical question presented by this appeal is whether the record presents evidence to support the findings of Judge Gwyn that the appealing defendants were nonresidents of North Carolina on 4 January, 1954, the date of the accident, and could be brought into court by service on the Commissioner of Motor Vehicles under G.S. 1-105. If there is supporting evidence, we are bound by the findings. *Bigham v. Foor*, 201 N.C. 14, 158 S.E. 548.

The briefs in this case on the question of residence are full and have been prepared with much care. We have examined the many cases cited. They arise under many different statutes, each enacted to accomplish a definite purpose. It is to be expected, therefore, that the holdings as to what constitutes residence, domicile, etc., vary according to the purposes of the statutes.

What constitutes nonresidence under G.S. 1-105 has not been the subject of direct judicial review. The nearest approach is *Bigham v. Foor, supra*. The broad purpose of the statute is to enable an injured resident of this State to bring back to answer for his tort a nonresident motorist who has inflicted injury while using the State highways and by the time suit can be instituted would otherwise be beyond this jurisdiction. It is contemplated that a resident of the State would ordinarily have enough of permanence and of fixed abode to keep him here and to permit personal service.

Residence has certainly in contemplation something of choice, of intention to remain permanently, or for a time sufficient to accomplish some undertaking requiring more than a brief period. How does the service-

man fit into this picture? It must be remembered he moves under orders and not from choice. It is not for him to say when or where he goes, or how long he stays when he gets there. Often, the first intimation of reassignment is the delivery of his movement orders. Can it be said he acquires a residence under such circumstances?

The impermanence of a soldier's or sailor's assignment is illustrated by a provision of the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C.A., War Appendix, Sec. 574, a wartime measure which provided: ". . . such person shall not be deemed by reason of compliance with military or naval orders to have become a resident in or resident of any other state, territory, possession or political subdivision of any of the foregoing . . . and personal property shall not be deemed to be located or present in, or to have a *situs* for taxation in such state, territory, . . ." etc.

Our view that members of the Armed Services stationed in this State under military or naval orders do not acquire residence here is supported by a recent decision of the Supreme Court of Arkansas, in the case of *Central Manufacturers' Mut. Ins. Co. v. Friedman,* 209 S.W. 2d 102. In that case the Court said, referring to an officer in the military service: "He did not intend to change his domicile or residence and had made no change unless his military service alone brought about such a change. In the circumstances here, Benno's military service did not bring about any change in his domicile or residence." . . . "In the Conflict of Laws, vol. 1, page 155, Professor Beale discusses the 'domicile of a soldier or sailor' and the capacity of a sailor or soldier to acquire a 'residence' notwithstanding his service in the Army or Navy, and it was there said: 'It is, of course, possible for him (soldier) to provide a house of his own, off the Post, where his family may live, if this is allowed by superior officers; and it is possible for him to change his domicile by the proper proceedings while on leave. But he cannot acquire a domicile in an Army Post.' . . .

" 'He is as able as anyone to acquire a new domicile so far as conditions allow. He cannot acquire it by any act done under military orders since, as has been seen, he has no choice but obedience. His orders would, so long as he remained in the Army, be enforced by all the powers of the state, and if he were permitted to leave the Army he could no longer remain in the Army quarters. He may, however, like anyone else, change his domicile by acquiring a residence outside an army post with the intention of making it his home.'

" 'The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and intent concur.' " . . . "Here, there is no

evidence that Benno acquired a residence outside of the Army Post with the intention of making it his home."

There is no suggestion in the record that either Dr. or Mrs. Fultz were in North Carolina for any purpose other than that contemplated by his naval service, or that they ever formed any intention to make North Carolina their place of residence. Dr. Fultz came to North Carolina under naval orders. He left under orders, and his entire stay here was incident to his naval orders. The evidence in the record is sufficient to support Judge Gwyn's findings of fact, and the findings are sufficient to sustain his conclusion that the appealing defendants were properly served with process by the delivery of same to the Commissioner of Motor Vehicles in compliance with G.S. 1-105.

The judgment of the Superior Court of Davidson County is

Affirmed.

R. F. HALL, JR., AND R. F. HALL, SR., TRADING AND DOING BUSINESS AS R. F. HALL & SON, v. J. W. CHRISTIANSEN AND WIFE, DAISY M. CHRISTIANSEN.

(Filed 14 January, 1955.)

1. Bills and Notes § 26b—

The evidence was to the effect that the payee of notes given for the purchase price of farm machinery agreed that if the growing season was bad, he would give an extension of time for payment of the notes, and that he extended the time beyond the extension requested by the makers. *Held:* The evidence does not support the defense that the indebtedness was to be paid out of crops to be grown.

2. Sales § 27—

Testimony of the maker of notes given for the purchase price of farm machinery that the seller did not say when the machinery would be delivered, but that it would be delivered in time to make that year's crop, and that in case it was not delivered in time, the seller would give an extension of time for payment of the notes, with further evidence that the delivery of the machinery was completed by July 1st of that year and delivery accepted by the purchaser, and extension of time granted as requested, *is held* insufficient to support a counterclaim for late delivery in the seller's action on the notes.

3. Same—Evidence held insufficient to show damage from alleged breach of agreement not to register deed of trust.

In plaintiffs' action on notes for the purchase price of farm machinery, secured by chattel mortgage and deed of trust, defendant set up a counterclaim alleging that in violation of plaintiff's promise, he had the deed of trust registered, and that as a result thereof, a third person refused to lend plaintiffs money for improvements. The evidence disclosed that the deed of trust contained a provision that if such third person should furnish

money for the improvements, such third person should have a prior lien to the amount furnished, and there was no allegation that plaintiffs had any control over such third person or anything to do with his failure to advance the money for the improvements. *Held:* The record fails to show a basis for the counterclaim.

4. Evidence § 39—Ordinarily, parol evidence is inadmissible to vary the terms of a written contract.

Where the purchaser of machinery gives written orders therefor, and executes notes, mortgage, and deed of trust setting forth the time and method of payment, the instruments constitute a contract in writing between the parties, and in the absence of evidence that the notes, mortgage, and deed of trust were conditionally delivered, or that there was mutual mistake in drafting them, or fraud in procuring their execution, or a different mode of payment agreed upon, parol testimony is inadmissible to vary or change the contract.

APPEAL by defendants from *Martin, S. J.*, March Term, 1954, NEW HANOVER.

The plaintiffs instituted this action to recover on four promissory notes, all dated 20 May, 1950, and due as follows: Three notes for $1,000.00 each, due respectively, 15 November, 1950, 15 December, 1950, 15 January, 1951; and the other note for $3,508.00, also due on 15 January, 1951. The notes were secured by chattel mortgage on certain named articles of farm machinery and equipment. The mortgage contained the following: "It is understood and agreed between the parties hereto that if the first three notes for $1,000.00 each as herein set out are paid on or before maturity dates, the balance of $3,508.00 shall be extended and paid as follows: $500.00, 15 July, 1951; $500.00, 15 August, 1951; $800.00, 15 September, 1951; $300.00, 15 October, 1951; $813.00, 15 November, 1951; $500.00, 15 December, 1951; and $400.00, 15 January, 1952. (Evidently the above calculation includes interest.)

In addition to the chattel mortgage, the defendants executed a deed of trust conveying to a trustee certain described tracts of land in Columbus County as further security for the notes. The deed of trust contained the same provisions with respect to the payment of the $3,508.00 as set out in the chattel mortgage. The deed of trust contained the further provision that if C. P. Holcomb should furnish to grantors not in excess of $8,500.00 for the purpose of constructing a drainage canal on the lands, that Holcomb should have a prior lien for the amount furnished.

Plaintiffs allege that no payments whatever had been made on the indebtedness and that the full amount was due. They asked for judgment and for a sale of the property covered by the chattel mortgage; and that the funds from the sale be applied on the indebtedness.

Defendants filed answer, claiming the notes were given for farm machinery, some of which was not delivered on time, and other items were

defective; that the defendants did not receive all the machinery in time to make a crop in the year 1950, out of the proceeds of the sale of which it was contemplated the notes would be paid; that plaintiffs put their deed of trust on record when they agreed not to do so; and that Holcomb refused to furnish the money to construct the drainage canal on account of the registration of the deed of trust; all of which the defendants allege was in violation of the agreement between the parties, resulting in the failure of the defendants to make a crop sufficient to pay the indebtedness, to the defendants' damage in the sum of $6,000.00, for which they make counterclaim and ask judgment.

The plaintiffs introduced the following stipulation: "It is stipulated between counsel for plaintiffs and defendants, the defendants being personally in court, that on May 20, 1950, defendants executed and delivered their three promissory notes, each in the sum of $1,000.00, becoming due and payable November 15, 1950, December 15, 1950, January 15, 1951, and one other note for $3,508.00, becoming due and payable January 15, 1951; all of said notes aggregating $6,508.00 are payable to R. F. Hall & Son, the plaintiffs, and bear interest from date at six per cent per annum, which said notes were offered in evidence by plaintiffs marked Plaintiffs' Exhibits A-1, A-2, A-3, and A-4; no part of said $6,508.00 has been paid, except $4,000.00, the net proceeds from the sale of the mortgaged personal property credited April 30, 1951; the balance due as of April 30, 1951 was $2,686.97, plus interest thereon from April 1951, at six per cent, which said notes were at all times owned by plaintiffs, payees, and secured by a chattel mortgage and a deed of trust to F. M. Powell, trustee, plaintiffs' Exhibit B, reading:" . . . (Here followed the introduction of the chattel mortgage and deed of trust.) "The value of the mortgaged personal property at the time it was seized by the sheriff and at the time he sold it was $4,000.00."

J. W. Christiansen, one of the defendants, testified as a witness. He admitted that when he ordered the machinery Mr. Hall did not say when the machinery would be delivered, that he (defendant) accepted it as it arrived, that part of the machinery was delivered by 10 or 15 June, and that delivery was completed by 1 July. He testified that the agreement was that the articles purchased would be delivered in time for 1950 bean crop and in case he didn't get the equipment in time, or if he had bad weather conditions, or both, Mr. Hall told him that they would go along with him on the payments and would give him an extension of time.

At the conclusion of all the evidence, Judge Martin peremptorily instructed the jury: "If you believe the evidence and find by the greater weight thereof that the balance due on these notes is $2,686.97, with interest, if you so find by the greater weight of all the evidence, it would be your duty to answer that issue in that amount." The jury answered

the issue of indebtedness as instructed and judgment was rendered for the plaintiffs for $2,686.97, from which the defendants appealed.

Stevens, Burgwin & McGhee for plaintiffs, appellees.
Kellum & Humphrey and Wm. F. Jones for defendants, appellants.

HIGGINS, J. While the defendants allege an agreement on the part of the plaintiffs that the payment of the indebtedness should be out of crops to be grown, yet the evidence and stipulation entered into do not support the allegation. All Mr. Christiansen said is that Mr. Hall agreed in the event the machinery was not delivered in time, or if weather conditions were bad, or both, the plaintiffs would not press for collection but would give an extension of time. The time during which the plaintiffs were to forego their right to collect the notes is not mentioned. A letter in the record shows that Mr. Christiansen asked that he be given until 1 April, 1951, so that he could make a sale of his property and pay his indebtedness to the plaintiffs. There is no claim of an agreement as to how long the plaintiffs would forbear. Actually, suit was not brought until the time requested by the plaintiffs had expired and more than two months after the last note was due.

The defendants allege, further, that Holcomb refused to advance the $8,500.00 to construct the drainage canal because plaintiffs' deed of trust was placed of record. However, the deed of trust itself contains the stipulation that if Holcomb furnished the $8,500.00 for the drainage canal, he should have a prior lien. There is no allegation or evidence that plaintiffs had any control over Holcomb or had anything to do with his failure to advance the money for the canal.

The defendant J. W. Christiansen offered to testify with respect to crop and weather conditions for the year 1950, his opportunity to obtain seed for a wheat crop, the suitability of the land for cultivating wheat, and the effect of failure to procure the construction of the drainage canal, all of which evidence was excluded on the plaintiffs' objection. The defendants also excepted to the peremptory instruction that if the jury believed the evidence they would find for the plaintiffs.

Judge Martin evidently took the view that the written orders for the machinery, the notes, mortgage and deed of trust setting out the time and method of payment, constituted a contract in writing between the parties. And in the absence of evidence that the notes, mortgage and deed of trust were conditionally delivered, or that there was mutual mistake in drafting them, or fraud in procuring their execution, or a different mode of payment and discharge agreed upon, that parol testimony was inadmissible to vary or change the contract. The evidence was properly excluded on the authority of the following cases: *Ins. Co. v. Morehead,* 209 N.C. 174,

183 S.E. 606; *Thomas v. Carteret County,* 182 N.C. 374, 109 S.E. 384; *Bank v. Rosenstein,* 207 N.C. 529, 177 S.E. 643; *Bowser v. Tarry,* 156 N.C. 35, 72 S.E. 74; *White v. Fisheries Products Co.,* 183 N.C. 228, 111 S.E. 182; *Dawson v. Wright,* 208 N.C. 418, 181 S.E. 264; *Walker v. Venters,* 148 N.C. 388, 62 S.E. 510.

The defendants accepted, retained and used the machinery without paying anything on the purchase price and without offering to return any part of it to the plaintiffs. Letters in the record show the defendants requested extension of time to make the payments and did not question the amount due until after suit was instituted and after all notes had been due for more than two months. The stipulation in the record admits the execution of the notes and the amount of the balance due in exact accordance with the amount found by the jury under the peremptory instruction of the court.

The record fails to show either basis for the defendants' counterclaim, or a defense to the action on the notes.

No error.

W. C. BARKER v. IOWA MUTUAL INSURANCE COMPANY.

(Filed 14 January, 1955.)

1. Insurance § 19c—

A provision in a policy of fire insurance including in its coverage personalty of insured "while elsewhere than on the described premises . . ." does not limit the period during which the property may be "elsewhere," and it will be assumed that the only limitation as to time is the life of the policy.

2. Domicile § 1—

A minor dependent son who moves from his father's house to an apartment, maintained by his father, for the purpose of attending classes at an educational institution does not become a resident of the college community, but retains his residence with his father.

3. Insurance § 19c—

The policy of fire insurance in suit provided coverage of the described personalty belonging to the insured or any of his family residing with insured. *Held:* Insurer is liable for the destruction of the described property while used by insured's minor son in an apartment maintained by the father for the son while attending classes at an educational institution, since under the facts the son continued to reside with insured within the meaning of the policy.

4. Insurance § 13a—

Since insurance policies are prepared by insurer, they must be construed liberally in favor of insured and strictly against insurer.

APPEAL by defendant from *Phillips, J.*, August Term, 1954, ALLEGHANY.

The defendant issued to the plaintiff a fire insurance policy in the sum of $6,500.00, covering the contents of a certain described dwelling occupied by the plaintiff and the members of his family in the Town of Sparta. At the time the policy went into effect the insured's family consisted of himself, his wife, a son, Bill Barker, age 19, and the son's wife, age 18, all living together in the described dwelling. The policy provided: "The insured may apply up to ten per cent (10%) of the amount specified . . . to cover property described . . . belonging to the insured or any member of the family of and residing with, the insured, while elsewhere than on the described premises . . ." At the trial the following stipulation was entered into:

"1. That the defendant issued to the plaintiff a policy of fire insurance as set out in the complaint.

"2. That there was a loss by fire amounting to $1,937.75, which occurred in an apartment in Raleigh, North Carolina, occupied by the minor son of the plaintiff and the wife of said minor son, and that the property destroyed and damaged was the property of the insured, W. C. Barker, and the clothing of his son and daughter-in-law.

"3. That the apartment was rented by W. C. Barker and the rent was being paid by him.

"4. That the apartment was furnished by W. C. Barker with furnishings taken from his home in Sparta."

In addition to the stipulation, the insured testified that his son is an only child; that he is 19 years of age and that his son's wife is 18. The apartment was temporarily set up in Raleigh in order that the son might attend classes at State College.

A jury trial was waived, the case tried before Judge Phillips. At the close of plaintiff's evidence, defendant moved for judgment of nonsuit, which was denied. The defendant excepted. The court rendered judgment for $650.00 in favor of the plaintiff, to which the defendant excepted, and from which he appealed.

R. F. Crouse for plaintiff, appellee.
Worth B. Folger for defendant, appellant.

HIGGINS, J. The facts in this case are not in dispute. The policy covered the contents of the dwelling occupied by the insured and the members of his family, including his wife, his dependent son, Bill Barker, 19, and the son's wife, 18, who constituted the members of the household. At the time the policy was issued all the property later lost by fire was in use by the members of the family in the dwelling in Sparta.

Subsequently, the insured rented an apartment in Raleigh for the use of his son and the son's wife while the son attended classes at State College. The furnishings lost when the Raleigh apartment burned were moved from the Sparta home by the insured, who paid the rent on the apartment. The maximum recovery permitted by the ten per cent clause in the policy was $650.00. It is admitted that the loss sustained by reason of the fire was $1,937.75. The recovery is made to depend upon the interpretation of the following provision in the policy:

"The insured may apply up to ten per cent (10%) of the amount specified for the household and personal property item to cover property described therein and insured thereby (except rowboats, canoes, animals and pets) belonging to the insured or any member of the family of and residing with, the insured, while elsewhere than on the described premises but within the limits of that part of Continental North America included within the United States of America, Alaska, the Dominion of Canada and Newfoundland; however, it is warranted by the insured that such extension of this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee."

Since no duration of time is fixed in which the property may be *elsewhere,* we may assume the only limitation is the life of the policy. Somewhat more troublesome is the requirement "belonging to the insured or any member of the family of and residing with, the insured, while elsewhere than on the described premises." The expression in the policy, "residing with," is equivalent to and means having his residence with. It, therefore, becomes pertinent to inquire where the minor son had his residence at the time of the loss. Residence has been variously defined by this Court. The definitions vary according to the purposes of the several statutes referring to residence and the objects to be accomplished by them. Definitions include "a place of abode for more than a temporary period of time;" in other cases the word residence is construed to mean "domicile," signifying a permanent and established home. The definitions of residence range all the way between these extremes. *Chitty v. Chitty,* 118 N.C. 647, 24 S.E. 517; *Carden v. Carden,* 107 N.C. 214, 12 S.E. 197; *Sheffield v. Walker,* 231 N.C. 556, 58 S.E. 2d 356; *Bryant v. Bryant,* 228 N.C. 287, 45 S.E. 2d 572; *Reynolds v. Cotton Mills,* 177 N.C. 412, 99 S.E. 240; *Watson v. R. R.,* 152 N.C. 215, 67 S.E. 502.

Does a minor and dependent son who moves to an apartment maintained by his father for the purpose of attending college classes become a resident of the college community, or does he retain his residence with his father? G.S. 116-143 provides that State institutions of higher learning, including State College, are empowered to fix tuition fees. G.S. 116-144 provides higher fees from nonresidents may be charged. "The provisions of this article shall not be construed to prohibit the several boards of

trustees from charging nonresident students tuition in excess of that charged resident students." Certainly, in so far as the right to charge tuition fees is concerned, students who attend from out of state remain nonresidents of the State. Students who are residents of the State do not become residents of the college community merely by occupying a room or apartment and attending classes. Such would seem to be the reasonable interpretation of the term "residence." To say the son ceased to be a resident of Sparta and became a resident of Raleigh under the facts of this case would be giving to the term "residing with the insured" its most narrow and restricted meaning. It must be remembered that the policy of insurance was written by the company's lawyers and that the courts must, therefore, in case of doubt or ambiguity as to its meaning, construe the policy strictly against the insurer and liberally in favor of the insured. The following is a pertinent quotation from the opinion of *Chief Justice Stacy* in the case of *Roberts v. Ins. Co.*, 212 N.C. 1, 192 S.E. 873: "Policies of insurance differ somewhat from other contracts, however, in respect to the rules of construction to be applied to them. They are unipartite. They are in the form of receipts from insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general, the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance, when it is too late for him to obtain explanations or modifications of the policy sent him. The policy, too, is generally filled with conditions inserted by persons skilled in the learning of the insurance law and acting in the exclusive interest of the insurance company. Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company." *Ins. Co. v. Wilkinson*, 13 Wall. (80 U.S.), 232.

The very fact the loss is limited to ten per cent of the full coverage indicates the insurer is willing to take some extra risk in order to make the policy more attractive to those who spend a part of their time away from the family residence. A case in point is *Central Manufacturers' Mutual Ins. Co. v. Friedman*, decided in 1948 by the Supreme Court of Arkansas, and reported in 209 S.W. 2d 102. In that case the policy insured against loss by theft of not to exceed ten per cent of the full coverage of "personal property owned, used or worn by the persons in whose name the policy is issued and members of the insured's family of the same household." The insured's son was a minor who attended Ohio State College for three months, then was inducted into the United States Army, attended officers' training school, was commissioned and assigned to duty at Fort Eustis, Virginia. While serving there, his locker was broken into and personal property stolen. The Court held that the son

at the time of the loss at Fort Eustis was a member of the insured's family of the same household and his loss was covered by the policy.

We conclude that the facts in this case are sufficient to support the findings and judgment.

Affirmed.

STATE v. JAMES F. CHESTNUTT, BILL COLLINS, ROY WALL, JR.

(Filed 14 January, 1955.)

1. Indictment and Warrant § 9—

Where a statute sets forth disjunctively several means or ways by which the offense may be committed, a warrant thereunder correctly charges them conjunctively.

2. Indictment and Warrant § 13: Criminal Law § 56—

Motion to quash the warrant and motion in arrest of judgment are properly overruled when no defect appears on the face of the record.

3. Constitutional Law § 14—

Statutes and municipal ordinances regulating the observance of Sunday derive their validity from the police power of the State.

4. Statutes § 2—

The effect of Art. II, sec. 29, of the State Constitution is to proscribe only such local, private, or special acts as relate to the subjects designated in the amendment.

5. Same: Constitutional Law § 14—

Chapter 177, Session Laws of 1949, bans all motor vehicle races on Sunday in Wake County without regard to the commercial or non-commercial character of the activity, and therefore, it is not an act regulating labor or trade within the meaning of Art. II, sec. 29. Persons whose activities are commercial in character are in no better position than those who engage in the proscribed activity without reference to profit.

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

DEFENDANTS' appeal from *Frizzelle, J.*, 6 September, 1954, Criminal Term, of WAKE.

Each defendant was tried in the Recorder's Court of Wendell upon a separate warrant charging that "on or about the 9th day of May, 1954, (he) did unlawfully, willfully engage in, promote and participate in a motor vehicle race on Sunday, May 9, 1954, in St. Matthews Township, Wake County, North Carolina, in contravention of the 1949 Session Laws, Chapter 177, . . ."; and was found guilty as charged; and, from the judgment pronounced, appealed.

Upon trial *de novo* in the Superior Court of Wake County, on the original warrants, the jury returned verdicts of guilty as charged. Thereupon, judgment as to each defendant, that he pay a fine of $50.00 and costs, was pronounced.

Each defendant excepted to the judgment pronounced against him and appealed, assigning as errors (1) the overruling of his motion to quash the warrant, (2) the denial of his motion for judgment as in case of nonsuit, and (3) the overruling of his motion in arrest of judgment.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., and Gerald F. White, Members of Staff, for the State.

Huger S. King for defendants, appellants.

BOBBITT, J. Each warrant adopts the phraseology of Ch. 177, Session Laws of 1949, which, in defining the conduct declared to constitute a misdemeanor, provides: "SECTION 1. It shall be unlawful for any person, firm, or corporation to engage in, promote, or in anywise participate in any motorcycle or other motor vehicle race or races on Sunday in Wake County, North Carolina."

It is noteworthy that the warrant uses the conjunctive "and" where the statute uses the disjunctive "or." The draftsman of the warrant was well advised. *S. v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381.

The statute does not disclose a purpose to regulate labor or trade. The purpose of the promotion may be recreation, sport or charity; or it may be a business venture, for profit. The participants may be volunteers or compensated, amateurs or professionals. The race may be widely advertised, drawing large crowds; or it may arise upon a sudden challenge and be known and of interest only to the participants. The statute is thus characterized by its caption: "An Act Prohibiting Motorcycle and Motor Vehicle Races on Sunday in Wake County." Since the statute prohibits promotion of and participation in all motor vehicle races on Sunday in Wake County, the undisputed evidence is that the defendants violated the statute as charged in the warrants. Neither the statute nor the warrants refer to "labor," "trade," "business venture," "compensation," or other words suggesting that the commercialization of motor vehicle races as distinguished from the motor vehicle races themselves was what the General Assembly purposed to ban.

The acts charged in the warrants are violations of the statute. The motions to quash the warrants and in arrest of judgment were properly overruled, there being no defect appearing on the face of the pleading, verdict or other part of the record. *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. Indeed, one discovers the factual basis for the defendants' posi-

tion only by consideration of the evidence; and the assignment of error available to defendants is that addressed to the overruling of defendants' motions for judgment as in case of nonsuit.

It appears from the *evidence* that defendant Chestnutt, through a business corporation, promoted automobile racing in Wake County, arranging for such races, employing participants, selling admission tickets, etc., as a business venture, for profit; and it appears from the *evidence* that defendants Collins and Wall participated in an automobile race held Sunday, May 9, 1954, in Wake County, under the promotion and supervision of defendant Chestnutt, under an arrangement whereby each was paid for his services in so participating.

The sole ground of defendants' appeal is that the statute is violative of Art. II, sec. 29, of the Constitution of North Carolina, which, in pertinent part, provides: "The General Assembly shall not pass any local, private, or special act or resolution . . . regulating labor, trade, mining or manufacturing; . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have the power to pass general laws regulating the matters set out in this section."

The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people; and Sunday observance statutes and municipal ordinances derive their validity from this sphere of legislative power. *S. v. McGee,* 237 N.C. 633, 75 S.E. 2d 783, and cases cited. And, prior to the effective date of Art. II, sec. 29, N. C. Constitution, statutes imposing prohibitions, restrictions and burdens in certain localities, *not in conflict* with any general criminal statute dealing with the same subject matter, were upheld. See *Taylor v. Racing Asso., ante,* 80, 84 S.E. 2d 390. The modification wrought by Art. II, sec. 29, is that now a local, private or special act, dealing with designated subjects, is void as violative of this section of our organic law.

Thus the appeal focuses attention upon this question: Conceding, *arguendo,* that the statute, directly affecting conduct in a single county, is a local act, *S. v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521, is it an act *regulating labor* or *trade* within the meaning of Art. II, sec. 29? Were the statute directed solely against labor, *e.g.,* compensated employment, or trade, *e.g.,* business ventures, for profit, in relation to the conduct of motor vehicle races on Sunday in Wake County, the question posed would be serious indeed. But where the statute in sweeping terms bans an activity, to wit, all motor vehicle races on Sunday in Wake County, making it a misdemeanor to promote or engage in the proscribed activity, without regard to the commercial or non-commercial character of the activity, the fact that these defendants promote and engage in such activ-

ity for profit and for compensation puts them in no better position than those who promote and engage in such activity without reference to profit or compensation.

Conceding the power of the General Assembly to ban motor vehicle races on Sunday in Wake County, the fact that the defendants cannot engage for profit or compensation (or otherwise) in such prohibited activity does not convert the statute into one regulating labor or trade within the meaning of Art. II, sec. 29. If the statute violates Art. II, sec. 29, it is void; otherwise, it is valid. It cannot be valid and enforceable as to non-commercialized motor vehicle races on Sunday in Wake County and invalid and unenforceable as to such races when conducted on a commercialized basis. We regard the statute as placing a ban upon a specified activity, to wit, motor vehicle races on Sunday in Wake County, rather than as a regulation of labor or trade in which the defendants and others are privileged to engage.

In upholding the constitutionality of Ch. 177, Session Laws of 1949, against the challenge of invalidity based on its alleged violation of Art. II, sec. 29, we are mindful of the rules of construction epitomized by *Stacy, C. J.*, in *S. v. Lueders,* 214 N.C. 558 (561), 200 S.E. 22, in these words: "In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity."

Without intimation or suggestion that Ch. 177, Session Laws of 1949, is subject to successful attack on other grounds, we note that we have considered it only in relation to the challenge urged by the defendants throughout the proceedings and made the basis of their brief, namely, its alleged violation of Art. II, sec. 29. The challenge on this ground being unsuccessful, the result is that the judgments must be affirmed; and it is so ordered.

Affirmed.

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

LAURA H. McDOUGALD CROWLEY AND HER HUSBAND, W. A. CROWLEY, v. D. A. McDOUGALD AND HIS WIFE, MARY V. McDOUGALD.

(Filed 14 January, 1955.)

1. Appeal and Error § 6c (2)—

A sole exception to the signing of the judgment is sufficient to present for review the question whether error of law appears on the face of the record.

2. Reference § 10—

Where the record discloses that judgment confirming the report of a referee was entered at a term of court convening before the expiration of the 30-day period for filing exceptions, G.S. 1-195, and the record discloses no waiver of the right to file exceptions at any time during the 30-day period, the premature entry of judgment of confirmation is error appearing on the face of the record.

3. Reference § 9—

Motion by plaintiff for voluntary nonsuit before the referee appointed to hear the cause does not preclude her from filing exceptions to the referee's report.

4. Same: Trial § 5½—

Where it does not appear of record that the stipulations were reduced to writing and signed by plaintiff or her counsel, but the stipulations appear only in the findings of fact as formulated and reported by the referee, it would seem that the stipulations are subject to challenge by exception along with the referee's general findings and conclusions.

APPEAL by plaintiffs from *C. L. Moore, J.*, at April Term, 1954, of HOKE.

Civil action to reform partition deed on the ground of mutual mistake.

Laura H. McDougald Crowley, hereinafter referred to as the plaintiff, and D. A. McDougald, hereinafter called the defendant, are the children and only heirs at law of Alexander McDougald, who died intestate prior to 1935, leaving a landed estate in Hoke County which descended to the plaintiff and the defendant as tenants in common. In 1935, by exchange of deeds they divided part of these lands. The plaintiff alleges it was the intention of the parties to divide all the lands and that the deed made to the defendant correctly describes the one-half share in value intended to be allotted to him, but that the deed to the plaintiff fails to describe properly the land intended to be described in her deed and as a result the lines and boundaries when plotted out overlap on adjoining lands and do not close. The plaintiff further alleges that by mutual mistake of the parties a tract of about 82 acres was omitted entirely from the deed made to her. The defendant by answer admits the alleged errors of description. However, he denies that the 82-acre tract was intended to be included in the plaintiff's deed. On the contrary, the defendant alleges that this tract was not contemplated by the parties in making the division and therefore was left undivided.

When the cause first came on for hearing, the court concluded it involved a complicated question of boundary and ordered a compulsory reference (G.S. 1-189 (3)). J. M. Andrews, Esq., was appointed referee. His report discloses that a hearing was held 26 February, 1954, and that after certain evidence was offered and stipulations made, all to the effect

that the 82-acre tract was not included in the lands sought to be divided in 1935, "the plaintiff moved for a voluntary nonsuit in the case." The report further discloses that the plaintiff's motion was granted by the referee, but that it later occurred to him he was without legal authority to nonsuit the action and therefore upon further reflection he "passed the motion onto the court for final determination," together with his full report on the case.

The referee's report shows that he found and concluded that the 82-acre tract was undivided land belonging to the plaintiff and defendant.

The report was filed 5 April, 1954. The cause was calendared for hearing at the April Term of court, which convened 19 April, 1954. No exceptions were filed to the report of the referee. When the cause came on to be heard as calendared, the Clerk presented to the court a letter received from plaintiff's counsel asking him to request the Judge to sign judgment of voluntary nonsuit in accordance with form judgment transmitted with the letter. The presiding Judge declined to sign the judgment and, upon consideration of the record, entered judgment confirming the referee's report and decreeing that the 82-acre tract of land was never partitioned by the plaintiff and the defendant and is now owned by them as tenants in common. The judgment also directs that any costs accrued in excess of the sums previously deposited by the parties be taxed against the plaintiffs.

From the judgment entered the plaintiffs appeal.

Robert H. Dye and Joe M. Cox for plaintiffs, appellants.

G. B. Rowland and Varser, McIntyre & Henry for defendants, appellees.

JOHNSON, J. The plaintiff's only exception is to the signing of the judgment. This is sufficient to present for review the question whether error of law appears upon the face of the record. *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53.

The referee's report was filed 5 April, 1954. The judgment below confirming the report was entered at the one-week term of court which convened 19 April, 1954, before expiration of the plaintiff's 30-day period for filing exceptions as allowed by statute, G.S. 1-195. She insists that the record discloses no waiver of her right to file exceptions to the report any time during the 30-day period and that the premature entry of judgment of confirmation is error appearing upon the face of the record. This view is supported by the record. The plaintiff's action in moving for voluntary nonsuit does not preclude her from filing exceptions to the referee's report. True, any exceptions directed to the merits of the case would seem to be at variance with stipulations reported by the referee to

have been entered into by the plaintiff at the hearing. However, the record on appeal does not contain any part of the transcript of the proceedings before the referee, and it has not been made to appear that the stipulations were reduced to writing and signed by the plaintiff or her counsel. Rather, upon the record as presented, the stipulations appear only in the findings of fact as formulated and reported by the referee. Therefore, on this record, it would seem that the stipulations as reported are subject to challenge by exception along with the referee's general findings and conclusions.

For the error indicated the judgment appealed from will be vacated and the cause will be remanded to the court below for further proceedings in accord with this opinion.

Error and remanded.

MRS. ELLA OWEN v. HENRY S. GATES.

(Filed 14 January, 1955.)

Wills § 33g—

The will provided "I give my home and the balance of my land to my darter Ella for her to hold and have her lifetime." *Held:* In the absence of other provision evidencing an intent to the contrary, the plain and unambiguous language limits the estate devised to a life estate, and the devisee cannot convey the fee.

APPEAL by plaintiff from *Moore, J.*, October Term 1954, PERSON. Affirmed.

Controversy without action under G.S. 1-220.

Plaintiff contracted to sell to defendant the land she took under her father's will and to convey to him a fee simple title thereto by deed containing full covenants of warranty. Defendant declined to accept deed for the reason plaintiff did not own and could not convey a fee simple title to said land. Thereupon, this proceeding was instituted to have the court adjudicate the respective rights of the parties.

The testator, plaintiff's father, died seized of the land in controversy. His will contains the following provision:

"1. I leave my property to Be equally divided amonst my three children . . . i lean all of my land to my widow for her to have the Benefit of it so long as she is my widow and when she ceases to Be my widow I want it equel divied amonst my three children."

In paragraphs 2 and 3 he devised specified tracts of land to his son and to his oldest daughter and her husband. Paragraph 4 is as follows:

"4. I give my home and the balance of my land to my darter Ella for her to hold and have her lifetime."

The court below concluded that plaintiff took a life estate only in the land devised to her and signed judgment denying plaintiff's prayer for specific performance. Plaintiff excepted and appealed.

Davis & Davis for plaintiff appellant.

Burns & Long and Charles B. Wood for defendant appellee.

PER CURIAM. The language used by the testator in paragraph 4 of his will is clear and unambiguous. There is no room for construction. What prompted the testator to limit the estate devised to plaintiff to an estate for life we do not know. Even so, this he did in language which cannot be misunderstood, and there is no other provision in the will evidencing an intent to the contrary. We must, therefore, accept the will as the testator made it.

The judgment entered in the court below is

Affirmed.

NANNIE T. HARRISON v. ANNIE B. KAPP AND THOMAS E. KAPP.

(Filed 14 January, 1955.)

Automobiles §§ 8i, 18h (2)—

This action was instituted to recover damages resulting from a collision at an intersection of streets in a municipality. Plaintiff's evidence that she entered the intersection first and that defendants entered the intersection from her left, is sufficient to take the case to the jury over defendants' motion to nonsuit. G.S. 20-155.

APPEAL by the plaintiff from *Fountain, Special Judge,* 19 July, 1954 Term, FORSYTH.

The plaintiff brought this action, alleging she suffered personal injuries and property damage on account of the actionable negligence of the defendants in a collision between her Ford and the Plymouth driven by the defendant Annie B. Kapp. The accident occurred at 11:30 a.m. on a clear day at the intersection of First Street and Cloverdale Avenue in the City of Winston-Salem.

The defendants denied negligence on the part of Annie B. Kapp and set up a counterclaim alleging actionable negligence on the part of the plaintiff and asked for recovery for personal injury and property damage suffered by the defendants.

The plaintiff's evidence disclosed that West First Street runs near east and west and that Cloverdale Avenue runs near north and south. There

was an electrically operated traffic control signal light over the center of the intersection. However, at the time of the accident this light was temporarily out of working order. The plaintiff was going west on First Street, the defendants north on Cloverdale. The defendants, therefore, were to plaintiff's left, and the plaintiff was on the defendants' right. Mrs. Motsinger, a plaintiff's witness, testified she saw the accident; that plaintiff entered the intersection first, at about 15 miles per hour; that the defendants did not stop as they approached the intersection, but entered at about 20 or 25 miles per hour. The cars came to rest on the northwest corner of the intersection.

At the conclusion of the plaintiff's evidence, motion for judgment of nonsuit was made and sustained, and from the judgment dismissing the action the plaintiff excepted and appealed.

Ingle, Rucker & Ingle for plaintiff, appellant.

Deal, Hutchins & Minor, by Fred S. Hutchins, for defendants, appellees.

PER CURIAM. The plaintiff's showing that she entered the intersection first, that she was on the right and the defendants on her left, is sufficient to survive the motion for nonsuit and take the case to the jury. G.S. 20-155. As is customary in reversing a nonsuit, we refrain from discussing the evidence, except to the extent necessary to show the reason for the conclusion reached.

Reversed.

STATE v. DELOS AVERN HILL, JR.

(Filed 14 January, 1955.)

Bigamy and Bigamous Cohabitation § 3: Criminal Law § 39c—

In a prosecution for bigamous cohabitation, the wife is competent to testify against her husband to prove the fact of marriage, but she is not competent to give testimony as to the absence of a divorce, and the admission of her testimony in regard thereto is prejudicial. G.S. 8-57.

APPEAL by defendant from *Fountain, Special J.*, March-April 1954 Criminal Term of DURHAM.

Criminal prosecution on bill of indictment charging bigamous cohabitation, under G.S. 14-183. Defendant pleaded Not Guilty.

The State offered as its witness the alleged first wife of defendant. She was permitted to testify, over objections by defendant, not only that she and defendant were married in Danville, Virginia, on 4 August, 1947,

but to the place and duration of their cohabitation pursuant thereto, and also that since their marriage there had been no divorce proceedings commenced by her, and that she had never heard of any divorce action her husband had started and had not been served with papers in any such divorce action.

The jury returned a verdict of Guilty as charged. Thereupon, the court pronounced judgment, from which defendant appeals, assigning as error the admission of the testimony stated above.

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

Spears & Spears for defendant, appellant.

PER CURIAM. G.S. 8-57, since the 1951 amendment, provides expressly that a wife is a competent witness against her husband in a criminal prosecution for bigamous cohabitation under G.S. 14-183 "to prove the fact of marriage." Here the wife's testimony goes beyond the prescribed limit. This is conceded by the Attorney-General.

In *S. v. Setzer,* 226 N.C. 216, 37 S.E. 2d 513, this Court, conceding, without deciding, that G.S. 8-57, before the 1951 amendment, made the wife a competent witness "to prove the fact of marriage" in a prosecution for bigamous cohabitation as well as in a prosecution for bigamy, construed the statute as meaning (1) that she was a competent witness only to facts tending to show that she and defendant had been legally married, and (2) that her testimony beyond this limit, *e.g.,* as to absence of divorce proceedings wherein she was plaintiff or defendant, was incompetent. It is noteworthy that the 1951 amendment (Ch. 296, Session Laws of 1951) of G.S. 8-57 did not in any way enlarge the meaning of the phrase, "to prove the fact of marriage," as construed in the *Setzer case.*

Should G.S. 8-57 be amended so as to facilitate prosecutions for bigamy and bigamous cohabitation by making the wife a competent witness against her husband to prove (1) that she and defendant had been legally married, and (2) that they are now legally married, *i.e.,* facts within her knowledge tending to show the absence of divorce proceedings wherein she was plaintiff or defendant? This is a question for consideration by the General Assembly.

Under G.S. 8-57, as construed in the *Setzer case,* incompetent evidence, prejudicial to defendant, was admitted, necessitating a

New trial.

S. M. UPCHURCH AND PAUL H. ROBERTSON v. C. P. BUCKNER AND WIFE, PAULINE BUCKNER.

(Filed 14 January, 1955.)

Trial § 49—

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the sound discretion of the trial court, and when no abuse of discretion is shown, the court's refusal to grant the motion is not reviewable.

APPEAL by plaintiffs from *McKeithen, Special Judge,* May Term 1954 of ORANGE.

Civil action to recover a balance of $1,817.67 under an alleged contract for completion of a dwelling house for the defendants.

The defendants filed answer denying that they owed plaintiffs anything, and set up a cross-action asking for the recovery of $1,500.00 allegedly due them from a loan made on the property, and also for the recovery of $1,500.00 damages for alleged defective workmanship and inferior materials used in the construction of the dwelling house by the plaintiffs.

The plaintiffs and the defendants offered evidence in support of the allegations in their pleadings.

The court submitted two issues to the jury: *One.* In what amount, if any, are the defendants indebted to the plaintiffs? And *Two.* In what amount, if any, are the plaintiffs indebted to the defendants? The jury answered the first issue nothing and the second issue $1,500.00. Judgment was entered in accordance with the verdict.

Plaintiffs appeal therefrom assigning error.

L. J. Phipps for Plaintiffs, Appellants.

Bonner D. Sawyer for Defendants, Appellees.

PER CURIAM. Plaintiffs have two assignments of error: *One,* to the court's refusal to set the verdict aside as being against the greater weight of the evidence, and *Two,* to the signing of the judgment.

The evidence was conflicting. The motion by the plaintiffs to set aside the verdict as being against the greater weight of the evidence was one addressed to the sound discretion of the court, and no abuse of discretion being shown its refusal to grant the motion is not reviewable. *Billings v. Observer,* 150 N.C. 540, 64 S.E. 435; *Hoke v. Whisnant,* 174 N.C. 658, 94 S.E. 446; *Anderson v. Holland,* 209 N.C. 746, 184 S.E. 511; *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909; *Poniros v. Teer Co.,* 236 N.C. 145, 72 S.E. 2d 9.

Appeal dismissed.

CLARENCE O. GARMON v. WADE THOMAS.

(Filed 4 February, 1955.)

1. Negligence § 11—

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, but is sufficient for this purpose if it is a proximate cause or one of them.

2. Negligence § 19c—

Since the burden of showing contributory negligence is on defendant, nonsuit for contributory negligence should not be allowed if the controlling facts are in dispute or if opposing inferences are permissible from plaintiff's proof.

3. Same—

Nonsuit on the ground of contributory negligence is proper when plaintiff's own evidence establishes this defense.

4. Automobiles § 16—

A pedestrian crossing the highway at a place which is not within a marked cross-walk or within an unmarked cross-walk at an intersection, is under duty to yield the right of way to vehicles along the highway, G.S. 20-174 (a), subject to the duty of a motorist to exercise due care to avoid colliding with any pedestrian and to give warning by sounding horn whenever necessary. G.S. 20-174 (e).

5. Same: Automobiles § 18h (3)—Evidence held to show contributory negligence on part of pedestrian struck while crossing open highway.

The accident in suit occurred on the southern portion of a dual highway which was used for two-way traffic while the highway was under construction. Plaintiff's evidence tended to show that he was refilling flambeaux and setting them along the northern edge of the portion of the highway in use, that he waited at the south edge of the pavement until a car traveling east had passed, that after looking both ways and seeing no vehicle approaching, he started across the highway, did not see defendant's truck, which was traveling west, until it was within 5 feet of him, although he could see in the direction from which it approached for a distance of 700 feet or more, and was hit by the truck when he was about a foot and one-half from the northern edge of the pavement. There was no evidence that defendant's truck was traveling at excessive speed. Defendant's evidence was to the effect that he was familiar with the highway, that he was traveling about 20 miles per hour at the time of the impact, and did not see plaintiff until he was within some 8 feet from him because he was blinded by the sun. *Held:* Conceding that defendant should have seen plaintiff and given him warning of his approach, plaintiff was guilty of contributory negligence as a matter of law on his own evidence in failing to yield the right of way to defendant's vehicle, which he should have seen in time to have avoided the injury if he had exercised reasonable care for his own safety and kept a timely lookout.

BOBBITT, J., dissenting.

APPEAL by defendant from *Clarkson, J.*, August Term, 1954, of UNION.

This is a civil action instituted by the plaintiff to recover for personal injuries sustained as a result of the alleged negligence of the defendant.

On 26 June, 1953, the northern lane of U. S. Highway No. 74, some distance east of the City of Monroe, in Union County, was under construction. The southern lane, which was to become the east-bound lane of a dual highway, was being used by east and west-bound traffic. The hard surfaced portion of this lane was approximately 22 feet wide with a shoulder on the south side of 8 or 9 feet. The northern shoulder of this traffic lane had not been completed or filled in after the hard surfaced portion thereof had been completed.

The plaintiff, at the time of the accident complained of, was an employee of the contractor who was constructing the dual highway. He was required, among other things to keep flambeaux burning which had been placed on the low shoulder along the northern edge of the south or open lane of traffic. On the particular afternoon in question, the plaintiff was engaged in refilling the flambeaux with oil from a container he carried in the trunk of his car, replacing and relighting them. He drove his car along the highway and parked it at intervals of approximately 60 feet on the southern shoulder of the road. He had crossed the road a number of times, having picked up and refilled 20 flambeaux before the accident occurred.

According to the plaintiff's testimony, immediately prior to the accident he started across the highway with two flambeaux, one lighted, the other not. That he was standing about 2 feet from the south edge of the pavement. He looked in the direction of Wadesboro to the east and saw no cars in sight. He then looked toward Monroe and saw a car coming from that direction. He waited until the car from Monroe passed; when this car had passed, he looked all the way down the road toward Wadesboro again and back toward Monroe and there was no truck in view. "Then I started across and then I glanced a couple of times to the right and that in so glancing I covered say, only 20, 30, or 40 feet both times. There wasn't anything coming when I looked." That he could see 700 feet down the highway in the direction from which the defendant's truck came, but that the truck was within 5 feet of him when he first saw it; that he jumped as high as he could and was hit when he was about a foot and a half from the northern edge of the pavement.

A highway patrolman who was a witness for the plaintiff testified that the plaintiff and the defendant pointed out to him the point of impact which was approximately two and one-half feet from the northern edge of the highway; that there were skid marks heading back from the defendant's truck for 39 feet and that the truck stopped about 12 feet from where the skid marks ended. There was one continuous run of skid marks, an over-all of 75 feet. Such skid marks were medium, not too

light or too heavy. That Mr. Thomas, the defendant, stated he was headed west on the highway and was traveling approximately 25 miles an hour; that he didn't see Mr. Garmon until he was too close to him to stop. He asked Mr. Garmon what happened and he said that he didn't see the truck until it was too late and when he did he jumped in the air and the right front of the truck hit him. That he examined the truck and the right front fender and headlight had been damaged. He estimated the damage at $20.00.

The defendant testified that he was familiar with the highway; that he knew about the signs stating the road was under construction; that he traveled the road three or four times a day; that the sun was shining practically in his face coming up the road when the accident happened. That Mr. Garmon was about 8 feet from the front of his truck when he first saw him; that "the reason I didn't see Mr. Garmon until the truck was some 8 feet from him was because I was blinded by the sun." That he could see right in front of the truck for 40 or 50 feet "looking kind of at the ground"; that he was traveling about 20 miles an hour at the time the truck came into collision with Mr. Garmon. That he skidded about the length of the truck and about twice the length of the truck from where Mr. Garmon was lying when it stopped. That the road had been recently tarred with fresh tar and it was slick. That he was engaged in hauling lumber and was on his way at the time of the accident to a sawmill near Waxhaw to get a load of lumber; that he was driving his own two-ton Ford, stake-body truck. There was no construction work going on along the southern lane of the highway which was open and constituted a part of one continuous highway from Monroe to Wadesboro.

All the evidence tends to show that the accident did not occur in a residential or business district; that it occurred about three o'clock in the afternoon on a bright sunny day; that the highway was almost level and visible for a distance of from 700 to 1,000 feet in the direction from which the defendant's truck was driven.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict, the defendant appeals, assigning error.

Welling & Welling and Elbert E. Foster for plaintiff.
Kennedy, Kennedy & Hickman for defendant.

DENNY, J. The defendant challenges the correctness of the refusal of the court below to sustain his motion for judgment as of nonsuit on the ground that the plaintiff was contributorily negligent as a matter of law.

In relying on this assignment of error, the defendant necessarily concedes his own negligence. Therefore, the question presented is whether

the evidence adduced in the trial below, when considered in the light most favorable to the plaintiff, clearly establishes his negligence as a contributing or proximate cause of his injury. If the plaintiff's negligence did contribute to his injury it need not have been the sole proximate cause thereof in order to bar recovery, but it is sufficient if it was a proximate cause or one of them. *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730; *Stevens v. R. R.,* 237 N.C. 412, 75 S.E. 2d 232; *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227.

The burden of showing contributory negligence is on the defendant and a motion for judgment as of nonsuit will not be allowed if the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof. *Battle v. Cleave,* 179 N.C. 112, 101 S.E. 555; *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146; *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696. But the plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from his own evidence that he was contributorily negligent. *Godwin v. R. R., supra.*

There is some evidence with respect to skid marks that would tend to show that the defendant became aware of plaintiff's presence on the road while he was a greater distance from him than that shown by his oral testimony. However, the doctrine of last clear chance is not pleaded. Neither is there any evidence which would have put the defendant on notice, if it had been that the plaintiff was incapacitated or incapable of exercising ordinary care for his own safety. *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109. The plaintiff's testimony shows that he was advertent to the fact that the road was in use as a highway.

G.S. 20-174, subsection (a), provides that: "Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right of way to all vehicles upon the roadway." While in subsection (e) of this statute it is provided as follows: "Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

The defendant, pursuant to the provisions of the above statute, had the right of way on the occasion under consideration subject to the provisions of subsection (e) thereof.

The facts disclosed by this record are unusual in certain respects. The defendant traveled from 700 to 1,000 feet along a main traveled highway

at approximately 25 miles per hour, partly blinded by the sun, and never saw the plaintiff until he was too close to him to stop before hitting him. On the other hand, the plaintiff, according to his testimony, never saw the approaching truck until it was within 5 feet of him although he testified that he looked all the way down the road toward Wadesboro just before he started across the highway and that the defendant's truck was not in sight. He further testified that he glanced to his right when he was halfway across the highway and saw nothing. But all the evidence supports the view that the plaintiff could have seen the defendant's truck at any time while it was traveling toward him for the distance of 700 to 1,000 feet if he had looked. Furthermore, there is no evidence that the defendant was driving his truck at an excessive or illegal rate of speed. Conceding, however, that the defendant should have seen the plaintiff and given him warning of his approach, the plaintiff was at all times under the duty to see the defendant and to yield the right of way to him. In our opinion, both parties were negligent. The defendant was negligent in failing to exercise due care to avoid colliding with the plaintiff on the highway, *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, and the plaintiff was negligent in failing to exercise reasonable care for his own safety in that he failed to keep a timely lookout to see what he should have seen and could have seen if he had looked. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Jenkins v. Johnson,* 186 Va. 191, 42 S.E. 2d 319. The facts compel the view that the defendant's truck was near the plaintiff and plainly visible to him if he had looked at the time he walked into its path. "There are none so blind as those who have eyes and will not see." *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342.

The facts in the case of *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462, which is relied upon by the plaintiff, are distinguishable from those here, as well as the facts in *Tysinger v. Dairy Products, supra,* and similar cases. In the *Williams case,* the deceased lived on the north side of the highway. She left her home to go to her mailbox on the southern edge of the highway. As she crossed the highway, two heavily loaded oil trucks were approaching from the west traveling 45 or 50 miles an hour. The first truck passed the deceased. As the second truck approached, deceased was standing at the mailbox on the shoulder of the road, apparently oblivious of the approach of the second truck. When the truck was within 15 or 20 feet of the deceased, she turned suddenly and "started back across the highway in a fast walk." She was hit by the truck and thrown 112 feet while the truck traveled 250 feet before it stopped. This Court, speaking through *Barnhill, J.,* now *Chief Justice,* said: "Here the defendant was operating his heavily loaded truck at 45 to 50 miles per hour within 150 feet of the vehicle just ahead. As the road was straight he saw or should have seen the deceased on the shoulder of the highway

standing at the mail box even before the first truck passed her. She had her back to him and was apparently oblivious of his approach. Yet he did not slacken his speed or apply his brakes or sound his horn. These circumstances present a case for the jury."

In the case of *Tysinger v. Dairy Products, supra,* the plaintiff's deceased was walking in the direction from which the defendant's truck was approaching, and suddenly started to cross the highway and was hit by the side of the truck. The truck had been visible for at least 300 yards. *Winborne, J.,* speaking for the Court, said: ". . . it was the duty of plaintiff's testator, in crossing the highway at a point other than within a marked cross-walk or within an unmarked cross-walk at an intersection, to yield the right of way to defendant's truck approaching upon the roadway, and the operator of the truck, in the absence of anything which gave or should have given notice to the contrary, was entitled to assume and to act upon the assumption that plaintiff's testator would use reasonable care and caution commensurate with visible conditions, and that he would observe and obey the rules of the road. . . . And there is no evidence of anything that gave or should have given notice to the operator of defendant's truck that plaintiff's testator was unaware of the approach of the truck, and would not obey the rule of the road, until the time the testator started across the highway, nor is there evidence as to how close the truck was to him when he started across—except the fact that he was stricken by the side of the truck near the center of the highway. Under such circumstances, to infer that the operator of the truck failed to exercise due care to avoid colliding with the testator upon the roadway, or to infer that a failure to give warning by sounding the horn was a proximate cause of the collision between the truck and testator, . . . would be mere speculation."

In *Jenkins v. Johnson, supra,* the decedent was observed standing on the south side of the highway. As soon as two motor vehicles traveling east passed him, he started across the highway. Defendant, traveling west at between 25 and 30 miles an hour, first saw decedent when he (decedent) was about the center of the highway and defendant was 25 or 30 steps to the east. Defendant immediately blew his horn. When he saw that decedent did not intend to stop and permit him to pass, he swerved his car to the right. At the same time decedent increased his speed and walked or half ran into the side of defendant's car when the right wheels were at least 3 feet off the hard surface of the road shoulder. The Supreme Court of Virginia said: "The highway was level and straight for approximately one-quarter of a mile east and west of the point of impact. After the motor vehicles traveling east had passed, there was nothing to prevent either defendant or decedent from seeing the other. If defendant was negligent in failing to see decedent, decedent was equally

negligent in failing to see defendant's car. If it be conceded that the defendant was negligent in failing to see decedent in time to have avoided the accident, then it must be conceded that if decedent had stopped walking at any point within four feet of the northern edge of the hard surface, he would have saved himself from the collision." The Court held that the decedent's negligence was a contributing cause of his injuries.

The defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

BOBBITT, J., dissenting: There is evidence both of actionable negligence and of contributory negligence. The decisive question: Does the evidence establish conclusively, as a matter of law, that negligence of the plaintiff contributed to his injury as a concurring proximate cause thereof? The Court answers in the affirmative, reversing the court below on the ground that judgment of involuntary nonsuit should have been entered. My analysis of the evidence impels me to a different view.

The court will declare a plaintiff contributorily negligent as a matter of law only when, upon facts admitted or established by uncontradicted evidence, contributory negligence of the plaintiff is the only reasonable inference that may be drawn therefrom. Too, testimony of defendant's witness, favorable to plaintiff, must be considered in plaintiff's favor upon consideration of defendant's motion for judgment of involuntary nonsuit at the close of all the evidence. These well-established propositions are relevant here.

In *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, plaintiff's testator was held contributorily negligent as a matter of law. In that case, as here, the highway was 22 feet wide; its course was east-west; and plaintiff's testator was struck by defendant's truck while attempting to cross from the south to the north side of the highway. The distinguishing facts are these: Defendant's truck, traveling east, was on its right side of the highway, adjacent to the shoulder on the south side, and plaintiff's testator, before going upon the highway, was walking west along the south shoulder, thus facing in the direction of the oncoming truck; and plaintiff's testator walked north from his place of safety on the south shoulder, directly in the path of the approaching truck, making contact with the right side thereof as it veered to the left just before the impact. After an analysis of the evidence, *Winborne, J.,* says: "And there is no evidence of anything that gave or should have given notice to the operator of defendant's truck that plaintiff's testator was unaware of the approach of the truck, and would not obey the rule of the road, until the time the testator started across the highway, nor is there evidence as to how close

the truck was to him when he started across—except the fact that he was stricken by the side of the truck near the center of the highway."

As to the Virginia case of *Jenkins v. Johnson,* 186 Va. 191, 42 S.E. 2d 319, suffice it to say that the factual situation there impresses me as analogous to that in the *Tysinger case* rather than to that in the case now before the Court.

In *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462, judgment of involuntary nonsuit was reversed. Here again we have an east-west highway on which plaintiff's intestate was struck by defendant's truck while attempting to cross from the south side to the north side of the highway. Defendant's truck, traveling east, was on its right side of the highway, adjacent to the shoulder on the south side, and plaintiff's intestate was standing at her mailbox on the south shoulder, with her back towards the approaching truck, apparently oblivious of its approach. "When this truck was within 15 or 20 feet of deceased, she turned suddenly and 'started back across the highway in a fast walk.'" The *Tysinger case* was distinguished on the ground that the driver in the *Williams case* was negligent in failing to give timely warning to a pedestrian *apparently unaware* of the approach of the truck. As to contributory negligence, *Barnhill, J.* (now *C. J.*), says: "Of course it was the duty of the deceased to look before she started back across the highway. Even so, under the circumstances here disclosed, her failure so to do may not be said to constitute contributory negligence as a matter of law. It is for the jury to say whether her neglect in this respect was one of the proximate causes of her injury and death."

In my opinion, the facts here are more favorable to the plaintiff than in the *Williams case.* These features should be noted:

1. Smith, defendant's witness, who was standing behind the cab on defendant's truck, facing in the direction of travel, west, saw the plaintiff, while walking slowly across the highway, proceeding from the south side towards the north side thereof, apparently oblivious of the approach of defendant's truck. "Mr. Garmon was coming on, not looking at him." No warning was given to plaintiff.

2. Defendant's truck, traveling west, was on its right side of the highway; and plaintiff was walking slowly, visible to the driver of the truck during the entire course of such walk until he reached the point of impact, only a foot and one-half from the northern edge of the hard surface. There is no evidence of any sudden, unforeseeable act of plaintiff, such as darting out in front of the oncoming truck, nor is there any evidence of hesitation, stopping or change of direction or pace while walking across the highway.

In addition to these distinguishing features, I am persuaded that, under the facts in the case now under consideration, it was permissible for the jury to find that plaintiff had the right of way.

It is not unlawful for a pedestrian to cross a public highway. If, while so engaged, he is injured or killed from contact with a motor vehicle on such public highway, the statutory rule as to right of way is relevant. G.S. 20-174. In relation to the cited statute, it has been held consistently that a pedestrian's failure to yield the right of way is not contributory negligence *per se,* but only evidence thereof for consideration with all other facts and circumstances. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649; *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762.

G.S. 20-155 (a) provides: "When two vehicles approach or enter an intersection and/or junction *at approximately the same time,* the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in sec. 20-156." (Italics added.) Even so, the driver of the vehicle on the left has the right of way if, when he reaches and enters the intersection, the vehicle approaching on his right is far enough away so that, in the exercise of reasonable care and prudence, he is justified in the belief that he can pass over the intersection in safety. In such case, upon his entering the intersection, it becomes the duty of the driver of the vehicle approaching on the right to decrease his speed, bring his car under control, and, if necessary, stop it in order to yield the right of way and thereby avoid a collision. *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532, and cases cited.

The rights as between motorist and motorist are relative. *Williams v. Henderson, supra.* This is equally true as between motorist and pedestrian. "The rights of pedestrians and vehicular traffic in the use of streets and highways are generally 'mutual, equal, and co-ordinate.' A pedestrian should use ordinary care for his own safety when crossing a street or highway; however, he has the right to assume that others will use a like care to avoid injuring him." 5 Am. Jur., Automobiles, sec. 448. "A person in a public highway may rely upon the exercise of reasonable care on the part of drivers of vehicles to avoid injury. A failure to anticipate the omission of such care does not render him negligent." *Deputy v. Kimmell,* 73 W. Va. 595, 80 S.E. 919, 51 L.R.A. (N.S.) 989, Ann. Cas. 1916E, 656.

If, when plaintiff started his slow walk across the highway, the defendant's truck was not in sight, as plaintiff's evidence tends to show, or was far enough away that plaintiff, in the exercise of due care, was justified in believing that he could cross safely ahead of the approaching truck of defendant, as the testimony of Smith, defendant's witness, tends to show,

in either case defendant should have yielded the right of way to plaintiff. The fact that he lacked only a foot and a half of completing the crossing when struck by the right front fender and headlight of defendant's truck is a circumstance tending to show that he was justified in believing he could cross safely.

Smith, defendant's witness, testified, in substance: That he saw plaintiff, carrying the flambeaux, when plaintiff started across the highway, and as plaintiff continued across the highway; that "(he) wished (he) was sitting in the front by Mr. Thomas so (he) could tell him that (plaintiff) was crossing"; that "(he) wanted to go get there in the front seat to warn him, maybe he didn't see the man"; that "(he) had seen him away from it a good distance"; and his testimony as to the actual distance from the truck to plaintiff when he first saw plaintiff, neither clear nor consistent, varied from testimony that plaintiff was some 300 feet away when the witness first observed him *on* the highway to testimony permitting inferences that plaintiff was much farther away from defendant's truck when plaintiff started his walk across the highway. The evidence permits the inference that had defendant seen what Smith saw, according to Smith's testimony, defendant could and would have stopped or slowed down or turned out to the left and in doing so avoided striking plaintiff; and the evidence permits the further inference that the explanation for defendant's failure to do so is that defendant, blinded by the sun, drove on when unable to see what was taking place on the highway ahead of him. Surely, failure of plaintiff to anticipate that defendant would drive on under such circumstances should not be charged to plaintiff as contributory negligence as a matter of law.

A motorist who saw plaintiff would have seen that, crossing towards the barricades with a flambeau in each hand, he was engaged in performing duties incident to the construction work then in progress. While plaintiff's status is distinguishable from that of a man actually engaged in work on the traveled portion of a highway, *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; Anno.: 30 A.L.R. 2d p. 876 *et seq.*, these facts seem pertinent as additional circumstances bearing upon the issues of negligence and contributory negligence. It is noteworthy that plaintiff's work in locating the lighted flambeaux had to be performed at the barricades near the north edge of the hard surfaced highway then in use. Compare: *Fleming v. Holleman*, 190 N.C. 449, 130 S.E. 171; *Daughtry v. Cline*, 224 N.C. 381, 30 S.E. 2d 322.

Assuming that plaintiff was justified in starting across the highway, having looked and having observed no vehicle dangerously near, he was not required *as a matter of law* to look continuously for the approach of motor vehicles while crossing: "If, as he leaves the curb, he looks for the approach of machines, he is not necessarily guilty of negligence in failing

to keep a continuous lookout or to look a second time, but whether he has exercised a reasonable degree of prudence is a question for the jury." Again: "Even if he sees an automobile approaching, he is not under the duty of continually watching its approach, provided its proximity and apparent speed are such as to justify an ordinarily prudent man in believing that he would have sufficient time to cross ahead of it with safety." Huddy, Vol. 5-6, Encyclopedia of Automobile Law, 9th Ed., sec. 86; also, see 5 Am. Jur., Automobiles sec. 451; *Deputy v. Kimmell, supra; Ritter v. Hicks,* 102 W. Va. 541, 135 S.E. 601, 50 A.L.R. 1505.

If, *while crossing* the highway, plaintiff should have been more vigilant in his lookout for a vehicle approaching from his right, it is well to remember that at most he is chargeable with what he would have seen had he so looked, to wit, a truck approaching at 20 to 25 miles per hour with no other vehicular traffic involved.

My conclusion is as follows: This case is distinguishable from the *Tysinger case* where plaintiff's testator was held contributorily negligent as a matter of law; it is more favorable to plaintiff than the *Williams case,* where the issue of contributory negligence was held to be for the jury; and it rather closely resembles the *Goodson case,* where the issue of contributory negligence was held to be for the jury.

For the reasons stated, I think the issue of contributory negligence was for the jury. Since the Court's decision is that judgment of involuntary nonsuit should have been entered, there is no occasion to comment on assignments of error not relating to this determinative question.

R. W. COOK v. CITY OF WINSTON-SALEM AND SHERRILL PAVING COMPANY.

(Filed 4 February, 1955.)

1. Municipal Corporations § 14a—

The duty of a municipality to exercise reasonable care to keep its streets and sidewalks in a reasonably safe condition for travel extends to those who are blind or suffer from defective vision or other physical handicap, who are themselves exercising due care, under the circumstances, for their own safety.

2. Same—

A construction company which has not completed its work on a street under contract with the city is under substantially the same legal duty to the traveling public as is the city.

3. Same—

Neither a municipality nor a construction company improving a street under contract with the city is an insurer of the safety of travelers, whether blind or physically handicapped, or not.

4. Same—

Where, in the process of improving a street, a path along an intersecting street is left with a drop or slope of some two feet, plainly visible in the daytime, it would seem that neither the municipality, nor the construction company improving the street under contract with the city, is under duty in the exercise of reasonable diligence to place a signal or guard at the descent during the daytime to warn pedestrians, blind or otherwise, since a person with sight could see its condition, and a blind person must exercise a higher degree of care than would be required of a person in possession of all his senses.

5. Same—

A blind or otherwise handicapped person has as much right to use public ways open to pedestrians as those physically sound, but in doing so, must exercise for his own safety that degree of care which an ordinarily prudent person with the same disability would exercise under the same or similar circumstances, which requires of him a greater degree of effort to attain due care for his own safety than would be required of a person in possession of all his senses.

6. Same—Plaintiff's evidence held to disclose contributory negligence as a matter of law in failing to use ordinary care for his own safety under the circumstances.

Plaintiff's evidence tended to show that he was blind, and that, accompanied by his "seeing-eye" dog, he attempted to enter a street under improvement from a path along an intersecting street, that as his dog stopped he put his foot down, and slipped upon the top of the bank and slid down a two foot slope to the street, resulting in personal injuries. Plaintiff's evidence further tended to show that he assumed the construction work was finished along the street because vehicles were again using the street, but further testified that he knew the gutters along the intersecting street had not been put in, and that he had remained away from that section until he assumed the work was finished. *Held:* The fact that vehicles were traveling along the improved street was no assurance that the place where the curbing was to be put was in a reasonably safe condition for pedestrian use, and plaintiff with knowledge that the gutters had not been put in, voluntarily went to the place of danger, and therefore, plaintiff's evidence discloses contributory negligence in failing to exercise due care for his own safety, constituting a proximate cause of his injuries, and defendant's motion to nonsuit should have been allowed.

7. Negligence § 11—

Where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery.

JOHNSON, J., concurring.

WINBORNE, J., joins in the concurring opinion of JOHNSON, J.

BOBBITT, J., concurring in result.

APPEAL by plaintiff from *Phillips, J.*, September Term 1954 of FORSYTH.

Action to recover damages for personal injuries.

In 1951 the City of Winston-Salem entered into a contract with the Sherrill Paving Company to pave, among other streets, Peachtree Street, which included the paving of Peachtree Street at its intersection with East Marne Street. At the time plaintiff fell the paving of Peachtree Street had not been completed: the stone base had been laid, but the curb and the gutter and the top surfacing had not been put on it. Marne Street was not under repair, and is a dirt street.

In preparation for paving Peachtree Street, the grade of the street where it intersects with Marne Street was lowered or cut down about two feet. On the South side of Marne Street there was just a little gravelled path used by school children and others, until the bank got so rough. The City of Winston-Salem put the gravel down there about the time school started in 1951. J. H. Blakely, Jr., a witness for plaintiff who saw him fall, described the end of this path at Peachtree Street as follows: "There was a drop there. It appeared to me like when a bunch of us kids used to get on a bank, long ago, and just have a slide-board down it. It was approximately a good 2½ feet from the top to the bottom, and it was more than a slant taper. From the crest of the slant to the bottom, where it leveled off at, I would say it was between 2½ to 3 feet, that is, the whole slant. The perpendicular depth wouldn't be more than 24 inches. They are estimates I have got; I didn't measure it at all." This is plaintiff's description: "I know they were working on Peachtree St.; but before they did work on it that was nearly a gradual walk right across Marne on out into Peachtree, with the exception of a little water ditch down the side of the street. When they laid the stone base there to pave Peachtree Street, they cut it lower right there at the intersection of Marne Street; it evidently must have been at least 2½ feet lower than the old sidewalk was, the way it appeared to me when I went down; I imagine it was something like a 45-degree from the top down, I'd guess that." This is the description of H. J. Arnold, a witness for the plaintiff: "I would say the grade of that offset was from 2 to 3 feet, and she went off to about 4 or 5 feet, something on the order of a 45, and it was a little rough where the grading machine had knocked it off there; it didn't make as smooth a job as if it had been done with a pick and shovel and smoothed down; it was unlevel and irregular—I am talking about the edge of the top, where it looped—it was unlevel and irregular. The top edge of the stepoff was irregular; it looped back in some at places; the sidewalk would extend out a little farther at some places than it would at others; it zigzagged." J. H. Blakely, Jr., testified the slope "was obvious; you could see it all right."

At the time of plaintiff's fall there were no barricades, or warning signs of any sort at or near the end of this path on Peachtree Street. This condition had existed for several months prior to plaintiff's fall. The Sherrill Paving Company had not done any work on Peachtree Street from October or November 1951, until after plaintiff fell on 25 May 1952. The Atlantic Bitulithic Company did not commence work on the curb and gutters on Peachtree Street until after plaintiff's injury.

Plaintiff, a 76 year old blind man, who walked with the aid of a "seeing-eye" dog, lived on Forest Avenue about five blocks from the intersection of Marne and Peachtree Streets. He owned a lot on Peachtree Street. On Sunday morning, the 25th of May 1952, about 10:00 a.m. with the sun shining, he decided to walk to Peachtree Street to see a friend. He had been over this same intersection about 25 times before they started the work on Peachtree Street, but when they were working on the street, he wouldn't go down in that section until he thought it was finished, or heard it was finished. He knew Peachtree Street was being improved because he owned a lot on it. On cross-examination by the Paving Company plaintiff said: "After I knew that the improvements were being made to Peachtree Street and the other streets, I stayed off of those streets. I had passed along Peachtree Street several times in a car, and then when they turned traffic on a street, I presumed that the street was finished; so that the first time after that that I went down there walking." On this same cross-examination he further said: "I did not know that work was in progress on Peachtree Street on that day when I was taking my walk, for the curbing wasn't started for quite a little bit after I fell. I knew there was some talk about curbing, for they had got up a petition for the curbing, I knew that the curbing was to be put in. Automobiles were traveling up and down Peachtree Street when I went over there. I don't know as I asked anybody anything about the street. I didn't make any inquiry to find out what the condition of Peachtree Street was. When I travel over a street in an automobile back and forth a dozen times, I assume that the street is finished."

This is plaintiff's description of his dog on direct examination: "But my dog will always go where there is a path. If I start that way, he will take me in the path, let me walk along in the path. The idea of the dog and the way they are trained is that when you are going along, if there is any obstruction, a curb or anything in front of you, the dog is supposed to walk up to it and stop. Well, when he stops, you are supposed to stop, and if he won't go on, you urge him to go, and if he won't go, you are supposed to take your foot and feel out, to see what the obstruction is, and then figure out a way to get around it." This is his description when examined by the Court: "When my dog is with me, I don't use a stick or anything in addition to my dog; I just depend on him entirely . . . I

just know what he is going to do, and I can tell every step he makes, right and left, up or down. I can tell it by that (indicating harness). I get it through my left hand. And when you are depending on a dog, your mind is right on him all the time. If you don't, you'll get lost. You have just got to keep your mind on your dog and where you are going, and all like that, all the time."

It had rained the night before and it was muddy.

Plaintiff walked down this path on the South side of Marne Street to where it ended on Peachtree Street. His account, on direct examination, of his fall follows: "I had crossed the last driveway going in, probably 75 to 100 feet from Peachtree, and we were walking along up there, and I was expecting to come to the street any time, and the dog stopped, but evidently I was making a step with my right foot when the dog stopped. When I put it down, that is the last thing I remember. It just felt like something give 'way under my right foot, and the next thing I knew I was down in the ditch; and I heard a car coming, and someone drove up, and I hollered, and Mr. Blakely came up and talked a little and said he'd run and call the ambulance. So that is just practically all I know about it." On cross-examination by the Paving Company this is plaintiff's description of his fall: "As I came up to the intersection, my dog came to a complete stop. He always stops at any obstruction, of course, or anything like that. I don't know how long my dog remained stopped. He stopped there and, like I said before, my right foot was in the air. Just as I went to make the step, he stopped, and when I set my foot down, the dog had stopped, and when I set my foot down, that throwed my foot about probably even with his head or neck, and it hit, struck the edge of the bank; I felt something give away, and I went down the bank, and after that I don't know anything until they took me to the hospital; and the last thing I recollect is stepping on something soft, and then going down the bank."

J. H. Blakely, Jr., testifying for the plaintiff, said on direct examination: "When I was approximately 300 feet from the corner, I glanced up, and I got the appearance of a man falling; he was in the fall when my eye caught him. I went on up there and found that it was Mr. R. W. Cook, the plaintiff in this action. When I got there, Mr. Cook appeared to have just slipped down the bank, straight as a child would get on a bank, and just slide down, and he had been scrambling."

Plaintiff in his fall received injuries to his foot and ankle.

Plaintiff offered in evidence the following portion of Paragraph VI of the Further Answer of Sherrill Paving Company to the Amended Complaint: "That while this defendant was actually performing the work provided for in its contract with the City of Winston-Salem, it kept and maintained at all times barricades and lights wherever they were needed,

which was well known to the City of Winston-Salem; that when the dispute arose over the curbs and gutters and this defendant had performed all the work that it could on Peachtree Street, it took up the barricades on Peachtree Street, . . ."

Plaintiff first sued the City of Winston-Salem. The city made the Sherrill Paving Company a party defendant, whereupon the plaintiff filed an amended complaint against the Paving Company.

At the close of plaintiff's evidence, each defendant moved for judgment of nonsuit, which the court allowed.

Judgment of involuntary nonsuit was entered, and plaintiff appeals.

Deal, Hutchins & Minor for Plaintiff, Appellant.

Womble, Carlyle, Martin & Sandridge for Defendant, Appellee City of Winston-Salem.

Jordan & Wright and Perry C. Henson for Defendant, Appellee Sherrill Paving Company.

PARKER, J. The law in respect to liability for injury to a pedestrian due to condition of street as affected by his blindness or other physical disability is clearly stated in 141 A.L.R. Annotation II, pp. 721-2: "It is the general rule that those charged with duties respecting the condition of public ways open to pedestrians must exercise due and reasonable care to keep them reasonably safe for travel by the public, including those who are blind or suffer from defective vision or other physical infirmity, disability, or handicap, and are themselves exercising due care, under the circumstances, for their own safety. While a city or other authority or person owes no more than due, ordinary, or reasonable care toward a blind or other physically afflicted or handicapped pedestrian, in respect of the condition of walkways, the effect of the affliction or handicap may be considered in determining whether the required degree of care has been exercised, which seems a natural conclusion from the premise that such persons have as much right to use such ways as those physically sound, and in harmony with the proposition that the physical condition of the person injured is a proper matter for consideration in determining whether or not he has exercised the degree of care imposed upon him by law, as regards freedom from contributory negligence." Cases from many jurisdictions are cited in support.

The Sherrill Paving Company had not completed its work on Peachtree Street, because the top surfacing had not been put on. The Sherrill Paving Company, having entered into a contract with the City of Winston-Salem to pave Peachtree Street, "was under substantially the same legal duty to the travelling public" as the City of Winston-Salem.

Presley v. Allen & Co., 234 N.C. 181, 66 S.E. 2d 789; *Broadaway v. King-Hunter, Inc.*, 236 N.C. 673, 73 S.E. 2d 861.

Neither the City of Winston-Salem, nor the Sherrill Paving Company, was an insurer of the safety of travellers, whether blind, or physically handicapped, or not, using the path on the South side of Marne Street. *Welling v. Charlotte, ante,* 312, 85 S.E. 2d 379; *Broadaway v. King-Hunter, Inc., supra;* Anno. 141 A.L.R. pp. 721-2.

The descent or drop or slope of the patch on the South side of Marne Street, where it intersected Peachtree Street, was plainly visible in the daytime. The paving on Peachtree Street was not completed, though it had been stopped for a number of months because of a dispute over curbing. It would seem that it was not the duty of the defendants, in the exercise of reasonable diligence, and in order to keep the street in a reasonably safe condition, to place a signal or guard at the descent or drop or slope *during the daytime, when it was plainly visible. Rock Island v. Gingles,* 217 Ill. 185, 75 N.E. 468; *Presley v. Allen & Co., supra;* 63 C.J.S., Mun. Corp., p. 158.

Plaintiff's allegations of negligence are: the top of the bank had crumbled, leaving loose dirt thereon, which had become pulverized and slick; that no warning signals or barricades were there to give notice of danger; and that the bank had been cut down almost straight instead of cutting it with a gradual slope. The entire condition of the top of this bank and the way it had been cut down, as alleged by plaintiff, was clearly obvious and visible in the daytime. It would appear that plaintiff's evidence fails to show any failure on the part of the defendants to exercise reasonable diligence to keep the end of this path at Peachtree Street in a reasonably safe condition for pedestrians, blind or otherwise, *using this path in the daytime,* because a person with sight could see its condition, and because as to a blind person "ordinary care on his part meant a higher degree of care than would be required of a person in the possession of all his senses," (*Foy v. Winston,* 126 N.C. 381, 35 S.E. 609).

But if we concede, which we do not, that the evidence made out a case of negligence against the defendants, nevertheless, it is manifest from plaintiff's evidence that he, although blind and using a "seeing-eye" dog, failed to exercise due care for his own safety, which was a proximate contributing cause of his injuries.

It is undoubted law that the blind, the halt, and the lame have as much right to use public ways open to pedestrians as those physically sound. *Weinstein v. Wheeler,* 127 Or. 411, 271 Pac. 733, 62 A.L.R. 574; Anno. 141 A.L.R., p. 721. See also *Foy v. Winston, supra.*

It seems to be the general rule that a blind, or otherwise handicapped person, in using the public ways, must exercise for his own safety due care, or care commensurate with the known or reasonably foreseeable

dangers. Due care is such care as an ordinarily prudent person with the same disability would exercise under the same or similar circumstances. *Keith v. Worcester & B. V. Street R. Co.*, 196 Mass. 478, 82 N.E. 680, 14 L.R.A., N.S. 648; *Jones v. Bayley*, (Cal.), 122 P. 2d 293; Anno. 21 L.R.A., N.S., p. 627 *et seq.; Muse v. Page*, 125 Conn. 219, 4 A. 2d 329; *Gill v. Sable Hide & Fur Co.*, (Ky.) 4 S.W. 2d 676; 65 C.J.S., Negligence, Sec. 142; Anno. 62 A.L.R., p. 580 *et seq.;* Anno. 147 A.L.R., p. 724 *et seq.*

In respect to the care required of a blind person for his own safety we approved this instruction to the jury by the trial judge in *Foy v. Winston, supra:* "That being blind did not relieve him from exercising ordinary care in passing along the sidewalk, and that ordinary care on his part meant a higher degree of care than would be required of a person in the possession of all his senses."

In *Fann v. R. R.*, 155 N.C. 136, 71 S.E. 81, the jury found the plaintiff guilty of contributory negligence. The plaintiff was deaf. This Court said: "The fact that he was deaf should have quickened his obligation to look more carefully, as held in *Foy v. Winston,* 126 N.C. 381."

In *Keith v. Worcester & B. V. Street R. Co., supra,* it is said: "But it is also correct to say that, in the exercise of common prudence, one of defective eyesight must usually, as matter of general knowledge, take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than the same person with good eyesight, in order to reach the standard of excellence established by the law for all persons alike, whether they be weak or strong, sound or deficient."

In *Smith v. Sneller,* 345 Pa. 68, 26 A. (2d) 452, 141 A.L.R. 718, the Court quoted with approval from *Fraser, Appellant, v. Freedman*, 87 Pa. Super 454 (a case in which recovery was denied a blind man who fell into an open cellarway extending into the sidewalk) as follows: " 'The law requires a degree of care upon the part of one whose eyesight is impaired proportioned to the degree of his impairment of vision. He is bound to use the care which would be exercised by an ordinary prudent person, and in passing upon the question of his negligence due consideration should be given to blindness or other infirmities. In the exercise of common prudence one of defective eyesight must usually, as a matter of general knowledge, take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions; in order to reach the standard established by law for all persons alike, whether they be sound or deficient. The statement that a blind or deaf man is bound to a higher degree of caution than a normal person does not mean that there is imposed upon him a higher standard of duty, but rather that in order to measure up to the ordinary standard he must the more vigilantly exercise caution through other senses and other means, in order to compensate for

the loss or impairment of those senses in which he is defective;'" citing many authorities. The Court then says: "We cannot escape the conclusion of the Superior Court that the instant case is ruled by the *Fraser case.* While it is not negligence *per se* for a blind person to go unattended upon the sidewalk of a city, he does so at great risk and must always have in mind his own unfortunate disadvantage and do what a reasonably prudent person in his situation would do to ward off danger and prevent an accident."

The plaintiff knew that construction work was being done on Peachtree Street. He knew on the day he fell that the curbing had not been put in. The principle "that ordinarily one may assume the public streets to be in a reasonably safe condition" has no application here. *Beaver v. China Grove,* 222 N.C. 234, 22 S.E. 2d 434. "No one needs notice of what he already knows." *Lane v. Lewiston,* 91 Me. 292.

In *Dunnevant v. R. R.,* 167 N.C. 232, 83 S.E. 347, the Court said: "And where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery." This statement has been quoted with approval in the recent case of *Gordon v. Sprott,* 231 N.C. 472, 57 S.E. 2d 785.

It is our duty now to apply the law to the facts here. The plaintiff knew that construction work had been in progress on Peachtree Street, and knew that it was not finished, because he testified, "I knew that the curbing was to be put in." On direct examination plaintiff said: ". . . when they were working on the street, I wouldn't go down in that section until I thought it was finished, or heard it was finished." On cross-examination he said: "I had passed along Peachtree Street several times in a car, and then when they turned traffic on a street, I presumed that the street was finished; so that the first time after that that I went down there walking." He said further on cross-examination: "Automobiles were traveling up and down Peachtree Street when I went over there. I don't know as I asked anybody anything about the street. I didn't make any inquiry to find out what the condition of Peachtree Street was. When I travel over a street in an automobile back and forth a dozen times, I *assume* that the street is finished." The plaintiff had no right to presume or assume the path was in a reasonably safe condition as it entered Peachtree Street, for he knew the curbing was still to be put in, and he knew that in entering Peachtree Street he would have to cross where the curbing would be. The fact that automobiles were travelling on Peachtree Street was no assurance that the place where the curbing was to be put was in a reasonably safe condition for use of pedestrians. And yet, plaintiff knowing that the construction work as to curbing on Peachtree Street was not finished, and knowing that it was dangerous to him in his

condition to go there, for he remained away from that section until, as he testified, he *assumed* the work was finished because of automobile traffic, voluntarily went there into a place of danger, and on a Sunday morning about 10:00 a.m., with the sun shining, at the place where the path on the South side of Marne Street entered Peachtree Street fell down a descent or drop or slope of about 2 feet, which was plainly and clearly obvious.

If plaintiff had had normal sight, he would undoubtedly be barred of recovery by reason of contributory negligence. *Burns v. Charlotte,* 210 N.C. 48, 185 S.E. 443; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571; *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424; *Walker v. Wilson,* 222 N.C. 66, 21 S.E. 2d 817; *Welling v. Charlotte, supra.*

Plaintiff's evidence compels the conclusion that he, a blind man, failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his own safety: that standard of care which the law has established for everybody. *Foy v. Winston, supra.* Such a failure to exercise due care for his own safety was a proximate contributing cause of his injuries.

We have examined the cases relied upon by plaintiff, and they are distinguishable.

What *Stacy, C. J.,* said in *Houston v. Monroe, supra,* is applicable here: "In the circumstances thus disclosed by the record, we are constrained to hold that the demurrer to the evidence should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence."

The judgment of nonsuit below is

Affirmed.

JOHNSON, J., concurring: I concur in the result reached in the majority opinion on the single ground that the plaintiff's evidence is insufficient to make out a case of actionable negligence against the defendants, and this being so, I see no reason for a discussion of the question of contributory negligence.

WINBORNE, J., joins in this concurring opinion.

BOBBITT, J., concurring in result: I agree that the facts shown are insufficient to constitute actionable negligence. For this reason, I concur in the result.

Decision does not require that we determine whether the plaintiff was contributorily negligent as a matter of law. If such determination were required, the issue of contributory negligence, in my opinion, would be for the jury under instructions embodying the principles set forth in the Court's opinion. The contributory negligence issue was submitted to the

jury in *Foy v. Winston*, 126 N.C. 381, 35 S.E. 609, and in *Fann v. R. R.*, 155 N.C. 136, 71 S.E. 81.

QUEEN CITY COACH COMPANY v. FRANK BURRELL, D/B/A BURRELL BAKERY, AND MIDDLESEX MUTUAL FIRE INSURANCE COMPANY.

(Filed 4 February, 1955.)

1. Judgments § 32—

A final judgment on the merits rendered by a court of competent jurisdiction, in the absence of fraud or collusion, is conclusive of the rights and facts in issue as to the parties and their privies, as a universal rule of expediency, justice, and public tranquillity.

2. Same—

The term "privity," when used to describe persons barred by the doctrine of *res judicata*, means persons having mutual or successive rights to the same interests in property, and whose interests therefore have been legally represented at the previous trial.

3. Same—

The rule that a judgment ordinarily binds only parties and privies, is subject to an exception in favor of an employer, whose liability is purely derivative and dependent entirely upon the doctrine of *respondeat superior*.

4. Same: Attorney and Client § 6—

The fact that one of the attorneys representing the employer in an action against the third person tort-feasors had theretofore represented the employee in an action against the same defendants, does not import that such attorney was representing the employer in the former action, since the relationship of employer and employee in itself does not confer the power upon the one to represent or bind the other in litigation.

5. Judgments § 32: Constitutional Law § 21—

Every person is entitled to his day in court to assert his own rights or defend against their infringement.

6. Judgments § 32—

In an action by the driver of a bus against the driver and owner of a tractor-trailer involved in a collision with the bus, judgment for defendants was entered on the verdict that the bus driver was not injured by the negligence of defendants. *Held:* The judgment does not bar a subsequent action by the owner of the bus against the owner of the tractor-trailer to recover for damages sustained by the bus in the same collision, since the two plaintiffs are not in privity and the principle of mutuality is lacking.

7. Automobiles § 8g—

The mere skidding of a motor vehicle does not imply negligence.

8. Automobiles § 18h (2)—Evidence held sufficient for jury on question of whether skidding of vehicle was result of negligence.

Plaintiff's bus and defendant's tractor-trailer, traveling in opposite directions, collided. Evidence favorable to plaintiff tended to show that the road was wet and slippery, that as plaintiff's bus, traveling between 25 and 30 miles per hour, approached a long, sweeping curve to its right, the bus driver saw the tractor-trailer approaching and slowed his bus so that the tractor-trailer could clear the curve before the bus entered it, and that as the tractor-trailer, traveling between 35 and 45 miles an hour, got within 20 feet of the bus, the trailer jackknifed or skidded around on the bus' half of the road, resulting in the collision. *Held:* The evidence tends to show that the skidding of the trailer was the result of the negligence of its driver in traveling at a speed greater than was reasonable and prudent under the conditions then existing, and defendants' motion to nonsuit was properly denied.

9. Negligence § 19c—

A judgment of involuntary nonsuit on the ground of contributory negligence will not be granted unless the evidence on that issue is so clear that no other conclusion seems to be permissible.

10. Automobiles § 18h (3)—

In this action by the owner of a bus to recover for damages to the bus resulting from a collision with a tractor-trailer, the evidence *is held* not to show contributory negligence as a matter of law on the part of the bus driver, and denial of defendants' motion for involuntary nonsuit was proper.

11. Negligence § 20—

An instruction which charges in effect that defendant must satisfy the jury by the greater weight of the evidence that plaintiff was guilty of all of the acts of negligence relied upon before the jury should answer the issue of contributory negligence in the affirmative, must be held for prejudicial error.

APPEAL by defendants from *Rudisill, J.*, June Term 1954 of MECKLENBURG.

Civil action to recover damages for injury to a bus owned by plaintiff and driven by its employee, J. J. Canipe, in furtherance of its business, allegedly caused in a tractor-trailer and bus collision by the actionable negligence of Frank Burrell, doing business under the trade name of Burrell Bakery.

The defendant Burrell on 4 December 1951 answered denying negligence, pleading contributory negligence, and setting up a counter-claim for damage to his trailer.

The plaintiff procured an order making the Middlesex Mutual Fire Insurance Company a defendant on account of the defendant Burrell's counter-claim, because the Insurance Company had a $250.00 deductible policy of collision insurance on the tractor-trailer of Burrell.

The plaintiff filed an amended reply alleging contributory negligence on the part of the defendant Burrell.

On 5 October 1953 the defendant Burrell filed a plea in bar to plaintiff's action alleging it was *res judicata,* based on the following facts: In January 1952 J. J. Canipe, the driver of plaintiff's bus at the time of the collision complained of in the instant case, instituted an action against Burrell, the defendant herein, and M. A. Dennis, his driver, in the Superior Court of Burke County to recover damages for personal injuries in the collision allegedly caused by the actionable negligence of Burrell. The defendants Burrell and Dennis answered denying negligence and pleading contributory negligence. This action was tried at the March Term 1953 of the Superior Court of Burke County before a judge and jury, and the jury found by its verdict that Canipe was not injured by the negligence of the defendants. Judgment was entered on the verdict. Canipe did not appeal, and the time for appealing has expired. Judge Rudisill overruled the plea in bar, and the defendants excepted.

Appropriate issues were submitted to the jury. The jury found by its verdict that the plaintiff's bus was damaged by the negligence of the defendant Burrell, as alleged; that the plaintiff was Not Guilty of contributory negligence, and awarded damages; and left unanswered the issues on the defendants' counter-claim.

Judgment was entered in accord with the verdict, and the defendants appeal.

John F. Ray and Shearon Harris for Plaintiff, Appellee.

Brown & Mauney, Helms & Mulliss, James B. McMillan, and John D. Hicks for Defendants, Appellants.

PARKER, J. The defendants assign as error the overruling of the plea in bar.

Plaintiff's bus at the time of the collision was operated by J. J. Canipe, the plaintiff's employee, in furtherance of plaintiff's business. Canipe brought a suit against the defendant Burrell, defendant in this action, and his truck driver, for personal injuries. The case was tried in Burke County Superior Court, and resulted in a verdict that Canipe was not injured by the negligence of the defendants. Final judgment was entered upon the verdict. Canipe did not appeal, and the time for appealing has expired.

The defendants contend that the judgment in Canipe's action in Burke County is *res judicata* as to plaintiff's action here for damages to its bus in the same collision.

The doctrine of *res judicata* is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations as an obvious

rule of expediency, justice and public tranquillity. *Evers v. Williams,* 43 Ohio App. 555, 184 N.E. 19. That principle is concisely stated in 30 Am. Jur., Judgments, p. 908: "Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

This Court said in *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570: "Generally, to constitute a judgment an estoppel there must be identity of parties, of subject matter and of issues. *Hardison v. Everett,* 192 N.C. 371, 135 S.E. 288. It is a principle of elementary law that the estoppel of a judgment must be mutual, and 'ordinarily the rule is that only parties and privies are bound by a judgment.' *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321; 116 A.L.R. 1083. When used with respect to estoppel by judgment, 'the term "privity" denotes mutual or successive relationship to the same rights of property.' Greenleaf on Evidence, Redfield Ed., Vol. 1, Sec. 189, p. 216."

"And in the case of *McMullin v. Brown,* 2 Hill Eq. 457, the trial judge whose decree was affirmed said: 'And I understand by the term privy, when applied to a judgment or decree, one whose interest has been legally represented at the trial.'" *First Nat. Bank v. U. S. F. & G. Co.,* 207 S.C. 15, 35 S.E. 2d 47. To the same effect see: 50 C.J.S., Judgments, p. 325; 30 Am. Jur., Judgments, p. 957.

". . . a party will not be concluded, against his contention by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way . . ." 50 C.J.S., Judgments, p. 293; *Leary v. Land Bank, supra; Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99.

To the rule that a judgment ordinarily binds only parties and privies there is an exception "in favor of the master whose liability is purely derivative and dependent entirely upon the doctrine of *respondeat superior.*" *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Leary v. Land Bank, supra; Good Health Dairy Products, Inc., v. Emery,* 275 N.Y. 14, 9 N.E. 2d 758, 112 A.L.R. 401, Anno. p. 404.

"The rule appears to be quite well established that a judgment for the defendant in an action growing out of an accident is not *res judicata,* or conclusive, as to issues of negligence and contributory negligence, in a subsequent action based on the same accident and brought against the same defendant by a different plaintiff." Anno. 133 A.L.R., p. 185 IIIa. See also: *Meacham v. Larus & Bros. Co., supra; Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321 (Adverse judgment against minor in action by

minor, brought by father as next friend, held not to bar action by father to recover for loss of services of minor).

The great weight of authority seems to be that a judgment for the plaintiff in an action growing out of an accident is not *res judicata,* or conclusive as to issues of negligence or contributory negligence, in a subsequent action growing out of the same accident by a different plaintiff against the same defendant. *Tarkington v. Printing Co.; Dunston v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; Anno. 133 A.L.R., p. 185 IIIb.

"It is well established that an adjudication unfavorable to a wife in an action by her for personal injuries is not *res judicata,* or conclusive, as to negligence or contributory negligence, in an action by her husband for loss of services or *consortium* because of such injuries, there being no privity between the respective plaintiffs." 133 A.L.R. 199, where cases are cited.

The only evidence in the Record of the trial of Canipe's action in Burke County is the Complaint, Answer and Judgment. There is no allegation in the plea in bar that plaintiff here had anything to do with Canipe's case in Burke County, nor any evidence to that effect. It is true that one of plaintiff's lawyers here represented Canipe in his case in Burke County. However, that mere fact is no evidence that this lawyer was representing plaintiff here in the trial of Canipe's case. "The relation of employer and employee, in and of itself, does not confer upon the employer any power to represent or to bind the employee in litigation." *Pesce v. Brecher,* 302 Mass. 311, 19 N.E. 2d 36.

It is elementary and fundamental that every person is entitled to his day in court to assert his own rights or to defend against their infringement. The parties are not identical. The present plaintiff was not a party to Canipe's action in Burke County. It had no control over the conduct of Canipe's trial; it could not cross-examine opposing witnesses, or offer witnesses of its own choice. The alleged rights of Queen City Coach Company and J. J. Canipe were entirely separate and distinct. Queen City Coach Company's cause of action is for property damage; Canipe's for personal injuries. Neither could assert them in whole or in part for or in the name of the other. *Meacham v. Larus & Bros. Co., supra;* Anno. 133 A.L.R., p. 185a; G.S. 1-57, "Actions must be prosecuted in the name of the real party in interest . . ."

The exact question raised by the plea in bar does not seem to have been presented to this Court before for decision. Counsel for the parties in their briefs have cited no case presenting the same or substantially the same facts, and no text writer discussing the exact question.

Similar facts to the case here were presented in *Gentry v. Farruggia,* 132 W. Va. 809, 53 S.E. 2d 741. In that case Chester Gentry sued

Charles Farruggia to recover damages for personal injuries suffered by Gentry when a taxicab owned by Joe Bengey and driven by Gentry collided with a truck owned and operated by Farruggia. Farruggia filed a special plea alleging that at the May Term 1948 of the Circuit Court of Raleigh County, a verdict was returned and judgment entered in his favor in an action brought by Joe Bengey against him, in which Bengey sought to recover for property damage to the vehicle owned by him, and damaged in the same collision. The plea alleged that Gentry, as the agent, servant and employee of Joe Bengey, was driving the taxicab at the time and place of the same collision alleged by Gentry to have given rise to his right of action and alleged by Bengey in the former action as ground for his recovery. The Circuit Court sustained the defendant's plea of *res judicata*, and certified to the Supreme Court of Appeals this question: "Is the final judgment in favor of the defendant in the case of *Joe Bengey v. Charles Farruggia* heretofore rendered in the Circuit Court of Raleigh County a bar to the right of the plaintiff in this case to maintain this action?" The Supreme Court of Appeals answered the question No, and reversed the order of the Circuit Court. The rationale of the Court is: the relationship between Gentry and Bengey does not create privity of interest; and second "that the plea fails because the alleged circumstances preclude the idea of mutuality which is a necessary element of the doctrine sought to be applied"; that plaintiff would not be entitled to a judgment based upon the mere proof of a recovery by Bengey in his action, if he had recovered; and that "both litigants must be alike concluded, or the proceeding cannot be set up as conclusive upon either."

This question was presented for decision in *Philadelphia Auburn-Cord Co. v. Shockcor,* 133 Pa. Super. 138, 2 A. 2d 501: "Does a judgment against the president of a corporation individually, in his action for personal injuries, bar a subsequent action by the corporation for the property damage it sustained in the same accident?" In the municipal court of Philadelphia County there had been a judgment on a verdict for plaintiff for the sum of $925.23. Defendant appealed. The Court said in a Per Curiam opinion: "The case is ruled in principle against the appellant by the decision of the Supreme Court in *Woodburn v. Pennsylvania Railroad Co.,* 294 Pa. 174, 144 A. 93. The court, in a per curiam opinion, there said: 'Though the same defendant figures in both cases, yet, since the record tendered as evidence involved an issue pending between a plaintiff other than the one now at bar, the mere fact that the injury to both plaintiffs occurred in the same accident, and that the present plaintiff appeared as a witness for the other plaintiff, would not make the judgment for defendant in such other suit *res judicata* in this suit. *Walker v. Philadelphia,* 195 Pa. 168, 173, 174, 45 A. 657, 78 Am. St. Rep. 801;

Siegfried v. Boyd, 237 Pa. 55, 58-60, 85 A. 72.' On the authority of the *Woodburn Case,* the judgment is affirmed."

In Blashfield's Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 9, p. 113, it is said: "A judgment against an employee or agent in his suit for injuries sustained in an automobile accident does not, necessarily, bar a subsequent action by the employer or principal for property damage to an automobile in the same accident." The above Pennsylvania Case is cited as authority for the statement.

In *Pesce v. Brecher, supra,* the third headnote in 19 N.E. 2d 36 correctly states the decision of the Court: "A truck driver was not estopped from suing motorist for injuries sustained in collision, by reason of judgment against driver's employer in prior action instituted by motorist against employer for property damages caused by collision, where driver was not a party to prior action, notwithstanding that driver testified as a witness in prior action." The Court in its opinion said: "The present plaintiff was not a party to the former action. He is not in privity with any party in the sense that his rights are derived from one who was a party. His cause of action is and always has been his own. It is in no way derived from his employer, who was a party. . . . That the plaintiff testified as a witness in the former action is immaterial. . . . The essential elements of an estoppel by judgment are lacking, citing authorities."

A case involving the same principle of law is *Elder v. New York & P. Motor Express,* 284 N.Y. 350, 31 N.E. 2d 188, 133 A.L.R. 176. The first headnote in A.L.R. correctly summarizes the decision. It is: "A judgment in consolidated actions between trucking companies, each company having brought suit against the other independently to recover for property damage based on alleged negligence resulting in a collision between two trucks, is not *res judicata* in a subsequent action by the driver of one of the trucks to recover for personal injuries against the trucking company against which judgment in the first action had been entered." The Court said in the close of the opinion: "In the case at bar plaintiff was one of the two principal actors in the collision and his right to recover has not been adjudicated in the previous action. The proposed abrogation of the rule of mutuality would seem to lead to a complete abrogation of the rule, even if the new exception now urged upon us should be confined to that class of cases where the defendant has been a plaintiff in the prior action."

The defendants rely principally upon this *quaere* in *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345: "Hence, if it be found that the automobile in question was owned and maintained by James H. Austin, and was being operated by Mrs. Austin, all within the family purpose doctrine, *quaere,* is he, James H. Austin, under the principle of *respondeat superior,* estopped by the judgment on the verdict in the Scotland County

cases in respect to the issues on which original defendants now seek contribution from Mrs. Austin? Compare *Leary v. Land Bank, supra.*" The defendants McIntyre and Adcox invoked the aid of G.S. 1-240 to determine and enforce contribution against Mrs. Austin and her husband. Prior to the institution of the Stansel action, McIntyre and Adcox had sued Mrs. Austin in Scotland County to recover damages for property damage and personal injuries, respectively, arising out of the same collision in which the person for whom Stansel is administrator was killed, and Mrs. Austin had filed a counterclaim for damages for her personal injuries. The trial in Scotland County resulted in a verdict that Mrs. Austin was Not Guilty of negligence in injuring and damaging McIntyre and Adcox, that Mrs. Austin was injured by the negligence of McIntyre and Adcox, but that she was guilty of contributory negligence. Judgment was entered on the verdict. On appeal no error was found in the trial. 235 N.C. 591, 70 S.E. 2d 837. The question asked by this Court does not relate to the plaintiff Stansel. It relates solely to the defendants. Mrs. Austin had a complete trial of her case under her management in Scotland County. It would seem that Mr. Austin should not have a second opportunity to prove the same facts which his wife failed to prove the first time in the trial in Scotland County. It would appear that if the jury answered the issues in Stansel's favor, that as between McIntyre and Adcox and Mr. & Mrs. Austin the judgment that Mrs. Austin was guilty of contributory negligence would as to Mr. Austin call for the application of the principle of derivative liability, though he was not a party to the case in Scotland County. Anno. 133 A.L.R., p. 192 VII. The facts to which the *quaere* relates are the converse of the facts in *Leary v. Land Bank, supra,* but would seem to call for the application of the principle of law therein decided. In the *Stansel Case* the plaintiff there had had no previous opportunity to prove her case. This *quaere* concerns principles of law entirely different from the question for our decision as to defendants' plea in bar here.

The defendants admit in their brief that the plaintiff here is not in privity with J. J. Canipe. The facts alleged in the plea in bar preclude the principle of mutuality. The facts do not come within an exception to the rule of mutuality. The essential elements of *res judicata* are lacking. The trial court was correct in overruling the plea in bar. The plaintiff here has a right to its day in court. If plaintiff ultimately makes a recovery, it would present no more than a case of contrary verdicts by different juries and opposing judgments. See *Tarkington v. Printing Co.; Dunston v. Printing Co., supra,* p. 358.

Defendants next assign as error the trial court's denying their motion for judgment of nonsuit. The evidence favorable to plaintiff tended to show these facts: Shortly after 4:00 a.m. on 15 September 1951 Canipe

was driving its bus, containing 5 passengers, on Highway No. 70. He was going to Asheville, which was West. The bus, about 3 miles West of the Town of Cleveland, was going down a slight grade at a speed of between 25 and 30 miles an hour. It had been raining hard, but the rain had slowed down. The road was very slick when wet, because the rain had washed the gravel and rock off the road so there was little gravel in the tar. That was the reason for the slow speed of the bus. Defendant's tractor-trailer was traveling East on this road, and meeting the bus. Defendant's driver testified he traveled frequently over this road delivering bread, and that it was a pretty slick road. That as the bus approached a long, sweeping curve to its right, Canipe saw the tractor-trailer coming around this curve meeting him. Canipe slowed his bus still more so the tractor-trailer could clear the curve before he entered it. The tractor-trailer prior to the impact was traveling approximately between 35 and 45 miles an hour. When the bus got within 20 feet of the front of the tractor-trailer, the trailer part came around on the bus' half of the road. Canipe had moved over to his right as far as he could, until he could feel his right wheels dropping off on the shoulder of the road, which was the North side of the road. The trailer jackknifed into the bus. That tracks, apparently made by the tractor-trailer, were in plaintiff's traffic lane.

The mere skidding of a motor vehicle does not imply negligence. *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251. However, considering the evidence in the light most favorable to the plaintiff, there was evidence tending to show that the skidding of the trailer was the result of the negligence of the defendant Burrell's driver in driving the tractor-trailer carelessly and heedlessly, at a speed greater than was reasonable and prudent under the conditions then existing, and on the wrong side of the highway. That evidence makes it a case for the jury. *Waller v. Hipp,* 208 N.C. 117, 179 S.E. 428; *Williams v. Thomas,* 219 N.C. 727, 14 S.E. 2d 797.

The defendants contend that the plaintiff by its own evidence established contributory negligence of its bus driver, and cannot recover. A judgment of involuntary nonsuit on the ground of contributory negligence will not be granted, unless the evidence on that issue is so clear that no other conclusion seems to be permissible. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676. In our opinion, from a study of the evidence, such contention is without merit.

We have refrained from stating the evidence fuller, because there must be a new trial for error in the charge. The evidence offered by the defendant required the submission of an issue of contributory negligence. The defendants assign as error this part of the charge: "If the defendant has satisfied you from the evidence and by its greater weight that the plaintiff was operating his bus on Highway No. 70, and that while oper-

ating the same he failed to keep a proper lookout, failed to have his bus under control and did operate his bus on the wrong side of the center of said highway, and that he was operating his bus at an excessive rate of speed and that he did operate his bus so as to collide with the trailer operated by the defendant, this would constitute contributory negligence on the part of the plaintiff, and if the defendant has further satisfied you from the evidence and by its greater weight that such contributory negligence and collision combined and concurred with the defendant's negligent acts and contributed to the damage of the defendant as the proximate cause thereof as an element without which the damages to his trailer would not have occurred, the Court instructs you that it would be your duty to answer the second issue YES. If the defendant has failed to so satisfy you that the plaintiff was negligent, by the evidence and by its greater weight, you will answer that issue No."

To find the plaintiff guilty of contributory negligence, the judge instructed the jury that the defendant must satisfy them that the plaintiff was guilty of *all* the acts of negligence enumerated as to it in the charge, whereas it was sufficient for defendant to satisfy the jury of either, when alleged and supported by evidence. *Burnett v. Seventh Street Produce Co.*, (Ark.), 47 S.W. 2d 38; *Rogers v. Mason,* (Ill. 1952), 104 N.E. 2d 354.

For error in the charge there must be a new trial, and it is so ordered.

New trial.

R. W. MARSHBURN v. BILLY RAE PATTERSON, CLYDE EDDLEMAN AND ETHEL EDDLEMAN.

WILBUR W. MARSHBURN, BY HIS NEXT FRIEND, LUCILLE C. MARSHBURN, v. BILLY RAE PATTERSON, CLYDE EDDLEMAN AND ETHEL EDDLEMAN.

(Filed 4 February, 1955.)

1. Automobiles § 8i—

When a motorist traveling on a dominant highway and a motorist traveling on an intersecting servient highway approach the intersection of the two highways so nearly at the same time that either one or the other must yield the right of way or else create a dangerous traffic hazard, it is the duty of the motorist on the servient highway to slow down and, if necessary, stop and yield the right of way.

2. Same—

In the absence of some fact or circumstance sufficient to put a man of ordinary prudence on notice that the motorist traveling on the servient highway does not intend to, or cannot slow down in time to, yield the right of way, the failure of a motorist on the dominant highway to keep a proper

lookout cannot constitute one of the proximate causes of a collision at the intersection, since under such circumstances the motorist on the dominant highway has the right to assume that the motorist on the servient highway will yield the right of way as required by law.

3. Same—

It is the duty of a motorist traveling along a dominant highway to keep a proper lookout, and where a person of ordinary prudence who is keeping a proper lookout would see and apprehend that a motorist traveling along a servient highway approaching the intersection with the dominant highway is traveling at such high rate of speed that he cannot or will not stop and yield the right of way, or would apprehend any other circumstance sufficient to give him such notice, and such circumstance is apparent to a driver along the dominant highway in time to enable him to stop or slow down so as to avoid collision, the failure of the driver along the dominant highway to keep a proper lookout and reduce speed constitutes a proximate cause of the resulting collision.

4. Automobiles § 18h (3)—

Nonsuit will not be entered on the ground of contributory negligence for failure of the driver along a dominant highway to keep a proper lookout if the evidence is conflicting as to whether he could or should have observed, in time to have avoided the collision, circumstances putting him on notice that the driver along the servient highway could not or would not stop and yield the right of way.

5. Same: Trial § 22b—

On motion to nonsuit on the ground of the contributory negligence of the driver of the vehicle along the dominant highway in failing to keep a proper lookout, defendant's evidence as to the speed of the car traveling along the servient highway approaching the intersection must be considered on the question of whether the driver on the dominant highway should have known that the other car would not stop and yield the right of way.

6. Automobiles § 18h (3)—

In this action to recover for a collision at an intersection of a dominant and servient highway, plaintiff's evidence was to the effect that the vehicle approaching along the servient highway was traveling at such excessive speed that it was apparent the driver could not or would not stop and yield the right of way. Defendant's evidence was to the effect that the driver along the servient highway was traveling at a moderate speed so that no such conclusion was apparent. *Held:* Nonsuit on the ground of the contributory negligence of the driver along the dominant highway in failing to keep a proper lookout was properly denied upon the conflicting evidence.

7. Same—

Nonsuit on the ground of contributory negligence for failure of the driver along the dominant highway to keep a proper lookout so as to see that the driver along the servient highway was approaching the intersection at such excessive speed that he could not stop and yield the right of way, *held* properly denied in the absence of evidence as to how far the vehicle on the servient highway was from the intersection when the driver along the dominant highway should have observed it and its manner of approach,

since in the absence of such evidence it is not made to appear that the driver along the dominant highway had notice of the circumstance in time to have avoided the collision.

8. Trial § 31c—

Where evidence relating to a material item of damage is admitted but is thereafter withdrawn by the court, an instruction submitting to the jury the substance of the evidence withdrawn must be held for prejudicial error.

APPEAL by defendants from *Clarkson, J.*, May Term 1954, GUILFORD (Greensboro Division).

Two civil actions, one to recover compensation for damages to an automobile, and the other for personal injuries resulting from an intersection automobile collision, consolidated for the purpose of trial.

Wendover Avenue in Greensboro extends in an east-west direction, and is, at Latham Road, an arterial or through highway (U. S. Highway No. 220). Latham Road is an intersecting servient street in said city. On 14 September 1952, at about 8:00 p.m., the plaintiff W. W. Marshburn was a passenger on an automobile being operated by his brother, going westward on Wendover Avenue. The automobile was the property of plaintiff R. W. Marshburn, father of the infant plaintiff, and was maintained as a family purpose vehicle.

Patterson and Ethel Eddleman were traveling south on Latham Road on an automobile which was the property of Ethel Eddleman and her husband, defendant Clyde Eddleman, though the certificate of title was issued to her alone. Patterson was operating this vehicle.

Stop signs were maintained at the intersection of the two streets as required by an ordinance of the city. And as the two vehicles approached the intersection, the Marshburn vehicle was to the left of the Eddleman vehicle.

The testimony offered by plaintiffs tends to show that the Marshburn vehicle was traveling at a reasonable rate of speed—about twenty or twenty-five miles per hour; that the speed of the Eddleman car was excessive—above the maximum of thirty-five miles per hour for a residential area. As the two vehicles approached the intersection, a witness, Dr. Marks, was traveling east on Wendover approaching the same intersection. When he observed the Eddleman vehicle it "was going unusually fast . . . was going too fast to stop . . . The speed was from 50 to 60 m.p.h." So he stopped right at or slightly in the intersection. Patterson proceeded on into the intersection without stopping or decreasing his speed. Marshburn, likewise, without looking to the right or to the left, drove on into the intersection. He did not see the Eddleman vehicle prior to the collision.

As the Eddleman automobile approached the intersection, Ethel Eddleman was pointing out to Patterson, and telling him, which way to go. He

did not see the stop signs or the Marshburn vehicle. He drove into the intersection directly in front of it without slowing down or stopping. The front of the Marshburn car struck the right rear side of the Eddleman vehicle, crossed the intersection, struck the Marks automobile, and came to rest at the side and parallel to the Marks automobile. The Eddleman automobile proceeded on along Latham Road a distance variously estimated at from 150 to 275 feet. A police officer testified that it was 275 feet by actual measurement from the intersection. The major portion of the debris was practically in the center of the intersection. The infant plaintiff was thrown under the Marks vehicle and sustained serious personal injuries. The automobile of the adult plaintiff was substantially damaged. Patterson left the scene of the accident and was later picked up by officers and carried to the police station.

The defendants offered evidence in rebuttal, and Patterson testified that he was traveling about twenty-five or thirty miles per hour as he approached the intersection and "seen one car coming. I thought I had time enough to get out of the intersection. The car I saw was coming from the left. I did not see a car to the right. My intention was to make a left turn at the intersection . . . After the collision, I did not have any control over the car, and the car stopped going down the street." He also testified that both cars struck the car he was operating.

The infant plaintiff had scar tissue on his hand, arm, face, and under his chin. He was permitted to testify, over objection of defendants, that this scar tissue could be eliminated by grafting, and that the Duke Clinic had estimated the cost of such grafting at around $1,100. Thereafter, at the conclusion of the evidence for the plaintiff, the court withdrew this testimony from the jury and instructed them not to consider the same in their deliberations but to erase it from their minds. Then, in charging the jury on the measure of damages, the court made references to the scars and scar tissue and recited as a part of the evidence in respect thereto "that he has a disfigurement of his face and head and under his chin and that it will be necessary to eliminate that disfigurement, if he ever has it eliminated, by skin grafting which would be a long, painful and expensive operation," and instructed the jury that if the infant plaintiff was entitled to recover at all, he is entitled to recover for all injuries, past, present, and prospective, including physical injuries and pain, mental pain and suffering, expenses incurred, including hospital bills, doctors' bills, medicines, and supplies.

During the progress of the trial the court, on motion of defendant Ethel Eddleman, entered a judgment of nonsuit as to her cross action.

The jury, for its verdict, answered the issue of negligence in both cases in the affirmative, the issue of contributory negligence in the case of the infant plaintiff in the negative, awarded plaintiff R. W. Marshburn

property damage in the sum of $1,500 and the infant plaintiff compensation for personal injuries in the sum of $5,000. The court entered judgments on the verdicts, and the defendants excepted and appealed.

Jordan & Wright for plaintiff appellees.
C. M. Llewellyn and M. B. Sherrin for defendant appellants.

BARNHILL, C. J. During the trial of these causes in the court below, the defendants entered timely motions to dismiss the actions as to both plaintiffs as in case of involuntary nonsuit. The motions were denied and the defendants excepted. These exceptions are the bases of one of defendants' primary assignments of error.

The defendants in their brief concede there is sufficient evidence of negligence on the part of the defendant Patterson to repel their motions for judgment as in case of involuntary nonsuit. They rest their motions, as they must rest, on the alleged contributory negligence of the operator of the Marshburn automobile.

There is evidence tending to show that as the operator of the Marshburn vehicle approached the intersection, he did not look either to the right or to the left. He so testified. Had he been keeping a proper lookout, he could and would have seen the Eddleman vehicle approaching the intersection at approximately the same time. Was his negligence in failing to keep a proper lookout one of the proximate causes of the resulting collision?

When a motorist traveling on a dominant, primary highway and a motorist traveling on a servient, intersecting highway approach the intersection of the two highways so nearly at the same time that either one or the other must yield the right of way or else create a dangerous traffic hazard, it is the duty of the motorist on the servient highway to slow down and, if necessary, stop and yield the right of way. And the motorist traveling on the dominant highway, nothing else appearing, has the right to assume that the motorist on the servient highway will yield the right of way as he is by law required to do. *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25.

Therefore, in the absence of some fact or circumstance sufficient to put a man of ordinary prudence on notice that the motorist traveling on the servient highway does not intend to or cannot slow down in time to yield the right of way, a motorist on the dominant highway breaches no duty he owes the motorist on the servient highway in his failure to keep a proper lookout. Ordinarily any negligence on his part in this respect does not constitute one of the proximate causes of a collision at the intersection. *Loving v. Whitton, ante,* p. 273; *Harrison v. Kapp, ante,* p. 408.

When, however, a motorist on the dominant highway has time to realize, or by the exercise of proper care and watchfulness should realize, that the motorist on the servient highway is unaware of his presence, or does not intend to or cannot observe the law, or is in a somewhat helpless condition, or is apparently unable to avoid the approaching machine, the negligence of the motorist on the dominant highway may be considered one of the proximate causes of a collision at the intersection. *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707; *Cory v. Cory,* 205 N.C. 205, 170 S.E. 629; *James v. Coach Co.,* 207 N.C. 742, 178 S.E. 607.

That is to say, it is the duty of a motorist traveling on a through street to keep a proper lookout, and he is charged with having seen what he should have seen. When he observes a vehicle traveling on a servient street approaching the same intersection at such a high rate of speed or under such other circumstances that he, in the exercise of ordinary care, knows or should know that the motorist on the servient highway cannot or will not stop and yield the right of way, it is the duty of the motorist on the through street to reduce his speed and use all precautions reasonably at his command to avoid a collision. If the speed of the vehicle on the servient road, or some other circumstance, is such that it puts him on notice that the other motorist cannot stop, and the circumstances are such that he (the motorist on the dominant road) could avoid the collision after observing this condition, but he does not do so for the reason he is not keeping a proper lookout, then his failure to keep a proper lookout and to reduce his speed must be deemed to be one of the proximate causes of the resulting collision. *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Howard v. Bingham,* 231 N.C. 420, 57 S.E. 2d 401; *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377.

It follows that the court will not sustain a motion for judgment of involuntary nonsuit for the reason plaintiff's evidence tends to show that he failed to keep a proper lookout when the evidence in respect thereto is conflicting.

Here, on the question posed for decision the record discloses a somewhat novel situation. Plaintiff offered evidence tending to show that if the operator of the Marshburn automobile had been keeping a proper lookout he would have observed that the Eddleman vehicle was traveling at such an excessive speed that it could not be stopped before entering the intersection so as to yield the right of way. Thus he would have been put on notice he could no longer rely upon the assumption that Patterson would yield the right of way.

On the other hand, however, the defendants offered testimony tending to show that the Eddleman vehicle approached and entered the inter-

section at a speed of only twenty or twenty-five miles per hour. In ruling on the motion for judgment of nonsuit we must consider this testimony offered by defendants. They vouched for it and are in no position to insist that we disregard it and sustain the exceptions on the evidence offered by the plaintiffs alone.

Thus the evidence is conflicting as to the condition existing at the time, particularly in respect to whether the operator of the Marshburn automobile was put on notice that Patterson would not yield the right of way. Hence it was a question for the jury.

A further significant circumstance to be considered in ruling on these assignments of error is the fact that it is not made to appear how far the Marshburn vehicle was from the intersection at the time its operator should have observed the Eddleman automobile and its manner of approach. Even if the circumstances were such as to put Marshburn on notice that Patterson would not yield the right of way, was Marshburn then a sufficient distance away to reduce his speed and avoid the collision? The record fails to answer, and the absence of such proof in itself is sufficient to repel the motion.

The other exceptions directed to alleged error in the trial on the issues in the R. W. Marshburn case are not of sufficient merit to require discussion. Suffice it to say that we have examined them and find that they fail to point out prejudicial error.

However, in the Wilbur W. Marshburn case there is an assignment of error to which we must direct our attention. During the progress of the trial the court permitted this plaintiff to testify over the objection of the defendants that the Duke Clinic had estimated that plastic surgery to remove the scars on his arm, face, and under his chin would cost around $1,100. Thereafter, on the next day, the court withdrew this testimony and instructed the jury to disregard it. Then the court, in its charge, instructed the jury in part as follows:

". . . he (plaintiff Wilbur W. Marshburn) contends . . . that he has suffered permanent injuries in that he has a disfigurement of his face and head and under his chin and that it will be necessary to eliminate that disfigurement, if he ever has it eliminated, by skin grafting which would be a long, painful and expensive operation."

It thereafter further instructed the jury that plaintiff was entitled to recover, if at all, ". . . the amount of expenses reasonably incurred by him in the treatment of his injuries, including hospital bills, doctors' bills, medicines and supplies . . ."

Thus the court submitted to the jury the substance of evidence it had first admitted and then withdrawn from the consideration of the jury. *Curlee v. Scales*, 223 N.C. 788, 28 S.E. 2d 576; *S. v. Wyont*, 218 N.C. 505, 11 S.E. 2d 473. And the testimony was not related to its probable

effect on plaintiff's future earning capacity. This evidence had a direct bearing upon the amount of damages this plaintiff was entitled to recover, and the submission thereof to the jury under the circumstances here disclosed constitutes prejudicial error which entitles the defendants to a new trial in this cause.

In so holding we do not mean to say that the jury is not to consider any disfigurement caused by the injuries received by him. An outward, observable blemish, scar, or mutilation which tends to mar the appearance to the extent that it lessens or reduces the opportunities of the injured party to obtain remunerative employment might well effectuate a diminution of his future earning capacity. It is so considered under the Workmen's Compensation Act, G.S. 97-31 (v) (w); *Arp v. Wood & Co.*, 207 N.C. 41, 175 S.E. 719; *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570. We will reserve that question until it is properly posed for decision.

Here the charge considered in the light of all the attendant circumstances leads us to the conclusion that its probable prejudicial effect was such as to warrant a new trial. It is so ordered.

In R. W. Marshburn v. Patterson—No Error.

In W. W. Marshburn v. Patterson—New Trial.

WILLIE GUEST (EMPLOYEE) v. BRENNER IRON & METAL COMPANY (EMPLOYER), AND AETNA CASUALTY & SURETY COMPANY (CARRIER).

(Filed 4 February, 1955.)

1. Master and Servant § 52—

It is required that the Industrial Commission find all the crucial and specific facts upon which the right to compensation depends in order that it may be determined on appeal whether adequate basis exists for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment, but it is not required that the Commission make a finding as to each detail of the evidence or as to every shade of meaning to be drawn therefrom.

2. Master and Servant § 55d—

In reviewing an award of the Industrial Commission, the courts will consider the specific findings of fact of the Industrial Commission, together with every reasonable inference that may be drawn therefrom, in claimant's favor.

3. Master and Servant § 40c—

The words "out of" as used in the Workmen's Compensation Act refer to the origin or cause of the accident and import that there must be some

causal relation between the employment and the injury, but not that the injury ought to have been foreseen or expected.

4. Master and Servant § 40d—

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

5. Master and Servant § 37—

While the Workmen's Compensation Act should be liberally construed to the end that its benefits should not be denied by technical, narrow and strict interpretation, the rule of liberal construction cannot be employed to attribute to a provision of the Act a meaning foreign to the plain and unmistakable import of the words employed.

6. Master and Servant § 40c—

Whether an injury to an employee received while performing acts for the benefit of third persons arises out of the employment depends upon whether the acts of the employee are for the benefit of the employer to any appreciable extent, or whether the acts are solely for the benefit or purpose of the employee or a third person.

7. Same—Findings held to support conclusion that aid given third person by employee was in reciprocity for aid requested for employer's benefit.

The specific findings were to the effect that plaintiff employee was sent to fix flat tires on a car, that in the performance of this work it was necessary for him to seek a pump to inflate the tires, that he went to a filling station and requested free use of its air pump, that before inflation of the tires was completed, the filling station operator asked him to help push a stalled car, and that while he was doing so he was struck by another car, resulting in permanent injury. *Held:* The courtesies and assistance extended by the employee were in reciprocity for the courtesy of free air requested by the employee for the employer's benefit, so that the employee had reasonable ground to apprehend that refusal to render the assistance requested of him might well have resulted in like refusal of the courtesy requested by him, and therefore, the findings support the conclusion that the accident arose out of and in the course of his employment.

WINBORNE and DENNY, JJ., dissent.

APPEAL by defendants from *Patton, Special J.*, 26 April, 1954, Civil Term, GUILFORD, Greensboro Division.

Proceeding under Workmen's Compensation Act (G.S. Ch. 97, Art. I).

The findings of fact, upon which the judgment for plaintiff is based, are as follows:

"1. That the parties are subject to and bound by the provisions of the Workmen's Compensation Act, defendant employer regularly employing five or more employees.

"2. That Aetna Casualty & Surety Company is the compensation carrier and was on the risk at the times complained of.

"3. That on and prior to 26 November 1952 plaintiff was regularly employed by defendant employer at an average weekly wage of $48.50.

"4. That U. S. 421 between Winston-Salem and Greensboro runs generally east and west and an airport is located approximately midway between the two cities; that on 26 November 1952 defendant employer sent its employee Willie Guest from its place of business in Winston-Salem to the airport, accompanied by the driver of one of its trucks, to change two flat tires; that plaintiff and the truck driver bought two new inner tubes as they had been instructed to do, went to the airport in plaintiff's car (which he was authorized to use on this occasion) and fixed the flat tires by removing the old tubes and putting the new tubes in the tires and the tires back on the rims; that it then became necessary to go somewhere to obtain air to put in the tires to inflate them; that they put the tires and rims in plaintiff's car and drove along U. S. 421 in an easterly direction toward Greensboro looking for a filling station and an air hose; that they came to a station known as Pop's & Joe's Place located on the south side of U. S. 421, drove into the place and asked the man in charge for permission to use his air hose to inflate the tires; that such permission was granted and plaintiff and the truck driver began to inflate the tires with air; that before finishing with the first tire a customer who had just bought some gas was unable to start the engine of his car and the filling station operator requested plaintiff to assist in pushing the car off from a standing position so as to get it started and in order to move it on away from the gas pumps; that plaintiff acceded to the request and commenced pushing the car from the driveway onto U. S. 421 headed east toward Greensboro; that it was between 6:30 and 7 p.m., almost dark and raining, and visibility was rather poor; that when the car had reached the hard surface of U. S. 421 and had been pushed about 50 feet, more or less, along the hard surface in an effort to start the motor, a Ford automobile driven by one Herman Thomas Wade approached from the rear, traveling east toward Greensboro and on the same side of the road, and crashed into the rear of the car being pushed so that plaintiff was caught and pinned between the two automobiles and suffered serious injuries hereinafter set out.

"5. That as a result of the accident above plaintiff suffered . . ." (Description of injuries)

"6. That plaintiff had not attained maximum improvement or reached the end of the healing period on the date of the hearing in Greensboro, and his permanent disabilities are not ready to be rated.

"7. That Brenner Iron & Metal Company always instructed its employees to be courteous and nice but had never given any specific instructions about assisting others in distress; that in the way and manner above

set out plaintiff sustained an injury by accident arising out of and in the course of his employment."

The foregoing findings of fact were made by the hearing commissioner, adopted by the full Commission and confirmed by the court. The court overruled *seriatim* defendants' exceptions to the findings of fact, conclusions of law and award of compensation to plaintiff made by the full Commission. Judgment was entered in accordance with the full Commission's award. Defendants objected and excepted to the rulings of the court and to the judgment, appealed and assign error.

Defendants challenge by exceptive assignments of error the finding of fact: "7. . . .; that in the way and manner above set out plaintiff sustained an injury by accident arising out of and in the course of his employment."

William S. Mitchell for plaintiff, appellee.

Smith, Moore, Smith & Pope, Bynum M. Hunter, and Stephen P. Millikin for defendants, appellants.

BOBBITT, J. The specific findings of fact are supported by competent evidence. Defendants, by brief, assert that they do not "quibble" with the findings of fact set forth in paragraph 4, quoted above.

Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. *Singleton v. Laundry Co.*, 213 N.C. 32, 195 S.E. 34; *Gowens v. Alamance County*, 214 N.C. 18, 197 S.E. 538; *Farmer v. Lumber Co.*, 217 N.C. 158, 7 S.E. 2d 376; *Cook v. Lumber Co.*, 217 N.C. 161, 7 S.E. 2d 378. Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706.

The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom. When the specific, crucial findings of fact are made, and the Commission thereupon finds that plaintiff was injured by accident arising out of and in the course of his employment, we consider such specific findings of fact, together with every reasonable inference that may be drawn therefrom, in plaintiff's favor in determining whether there is a factual basis for such ultimate finding.

"The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. . . . There must be some causal relation between the employment and the injury; but if the injury is one which, after the event,

may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." *Adams, J.*, in *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266. This excerpt, often quoted, may be regarded as a statement of the basic principles applicable to compensation cases.

The Act "should 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; but "the rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched," *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760.

"Acts of an employee for the benefit of third persons generally preclude the recovery of compensation for accidental injuries sustained during the performance of such acts, usually on the ground they are not incidental to any service which the employee is obligated to render under his contract of employment, and the injuries therefore cannot be said to arise out of and in the course of the employment. . . . However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established." Schneider, 7 Workmen's Compensation Text, sec. 1675.

As stated by Larson: "If the ultimate effect of claimant's helping others is to advance his own employer's work, by removing obstacles to the work or otherwise, it should not matter whether the immediate beneficiary of the helpful activity is a co-employee, an independent contractor, an employee of another employer, or a complete stranger." 1 Larson's Workmen's Compensation Law, sec. 27.21.

Decisions in other jurisdictions cited by these text writers, some tending to support plaintiff's position and others tending to support defendants' position, disclose factual situations somewhat similar yet different in some material feature from the case now before us. Basically, whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person.

Mindful of these well settled principles, we must now apply them to facts substantially different from facts in cases heretofore presented to this Court.

At the request of plaintiff and his fellow-employee, the filling station operator gave permission to use his air hose to inflate the tires. They began but did not finish inflating the first tire.

Just then, a customer, whose car was standing at the gas pump, was unable to start his car; and the filling station operator requested plaintiff to assist in pushing the car off from a standing position so as to get it started and in order to move it on away from the gas pumps. Plaintiff complied with this request. The car was pushed from the filling station premises onto the highway. It had been pushed 50 feet, more or less, along the highway, in an effort to start the motor, when plaintiff was struck and injured by another car approaching from the rear.

Plaintiff and his co-employee were not customers. They asked for and received permission to get *free air*. The assistance extended by the filling station operator was for the benefit of their employer. In turn, the filling station operator requested plaintiff's aid in pushing off and starting his customer's car, then blocking access to his gas pumps. Reciprocal courtesies and assistance were requested and extended. To hold that plaintiff acts in the course of his employment when receiving aid for the benefit of his employer but ceases to do so when he renders assistance to the man who is helping him at the very time is a distinction too attenuate for adoption by this Court. It is noteworthy that plaintiff, when he responded to the filling station operator's request for assistance, had not received the assistance needed to enable him to complete his service to his employer. Plaintiff had reasonable grounds to apprehend that his refusal to render the assistance requested of him might well have resulted in like refusal by the filling station operator.

In view of the limitless variety in factual situations, it is difficult to embrace in a single statement a rule applicable to all cases. Here plaintiff's response was reasonable and natural. He had reasonable grounds to believe that what he was doing was incidental to his employment and beneficial to his employer and that, if his employer had been there, he would have instructed plaintiff to render such reciprocal assistance. Under such circumstances, when at the time and place of injury mutual aid is being exchanged between the employee and the filling station operator, the inbound aid being for the employer's benefit, the aid received and the aid given are so closely interwoven that an injury to the employee under such circumstances must be held connected with and incidental to his employment.

If the risk is one to which all others in the neighborhood are subject, as distinguished from a hazard peculiar to the employee's work, injury resulting therefrom is not compensable. *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89, and *Marsh v. Bennett College*, 212 N.C. 662, 194 S.E. 303, tornado cases; *Plemmons v. White's Service, Inc.*, 213 N.C. 148,

195 S.E. 370, dog bite case; *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342, where plaintiff fell when he stepped on fruit peeling on sidewalk; *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751, where plaintiff was struck by car while crossing the public road on his way to work. Plaintiff, while pushing the car onto and along the highway, subjected himself to a hazard not common to all others in the neighborhood but peculiar to the task in which he was engaged. Whether plaintiff's injury by accident arose out of and in the course of his employment depends upon principles other than that upon which the cited cases are based.

Many decisions turn on *the extent* to which the employee deviated from the course of his employment. Where the deviation is of such nature as to constitute a total departure from the employment, compensation is denied; but where the deviation is of a minor character, compensation is awarded. *Parrish v. Armour & Co.*, 200 N.C. 654, 158 S.E. 188. Often we face real difficulty when attempting to apply this reasonable but broad rule to the facts of particular cases. While the question of deviation has been considered, our view is that it is not the proper basis for decision here.

In *Sichterman v. Kent Storage Co.*, 217 Mich. 364, 186 N.W. 498, plaintiff, a salesman, traveled by automobile in the course of his work. On one of his trips he observed a peddler, whose wagon had been struck by an automobile, at the side of the road. Plaintiff stopped, got out of his car, went back and asked if he could render any assistance; and then plaintiff was struck and injured by another car. Plaintiff's claim for compensation was denied. After reviewing decisions from other jurisdictions, some favorable and others unfavorable to plaintiff's position, the Supreme Court of Michigan by *Fellows, C. J.*, concluded: "This unfortunate accident occurred when the deceased was performing an act of humanity entirely dissociated from the master's work. It did not arise out of the employment." This decision, cited by defendants, suggests the further question as to whether an injury is compensable when an employee, a motorist, then in course of his employment, renders "a courtesy of the road" to another motorist then in need of aid. Consideration of that question must await an appropriate fact situation; for we are not dealing here with a situation where the employee renders a service because he *would expect* a similar service to be rendered to him if the positions of the parties were reversed, such service being directly for his benefit and indirectly for the benefit of his employer. We have here a situation where plaintiff *was receiving* requested assistance from the filling station operator at the very time and place he was rendering requested assistance to the filling station operator. The facts of this case are distinguishable from cases where the act of the employee, characterized as "chivalric," or

"an errand of mercy," or "the act of a good Samaritan," is wholly unrelated to the employment.

The specific facts found, considered in the light most favorable to plaintiff, support the factual element in the ultimate finding; and the ultimate finding, that plaintiff was injured by accident arising out of and in the course of his employment, will be upheld.

Affirmed.

WINBORNE and DENNY, JJ., dissent.

W. A. MANLEY v. GREENSBORO NEWS COMPANY AND L. R. RUSSELL.

(Filed 4 February, 1955.)

1. Conspiracy § 2—Evidence held insufficient to support allegation of conspiracy in publication of libel.

Plaintiff, a candidate for public office, alleged that the opposing candidate and a newspaper company collaborated and conspired in the publication of defamatory matter for the purpose of causing the defeat of plaintiff in the primary election. The only evidence of conspiracy on the part of the individual defendant was that he had filed a protest and challenge of plaintiff's candidacy with the Board of Elections, that he talked with a reporter and an employee of the paper about it prior to publication, and that the newspaper published the challenge along with plaintiff's denial of the truth of the matters therein asserted. *Held:* The evidence is insufficient to support the allegation of collaboration and conspiracy as against either of the defendants.

2. Same—

A person may not conspire with himself.

3. Libel and Slander §§ 9, 12—

Plaintiff, a candidate for public office, brought this action for libel against the opposing candidate and a newspaper alleging that the publication of a libelous article in the newspaper was pursuant to a conspiracy between defendants. There was no contention or evidence that the individual defendant was an employee of the newspaper or was acting for it. *Held:* In the absence of evidence of conspiracy, nonsuit was properly entered, since libel is an individual tort incapable of joint commission.

4. Pleadings § 24—

Allegation without proof is insufficient.

5. Trial § 23a—

Where there is a total failure of proof to support an essential allegation of the complaint, nonsuit is proper.

6. Trial § 26—

Plaintiff brought this action against two defendants, alleging a libel pursuant to a conspiracy. There was a total failure of proof of conspiracy, and nonsuit was entered. *Held:* Defendants' contention that the action should have been divided, but not dismissed, will not be considered when it appears that plaintiff did not request the trial court to dismiss the action against one defendant and to proceed against the other, and did not except and assign as error the failure of the trial court to divide the actions.

APPEAL by plaintiff from *Patton, Special Judge,* February Civil Term 1954 of GUILFORD.

Civil action to recover compensatory and punitive damages from the defendants for libel.

Plaintiff was a candidate in the Democratic Party Primary Election 1952 for the nomination as Constable for Morehead Township, Guilford County. Plaintiff ran second in the first primary, and called for a second primary, which was held on 28 June. On 17 June the defendant Russell, a resident of Guilford County, filed with the Guilford County Board of Elections a protest and challenge, which was sworn to, of the right of plaintiff to call for a second primary "for that in fact and in law, he is unqualified to hold office, or to register and vote in any primary or general election, and in support of this challenge I do hereby allege upon information and belief as follows: 1. That W. A. Manley has heretofore been convicted of the felony of murder, or manslaughter, by reason of which he has lost his citizenship. 2. That W. A. Manley cannot read and write, and consequently is not qualified in law to register, vote, or be a candidate in any primary election."

The defendant, the Greensboro News Company, then and now, owns, publishes and controls the *Greensboro Daily News* and the *Greensboro Record,* two daily newspapers, published in Greensboro, with a large circulation there and elsewhere. The same defendant owns and operates Radio Station WFMY and Television Station WFMY-TV.

The day of the filing of this protest a reporter at the Greensboro News Company called plaintiff by telephone, and read to him the contents of the protest and challenge. Plaintiff replied: "There ain't a word true, except I did serve some time for being in that riot in Winston, and stayed in the hospital ten months and Governor Bickett pardoned me. . . . I have got papers here to show you that it is all wrong and don't you print that; if you do I am going to sue the paper." The evidence does not disclose how the reporter received notice of the filing of the protest.

The next day, 18 June 1952, the *Greensboro Daily News* on page one, section two, of its issue published an article entitled "Candidate's Right to Seek Office is Challenged" in which the protest of Russell was set forth verbatim, and plaintiff's denial. The plaintiff admitted on cross-exami-

nation that the article correctly stated that Russell made and filed the protest before the County Board of Elections, correctly printed the contents of the protest, and stated his denial of the truth of the matters and things set forth in the protest. The Greensboro News Company carried follow-up articles in its papers on 23 June 1952 (which stated among other things "Manley says his Accuser is Perjurer"); on 27 June 1952; on 28 June 1952; on 29 June 1952; and on 1 July 1952. On the day the protest was filed, plaintiff was served with a paper to show cause before the Guilford County Board of Elections why his name should not be removed from the ticket as a candidate. A hearing before the County Board of Elections was held on 23 June, and the final disposition of the hearing was set for 30 June. The follow-up articles, while repeating the ground of protest, dealt principally with the hearings. The statement made by the reporter to plaintiff was put on the air by the Greensboro News Company's radio and television station.

The second primary election was held with the plaintiff's name on the ticket. Plaintiff was defeated.

The plaintiff in his statement of facts in his brief says: "This was a civil action brought by plaintiff for damages on two causes of action for libel published by defendants, the first cause of action being for actual damages, and the second cause of action being for punitive damages. Plaintiff . . . alleges that the defendants wilfully and unlawfully collaborated and conspired with each other in the publication in defendant corporation's *Greensboro Daily News* and *Greensboro Record* of a news article, etc." Plaintiff alleges in Paragraph 7 of what he calls his first cause of action: "That defendant corporation, through its agents and servants, in collaboration and conspiracy with the defendant Russell in the production and publication of the newspaper article hereinbefore quoted, etc." In Paragraph 8 of this alleged first cause of action plaintiff alleges: "That the acts and conduct, words and deeds of defendants in mutual conspiracy and collaboration, in the publication of said newspaper story as hereinbefore alleged, etc." And in Paragraph 4 of this alleged cause of action he alleges: "That the sole intent and purpose of defendant corporation in collaboration and conspiracy with the individual defendant L. R. Russell was to cause and bring about the defeat of plaintiff in the said second primary, and that it did." The above quoted allegations from plaintiff's alleged first cause of action were repeated practically verbatim in Paragraphs 4, 7 and 9 of his so-called second cause of action, and in Paragraph 8 of the alleged second cause of action plaintiff alleges: "That on the 6th day of June 1953 after plaintiff, for almost an entire year, had endured and suffered the most damaging and destructive effects resulting as a consequence of defendant corporation's publication

of the libelous newspaper story hereinbefore alleged, in conspiracy and collaboration with its individual co-defendant, etc."

Plaintiff in his alleged two causes of action sues for the recovery of actual and punitive damages for the publication in the *Greensboro Daily News* of the article on 18 June 1952.

At the close of plaintiff's evidence, each defendant moved for judgment of nonsuit, which the court allowed.

Judgment of involuntary nonsuit was entered, and plaintiff appeals.

E. L. Alston, Jr., George A. Younce, and James Spence for Plaintiff, Appellant.

Brooks, McLendon, Brim & Holderness for Defendant, Greensboro News Company.

Hoyle & Hoyle for Defendant, Russell.

PARKER, J. Plaintiff contends that he has alleged two causes of action, one for the recovery of actual damages for the publication of an alleged libelous news story in the *Greensboro Daily News* of 18 June 1952 as the result of an alleged conspiracy between Greensboro News Company and L. R. Russell, and two for the recovery of punitive damages for the publication of the same news story as the result of the same alleged conspiracy. The allegations of the two alleged causes of action are substantially identical, except as to allegations of damages. In fact, plaintiff has alleged only one cause of action for the recovery of actual and punitive damages, because of the publication of an alleged libelous news story about him on 18 June 1952 by the defendants acting in pursuance of a conspiracy between them "to cause and bring about the defeat of plaintiff in the second primary, and that it did." Plaintiff alleges no cause of action against Russell for the charges made in the protest and challenge.

All the evidence as to what Russell did is as follows: He made and filed the protest and challenge, under oath, that plaintiff was not qualified to hold public office or to register and vote for the reasons he assigned, with the Guilford County Board of Elections. After the publication of the news story on 18 June 1952 plaintiff went to the office of the *Greensboro Daily News,* and talked to a Mr. Shepherd there, who was an employee of the Greensboro News Company. Plaintiff had the paper in his hand. This is the conversation between them: "I said, 'Mr. Shepherd, I thought I told you not to print this in the paper.' 'Well,' he said, 'Mr. Manley,' he says, 'The affidavit come in here' and he says—can I say who he said brought it in there? Q. Yes, go right ahead and tell what he said. A. He said, 'L. R. Russell'—I understood him to say, 'He brought it in here.'

(OBJECTION to the foregoing question and answer by the defendant Russell sustained as to him.)

And Shepherd said, 'I didn't pay too much attention to what he (Russell) said because the F B I just arrested him (Russell) a few days ago for signing a communist petition.' But he says, 'After I talked to him,' he said, 'I went ahead and took it up with our lawyer and the lawyer said go ahead and print it,' and he said, 'When the lawyer said go ahead and print it I went ahead and printed it.' "

When the reporter talked to plaintiff over the telephone about Russell's protest and challenge on 17 June 1952, he said he had talked to Russell, that he wanted to get plaintiff's side of it, he had already gotten Russell's.

The complaint contains no allegation of any relationship between the Greensboro News Company and Russell such as employer or employee, nor is there any evidence to that effect. Plaintiff's testimony that he understood Shepherd to say L. R. Russell brought the affidavit to the Greensboro News Company was not admitted in evidence against Russell, because it was clearly incompetent as to him. All that is left in evidence against Russell is that he executed under oath the protest and challenge, and filed it with the Guilford County Board of Elections, and a reporter of the Greensboro News Company and Shepherd talked to him about it. Surely that is no evidence at all that Russell had entered into a conspiracy with the Greensboro News Company, and in furtherance of said conspiracy the news story of 18 June 1952 was published in the *Greensboro Daily News*. As the evidence fails to show that Russell was a party to the alleged conspiracy, it follows that the Greensboro News Company was not a conspirator, because it could not conspire with itself. *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783. In *Morrison v. California,* 291 U.S. 82, 78 L. Ed. 664, p. 671, *Mr. Justice Cardozo* speaking for the Court said: "It is impossible in the nature of things for a man to conspire with himself."

We are also of the opinion that there is no evidence that the Greensboro News Company entered into the alleged conspiracy.

This Court said in *Rice v. McAdams,* 149 N.C. 29, 62 S.E. 774: "We are not favored by plaintiff with any authority which, we think, sustains his contention that a joint action may be maintained against two or more persons for words spoken, unless the defendants are connected by allegation and proof of a common design and purpose. As a general rule, such an action cannot be maintained, for the words of one are not the words of the other. 25 Cyc. 434, and cases cited." See also Anno. 34 A.L.R. 345; 53 C.J.S., Libel and Slander, p. 243.

The general rule is "that slander, unlike other torts, is an individual tort, incapable of joint commission, and that therefore two or more individuals uttering slanders against the same person cannot be held jointly

liable, in the absence of a conspiracy between them, even though they utter the identical words simultaneously." 26 A.L.R. 2d Anno. 1032 *et seq.*, where among the many cases cited is *Rice v. McAdams, supra.*

It is said in 26 A.L.R. 2d Anno. p. 1035 *et seq.:* "The major exception to the general rule is found in the generally accepted doctrine that persons uttering slanders in pursuance of a conspiracy to slander, and all other members of the conspiracy as well, may be held jointly liable." Among the many cases cited in support is *Rice v. McAdams, supra.*

"Generally a joint action may not be maintained against two or more persons for slander except where a common agreement or conspiracy is charged; where a libel is the joint act of several persons, they may be sued jointly or separately at plaintiff's election." 53 C.J.S., p. 243.

The Supreme Court of Appeals of West Virginia said in *Barger v. Hood,* 87 W. Va. 78, 104 S.E. 280: "The defendants contend that their demurrer should have been sustained because there is a misjoinder of defendants in the declaration. They argue that two or more persons cannot be joined in a suit for libel unless it is shown that the publication of the libel was the common or joint action of all of them. The authorities are clear that this is the law. 17 R.C.L., Title, Libel and Slander, Sec. 130."

The plaintiff has alleged a conspiracy, but there is a total failure of proof to sustain such allegation. *Allegata* without *probata* is insufficient. Both must concur to establish a cause of action. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

"Plaintiff's recovery is to be had, if at all, on the theory of the complaint and not otherwise." *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470. "If the petitioners are to succeed at all, they must do so on the case set up in their complaint." *Sale v. Highway Commission,* 238 N.C. 599, 78 S.E. 2d 724. It is familiar learning that where there is a total failure of proof to support the allegations of a complaint, a motion for judgment of nonsuit should be granted. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14.

The plaintiff contends that "if the plaintiff has not put on sufficient evidence of common design, the action could have been divided, but should not have been dismissed." The plaintiff cites in support of this contention what this Court said in *Lewis v. Carr,* 178 N.C. 578, 101 S.E. 97, about *Rice v. McAdams, supra:* "In that case there was no common purpose or design shown, and the Court said the action should have been divided, but that it would be error to dismiss it." In *Rice v. McAdams* the defendants were charged jointly with uttering *different slanderous words.* The contention is without merit, because as we have stated above plaintiff has stated *one cause of action for one publication* in pursuance of a conspiracy between the defendants to libel him. Russell's learned

counsel has concisely said in his brief in replying to this contention of plaintiff: "The plaintiff in the case at Bar, seeks to discuss as error, the failure of the Judge to do what he was not asked to do; and to assign as error, a matter not based upon an exception taken below. He will not be permitted to do so."

The plaintiff did not request the trial judge to permit him to dismiss his action against Russell and to proceed against the Greensboro News Company. We will not consider this matter, since it is not presented by exception, and assignment of error duly entered. *Rader v. Queen City Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609. The plaintiff decided to proceed to the end against both defendants. He is bound by his decision.

Plaintiff has offered no evidence that Russell took any part in the publication of the alleged libel, so *Taylor v. Press Co.*, 237 N.C. 551, 75 S.E. 2d 528, does not support plaintiff's contentions.

Plaintiff has based his action squarely upon the publication of an alleged libel in pursuance of an alleged conspiracy between the defendants to libel him. He has *allegata*, but not *probata*. That is fatal. The judgment of nonsuit was correctly entered. *Aiken v. Sanderford, supra.*

Affirmed.

DAISY O. FLOYD, ADMINISTRATRIX OF E. L. FLOYD, DECEASED, v. NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 4 February, 1955.)

1. State § 3a—

The State Tort Claims Act is in derogation of the sovereign immunity from liability for torts, and the sounder view is that the Act should be strictly construed, and certainly the Act must be followed as written.

2. Same—

A claim under the State Tort Claims Act must identify the employee of the State whose negligence is asserted, and set forth the act or acts on his part which are relied upon.

3. State § 3b—

In order for claimant to prevail in a proceeding under the State Tort Claims Act, he must show not only injury resulting from negligence of a designated State employee, but also that claimant was not guilty of contributory negligence.

4. Same—Evidence held to support sole conclusion that State employee was not guilty of negligence.

The evidence tended to show that some eight months prior to the accident in question a fill on a county road was raised two or three feet, that at the time the work was performed the county maintenance supervisor

was advised that the fill had washed out once before in the approximately 30 years the road had been built, that the supervisor thereupon directed that the old tile culvert be ripped out and be replaced with tile of larger diameter, that the up-stream side was laid with larger tile but the down-stream side was finished with the original tile, and that after an exceptionally heavy rain, the road again washed out, resulting in the death of claimant's intestate when he drove into the washout at a time of poor visibility. *Held:* The mere fact of the washout does not establish negligence, nor was the superintendent under duty to go back and inspect to see that his directions had been carried out, and therefore, the evidence is insufficient to support a claim based upon the alleged negligence of the supervisor.

5. Highways § 4b—

It is not required that highways be constructed in such manner as to insure safety under all conditions, it being a matter of common knowledge that culverts, fills, embankments, and whole sections of roads give way to the destructive force of flood waters.

6. Evidence § 5—

It is a matter of common knowledge that increase in pressure increases the flow of water, and that, therefore, an increase in the height of a highway fill, by increasing the volume of water impounded, will increase the flow of water through a culvert under the fill so as to make the road safer from washouts than it was before the height of the fill was increased.

PARKER, J., dissenting.

APPEAL by defendant from *Clarkson, J.*, February 1954 Civil Term, DAVIDSON.

This is a proceeding before the North Carolina Industrial Commission under the Tort Claims Act, Section 1, Chapter 1059, Session Laws 1951, now G.S. 143-291, *et seq.*

The plaintiff, Administratrix of E. L. Floyd, sets forth in her claim and affidavit that the death of her intestate was the result of negligent acts on the part of Fred L. Everhart and Elton Cross, employees of the State Highway and Public Works Commission. It is claimed that in rebuilding a culvert and fill on a public highway in Davidson County they used drainage tile of a size insufficient to carry surface water after heavy rains; that after an unusually heavy rainfall on the night of 4 March, 1952, surface water was impounded above the fill, resulting in a washout across the road of a depth equal to the height of a 1930 Ford automobile and of a width slightly more than the length of the Ford. Just before daylight, when visibility was poor on account of light rain and fog, plaintiff's intestate drove his Ford automobile into the washout, sustaining injury resulting in his death.

The evidence tended to show that the road had been built for approximately 30 years; that 30-inch tile was originally used to carry water under the fill at the place where the accident occurred. However, about

eight months prior to the accident the State Highway and Public Works Commission rebuilt the road, raised the fill two or three feet and applied an asphalt treatment to the road surface.

Mr. C. R. Garner, a plaintiff's witness who owned the land adjacent to the fill, testified: "I told Mr. Fred Everhart that since he was building the road higher and had his men and equipment there, I thought it would be a good time to place a larger tile in there because this had washed out *once* before . . . He agreed that I was right and told the boys to go ahead and rip out the old tile and put in larger tile. They went ahead and tore it out and sent a man after large tile. He didn't bring enough . . . and they finished out with the same tile that was there. The large tile was placed on the up-stream side and they finished the culvert with the small tile down-stream. Mr. Everhart didn't stay around to see that his orders were carried out. I couldn't say as to whether he ever inspected the finished job. He wasn't there when the job was finished. He gave instructions about how to do it but he went on about his work, I suppose." Mr. Garner further testified that in the 30 years he had lived in that vicinity the fill had washed out *twice* before, the last time about eight or ten years prior to the time of the accident.

The parties entered into the following stipulation:

"Defendant's counsel stipulated that Daisy O. Floyd was the duly appointed, qualified Administratrix of the estate of E. L. Floyd, deceased, who died as a result of injuries received from an accident on March 4, 1952. Counsel further stipulated that the accident occurred on a county road, which was a part of the county road system of the State Highway and Public Works Commission, and that the work done on this road was done by employees of the State Highway and Public Works Commission in the course and scope of their employment, and that Fred Everhart was employed by the State Highway and Public Works as County Maintenance Supervisor in Davidson County and as such was in charge of the supervision of the county road system of the State Highway and Public Works Commission in Davidson County."

A hearing was held before Commissioner Bean of the North Carolina Industrial Commission, who took testimony, made findings of fact and stated conclusions of law. A recovery was denied on the ground the evidence failed to show a negligent act on the part of the employees of the State Highway and Public Works Commission. The plaintiff in apt time appealed from the order and findings to the full Commission, alleging errors in certain designated particulars. The full Commission, after hearing and reviewing the record, adopted as its own the findings of fact and conclusions of law reported by Commissioner Bean. In addition, the full Commission stated as its opinion: "The rain was of such unusual magnitude as to constitute an act of God." The full Commission was

further of the opinion "plaintiff's intestate was guilty of contributory negligence in failing to observe the washout in time to stop his car before running into it, and that his contributory negligence was one of the proximate causes of his death." The full Commission approved and affirmed the order denying recovery.

From the order and findings of the full Commission, the plaintiff appealed to the Superior Court of Davidson County, specifying 27 exceptions and assignments of error in the Commission's findings and conclusions. Upon the hearing in Superior Court, the trial judge sustained 15 exceptions. In reference to ten other exceptions and assignments of error, "The Court holds the findings of fact are insufficient to enable the Court to determine the rights of the parties and remands the cause to the North Carolina Industrial Commission for further findings." Two exceptions were overruled "without prejudice." From the order of the Superior Court, the defendant brings this appeal.

DeLapp & Ward and Charles W. Mauze for plaintiff, appellee.
R. Brookes Peters and Kenneth Wooten, Jr., for defendant, appellant.

HIGGINS, J. In 1951 the State, acting through its legislative branch (Chapter 1059, Session Laws 1951), waived its immunity from suit in cases where injury and damage result from the acts of negligence of its employees. The United States and some of the other states have similar statutes. The courts are not in agreement as to whether such acts should be strictly or liberally construed. Inasmuch as the acts permitting suit are in derogation of the sovereign right of immunity, we think the sounder view is that they should be strictly construed. The authorities are cited in the concurring opinion by *Justice Bobbitt* in the case of *Alliance Company v. State Hospital, ante,* 329. At any rate, the statute giving the right to maintain the suit must be followed as written. G.S. 143-291 authorizes the filing of the claim before the North Carolina Industrial Commission. G.S. 143-297 provides that the claim must be accompanied by an affidavit in duplicate, setting forth among other things, (b) The name of the department, institution or agency of the State against which the claim is asserted *and the name of the State employee upon whose alleged negligence the claim is based.* The purpose of requiring the claimant to specify the State employee whose negligent act caused the injury is to enable the State or department to make proper investigation as to the employee designated and ascertain the facts with respect to his alleged acts of negligence, and present evidence or be heard with respect thereto.

In this case the claimant charges negligence against Fred L. Everhart and Elton Cross. Nowhere in the evidence is Cross mentioned. There

is no evidence of any act on his part, negligent or otherwise. If recovery is sustained, therefore, it must be on the negligence of Everhart alone. It isn't enough to say that some employee's negligence caused the injury. The claim and the evidence must identify the employee and set forth his act or acts of negligence which are relied upon. Even in the ordinary case of negligence between private parties the proof must follow the allegation as to whose negligence caused the injury. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14. However, in order to sustain an award under the Tort Claims Act, the claimant must show not only injury resulting from a designated employee's negligence, but also must go further and show that the claimant was not guilty of contributory negligence. For the claimant to prevail in this case she must show a negligent act on the part of Everhart proximately causing the injury and, in addition thereto, she must show absence of contributory negligence on the part of her intestate. Failure in either particular defeats recovery.

The record contains all the evidence presented at the hearing. Careful examination compels the conclusion that certain of the findings of fact made by the hearing commissioner and adopted and confirmed on appeal by the full Commission are not supported by the evidence. However, the unsupported findings relate to unimportant details without bearing on the question of Everhart's negligence. The evidence upon which the claimant seeks to charge Everhart is: (1) He was Maintenance Supervisor for Davidson County; (2) while rebuilding the road he failed to see that his instructions were carried out with respect to the use of larger tile after he had notice that the fill had washed out once before in 30 years.

True, in his evidence, Garner stated the fill had washed out twice before, the last time about eight or ten years prior to the time the repairs were being made. However, the plaintiff's uncontradicted evidence is that he told Everhart the fill had washed out *once* before. The claimant contends Everhart was negligent in that he failed to make inspection and ascertain whether his directions had been carried out. The instructions were given, Everhart went on about other duties. The tile was installed, the fill completed, which, of course, covered up the tile. There is no evidence that Everhart had notice that his instructions had been carried out only in part. Was the maintenance supervisor in charge of the county road system of a large and populous county required to go back to the fill, measure the tile at each end to see if the tile down-stream was the same size as the tile up-stream? Suppose Everhart had permitted the fill to remain as it was with the tile that so far as he knew had carried the water for 30 years, except on one occasion. Can it be charged that in so doing he committed an act of negligence within the meaning of the law? Maintenance supervisors throughout the State know of washouts.

Can it be that in event of a second washout the State Highway and Public Works Commission is liable should injury result?

No longer do we encounter open fords on our highways. Roads cross watercourses and drainage ditches over bridges and culverts. That these structures are matters of engineering and planning is common knowledge. To build them in such manner as would insure safety under all conditions is too much to expect. The cost would be prohibitive. Bridges, culverts, fills, embankments and whole sections of roads give way to the destructive force of flood waters. Road repair work is usually emergency work, made out of materials close at hand in order that modern travel may move with a minimum of delay and inconvenience. Once, and only once, so far as Everhart knew, the 30-inch pipe had proved insufficient to carry flood water during a period of 30 years.

New repairs made eight months before the accident raised the fill two or three feet. The effect was to increase the volume of impounded water above the fill, by actually how many gallons or cubic feet only an hydraulic engineer could say. By common knowledge, however, the increase was substantial. This, of course, lessened the chance of overflow from a hard rain. Not only the increased capacity to hold the water above the fill, but the pressure of so much additional water increased the rate of flow through the tile, lessening the danger of overflow. In order to see a manifestation of this principle, it is only necessary to turn on a water spigot. Pressure determines the rate of flow, and increased pressure increases the flow, and it makes no difference whether the pressure comes from the weight of additional water or from compressed air in a tank. These are matters of usual, everyday observation—a part of our common knowledge —so, actually the tile would carry, and the fill would withstand a substantially greater volume of surface water than would have been the case before the repairs were made. The road was safer from flood than it was before.

The Industrial Commission found that Everhart was not guilty of any act of negligence. The evidence not only supports this finding, but would be insufficient to support any finding to the contrary. There is no evidence that the larger tile would have been sufficient to carry the water. So far as the record is concerned, no inspection was made to determine whether debris picked up by moving water partially impeded the flow through the culvert. The evidence leaves too much in the realm of speculation and conjecture to form the basis for a finding of negligence. The claim must fail for want of proof. It, therefore, becomes unnecessary to consider proximate cause and contributory negligence.

A combination of unfortunate circumstances caused Mr. Floyd to lose his life: (1) A very heavy rainfall; (2) a culvert that proved inadequate to carry off surface water; (3) a washout which Mr. Floyd happened to

approach at a time when visibility was poor because of the time of day, rain and fog; (4) he failed to see the washout, drove into it and was killed. Such are the hazards of life.

It is ordered that the case be remanded to the Superior Court of Davidson County to the end that a judgment be there entered confirming the order of the North Carolina Industrial Commission.

Reversed and remanded.

PARKER, J., dissenting: I do not agree with the expression in the majority opinion that we think the sounder view is that the Tort Claims Act of this State should be strictly construed. The doctrine of strict application of statutes waiving sovereign immunity has been held in *U. S. v. Aetna Cas. & S. Co.*, 338 U.S. 366, 94 L. Ed. 171 (1949) not applicable to the Federal Tort Claims Act. In that case *Vinson, Chief Justice,* said for the Court: "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by *Judge Cardozo's* statement in *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

The purpose of our Tort Claims Act was to relieve the General Assembly from the judicial function of passing upon tort claims against the State, and was enacted pursuant to the current trend of legislative thought to waive the State's immunity from suit. When the State has done so, I think the statute should not be strictly construed, but construed as expressed in the words of *Cardozo, J.*, quoted by *Chief Justice Vinson.*

I agree with the trial judge that the findings of fact were insufficient to enable the lower court to determine the rights of the parties, and that the cause should be remanded to the Industrial Commission for further findings.

STATE v. ROBERT S. CONNER.

(Filed 4 February, 1955.)

1. Constitutional Law § 9: Criminal Law § 54i—

In a prosecution for a capital felony, the right of the jury to recommend life imprisonment rests in its unbridled discretion and should be exercised by the jury on the basis that imprisonment for life means imprisonment for life in the State's prison, without considerations of parole or eligibility therefor, the power of parole being vested exclusively in the executive branch of the State government. Constitution of North Carolina, Art. III, Sec. 6. G.S. 14-17; G.S. 148-58.

2. Criminal Law § 53n—

When, in a prosecution for a capital felony, the question of eligibility for parole arises spontaneously during the deliberations of the jury, and is brought to the attention of the court by independent inquiry of the jury and request for information, the court should instruct the jury that the question of eligibility for parole is not a proper matter for the jury to consider and should be eliminated entirely from their deliberations, and the action of the court in merely telling the jury that he cannot answer the inquiry must be held for prejudicial error upon appeal from conviction of the capital felony without recommendation of life imprisonment.

PARKER, J., dissents.

HIGGINS, J., dissenting.

APPEAL by defendant from *Phillips, J.*, and a jury, at 12 July, 1954 Term of FORSYTH.

Criminal prosecution upon a bill of indictment charging the defendant with the murder of one Langston B. Roberts while in the perpetration of the crime of robbery.

There was a verdict of guilty of murder in the first degree without recommendation of life imprisonment, followed by judgment imposing sentence of death by asphyxiation, from which the defendant appeals.

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

Philip E. Lucas and Oren W. McClain for defendant, appellant.

JOHNSON, J. After the jurors had deliberated upon the case for some time, they returned to the courtroom and, after informing the court they desired further information on a matter that had arisen, one of the jurors propounded this question: "Will the defendant be eligible for parole if he were given life imprisonment?" To the inquiry the court replied without further elaboration: "Gentlemen, I cannot answer that question."

For the court to have answered the question propounded by the jury so as to have given them the information sought would have been to tell them in substance that the defendant, if given life imprisonment, would be eligible for parole by virtue of the mandate of Article III, Section 6, of the Constitution of North Carolina, which vests in the Governor the exclusive power to grant reprieves, commutations, and pardons, and that also by virtue of G.S. 148-58 any prisoner serving a sentence for life "shall be eligible" for a hearing upon application for parole when he has served ten years of his sentence.

However, the presiding Judge properly refrained from so informing the jury of the defendant's eligibility for parole. This is so for the reason that eligibility for parole was not a relevant or proper factor for the jury to consider in arriving at its verdict.

Our statute, G.S. 14-17, which fixes the death penalty for murder in the first degree, now by virtue of Chapter 299, Session Laws of 1949, contains a proviso which directs that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

The proviso by its express terms confers on the jury the discretionary right to mitigate the punishment from death to "imprisonment for life in the State's prison." The statute makes no reference, either expressly or by implication, to considerations of parole or eligibility therefor. Consequently, in so far as the jury is concerned, imprisonment for life means, as plainly stated in the statute, "imprisonment for life in the State's prison." As to this, it is to be kept in mind that the power to determine guilt and to assess punishment for crime are functions of the courts, whereas the power of parole is vested exclusively in another branch of the state government—the executive branch. Moreover, punishment is ordinarily assessed against a person convicted of crime on the basis of his acts and conduct prior to trial, whereas parole is determined mainly on the basis of subsequent acts and demeanor. Therefore, in determining guilt and in resolving the question of life imprisonment under the Act of 1949, the question of what afterwards may happen to a prisoner by way of commutation, pardon, or parole is no concern of the jury. It is their duty to determine the question of guilt, and in case of guilt of murder in the first degree to determine whether or not the punishment shall be mitigated from death to "imprisonment for life in the State's prison." The determination of this question of mitigation of punishment should be made by the jury upon the basis of what to them seems just and proper in the exercise of their unbridled discretion (*S. v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212), wholly uninfluenced by speculations as to what

another arm of the government may do in the future by way of commutation, pardon, or parole.

The Judge's original instruction on the question of the right of the jury to recommend imprisonment for life was adequate as an original instruction. It was in accord with the language of the amendatory Act of 1949 and these decisions construing and interpreting the statute: *S. v. McMillan, supra; S. v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684. This being so, when the jury returned and made inquiry as to eligibility for parole, it may well be that the Judge in telling the jurors he could not answer the question meant thereby to impart to them the idea that eligibility for parole was not a proper factor for them to consider and that they should dismiss it from their minds.

However, while such impression may have been deduced by the jury, it is more probable, we think, that they were left free to speculate on the question of eligibility for parole in arriving at their verdict and in resolving the question of mitigation of punishment. The form of the question indicates unmistakably that a recommendation of life imprisonment was under consideration and that it was being contemplated in the light of possible interference by parole. It is inferable that the jurors had sought without success to settle the question of eligibility for parole on the basis of their own knowledge of parole law and procedure. It is inferable also that there was a division of opinion as to whether the defendant, if given life imprisonment, would become eligible for parole and, if so, when and under what circumstances his eligibility would be determined. It is manifest, we think, that the Judge's response was insufficient to put an end to such speculations in the minds of the jurors. Rather, it would seem the jurors were left to continue to speculate and deliberate on the basis of their own lay information or misinformation concerning vital factors of parole in arriving at their verdict and in fixing the defendant's punishment as between death and life imprisonment. That the speculative factors which were calculated to weigh against recommending life imprisonment prevailed in the jury room is shown by the verdict, which consigned the defendant to death.

It may be conceded as an established rule of law that where, as here, a jury is required to determine a defendant's guilt and also to fix the punishment as between death and life imprisonment, to permit factors concerning the defendant's possible parole to be injected into the jurors' deliberations by argument of counsel or comment of the court is considered erroneous as being calculated to prejudice the jury and influence them against a recommendation of life imprisonment. *S. v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *Strickland v. State,* 209 Ga. 65, 70 S.E. 2d 710.

It may be conceded also that if the matters relating to the question of eligibility for parole had been planted in the jurors' minds from outside sources during the course of the trial, such as by comment of the court or by argument of counsel, the duty would have devolved upon the trial court to remove by timely instruction the prejudicial impression created thereby in the minds of the jurors. *S. v. Dockery, supra.*

However, in the case at hand the question of eligibility for parole was not injected into the jury box during the course of the trial. It arose spontaneously while the jurors were deliberating upon the case. But even so, the question raised seems to have become a controversial factor in the deliberations of the jury no less than if it had been planted in the minds of the jurors during the course of the trial.

Thus, the ultimate question is: When the question of eligibility for parole arises spontaneously during the deliberations of the jury, and is brought to the attention of the court by independent inquiry of the jury and request for information, as here, is the judge required to instruct the jury to eliminate such matters from their minds, or does it suffice for him merely to tell the jury he cannot answer the inquiry?

If matters relating to eligibility for parole are not pertinent factors for the jury to weigh in assessing punishment because they are deemed in law to be irrelevant to the issues involved in the case and prejudicial to the interests of the accused, it would seem that the rule which requires the elimination of such matters from consideration by the jury is nonetheless exacting when they are known to arise spontaneously in the jury room than when they derive from sources connected with the progress of the trial. It is the knowledge that irrelevant considerations of a prejudicial nature have entered into the deliberations of the jury, rather than the source of such considerations, that calls the judge to duty.

We are constrained to the view that the Judge's response to the inquiry of the jury was insufficient to remove from their minds prejudicial matters relating to eligibility for parole. While the question propounded related to considerations which were legally irrelevant to the case and prejudicial to the interests of the defendant, nevertheless it must be conceded that the question so raised reflected a natural trend of lay thinking within the jury room. The question as propounded was logical and reasonable. The Judge's response, "I cannot answer that question," was purely negative.

The jurors should have been given a positive instruction to put the irrelevant question, and matters relating thereto, out of their minds; for example, by having the court reporter read to the jury the pertinent part of the original charge bearing on the question of the right of the jury to recommend life imprisonment under application of the 1949 statutory amendment, and by further instruction in substance as follows: that the

question of eligibility for parole is not a proper matter for the jury to consider and that it should be eliminated entirely from their consideration and dismissed from their minds; that in considering whether they should recommend life imprisonment, it is their duty to determine the question as though life imprisonment means exactly what the statute says: "imprisonment for life in the State's prison," and that they should resolve the question of mitigation of punishment in the exercise of their unbridled discretion, wholly uninfluenced by considerations of what another arm of the government might do or might not do in the future by way of commutation, pardon, or parole.

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

New trial.

PARKER, J., dissents.

HIGGINS, J., dissenting: The prisoner was charged with murder in the first degree committed in the perpetration of a robbery. The jury returned a verdict of guilty as charged, without recommendation of life imprisonment. After the judge had delivered a charge, admittedly free from error, and after the jurors had been deliberating for 10 minutes, they returned to the courtroom where the following took place:

Court: The officer informed the court that the jury would like to ask a question. What is it?

Juror Turner: Your Honor, *the points may not deserve an answer, or they might not be relevant,* but we would like to clear them up.

Court: All right.

Juror Turner: Will this defendant be eligible for a parole if he were given life imprisonment?

Court: Gentlemen, I cannot answer that question.

Juror Turner: Thank you. The second question: May we inquire about his previous record?

Court: No, sir, because the defendant's character was not in issue since he did not go upon the stand or place his character in issue; therefore, there was no evidence as to his previous record or his good character or bad character, because he did not place his character in issue; therefore, there is no evidence as to his character, either way.

Juror Turner: Thank you, sir.

The prisoner excepts to the court's answer to the question about eligibility for parole in case of life imprisonment. Since the question was asked, the court was confronted with the necessity either of answering the question or declining to answer it. An answer would have required the court to say the prisoner would be eligible for parole. Constitution of

North Carolina, Article III, Sec. 6; G.S. 147-43; G.S. 148-58. To have told the jury the prisoner would be eligible for parole in the event of life imprisonment would have been error, in my judgment. It was mandatory, therefore, that the court decline to answer the question.

This Court has said the jurors have the right in their unbridled discretion to recommend life imprisonment. The right to refuse to make such a recommendation is equally unbridled. For the judge to have told the jury that the question of parole was no concern of theirs and that they should not consider it tends to put a bridle on discretion. It is perfectly plain, or it seems so to me, the jurors wanted no part of the responsibility of allowing the prisoner again to be at large, arm himself, keep in concealment until some other merchant is alone in his place of business, enter, shoot him down, take his money from the cash drawer and from his pocket, and leave him alone in the agony of death.

I regret I am unable to go along with my brethren in the view the prisoner's rights were prejudiced by the judge's failure to tell the jury that they should not concern themselves with the question of parole. That is merely another way of declining to answer the question.

PARK TERRACE, INC., v. PHOENIX INDEMNITY COMPANY (ORIGINAL DEFENDANT) AND PARK BUILDERS, INC. (ADDITIONAL DEFENDANT).

(Filed 4 February, 1955.)

1. Principal and Surety § 8: Pleadings § 31—

In an action upon a builder's performance bond to recover for alleged defective materials and improper workmanship, allegations to the effect that the architect responsible for the construction of the project had certified that all work had been completed in accordance with the terms of the contract, are relevant and material, and motion to strike such allegations from the pleadings is correctly denied.

2. Appeal and Error § 6c (1)—

Where the court enters an order striking certain paragraphs from the pleadings and likewise denying motion to make an additional party defendant, an exception particularizing objection solely to so much of the order as strikes the paragraphs, does not support an assignment of error to the refusal to make the additional party defendant.

3. Corporations § 20—Corporation not bound by agreement of individual made with individual shareholders in purchasing their stock.

Plaintiff corporation owned certain lands and executed a contract with a corporate builder for the construction of certain apartment buildings thereon. After the completion of the buildings, an individual, who had no previous connection with plaintiff corporation, purchased all its common

stock from the individual stockholders, and executed an agreement with vendors that no claim should be asserted against them or the building corporation for improper workmanship or defective materials in the construction of the apartments. *Held:* The individual purchasing the stock could not bind plaintiff corporation by the contract of release, since at the time of making the agreement he was neither stockholder, officer, director nor employee of the corporation, and allegations that he was acting in behalf of plaintiff corporation and had authority to execute the agreement are mere conclusions of the pleader.

4. Principal and Surety § 8: Pleadings § 31—

In an action by a corporation on a builder's performance bond, allegations in defendants' answers setting up a release from liability for improper workmanship and defective materials, executed by an individual in purchasing all of the common stock of the corporation from its individual stockholders after the completion of the buildings, are properly stricken on motion when the release contract is not binding on the corporation.

5. Corporations § 21: Principal and Agent § 7d—

Where an individual does not purport to be acting for a corporation in executing a contract, the question of corporate ratification of his acts cannot arise.

6. Corporations § 20—

A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting.

7. Principal and Surety § 8: Parties § 3—Individual executing release agreement not binding on corporation held not necessary party in corporation's action on builder's performance bond.

Plaintiff corporation owned certain lands and executed a contract with a corporate builder for the construction of certain apartment buildings thereon. Sometime after the completion of the buildings, the owners of all of the common stock of plaintiff corporation sold same to an individual by contract under which the purchaser of the stock agreed that no claim should be asserted against the sellers of the stock or the building corporation for improper workmanship or defective materials. *Held:* In an action by the plaintiff corporation on the builder's performance bond, the individual purchaser of the stock is not a necessary party, the corporation not being bound by the release contract.

8. Pleadings § 22b—

Where the trial court correctly declines to join an additional party defendant, denial of a motion to amend for the purpose of making allegations against such party is without error.

9. Same—

A motion to be allowed to amend is addressed to the discretion of the trial judge, and his action in declining to grant leave to amend is not reviewable.

BOBBITT, J., dissenting.

JOHNSON, J., concurs in dissent.

APPEAL by defendants from *Phillips, J.*, September Term, 1954, FORSYTH.

Civil action to recover damages for breach of building contract, heard on motion by plaintiff to strike allegations in defendants' further answers and motion of defendants to make M. P. McLean an additional party defendant and for leave to amend their answers.

On 12 October 1949 plaintiff entered into a contract—FHA Form No. 2442-M—with Park Builders, Inc. for the construction of certain apartment buildings and facilities on lands owned by the plaintiff. Park Builders, as a part of the contract, executed and delivered to plaintiff a performance bond known in the building trade as "Federal Housing Administration Contract Bond—Dual Obligee." Defendant Phoenix Indemnity Company, hereinafter referred to as Indemnity Company, executed this bond as surety. At that time W. B. Pollard, R. G. Burge, and Lawson Lester, Jr., owned 199 of the 300 outstanding shares of common stock of plaintiff, and J. A. Bolich, Jr. owned the remaining 101 shares. FHA owned the 100 shares—par value of $1.00 per share—of outstanding preferred stock of plaintiff.

On 15 February 1951, Malcolm P. McLean, Jr. acquired the 199 shares of Class A common stock of plaintiff from Pollard, Burge, and Lester, who were at that time also the directors and officers of Park Builders. On the same date McLean contracted to purchase from Bolich the remaining 101 shares of Class A common stock of plaintiff.

As a part of the contract of purchase and sale and as a consideration therefor, McLean executed and delivered to Pollard, Burge, and Lester, a contract which contained a provision as follows:

"The purchaser agrees, and has by this contract accepted the real estate and all improvements located thereon which is owned by the corporation in its present condition, and agrees that no claim shall be made against the parties of the first part (Pollard, Burge, and Lester) individually or against Park Builders, Inc., or J. A. Bolich, Jr., of any nature whatsoever because of defective workmanship, defective or inferior building materials in the structures located on said premises, and also because of any breakage or wear and tear that has heretofore occurred to any of the structures or fixtures located in said structures, it being definitely understood and agreed that the premises and all structures erected thereon and fixtures attached thereto are accepted in their present condition, and no guarantee of their conditions is made by the parties of the first part, Park Builders, Inc., or J. A. Bolich, Jr."

Two years and ten months after the transfer of said stock and the execution of said agreement, plaintiff instituted this action for damages for breach of the construction contract by Park Builders for improper workmanship, the use of defective materials, and in other respects it is unneces-

sary to detail. The action was originally instituted against the surety on performance bond only. On motion of Indemnity Company, Park Builders was made an additional party defendant.

The defendants filed separate answers in which they denied the material allegations contained in the complaint and pleaded as a further defense and bar of the claim of the plaintiff the agreement entered into by McLean at the time he acquired the common stock of plaintiff.

In paragraph 1 of the further answers each defendant alleges in part: ". . . and Lief Valand, the Architect responsible for the construction of the project under the provisions of said contract, certified to the Federal Housing Administration that said work in progress during the construction of the project, and all work as finally completed, was performed and completed in accordance with the terms of said contract including the plans, specifications, and drawings as said requirements . . ."

In the second paragraph of their further answers, the defendants plead the contract of release above quoted and allege that said contract is a bar to plaintiff's right to recover herein. Paragraph 3 of said further answers is as follows:

"3. The defendant, Park Builders, Inc., alleges that in executing and delivering said contract and release, set out in paragraph 2 of this Further Answer and Defense, Malcolm P. McLean, Jr., was acting in behalf of and as agent of the plaintiff; that he had authority to so act and that the plaintiff, as principal, is bound by the acts of the said Malcolm P. McLean, Jr., in executing and delivering said contract to this defendant, Park Builders, Inc."

On 17 March 1954 plaintiff filed a motion before the clerk of the Superior Court to strike paragraphs 2 and 3 and that part of paragraph 1 above quoted of defendants' further answer and defense. The clerk, on hearing the motion, entered an order striking the quoted excerpt of paragraph 1 and declining to strike paragraphs 2 and 3. When the cause came on for hearing before the judge on appeal from the clerk, the judge entered an order denying the motion to strike the excerpt from paragraph 1 of said further answers and striking paragraphs 2 and 3. He likewise denied the motion of defendants to make McLean an additional party defendant and for leave to amend their further answers. Both plaintiff and defendants excepted and gave notice of appeal. The appeal was perfected only by the defendants.

Spry & White and Dallace McLennan for plaintiff appellee.

Brooks, McLendon, Brim & Holderness for original defendant appellant, and Womble, Carlyle, Martin & Sandridge and Broaddus, Epperly & Broaddus for additional defendant appellant.

BARNHILL, C. J. There was no error in the order of the court below declining to strike the quoted excerpt from the further answers of the defendants. It was the duty of the architect in charge to exercise general supervision of the construction of the buildings contemplated by the building contract for the purpose of determining whether the builder was furnishing the type of building material and constructing the buildings in accordance with the plans and specifications. Consequently, the defendants will have the right to offer competent evidence in support of the allegation. Hence, inclusion of said allegation is neither irrelevant nor immaterial.

The appellants discuss in their brief the alleged error of the court below in declining to make McLean a party defendant. But there is no exception to sustain this assignment. Upon the signing of the order from which the defendants appealed, they elected to particularize their objections to the order in the following language: "The defendants . . . each excepts separately to so much of the foregoing order as strikes paragraphs 2 and 3 of their respective further answers and defenses, and the judgment entered, and each appeals to the Supreme Court." Thus the defendants, at the time, elected to direct their attack upon the order to so much thereof as struck paragraphs 2 and 3. They did not except to the refusal of the court to make McLean a party defendant. *Currie v. Malloy,* 185 N.C. 206, 116 S.E. 564. And, in any event, the refusal of the court to make McLean a party defendant was well advised. The purchase of the outstanding common stock from the then owners thereof was by McLean as an individual. He signed the so-called release as an individual. Hence, these defendants may not be permitted to try any action they may have against McLean in this suit.

The so-called release executed at the time and as a part of the contract of purchase and sale was executed by the then owners as parties of the first part and by McLean as the party of the second part, as individuals. Neither the vendors nor the vendee purported to act for the corporation.

While it is alleged that McLean, in executing the release, "was acting in behalf of and as agent of the plaintiff; that he had authority to so act and that the plaintiff, as principal, is bound by the acts of the said Malcolm P. McLean, Jr., in executing and delivering said contract to Park Builders, Inc.," the other specific facts alleged completely refute this allegation and make it nothing more than a conclusion. At the time McLean signed the release contract, he was not a stockholder, director, or officer of plaintiff corporation, and there is no allegation that he was an employee possessing any authority whatsoever to act in behalf of plaintiff.

Since McLean, in executing the release contract, did not purport to act as an agent of plaintiff, the question whether he had authority to act in behalf of that corporation does not arise. That question does not arise

until and unless he professes to contract for and in behalf of his alleged principal. *Air Conditioning Co. v. Douglass, ante,* 170.

A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting. "As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference, and intelligent discussion of proposed measures." *O'Neal v. Wake County,* 196 N.C. 184, 145 S.E. 28; *Tuttle v. Building Corp.,* 228 N.C. 507, 46 S.E. 2d 313, and cases there cited.

"The separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with corporate powers." Angel & Ames on Corporations, sec. 504. "Indeed, the authorities upon this subject are numerous, uncontradicted, and supported by reason." *Duke v. Markham,* 105 N.C. 131; *Tuttle v. Building Corp., supra,* and cases there cited; 13 A.J. 465; 3 Fletcher, Cyc. of Corporations, 2917; Ballentine, Manual of Corporation Law and Practice, 591.

It is apparent that at the time McLean acquired the stock of plaintiff corporation, the vendors were under the impression they might be liable individually in an action for breach of the building contract and were seeking to protect themselves against a suit for such breach. It would seem, therefore, that the release contract was made a part of the purchase and sale of the stock primarily for the protection of the vendors. In any event, the action of McLean in becoming a party to said contract was not binding upon plaintiff corporation. Whether Park Builders, Inc. has a cause of action against the vendors of the stock under said release contract will be determined by the verdict and judgment in this cause. If plaintiff recovers herein, Park Builders, Inc. may then assert its rights, if any, under said release contract.

McLean is not a necessary party to this action. The rights of plaintiff may be fully litigated without making him either a party plaintiff or defendant. The action of the court in declining to make him a party defendant cannot be held for error. The motion of the defendants for leave to amend their answers was interposed for the purpose of making allegations against McLean. Since McLean was not made a party, the motion to amend is clearly without merit. In any event, it was a matter of discretion resting in the presiding judge. His action in declining to grant leave to amend is not reviewable. *Hooper v. Glenn,* 230 N.C. 571, 53 S.E. 2d 843; *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391; *Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398.

Query: Since McLean has acquired all the stock of plaintiff, is it now a corporation? This question is not presented by this record.

The judgment entered in the court below is

Affirmed.

BOBBITT, J., dissenting: In considering plaintiff's motion to strike, we deal with *the facts alleged.*

On 15 February, 1951, Pollard, Burge and Lester owned 199 shares of plaintiff's common stock. Bolich owned the remaining 101 shares. Pollard, Burge and Lester owned common stock of defendant Park Builders, Inc. They were interested, as stockholders, in both corporations. This was the state of affairs when McLean purchased the 199 shares from Pollard, Burge and Lester, and the 101 shares from Bolich.

The release was signed by McLean. It was executed as recited therein, "as a part of the consideration for the purchase of said stock." It provides that McLean "accepted the real estate and all improvements located thereon . . . owned by the corporation in its present condition." The release, by its terms, is in favor of defendant Park Builders, Inc., as well as in favor of Pollard, Burge and Lester.

On 15 February, 1951, claims, if any, against Park Builders, Inc., "of any nature whatsoever because of defective workmanship, defective or inferior building materials in the structures located on said premises," vested in Park Terrace, Inc., the plaintiff. When McLean purchased the 199 shares of common stock in plaintiff he agreed, as expressly provided in the release, that no claim of this nature would be made against Park Builders, Inc.

The plaintiff, a corporate entity, neither received nor gave a consideration. But McLean became its sole common stockholder in consideration of his execution of the release. It is clear that McLean individually is precluded by his express agreement from asserting any claim against defendant Park Builders, Inc., or the surety on its bond, or Pollard, Burge and Lester, of any nature whatsoever because of defective workmanship or defective or inferior building materials in the structures located on said premises. The question for decision is whether, upon the facts alleged, Park Terrace, Inc., can assert such claims.

It is alleged that on 15 February, 1951, McLean became, and presently is, the owner of said 300 shares, the entire common stock of plaintiff; and that the only other stock outstanding is the 100 shares of preferred stock, having a par value of $1.00 per share, owned by the Federal Housing Administration.

The release is pleaded as a bar to plaintiff's action. The case has been presented as turning upon the question as to whether the release is to be considered the contract of the plaintiff, the contention being that McLean acted as agent for the plaintiff and by virtue of his authority as sole common stockholder. However, we consider the facts as alleged; and it is for this Court to pass upon the legal significance of the allegations. In so doing, we approach the question not to determine whether the release is in fact or in law the corporation's contract but rather to determine

whether McLean can maintain under the guise of a corporation suit an action for his benefit as sole owner of the plaintiff's common stock.

A corporation is an entity, distinct from its stockholders, although one individual owns its entire stock, or all but qualifying shares held by directors, 1 Fletcher, Cyc. of Corporations, sec. 25; 18 C.J.S., Corporations, sec. 4.

Too, as stated in the opinion of the Court, "a corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting." *Duke v. Markham,* 105 N.C. 131, 10 S.E. 1017; *Tuttle v. Building Co.,* 228 N.C. 507, 46 S.E. 2d 313. These principles are well settled in this jurisdiction. Nothing said herein is intended to indicate that I would modify or impair the authorities cited.

But a corporation should not be permitted to serve as a device, instrument or agency to enable its beneficial owners, the stockholders, to accomplish by indirection that which their solemn covenant forbids.

Sanborn, J., in a statement often quoted, says: "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *United States v. Milwaukee Refrigerator Transit Co.,* 142 Fed. 247; see 18 C.J.S., Corporations, secs. 6 and 7.

And Fletcher, op. cit., sec. 41, citing authorities, gives this summation: "A classification of the evidential facts on which the corporate entity will be disregarded is necessarily impossible beyond such categories as (a) fraud, (b) contravention of statute or law, (c) contravention of contract, (d) equitable titles or rights, (e) internal corporate transactions among all shareholders or members where third persons are not involved, (f) mere agencies and undisclosed principalships, and the like." See, 13 Am. Jur., Corporations, sec. 7.

In *Home Fire Ins. Co. v. Barber,* 93 N.W. 1024, the facts, in brief, were these: An individual purchased all of a corporation's outstanding capital stock, the sellers being stockholders, directors and officers of the corporation. After ownership and control had passed to the purchaser, a suit was brought by the corporation to recover from one of the sellers on the ground of alleged prior mismanagement of the corporation's affairs. Upon the premise that stockholders who acquire their shares and interest in the corporation from the alleged wrongdoer have no standing to complain thereof, (with which we are not concerned,) the court, opinion by *Pound, C.,* says: "Conceding, then, that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of

equity, may the corporation recover, notwithstanding? We think not. Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders. If they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name. (Citations) It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance, and not the form, would be very much limited in its application. 'It is the province and delight of equity to brush away mere forms of law.' *Post, J.,* in *Fitzgerald v. Fitzgerald & Mallory Construction Company,* 44 Neb. 463, 492, 62 N.W. 899. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly, courts and textwriters have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results."

The distinguished jurist, (later known to us as Dean Pound), concludes: "To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and, if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result."

"Thus it has been held that where a corporation was but the instrumentality through which an individual for convenience transacted his business, all of the authorities, not only equity, but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by acts which bound his corporation. *Llewellyn Iron Works v. Abbott Kinney Co.,* 172 Cal. 210, 214, 155 P. 986; *Industrial Research Corp. v. General Motors Corp.* (D.C.) 29

F. (2d) 623, 625. In the case of *Clark v. Millsap,* 197 Cal. 765, 782, 242 P. 918, 925, the Court states: 'The doctrine of corporate entity is not so sacred that a court of equity will hesitate to look through form to the substance of the thing, and it may, in proper cases, ignore it to preserve the rights of persons imposed upon or circumvented by fraud. In such cases, corporate fiction is disregarded.' That this rule is not limited to equity is clearly stated in *Llewellyn Iron Works v. Abbott Kinney Co., supra,* and the cases there cited." *Mirabito v. San Francisco Dairy Co.,* 47 P. 2d 530 (Cal. 1935).

In North Carolina, legal and equitable rights and remedies are determined in one and the same action. Constitution of N. C., Art. IV, sec. 1; *Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341.

The foregoing principles have been applied to diverse factual situations in a multiplicity of cases in other jurisdictions. It is generally accepted that "disregarding corporate entity" does not connote that the corporation has ceased to exist. Nor will corporate entity be disregarded when to do so would prejudice the corporation's creditors or other third parties. It is fundamental that the court will look behind the corporate entity only in relation to the facts of an appropriate case and to further the ends of justice.

If it should appear, when the evidence is developed, that McLean would be the beneficiary of any recovery by the corporation herein, the corporation in such case would in reality, prompted by McLean's ownership and control, be acting as his device, instrument or agency to reap for him an unjust gain. A court of equity should not permit the concept of corporate entity to aid him in such conduct.

It should be noted, however, that we are concerned now only with pleadings. The evidence, of course, may cast a different light both upon the questions presented and the legal principles applicable thereto.

In my view, the challenged allegations are relevant. The defense, in substance, is that the plaintiff cannot maintain this action because McLean, the beneficiary of the recovery, has contracted that such claim will not be made. Unless McLean is barred, the corporation is not barred. Hence, it seems to me that McLean is a necessary party. Therefore, I would reverse the ruling striking the challenged allegations and remand the cause with instructions that McLean be made a party.

JOHNSON, J., concurs in dissent.

HAROLD SUITS v. OLD EQUITY LIFE INSURANCE COMPANY.

(Filed 4 February, 1955.)

1. Process § 8c—

Findings to the effect that defendant insurance company and its predecessor solicited applications for insurance, delivered policies and collected premiums in this State through the United States mail is sufficient to show that defendant was transacting business in this State within the meaning of G.S. 58-164 (e), and that process served on the Insurance Commissioner in compliance with this statute renders defendant amenable to the jurisdiction of our courts, and meets the requirements of due process.

2. Appeal and Error § 6c (3)—

When it is claimed that findings of fact made by the judge are not supported by competent evidence, a litigant who would invoke the right of review must point out specifically the alleged error by exception duly taken, and an assignment of error alone will not suffice.

3. Appeal and Error § 23—

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 appellant desires to preserve and present for review.

4. Appeal and Error § 24—

An assignment of error not supported by an exception will be disregarded. This rule is mandatory and will be enforced *ex mero motu*.

5. Appeal and Error § 6c (2)—

A sole exception to the judgment presents for review the single question whether the facts found support the judgment, and does not present the findings of fact or the evidence upon which they are based.

APPEAL by defendant from *Sharp, Special Judge,* at 12 July, 1954, Term of GUILFORD (Greensboro Division).

Civil action to recover on policy of life insurance, heard below on special appearance and motion of the defendant to quash service of process upon it.

The following facts were found by the court:

"1. The plaintiff, Harold W. Suits, is a . . . resident of Guilford County, North Carolina.

"2. The defendant, Old Equity Life Insurance Company, is a corporation, organized and existing under the laws of the State of Indiana . . ., and is qualified to do business in Ohio and Indiana.

"3. On or about February 24, 1950, the defendant, Old Equity Life Insurance Company, a stock company, entered into a re-insurance agreement with Old Equity Insurance Company, an assessment company, under which agreement the defendant, Old Equity Life Insurance Company, assumed and agreed to perform all . . . the terms, provisions, and

obligations contained in the insurance policies which Old Equity Insurance Company had issued and which were outstanding.

"4. The officers executing the contract of re-insurance in behalf of Old Equity Life Insurance Company and Old Equity Insurance Company were the same individuals.

"5. Old Equity Insurance Company was engaged in the business of writing life, health, accident, and hospitalization insurance policies in all 48 states and the District of Columbia.

"6. The defendant, Old Equity Life Insurance Company and Old Equity Insurance Company were never licensed to do business in North Carolina, had no property in North Carolina and had no regular employees, officers or insurance salesmen in North Carolina and never formally designated any process agent as such.

"7. During August of 1949, Old Equity Insurance Company mailed to the plaintiff, Harold Suits, at his home in Guilford County, North Carolina, . . . a solicitation for the purchase of a lifetime income protection policy of insurance. Two application blanks were included in the solicitation to the plaintiff, and on the application blanks there was a printed notice that if the applicant used only one blank he should give the other to a friend or some member of his or her family. . . .

"8. On or about August 29, 1949, the plaintiff, Harold Suits, filled out one of the application blanks and mailed it in Guilford County to the Old Equity Insurance Company, Gary, Indiana. He included the first premium.

"9. On the basis of the application and receipt of the first premium, Old Equity Insurance Company issued to the plaintiff its Life Time Income Protection Policy of Insurance No. LM78.105, . . . This policy stated that disability benefits were payable for accidents that occurred after September 1, 1949. It further stated that by virtue of the policy and while the same remained in force, that the plaintiff was a member of Old Equity Insurance Company and entitled to vote at its annual meetings or any special meetings of its members.

"10. The aforesaid policy of insurance was issued by Old Equity Insurance Company and mailed in Indiana to the plaintiff who received it at his home in Guilford County, North Carolina, by use of the U. S. Mails.

"11. Neither Old Equity Insurance Company nor Old Equity Life Insurance Company has ever advertised or solicited applicants for insurance within the State of North Carolina by advertisements in newspapers or magazines or through the media of radio or television, but did advertise and solicit persons in North Carolina through the U. S. Mail.

"12. During December of 1949 the plaintiff received through the U. S. Mail a little booklet from the Old Equity Insurance Company. . . . The

booklet set out a partial list of claims paid by Old Equity Insurance Company and according to this list at least 40 claims had been paid to citizens and residents of the State of North Carolina. At the same time the plaintiff received the booklet, he also received another solicitation from Old Equity Insurance Company together with another application blank to double the benefits which he already had on his policy. The plaintiff did not submit this application blank.

"13. Old Equity Insurance Company issued and delivered contracts of insurance to other residents of North Carolina and collected from those insured by it the premiums agreed to be paid by the insured.

"14. On or about November 1, 1952, the plaintiff was seriously injured in an automobile accident in Guilford County, North Carolina, and the plaintiff promptly gave notice to the defendant of his injury but the defendant has not paid anything to the plaintiff under the terms of the insurance policy.

"15. Prior to the time of the plaintiff's injury the plaintiff had paid all premiums due by depositing same in the mails in North Carolina for transmission to the defendant at its office in Gary, Indiana. The plaintiff has been at all times a citizen and resident of Guilford County, North Carolina.

"16. During March of 1953 the defendant sent a claims adjuster, Mr. H. J. Alley, to the State of North Carolina from Indiana to investigate the claim of the plaintiff. Mr. Alley interviewed the plaintiff at his home in Guilford County concerning his injuries. No other adjuster for either Old Equity Life Insurance Company or Old Equity Insurance Company ever came to North Carolina, but claims have been paid by issuance of checks in Gary, Indiana, drawn on Indiana banks and forwarded to claimants via the U. S. Mails.

"17. On or about April 6, 1954, the plaintiff instituted suit in the Superior Court of Guilford County, Greensboro Division, and caused two copies each of summons and complaint to be served on the Insurance Commissioner of North Carolina pursuant to the General Statutes of North Carolina, G.S. 58-164 (e). All . . . the statutory requirements relating to the method of service of process on the defendant were properly performed by the plaintiff.

"18. Old Equity Insurance Company and the defendant, Old Equity Life Insurance Company transacted business in the State of North Carolina without a license and issued and delivered a policy of insurance to a citizen and resident of this State.

"19. This is a suit arising out of such policy of insurance.

"20. The issuance and delivery of such policy of insurance was a signification of the agreement of Old Equity Insurance Company, which agreement is binding upon the defendant Old Equity Life Insurance

Company, that service of process upon the Commissioner of Insurance of North Carolina in the method followed by the plaintiff would be of the same legal force and validity as personal service of process in this State."

Upon the foregoing findings of fact the court concluded as a matter of law that the service of summons is legal, valid, and binding upon the defendant, and accordingly entered judgment denying the defendant's motion to quash the service of process. From the judgment so entered, the defendant appealed.

Brooks, McLendon, Brim & Holderness, by G. Neil Daniels, for defendant, appellant.

Smith, Moore, Smith & Pope, by Bynum M. Hunter, for plaintiff, appellee.

JOHNSON, J. It is manifest the facts found by the court below disclose that the defendant and its predecessor were transacting business in the State of North Carolina within the meaning of G.S. 58-164 (e) and that the service of process under this statute was sufficient to meet the requirements of due process and hold the defendant amenable to the jurisdiction of the Superior Court of Guilford County. See *Lunceford v. Association,* 190 N.C. 314, 129 S.E. 805; *Travelers Health Asso. v. Virginia,* 339 U.S. 643, 70 S. Ct. 927, 94 L. Ed. 1154; *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057; *Parmelee v. Iowa State Traveling Men's Asso.,* 206 F. 2d 518, *cert.* den. 346 U.S. 877, 98 L. Ed. 384; *Zacharakis v. Bunker Hill Mutual Insurance Co.,* 120 N.Y.S. 2d 418; Annotation: 94 L. Ed. 1167, 1175.

The appeal seems to be predicated in the main upon assignments of error to the effect that the court erred in making findings of fact Nos. 5, 13, 18, and 20. But these assignments 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. 544.

When it is claimed that findings of fact made by the judge are not supported by competent evidence, a litigant who would invoke the right of review must point out specifically the alleged error. This he must do by exception. The assignment of error alone will not suffice. *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664.

The function of the assignment of errors is to group and bring forward such of the exceptions previously made and noted in the case on appeal as the appellant desires to preserve and present to the Court. *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175. Therefore an assignment of error not supported by an exception will be disregarded.

Moore v. Crosswell, supra; Donnell v. Cox, supra; S. v. Gordon, ante, 356. This rule is mandatory and will be enforced *ex mero motu. Anderson v. Heating Co.,* 238 N.C. 138, 76 S.E. 2d 458; *Donnell v. Cox, supra; Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

The only exception in the instant record is the general exception to the judgment. This brings here for review the single question whether the facts found support the judgment. It does not bring up for review "the findings of fact or the evidence on which they are based." *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488.

Here the findings of fact support the judgment. This suffices to work an affirmation of the judgment below. Further discussion is not necessary.

Nevertheless, we have examined the record and conclude that the determinative findings of fact are not subject to successful challenge. The record is free of prejudicial or reversible error and the judgment is in accord with the decided weight of authority.

The cases cited by the defendant are distinguishable or are not considered authoritative.

The judgment below is

Affirmed.

LONNIE B. HOLBROOK v. ALLEN J, PAGE, J. L. LORBACHER, BRUCE JONES AND CHARLES G. CHILDRESS.

(Filed 4 February, 1955.)

Automobiles §§ 18d, 18h (4)—Evidence held sufficient to make out prima facie case of concurrent negligence.

Plaintiff, a passenger in a car, was injured in a collision between the car and a truck. Plaintiff's evidence *is held* sufficient to support the inferences that the driver of the car was negligent in traveling at a high and unlawful rate of speed along a city street and in failing to exercise due care in keeping a proper lookout, and that the driver of the truck was negligent in that he drove the truck from a private driveway into the street in the nighttime without lights or signal and without exercising due care to maintain a proper lookout, and that the negligence of each united and concurred in producing the collision, and, therefore, motion of one of defendants for involuntary nonsuit was properly denied, notwithstanding his evidence that he was free of negligence or that the negligence of the other driver was the sole cause of the collision.

APPEAL by defendant Childress from *Fountain, Special Judge,* and a jury, April 1954 Civil Term of DURHAM.

Civil action to recover for personal injuries resulting from a collision of two motor vehicles on a street in the city of Durham.

The collision occurred in the nighttime on Angier Avenue near the home of the defendant Childress. The vehicles involved were a Plymouth automobile and a Chevrolet truck. The Plymouth, owned by the defendant Page, was being operated by the defendant Jones, with Page being present therein; the Chevrolet truck, owned by the defendant Lorbacher, was being operated by the defendant Childress. The plaintiff was a passenger, asleep, in the Plymouth. The collision ensued when the defendant Childress operated the truck into the street from a driveway at his house as the Plymouth, traveling eastwardly on Angier Avenue, was approaching and passing the Childress home. The plaintiff instituted the action against the owner and operator of each vehicle on the theory of agency and concurrent negligence of both drivers.

Issues were submitted to and answered by the jury as follows:

"1. Was the defendant Charles G. Childress acting as an agent, servant or employee of the defendant J. L. Lorbacher and about his master's business at the time of and in respect to the injury complained of? Answer: No.

"2. Was the plaintiff injured by the negligence of the defendant Bruce Jones, as alleged in the complaint? Answer: Yes.

"3. Was the plaintiff injured by the negligence of the defendant Charles G. Childress, as alleged in the complaint? Answer: Yes.

"4. What amount of damages, if any, is the plaintiff entitled to recover? Answer: $14,551.00."

From judgment entered upon the verdict, the defendant Childress appealed. He brings forward only the assignment of error relating to the refusal of the court to allow his motion for judgment as of nonsuit.

Ruark, Young & Moore and Jordan & Wright for Charles G. Childress, defendant, appellant.

Allen, Henderson & Williams and White & White for plaintiff, appellee.

JOHNSON, J. The case involves no new question requiring either a detailed statement of the evidence or an extended discussion of the controlling principles of law.

The evidence on which the plaintiff relies is sufficient to support these inferences: (1) that Jones, the driver of the Plymouth, was negligent in that he was driving along Angier Avenue at a high and unlawful rate of speed and failed to exercise due care in keeping a proper lookout; (2) that Childress was negligent in that he operated the Chevrolet truck from a private driveway into or upon Angier Avenue in the nighttime without

lights or signal and without exercising due care to maintain a proper lookout; and (3) that the collision was the direct and proximate result of the independent, negligent acts or omissions of the defendant Jones and the independent, negligent acts or omissions of the defendant Childress, with the negligence of each driver uniting and concurring and contributing as a proximate cause in producing the collision and the resultant injuries to the plaintiff.

True, the crucial evidence on which the plaintiff relies is sharply contradicted by the evidence of the defendants. And it may be conceded that the evidence on which the defendant Childress relies, omitted here as not being pertinent to decision, was sufficient to have sustained a jury-finding in his favor, either on the ground that he was free of negligence or upon the theory that in any event the negligence of the defendant Jones was the sole proximate cause of the collision. Nevertheless, a study of the record impels the conclusion that the evidence adduced made out a *prima facie* case of actionable negligence against the defendant Childress and also against the defendants Jones and Page on the theory of concurrent negligence, under application of the principles illustrated and explained in the decisions cited in *Bumgardner v. Allison,* 238 N.C. 621, top p. 626, 78 S.E. 2d 752, mid. p. 756. See also *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373.

The court below properly submitted the case to the jury. The verdict and judgment will be upheld.

No error.

HORACE F. CRUMP v. ECKERD'S, INC.

(Filed 4 February, 1955.)

Pleadings § 22: Process § 14—

The discretionary denial by the trial court of a motion to amend the pleadings and process is not reviewable in the absence of manifest abuse of discretion.

APPEAL by plaintiff from *Patton, Special J.,* March Extra Civil Term 1954 of MECKLENBURG.

Motion by the plaintiff that the court "exercise its discretion by permitting and ordering the process and pleadings in this cause to be amended by striking out the words, 'Eckerd's, Incorporated,' wherever they may appear, and inserting in lieu thereof the words 'Eckerd Drugs, Incorporated,' a Delaware corporation; and that the said Eckerd Drugs,

Incorporated, be allowed thirty days within which to answer or otherwise plead from date of service of said process."

The trial court, after hearing the evidence, made findings of fact and conclusions of law and entered the following order: "Upon the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, and in the discretion of the Court, it is ORDERED that plaintiff's said motion be, and the same is hereby denied."

The plaintiff appealed assigning error.

Hugh M. McAulay and Welling & Welling for Plaintiff, Appellant.

Kennedy, Kennedy & Hickman for Defendant, Appellee.

PARKER, J. Eckerd's, Inc., is a North Carolina corporation. Eckerd Drugs, Inc., is a Delaware corporation.

G.S. 1-163 is captioned "Amendments in Discretion of Court." The material part of this statute reads: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, . . . by correcting a mistake in the name of a party . . ."

It is not necessary for us to decide whether the plaintiff by his motion is seeking to correct a mistake in the name of the defendant, or is seeking to substitute a different corporation for the present defendant without service of process. The trial court *in its discretion* denied plaintiff's motion. No manifest abuse of discretion is made to appear. The court's ruling is not subject to review. *Gordon v. Gas Co.*, 178 N.C. 435, 100 S.E. 878; *Hogsed v. Pearlman*, 213 N.C. 240, 195 S.E. 789; *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466; *Pharr v. Pharr*, 223 N.C. 115, 25 S.E. 2d 471.

The judgment of the lower court is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1955

ARTHUR NEBEL AND WIFE, MARIE NEBEL, v. WILLIAM NEBEL, MARION NEBEL, J. A. BAKER AND WILLIAM H. ABERNATHY, DIRECTORS OF NEBEL KNITTING COMPANY, AND NEBEL KNITTING COMPANY, A CORPORATION.

(Filed 2 March, 1955.)

1. Pleadings § 13—

Allegations of the answer not amounting to a counterclaim are deemed denied without the necessity of a reply. G.S. 1-159.

2. Mandamus § 1—

Mandamus will lie only to compel an inferior tribunal, board, corporation, or person to perform a clear legal duty at the instance of a party having a clear legal right to demand such performance.

3. Corporations § 16—

Where, in an action by minority stockholders to compel the directors to declare dividends out of the accumulated profits of the corporation, the pleadings raise issues of fact, *mandamus* may not issue until the issues of fact raised by the pleadings have been finally adjudicated on their merits.

4. Same—

In an action by minority stockholders to compel the declaration of dividends, the setting aside of the corporate profits as working capital by resolution at a stockholders' meeting held subsequent to the institution of the action and the filing of all pleadings, should not be considered on the issue as to whether the corporate earnings had been set aside in accordance with the provisions of G.S. 55-115, but the issue with respect to compliance with the statute must be determined in accordance with the issues of fact raised by the pleadings. *Amick v. Coble*, 222 N.C. 484, cited and distinguished.

5. Same—Pleadings held not to raise issue of bad faith of controlling stockholders in setting aside all profits for working capital.

In an action by minority stockholders to compel the declaration of dividends, the complaint alleged that the controlling stockholders had pursued a policy of paying inadequate dividends in order to minimize Federal income taxes upon their own personal incomes, and that the stockholders had not set aside the accumulated profits as working capital in the manner prescribed by G.S. 55-115. The answer alleged that the bulk of the yearly profits had been used as working capital in expanding and modernizing the corporation's plant and equipment in substantial compliance with G.S. 55-115, and that plaintiff stockholders, with full knowledge, had approved and acquiesced therein. *Held:* The pleadings do not raise the issue of whether the controlling stockholders acted arbitrarily and in bad faith in setting aside all the profits as working capital. The pleadings do raise the question as to whether or not the plaintiffs are estopped from challenging the expenditure of accumulated profits for plant and equipment.

6. Trial § 37—

The issues in an action arise upon the pleadings filed, and the parties may not agree upon improper issues or alter the issues by the introduction of evidence or by the theory of trial.

7. Corporations § 16—

The setting aside of a part of the corporate profits for the expansion of plant facilities and for the purchase from time to time of new and up-to-date machinery to replace obsolete equipment, is a common practice usually essential to the normal growth and development of a corporation, and such expenditures will be presumed to have been made in good faith in the absence of fraud or proof of bad faith.

8. Same—

In an action by minority stockholders to compel the declaration of dividends, uncontradicted evidence tending to show that prior to the institution of the action a part of the accumulated profits of the corporation had been expended in plant expansion and equipment with the full knowledge and approval of plaintiff stockholders, entitles defendants to an instruction that if the jury believes the evidence to find in the affirmative the issue of estoppel of plaintiffs to challenge such expenditures.

9. Same—

The fact that substantially all of the quick assets of a corporation are invested in inventories is not a bar *per se* to the declaration of a dividend, since the corporation may nevertheless declare a dividend out of profits and borrow the money for payment, and then liquidate the loan by disposing of finished goods, collecting receivables, and reducing its inventory of raw materials.

10. Same—

Ordinarily, a minority stockholder is entitled to *mandamus* to compel the declaration of dividends out of accumulated profits in excess of such part of the profits as have been set aside as working capital. G.S. 55-115.

11. Same—

Where a corporation has inadvertently failed to take action with respect to setting aside capital in compliance with G.S. 55-115, *mandamus* will not lie to compel the distribution of all the accumulated profits without regard to the financial needs of the corporation, but in such instance, mandatory injunction will lie to compel the stockholders to set aside a reasonable portion of the accumulated profits as working capital, and to declare a dividend only out of such part of the accumulated profits as can be applied to dividends in the wise administration of a going concern.

JOHNSON, J., dissenting.

APPEAL by defendants from *McKeithen, Special Judge,* March Term, 1954, of MECKLENBURG.

Plaintiffs, who are the owners of 29.6 per cent of the outstanding stock of the defendant corporation, instituted this action for a writ of *mandamus* to compel the directors of the corporation to declare immediately a dividend of the whole of the accumulated profits of the corporation, up to and including 31st December, 1952, in the sum of $1,414,048.17.

It is alleged in plaintiffs' complaint that at the regular annual meeting of the stockholders and directors of the defendant corporation on 28th January, 1953, no action was taken by the stockholders with respect to setting aside working capital for the corporation, and no working capital for the corporation was set aside or reserved; and, at the directors' meeting, which was held immediately following the meeting of the stockholders, the plaintiff Arthur Nebel moved that the directors declare a dividend of the whole of the earned surplus or accumulated profits of the corporation as of 31st December, 1952. The motion failed to get a second and the meeting adjourned without declaring any dividend whatsoever.

The additional allegations in the complaint upon which the plaintiffs base their right to the relief they seek, are contained in the numbered paragraphs set out below:

"17. The defendants Marion Nebel and William Nebel, by virtue of their ownership of a majority of the stock, are in a position to control and do in fact completely dominate and control the stockholders meetings of the corporation and hence the dividends policy of the corporation.

"18. The defendants William Nebel and Marion Nebel have at all times since the incorporation of the corporate defendant under the laws of the State of North Carolina, controlled and directed the dividends policy of the corporation for their own personal benefit and advantage, in order to minimize the Federal Income Taxes upon their own personal incomes, rather than for the benefit of all of the stockholders of the corporation.

"19. The defendants have at all times since the incorporation of the Company in North Carolina pursued a studied policy of paying grossly inadequate dividends, representing only a small fraction of the net profits after taxes earned by the corporation, and have thereby depressed the market value of the plaintiffs' stock so that there is no market for the plaintiffs' shares, thereby depriving them of the opportunity to sell their stock on the open market at any figure approaching its true book value, and have further deprived them of a fair return on their investment by denying them their fair share of the corporate income.

"20. The plaintiffs are advised and believe that they are entitled to have the provision of N. C. G. S. 55-115 complied with, and the whole of the accumulated profits of the corporation declared as a dividend, and that the defendant corporation and its majority stockholders and directors who control and dominate same have declined and refused and still decline and refuse to declare such a dividend; that the plaintiffs have no remedy other than *mandamus* to enforce their rights."

The defendants filed an answer in which they admit that the plaintiff Arthur Nebel, a stockholder and director of the defendant corporation, moved to pay out as a dividend the "entire earned surplus" as of 31st December, 1952. With respect to the dividend policy of the corporation, they allege in their further answer and defense (1) that all actions in regard to the payment of dividends have been taken "with due consideration at all times to the financial condition and the operational needs of the defendant company"; (2) "that the defendant Company does not now have any funds available for the payment of dividends and, in any sound exercise of reason and judgment, should not now undertake to pay, nor be required to pay, any dividends"; (3) "that, except for the amounts which the defendant Company has paid out in dividends, the bulk of the Company's yearly profits have been used in expanding and modernizing its plant, machinery, equipment and business in order that it could continue to operate in the fiercely competitive field of the present-day hosiery industry; that such use has been reasonable, wise and necessary; that the plaintiffs have been fully aware and continuously informed as to such use and have acquiesced therein and are now estopped to contend that such profits should have been instead paid out in dividends"; and (4) "that with respect to the requirement of Section 55-115 of the General Statutes of North Carolina, the defendants aver that in substance and to all practical intents and purposes the profits of the defendant Company, not heretofore paid out in dividends, have been from time to time reserved and set aside by the stockholders and directors of the Company as capital or working capital for the purpose and uses set forth in the preceding paragraph; . . . the defendant, William Nebel, Chairman of the Board of Directors of the defendant Company, is proceeding to call

a special meeting of the stockholders of the Company in order that they may, if they see fit, formalize, in precise compliance with the terms of the aforesaid statute, what has, as above set forth, already been done in substance and reality."

It appears from the defendants' evidence that at a special meeting of the stockholders of the defendant corporation, on 13th March, 1953, a resolution was adopted which purported to reserve and set aside as working capital all of the accumulated profits of the Company not theretofore paid out in dividends. The stock owned by the plaintiffs was voted by proxy against the resolution.

The evidence discloses that the defendant William Nebel established the Nebel Knitting Company in Charlotte, North Carolina, in 1923, which concern was incorporated in the State of New Jersey, but the defendant corporation was incorporated in North Carolina on 3rd November, 1944, and duly organized with its principal office in the City of Charlotte. The defendant corporation took over the assets of the predecessor corporation as of 1st January, 1945.

It is agreed by all parties to this action that the paid-in capital of the defendant corporation was $975,289.34 as of 1st January, 1945, for which the corporation issued 2,273 shares of no-par value stock. The plaintiffs own 673 shares of this stock, and the defendants William Nebel and his wife, Marion Nebel, own 1,148 shares. All of the remaining shares are owned by other members of William Nebel's family, except two, one of which is owned by the defendant J. A. Baker and the other by the defendant William H. Abernathy. The defendants William Nebel, father of the plaintiff Arthur Nebel, and Marion Nebel, wife of William Nebel and stepmother of Arthur Nebel, own the controlling interest in the defendant corporation.

In 1937, 1938, and 1939, Arthur Nebel was president of the New Jersey corporation and drew an annual salary of approximately $6,000.00. The defendant William Nebel requested the plaintiffs for their proxies for the January 1940 annual meeting of the stockholders of the old corporation which was to be held in New Jersey. The proxies were executed and delivered to him. At the meeting, Arthur Nebel was not re-elected president and was dropped as a director of the corporation. His stepmother succeeded him as a director and as president of the corporation and has continuously been a director and the president of the defendant corporation.

Mrs. Marion Nebel drew a salary as president of the defendant corporation of $6,000.00 annually for the years 1945 and 1946, and $7,200.00 annually beginning in 1947 through 1952, or a total of $55,200.00. William Nebel, during this same period, as Chairman of the Board of Directors, Treasurer and General Manager and Director of Sales, drew as

salary, bonuses, commissions, and royalties, a total of $361,591.55. During this same period the corporation made donations to charitable organizations in the aggregate sum of $30,161.00.

The net profits of the corporation, less depreciation of $676,000.00, and after taxes, from 1st January, 1945, to 31st December, 1952, were $1,491,330.17. The corporation paid a dividend of $3.00 per share in 1945; $10.00 in 1946; $5.00 in each of the years 1947, 1948 and 1949, and $6.00 in 1950. These dividends totaled $77,282.00, which leaves accumulated earnings with the corporation as of 31st December, 1952, of $1,414,048.17. No dividends were paid in the years 1951 and 1952, although the net earnings in those years, after depreciation and taxes, amounted to approximately $205,000.00. Also, the record discloses, the corporation paid a dividend of only $6.00 per share in 1950, which amounted to $13,638.00, while the net profits for that year, after depreciation and taxes, amounted to $297,228.93.

The total assets of the defendant corporation as of 31st December, 1952, were $2,678,973.34, of which amount $975,289.34 is the original capital investment, leaving assets in excess of the paid-in capital of $1,703,684.00, all of which, except $994,000.00, have been used in expanding and modernizing its plant, machinery and equipment. The above sum of $994,000.00 is the total amount of the corporation's quick assets against which it has liabilities of $289,635.83, leaving net quick assets on the above date of $704,364.17. These assets consisted of $96,000.00 in cash; $27,000.00 in cash surrender value of life insurance on the life of William Nebel; and the balance in accounts receivable and inventories, consisting of raw materials, stock in process, finished goods, etc.

Arthur Nebel testified that at the time he was fired as president in 1940, his father told him he would never receive any more dividends; that he has always insisted in and out of stockholders' and directors' meetings that the corporation pay reasonable dividends; that he didn't ask that his motions be recorded; that the clerk wouldn't record anything his father didn't want recorded; that he had tried to sell the stock but had been unable to do so; that he purchased the stock from his father and paid for it out of cash gifts from him together with dividends received on the stock and from salary received while he was in the employ of the company. That the amount he received from his father by way of gifts and from dividends just about equaled the amount he paid for the stock. That he has been a director of the defendant corporation since 1946; that he had acquiesced in the amounts paid, and voted for dividends paid every time except one. That he was trying to get along with his father; that on one or more occasions he proposed a certain dividend and Mrs. Marion Nebel proposed a higher one than he had proposed, and it was voted. That at the meeting of the directors in January, 1951, he made

a motion to pay a dividend of $10.00 per share but could get no second to his motion. That his father married his stepmother in 1935; that he worked at the mill until 1940 when his father told him to finish up whatever he was doing and get out. That he and his wife have been estranged from his father and stepmother since that time. "I don't think they have been in our home. We have not been in theirs. I did not have any advance notice that I was going to be fired at that annual meeting of the stockholders."

This witness further testified that as money is earned and plowed back into the Company the book value of his stock goes up; that the size of the dividends he has received has rendered his stock unsaleable. That stock in a closed, small corporation is not readily saleable anytime, anywhere. He also testified that his attorney has stipulated a value of $500,000.00 for the sale of his stock, "and that is considerably less than its book value."

The defendants offered numerous extracts from the minutes of the stockholders' and directors' meetings, showing that the plaintiff Arthur Nebel participated in these meetings when the advisability of modernizing and enlarging the plant, and the purchase of additional machinery and equipment was considered; and when it was pointed out from time to time that larger dividends should not be paid in order to take care of the increased need of the corporation for additional funds. Testimony was offered at great length as to what machinery had had to be replaced, cost of the enlargement of the plant, and the purchase of additional machinery. Since 1st January, 1945, the corporation has spent approximately $250,000.00 for additional buildings, replacing out-of-date or obsolete machinery, and for the purchase of new machinery, at an overall cost for plant, machinery and equipment of approximately $2,000,000.00. And it does not appear from the minutes introduced in evidence that the plaintiff Arthur Nebel ever protested the expenditure of any funds in connection with the expansion or modernization of the Company's machinery and equipment.

William Nebel testified that he sold the stock to his son, which his son and wife now hold, for $125.14 per share; that its present book value is "around $1,000.00 per share." That in conversations with his son about dividends, they had discussed the needs of the Company. That in order for the business to grow and stay in good condition, the earnings must necessarily be retained in the business. "But I never did say I wouldn't pay any dividends, because only the Company could pay dividends."

The following issues were submitted to the jury: 1. Have the stockholders and directors of the defendant corporation reserved as working capital for the corporation the accumulated profits of the corporation up to December 31st, 1952? 2. If so, have the stockholders and directors

of the Company, in so doing, acted in bad faith and arbitrarily? On the first issue, the court instructed the jury, "as to that first issue, that is whether the stockholders and the directors of the defendant Company have reserved as working capital for the corporation its accumulated profits up to December 31, 1952, the court instructs you that if you believe the evidence which has been introduced in this case bearing on that issue, that is, the evidence of the plaintiff as well as the evidence of the defendant, it will be your duty to answer the first issue yes, otherwise no." The jury answered both issues "Yes." Whereupon, counsel for the plaintiffs waived in open court plaintiffs' right to demand the declaration of a cash dividend to plaintiffs in excess of $263.97 per share on the 673 shares of the capital stock of said corporation owned by them.

Judgment was entered to the effect that a writ of *mandamus* be issued against the defendant Nebel Knitting Company, and the directors thereof, commanding it and them forthwith and without unreasonable delay to declare a cash dividend to the plaintiffs on their stock, of $263.97 per share, out of the accumulated profits of said corporation. The defendants appeal, assigning error.

Bell, Bradley, Gebhardt & DeLaney for plaintiffs.

Pierce & Blakeney for defendants.

DENNY, J. The plaintiffs bottom their right to a writ of *mandamus* to compel the directors of the defendant corporation to declare immediately a dividend of the whole of the accumulated profits of the corporation, up to and including 31st December, 1952, on the ground that these accumulated profits have not been set aside and reserved as working capital in the manner prescribed by G. S. 55-115. Therefore, there is no allegation in the complaint which raises the question of bad faith or arbitrariness with respect to setting aside such accumulated profits for working capital. The gravamen of the complaint is to the effect that the defendants William Nebel and Marion Nebel have at all times since the incorporation of the corporate defendant under the laws of North Carolina, controlled and directed the policy of the corporation with respect to the payment of dividends and have pursued a policy of paying inadequate dividends in order to minimize the Federal income taxes upon their own personal incomes, and that such policy has resulted in depressing the market value of the plaintiffs' stock so that it cannot be sold in the open market at any figure approaching its true value.

On the other hand, the defendants, after denying the withholding of the payment of dividends for the reasons alleged in the complaint, aver in their further answer and defense that except for the amounts which the defendant corporation has paid out in dividends, the bulk of the

corporation's yearly profits has been used in "expanding and modernizing its plant, machinery, equipment and business," etc., and that the "plaintiffs have been fully aware and continuously informed as to such use and have acquiesced therein and are now estopped to contend that such profits should have been instead paid out in dividends." They also allege that for all practical purposes the stockholders and directors have complied with the provisions of G. S. 55-115 in that all the profits, not paid out as dividends, have been from time to time set aside as "capital or working capital" for the purposes enumerated above.

The plaintiffs filed no reply to the defendants' further answer and defense. But, since the allegations therein do not amount to a counterclaim, they are deemed denied. G. S. 1-159; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16.

Conceding that the allegations in the further answer and defense of the defendants raise an issue as to whether or not the stockholders and directors substantially complied with the provisions of G. S. 55-115 in setting aside the bulk of the profits for the purposes alleged, it likewise raises the question as to whether or not these plaintiffs are estopped by reason of their approval of and acquiescence in the action taken from time to time by the stockholders and directors with respect to the enlargement of the plant of the corporate defendant, the purchase of additional machinery needed to carry out the program of expansion, as well as the purchase of new and modern machinery to replace outmoded or obsolete equipment, from asserting any right to have the funds so expended now declared as dividends. 18 C.J.S., Corporations, section 524, page 1208, *et seq.:* Fletcher Cyc., Corporations, Per. Ed., Vol. 13, Chapter 58, section 5862, page 209, and cited cases, including *Dimpfel v. Ohio & M. Ry. Co.*, 110 U.S. 209, 28 L. Ed. 121, where it is said: "Objections now come with bad grace from parties who knew at the time all that was being done by the company, and gave no sign of dissatisfaction."

In light of the issues of fact raised by the pleadings in this action, it is proper to consider the function and purpose of a *mandamus.* It is a writ issuing from a court of competent jurisdiction, commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law. The party seeking such writ must have a clear legal right to demand it, and the tribunal, board, corporation, or person must be under a present clear legal duty to perform the act sought to be enforced. *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Hospital v. Joint Committee,* 234 N.C. 673, 68 S.E. 2d 862; *Steele v. Cotton Mills.* 231 N.C. 636, 58 S.E. 2d 620; *Poole v. Bd. of Examiners,* 221 N.C. 199, 19 S.E. 2d 635; *Harris v. Bd. of Education,* 216 N.C. 147, 4 S.E. 2d 328; 55 C.J.S., Mandamus, section 125, page 213.

When minority stockholders seek to obtain a writ of *mandamus* to compel the directors of the corporation to pay dividends out of the accumulated profits of the corporation and the pleadings raise issues of fact, such minority stockholders are not entitled to such writ until the issues raised by the pleadings have been finally adjudicated on their merits. *Hospital v. Wilmington, supra.*

The plaintiffs state in their brief that the trial judge announced in the course of the trial that he would direct a verdict on the first issue because in his opinion the resolution passed by the stockholders on 13th March, 1953, was proper as to form and would therefore effectively bar the plaintiffs' right to recover if such action was taken in good faith. That the trial court in taking this position relied upon the opinion of this Court in *Amick v. Coble,* 222 N.C. 484, 23 S.E. 2d 854.

In *Amick v. Coble, supra,* the plaintiff in his complaint sought to have all the accumulated surplus prior to the year 1940 declared as a stock dividend and to have the profits for the years 1940 and 1941 paid out in cash dividends. When the case was called for trial, a jury trial was waived and it was agreed that the court might hear the evidence, find the facts, draw its conclusions of law and enter judgment accordingly. No working capital had ever been formally set aside by the stockholders of the corporation as contemplated by G. S. 55-115. It is disclosed by the record in the case that in the course of the hearing the court suggested it might be well for the stockholders to have a meeting and consider setting aside working capital pursuant to the provisions of the statute. A special meeting was held and the majority stockholders, over the protest of the plaintiff, purported to set aside all the accumulated profits as working capital. The court then permitted the defendants to amend their answer by alleging that the stockholders had set aside all the accumulated profits as working capital, and by alleging that it had been the policy of the stockholders and directors of the corporation, since its organization, to consider the profits of the company as working capital except the actual amount voted each year to be paid out as a dividend; and further to plead such policy as an estoppel against the plaintiff from claiming such funds were available for the payment of dividends. The plaintiff filed a reply and admitted that from the organization of the company until he was voted out of office as secretary-treasurer and general manager in early 1940, it was by mutual consent the practice to keep all the profits for the purpose of expanding the business, except those amounts actually authorized to be paid out in dividends. The plaintiff, however, alleged in his reply that the action of the stockholders in attempting to set aside all the profits for the years 1940 and 1941 as working capital, was done arbitrarily and in bad faith for the purpose of doing directly what they had already done indirectly, that is, to des-

troy the value of his stock, or to force him to sell it to the defendants at a greatly depressed figure.

The trial court, among other things, found as a fact that prior to the year 1940 the stockholders and directors, by mutual consent, each year turned all net earnings of the corporation, as the same were earned, except the amount declared as a dividend, back into the business of the corporation. The court also found in effect that the action of the defendants as majority stockholders, in setting aside all the earnings for the years 1940 and 1941 as working capital, was not done in good faith, and rendered judgment directing the payment of dividends to the extent of the profits for the years 1940 and 1941, less certain deductions. This Court directed that all the profits for those years be declared as dividends without any deductions. *Winborne, J.*, in speaking for the Court, said: "That this may be done without impairing the capital structure of the corporation is, on this record, patent."

In the instant case, the pleadings raise no issue with respect to setting aside working capital except in the manner alleged in the further answer and defense. Neither do the pleadings raise any issue as to bad faith in connection with the setting aside of working capital, but, on the contrary, as we have heretofore pointed out, the plaintiffs are asking for *mandamus* on the ground that no working capital has ever been set aside by the stockholders and directors out of the accumulated profits of the corporation.

The appellees urgently contend that the defendants insisted upon a jury trial and that it was upon their theory of the case that the issues under consideration were framed and submitted to the jury. Even so, issues arise upon the pleadings only, and not upon evidential facts. *Miller v. Miller*, 89 N.C. 209; *Fortesque v. Crawford*, 105 N.C. 29, 10 S.E. 910; *Howard v. Early*, 126 N.C. 170, 35 S.E. 258; *Wells v. Clayton, supra.*

In *Miller v. Miller, supra,* the Court said: "Parties cannot agree upon improper issues; issues arise upon the pleadings, and these alone must be tried." Likewise in the case of *Shelton v. Davis*, 69 N.C. 324, *Chief Justice Pearson* said: ". . . the idea of giving the plaintiff judgment upon a state of facts not alleged in the complaint and entirely inconsistent with it . . . is a proposition which no member of this Court can for a moment entertain." *McLaurin v. Cronly*, 90 N.C. 50; *Willis v. Branch*, 94 N.C. 142; *Whichard v. Lipe*, 221 N.C. 53, 19 S.E. 2d 14; McIntosh, Practice and Procedure, section 508, page 541.

In *Featherstone v. Glenn*, 225 N.C. 404, 35 S.E. 2d 243, during the course of the trial a stipulation was entered into and a tender made and accepted. In light of the acceptance of the tender, the issue submitted to the jury was improper and not determinative of the question left for

adjudication and this Court remanded the case for a new trial. See also *King v. Coley,* 229 N.C. 258, 49 S.E. 2d. 648; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785, and cited cases.

In the case of *Tucker v. Satterthwaite,* 120 N.C. 118, 27 S.E. 45, it does not appear that an exception was entered to the issues submitted; nevertheless, this Court said: "We are not inadvertent to the long line of decisions laying down the rule that the refusal of the Court to submit an issue tendered by either party can not be reviewed by this Court unless exception is taken in apt time; nor do we wish to be understood as reversing or modifying it. That rule, when reasonably construed, does not conflict with the one herein laid down. What we now say is, that sec. 395 of The Code (now G. S. 1-200) is mandatory, binding equally upon the Court and upon counsel; that it is the duty of the Judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising in the pleadings, and that in the absence of such issues, or admissions of record equivalent thereto, sufficient to reasonably justify, directly or by clear implication, the judgment rendered therein, this Court will remand the case for a new trial." *Mitchell v. R. R.,* 124 N.C. 236, 32 S.E. 671, 44 L.R.A. 515; *Strauss v. Wilmington,* 129 N.C. 99, 39 S.E. 772; *Griffin v. R. R.,* 134 N.C. 101, 46 S.E. 7; *Holler v. Telegraph Co.,* 149 N.C. 336, 63 S.E. 92, 19 L.R.A. (NS) 475; *Brimmer v. Brimmer,* 174 N.C. 435, 93 S.E. 984; *Chapman-Hunt Co. v. Bd. of Education,* 198 N.C. 111, 150 S.E. 713; *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225.

The plaintiffs allege in effect (1) that all of the accumulated profits of the corporation are available for the payment of dividends, and (2) that the action of the directors in paying grossly inadequate dividends from 1945 through 1950, and no dividends for the years 1951 and 1952, was due to the domination and control of William and Marion Nebel in order to minimize their Federal income taxes, which action resulted in virtually destroying the market value of the plaintiffs' stock and depriving them of a fair return on their investment. When these allegations are considered, as they must be in light of the allegations in the defendants' further answer and defense, issues are raised which should be determined in order for the matters and things involved in this controversy to be equitably adjusted.

As we interpret the record, the court's instruction on the first issue was based solely on the action of the stockholders on 13th March, 1953, and no consideration whatever was given to the defendant's further answer and defense with respect to the investment of the corporate profits or to the evidence bearing thereon. Moreover, on the second issue, which is not raised on the pleadings, the court submitted to the jury for its consideration the expenditures made by the corporation to expand its plant

and for the purchase of new machinery, etc., as bearing on the question of bad faith on the part of the stockholders in setting aside the entire surplus of the corporation as working capital on 13th March, 1953. It may well be that the defendants acted in bad faith on 13th March, 1953, *in purporting to set aside all the accumulated profits as working capital,* but this does not mean necessarily that through the years the stockholders have acted in bad faith in using corporate profits for the expansion of plant facilities and for the purchase from time to time of new and up-to-date machinery to replace obsolete equipment. In fact, such practice is so common and considered so essential to the normal growth and development of corporate enterprises, expenditures for such purposes will be presumed to have been made in good faith in the absence of fraud or proof of bad faith. We think, if it be conceded that no action was ever taken by the stockholders of the corporation with the specific intent to set aside any profits as working capital prior to the institution of this action, pursuant to the provisions of G. S. 55-115, the plaintiffs are estopped from claiming any portion of the profits of the corporation as being available for the payment of dividends, which has been invested in plant expansion, new machinery, etc., with their full knowledge and approval. And there is nothing in the record to indicate that when such expenditures were considered and discussed from time to time in the stockholders' meetings, that these plaintiffs, or either of them, interposed an objection thereto at any time. Furthermore, the plaintiff Arthur Nebel was a director of the defendant corporation during the entire period complained of, except for the year 1945, and there is no evidence that he ever opposed, protested, or voted against the expenditure of funds for plant expansion or for the purchase of new machinery. The evidence on this record will not support a finding that the expenditures for plant expansion and the purchase of new or additional machinery from time to time were made in bad faith.

Moreover, if an issue of estoppel, with respect to the investment of profits in plant expansion, machinery, etc., had been submitted in the trial below, the defendants would have been entitled on the present evidence to have the jury instructed to the effect that if it believed such evidence to answer the issue in favor of the defendants. Even if it be conceded that the plaintiffs are estopped from claiming the funds invested in plant expansion, etc., there is still an ample amount of quick assets available out of which the plaintiffs are entitled to a reasonable dividend if such dividends were withheld during the period complained of, for the reasons alleged in the complaint. And the mere fact that the officers and directors of the corporation may have substantially all the quick assets invested in inventories, consisting of raw materials, stock in process and finished but unsold goods, is not a bar *per se* to the declaration of a divi-

dend. Indeed, it is not unusual for a corporation in such a situation to declare a dividend, borrow the money with which to pay it, and then to liquidate the loan by disposing of finished goods, reducing its inventory of raw materials, and collecting receivables. 13 Am. Jur., Corporations, section 660, page 657.

It seems clear that the provisions contained in G. S. 55-115 were enacted for the purpose of protecting minority stockholders. In pertinent part this statute reads as follows: "The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or bylaws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand."

Certainly a minority stockholder, upon a proper showing, is entitled to a writ of *mandamus* to compel the majority stockholders to set aside working capital as contemplated in the above statute. Likewise, when a private corporation ascertains the amount of its accumulated profits, in excess of the part thereof which has been set aside as working capital, in the manner provided in G. S. 55-115, such profits, upon demand of the stockholders, must be paid out in dividends as required by the statute, and *mandamus* will lie to compel such distribution. *Cannon v. Mills,* 195 N.C. 119, 141 S.E. 344. Even so, where a corporation has inadvertently, or from lack of knowledge of the existence of the provisions of G. S. 55-115, failed to take action with respect to setting aside working capital, such statute may not be invoked to compel the distribution of all the accumulated profits as dividends, irrespective of the facts and circumstances under which the profits were accumulated and reinvested in plant facilities, and without regard to the financial needs of the corporation. In such a situation, a court of equity may issue a mandatory injunction to compel the stockholders to set aside a reasonable portion of the accumulated profits as working capital, to the end that the corporation may not be crippled as a going concern, and the amount of funds available for the payment of dividends may be determined. 18 C.J.S., Corporations, section 473, page 1141, and cited cases, including *Wabash R. Co. v. Barclay,* 280 U.S. 190, 74 L. Ed. 368, 67 A.L.R. 762, in which the Supreme Court of the United States said: "When a man buys stock instead of bonds he takes a greater risk in the business. No one suggests that he has a right to dividends if there are no net earnings. But the investment presupposes that the business is to go on, and therefore, even if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a

dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern."

This cause should be tried *de novo* upon issues raised by the pleadings as now cast, or as they may be amended in the meantime. In the event the case is tried anew on the present pleadings, an issue should be submitted to determine whether or not dividends have been withheld improperly as alleged in the complaint. Likewise, an issue should be submitted to determine to what extent the profits of the corporation have been invested in permanent equipment with the approval or acquiescence of the stockholders, including these plaintiffs.

In the event the jury should find the defendant directors have improperly withheld the payment of dividends as alleged in the complaint, then the trial court, in the exercise of its equitable jurisdiction, should issue a mandatory injunction to the stockholders and directors of the defendant corporation, directing the stockholders to meet and to set aside in good faith such portion of the accumulated profits of the corporation as may not have been heretofore invested in plant expansion, machinery and equipment with the approval or acquiescence of the stockholders, as may be reasonably necessary for working capital, and ordering the Board of Directors of the defendant corporation to declare a dividend of all the excess of the accumulated profits up to and including 31st December, 1952, not set aside as working capital, and to report their respective actions to the court. Whether the court will find it necessary to interfere with the action of the stockholders and directors taken pursuant to the injunction, will depend upon whether or not they act in good faith. 13 Am. Jur., Corporations, section 708, page 725, *et seq.; Gaines v. Manufacturing Co.*, 234 N.C. 331, 67 S.E. 2d 355, and the cases and authorities cited therein; *Gibbons v. Mahon*, 136 U.S. 549, 34 L. Ed. 525. In the last cited case, the Court said: "Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property."

The contention of the defendants to the effect that the defendant corporation is not in financial condition to pay any dividend at this time does not appeal to the conscience of the Court. This is particularly true, since, in addition to making a profit of $1,491,330.17, after depreciation and taxes, during the period complained of, the defendant William Nebel, who owns only 454 shares of stock in the defendant corporation, has received $361,591.55 as salary, bonuses, commissions, and royalties; and his wife Marion Nebel, who owns 694 shares of stock, has received

$55,200.00 in salary. While, in the meantime, the plaintiffs, who own 673 shares of stock in the corporation, or 29.6 per cent thereof, have received no compensation in salary or otherwise except their pro rata part of the $77,282.00 paid in dividends, which amounted to approximately $22,000.00. This is a rather insignificant return over a period of eight years on stock admitted to have a book value of about $673,000.00, and during a period in which the corporation paid in compensation to two of its principal stockholders, William and Marion Nebel, who control the corporation and own a majority of its stock, a total of $416,791.55.

The defendants' assignment of error for failure of the court below to sustain their motion for judgment as of nonsuit is overruled. A discussion of other exceptions and assignments of error, in view of the conclusion we have reached, is unnecessary.

This cause must be heard and judgment entered on the issues raised by the pleadings, in accord with this opinion. To that end the cause is remanded for a

New Trial.

JOHNSON, J., dissenting: My study of the record leaves the impression that the variance between the form of the second issue and the allegations of the defendants' further defense, on which the issue is based, is not of sufficient moment to necessitate overthrowing the verdict and trial, particularly so in view of the apparent agreement of the parties on the form of the issue and of the full and complete charge delivered by the presiding Judge thereon. Here it is to be noted that the defendants admitted failure to comply formally with the requirements of G.S. 55-115 prior to the commencement of the action. The question sought to be presented by the second issue as submitted, *i.e.*, the *bona fides* of controlling management and the legal sufficiency of the means employed by such management in setting aside as capital the bulk of accumulated profits after dividends, was raised, as was the companion question of acquiescence or estoppel of the plaintiffs, not by the plaintiffs' complaint but rather by the defendants' affirmative defense. Therefore the burden of the issue was on the defendants to show good faith of controlling management. The issue as framed submitted the question of *bona fides* in reverse: whether the defendants acted arbitrarily and in bad faith, rather than in good faith. Moreover, the burden of the issue was placed on the plaintiffs. All this was favorable to the defendants. This being so, they are not in position to challenge the form of the issue or the verdict rendered thereon. The theory of the trial should prevail. *Thrift Corp. v. Guthrie*, 227 N.C. 431, 42 S.E. 2d 601.

However, it would seem that the judgment should be vacated and the cause remanded for further hearing on the question of the extent to which

the plaintiffs should be bound, on the ground of acquiescence or estoppel, by the action of controlling management in investing accumulated profits in equipment and permanent improvements. This question does not appear to have been properly determined before judgment. Therefore, my vote is to uphold the verdict and trial, with direction that the judgment be vacated and a further hearing ordered to determine the extent, if any, to which accumulated profits were invested in equipment and permanent improvements or otherwise capitalized with the approval and acquiescence of the plaintiffs.

The findings of the jury, or of the presiding Judge sitting as chancellor in the exercise of his equity powers, in respect to this question would determine whether controlling management has improperly withheld payment of dividends in the past; and, if so, then mandatory injunction should issue directing payment of a proper dividend, the amount thereof to be fixed and determined by the court on the basis of the facts found on the issue of acquiescence or estoppel. The jury verdict on the second issue is sufficient to justify retention of the cause on the equity side of the docket (13 Am. Jur., Corporations, section 708), and I am inclined to the view that such retention will be more conducive to an expeditious final determination of the cause.

EFFIE MAE MORRIS v. HULER WILKINS.

(Filed 2 March, 1955.)

1. Pleadings § 7—

Ordinarily, a defendant is not required to give bond or other security as a condition precedent to his right to defend the action.

2. Ejectment § 14—

In an action for the recovery or possession of real property, the defendant is required to give bond before answering to protect plaintiff from any damages he might suffer by reason of defendant's wrongful possession of the land between the commencement of the action and the entry of final judgment, G.S. 1-111, and upon failure of defendant to file the statutory bond plaintiff is entitled to judgment by default final as to title and possession, which judgment the clerk is authorized to enter. G.S. 1-209, G.S. 1-211.4.

3. Same—

In actions involving realty, a defense bond, G.S. 1-111, is not required of a defendant who is not in possession of the land in controversy.

4. Same—

In an action for the recovery or possession of real property, a plaintiff who takes possession of the lands in controversy or any substantial portion thereof by unauthorized entry after commencement of the action and prior to the expiration of time for filing answer, is not entitled to judgment by default final for defendant's failure to give a defense bond unless and until he first restores the *status quo* in respect to possession existing at the date of the commencement of the action.

5. Appeal and Error § 40d—

Even in the absence of statutory requirement, the lower court must find the material facts in order that its conclusions of law may be properly reviewed, but in the absence of request that such findings of fact be made it will be presumed that the court found facts upon supporting evidence sufficient to sustain the judgment.

6. Same—

Where rulings are made under a misapprehension of the law or the facts, the practice is to vacate such rulings and remand the cause for further proceedings as to justice appertains and the rights of the parties may require.

7. Same—Where judgment is entered upon misapprehension of law, presumption of finding from supporting evidence does not obtain.

In this action in ejectment, defendants failed to file bond, but did file affidavit stating that subsequent to the commencement of the action plaintiff had taken unauthorized possession of the major portion of the land. Facts set forth in the affidavit were not controverted by pleading or other affidavit. The court affirmed the clerk's judgment by default final for failure of defendant to give bond, without referring to the affidavit or the facts set forth therein. *Held:* It is apparent that the judgment was entered under a misapprehension as to the applicable law, and therefore, the judgment cannot be sustained upon presumed findings from conflicting evidence, but the cause must be remanded for findings of fact as to the matters set forth in the affidavit.

APPEAL by defendant from *Fountain, Special J.*, September Civil Term, 1954, of NASH.

An action in ejectment commenced 1 March, 1954.

Defendant's appeal is from judgment by default final. The judgment strikes the defendant's answer for failure to file a defense bond and adjudges the plaintiff to be the owner and entitled to the possession of the lands described in the complaint.

The complaint, filed 1 March, 1954, alleges: (1) that the plaintiff is the owner of and entitled to the immediate possession of a described tract of 87½ acres in Mannings Township, Nash County; (2) that the defendant is in wrongful possession thereof and has held such possession since 4 February, 1954, and "has failed and refused and still fails and refuses to surrender the possession to plaintiff notwithstanding demands made by

plaintiff for possession thereof"; (3) "that plaintiff is entitled to recover of defendant $1,000.00 damages for detention and wrongfully withholding possesssion of said premises"; (4) "that the said tract of land is a farm and is cultivated in tobacco, cotton, corn and other crops on an annual basis and that the reasonable annual rental value of the premises is $625.00." Included in the plaintiff's prayer for relief: "That defendant be required to enter into a bond, conditioned as prescribed by law, in the penal sum to be fixed by the Court, before she is permitted to file answer herein."

By order of the assistant clerk, the defendant was granted additional time, to and including 20 April, 1954, within which to file answer or demurrer. The defendant filed answer 20 April, 1954.

In her answer, the defendant denies plaintiff's allegations as to title and right to possession. She admits she is in possession of a dwelling house on the premises; otherwise, she denies plaintiff's allegations as to her possession. She alleges further that she and her husband went into possession of the lands on or about 11 December, 1944, when the property was conveyed to them; that they were in possession until her husband's death in 1953 and thereafter she remained in the unmolested possession thereof until on or about 4 February, 1954. She alleges further that the plaintiff's claim of title, based upon purchase from one John C. Matthews, mortgagee, on or about 4 February, 1954, for reasons stated, is invalid; and the defendant asks that Matthews be made a party to the end that the alleged mortgage and purported foreclosure thereunder may be adjudged invalid and removed from her title as clouds thereon.

Upon the filing of answer, the plaintiff moved promptly, to wit, 23 April, 1954, that the answer be stricken and that the plaintiff have and recover judgment by default final under G.S. 1-211 (4) for failure of the defendant to file a defense bond as required by G.S. 1-111. After due notice, and after hearing, the clerk on 5 May, 1954, rendered judgment in conformity with plaintiff's motion. The defendant excepted and appealed to the Superior Court.

During the September Civil Term, 1954, on Monday, 27 September, 1954, when the matter was heard, the defendant filed the joint affidavit of herself and of Thomas Wilkins, her son, which, so far as appears, was the only evidence before the court. Judgment entered by *Fountain, Special J.*, 30 September, 1954, affirms the clerk's judgment of 5 May, 1954. The judgment recites: "and it appearing to the court from the admission of counsel in open court and the record in this cause that this is an action for recovery or possession of real property within the meaning of G.S. 1-111 and that the defendant prior to the entry of the judgment by the Clerk did not and has not now executed and filed in the office of the Clerk of Superior Court an undertaking with sufficient surety as

provided by G.S. 1-111, . . ." The judgment makes no reference to said affidavit or to any of the matters set forth therein. The defendant excepted to the judgment and appealed, assigning errors.

The said affidavit, in due form, sets forth facts in detail, the gist thereof being: (1) That prior to 2 March, 1954 (the date summons was served), affiants were in actual possession of the lands in controversy; (2) that on 8 March, 1954, after this action was commenced, the plaintiff, through her tenants, went into possession of all of the lands in controversy except two dwellings; (3) that since 8 March, 1954, plaintiff's tenants have had continuous possession, cutting timber, planting and cultivating a garden, using the stables and cribs, and in general conducting extensive farm operations, including crops of tobacco (5.2 acres), oats and corn; and (3) that, since plaintiff, through her tenants, entered into such possession the defendant has had no possession of the lands in controversy except a five-room dwelling house.

Hobart Brantley for plaintiff, appellee.
Taylor & Mitchell for defendant, appellant.

BOBBITT, J. Defendant's assignments of error present two questions: first, if the facts are as set forth in said affidavit, was the defendant entitled to file answer without first filing a defense bond in conformity with G.S. 1-111; and second, if so, did the court err in striking the answer and granting plaintiff's motion for judgment by default final without finding the essential facts relating to the matters set forth in said affidavit, in the absence of specific request that the court make such findings? Upon the record presented, these questions must be answered in the affirmative.

Ordinarily, a defendant, who is brought into court by the action of the plaintiff, is not required to give bond or other security as a condition precedent to his right to defend the action. McIntosh, N. C. P. & P., p. 334. The rule is otherwise in actions for the recovery or possession of real property. G.S. 1-111. In such case (unless excused under G.S. 1-112), if the defendant fails to file the required bond the plaintiff is entitled to judgment by default final as to title and possession. *Jones v. Best,* 121 N.C. 154, 28 S.E. 187; *Patrick v. Dunn,* 162 N.C. 19, 77 S.E. 995. By statute, the clerk is authorized to enter such judgment. G.S. 1-209, 1-211 (4).

This is an action in ejectment. It is based upon plaintiff's allegations that she is the owner of the lands; that she is entitled to the possession thereof; and that defendant is in possession and wrongfully refuses to surrender possession to plaintiff. In such action, nothing else appearing, the defense bond prescribed by G.S. 1-111 is required.

Cases in which a defendant seeks to set aside a judgment by default final, rendered for want of an answer or defense bond or both, on the ground of excusable neglect, have no application here. *Vick v. Baker,* 122 N.C. 98, 29 S.E. 64; *Norton v. McLaurin,* 125 N.C. 185, 34 S.E. 269; *Pierce v. Eller,* 167 N.C. 672, 83 S.E. 758; *Battle v. Mercer,* 187 N.C. 437, 122 S.E. 4. Nor do cases in which the defendant, after answer, invokes the discretion of the court for leave to file defense bond after statutory time therefor has expired. *Cooper v. Warlick,* 109 N.C. 672, 14 S.E. 106; *Carraway v. Stancill,* 137 N.C. 472, 49 S.E. 957; *Shepherd v. Shepherd,* 179 N.C. 121, 101 S.E. 489.

The defendant does not allege excusable neglect or seek permission to file bond. She relies solely upon her contention that, by reason of plaintiff's conduct subsequent to the commencement of the action, she was entitled as a matter of law to file answer without filing a defense bond in conformity with G.S. 1-111.

The bond required by G.S. 1-111 does not apply to a defendant who is not in possession of the land in controversy. *Carraway v. Stancill, supra.* Hence, the statute does not apply to an action by a plaintiff in possession to remove a cloud from his title. *Timber Co. v. Butler,* 134 N.C. 50, 45 S.E. 956; *Roberts v. Sawyer,* 229 N.C. 279, 49 S.E. 2d 468. Nor does it apply to an action to establish a parol trust and to have defendant render an accounting as mortgagee in possession. *Hodges v. Hodges,* 227 N.C. 334, 42 S.E. 2d 82; *Bryant v. Strickland,* 232 N.C. 389, 61 S.E. 2d 89. Nor does it apply to a special proceeding under G.S. 38-1 *et seq.* to establish the location of a boundary line. *Roberts v. Sawyer, supra.* Our decisions point towards a restriction of its application to actions in ejectment, the defendant being in possession when the action is commenced. As stated by *Seawell, J.,* in *Bryant v. Strickland, supra:* "The *raison d'etre* and purpose of the statute (G.S. 1-111), lies in the nature and history of the possessory action of ejectment; 18 Am. Jur., p. 9; 28 C.J.S., pp. 848, 849; *cp. Freeman v. Ramsey,* 189 N.C. 790, 798, 128 S.E. 404. Despite statutory regulation it still savors of the trespass committed against John Doe, *ex dem.* Richard Roe,—the immediate wrongfulness of the possession, and the right to instant relief. The same exigency does not arise until after an accounting, and not even then if the plaintiff should have a further payment to make."

The fact that the title to real property is in issue, standing alone, is not determinative. Rather, the statute is to protect the plaintiff from damages he may suffer by reason of defendant's wrongful possession between the commencement of the action and the entry of final judgment. As *Clark, J.* (later *C. J.*), puts it: "For what other purpose than to secure such *mesne* profits is the defense bond required under the Code, sec. 237?" *Credle v. Ayers,* 126 N.C. 11, 35 S.E. 128. The plain purpose

of G.S. 1-111 is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession.

At the hearing in the court below, according to the uncontroverted facts set forth in said affidavit, plaintiff, after commencement of the action and before the time for filing answer had expired, proceeded to take possession of practically all of the 87½ acre tract. Having taken possession by such unauthorized entry, is the plaintiff entitled to the summary relief designed to protect those *who rely upon their legal remedies?*

The defendant, as well as the plaintiff, alleges that she is the owner and entitled to the possession of all of the lands described in the complaint. If the facts set forth in said affidavit are true, plaintiff on account of such unauthorized entry, has become in reality a defendant in possession in respect of the entire 87½ acre tract except a dwelling house in possession of the defendant. Should the plaintiff in respect of such lands in her possession be required or permitted to give bond as prescribed by G.S. 1-111? Obviously not, for the statute does not contemplate that the plaintiff be permitted to give bond to protect a possession acquired by plaintiff by unauthorized entry after commencement of the action. Moreover, these facts are beyond the scope of the pleadings.

In such case, the rule we adopt is this: In an action for the recovery or possession of real property a plaintiff is not entitled to the summary relief of judgment by default final ordinarily available upon defendant's failure to give the defense bond prescribed by G.S. 1-111 when he takes possession of the lands in controversy or any substantial portion thereof by unauthorized entry after commencement of the action unless and until he first restores the *status quo* in respect of possession existing as of the date of the commencement of the action.

No direct authority on the exact question here presented has come to our attention. However, this Court considered a somewhat similar situation in *Rollins v. Henry,* 77 N.C. 467.

Plaintiffs' action was against Ham Rollins, a tenant. One R. M. Henry, a third party, asked leave to intervene and defend the action. By affidavit, he alleged that he owned the lands in controversy and that Ham Rollins, original defendant, was in possession as his tenant. Plaintiffs filed counter-affidavits alleging that Ham Rollins was their tenant. Upon its findings of fact, the court adjudged that Ham Rollins was the tenant of plaintiffs, denied the motion of Henry to be allowed to defend as landlord and awarded a writ of possession against Ham Rollins, who had filed no defense bond or answer. Henry appealed. This Court held that upon filing the affidavit, R. M. Henry should have been permitted to defend either with or without the tenant, upon complying with the other statutory requirements. It was further held that the tenants claiming under Henry had been illegally evicted and were entitled to restitution of posses-

sion pending trial of the action. For the errors indicated, the cause was remanded. See companion cases of *Rollins v. Rollins,* 76 N.C. 264; *Rollins v. Bishop,* 76 N.C. 268, and *Rollins v. Henry,* 76 N.C. 269, heard in this Court at January Term, 1877.

Thereupon, Henry filed a defense bond and answer. Meanwhile, plaintiffs had taken possession under the erroneous judgment. In this situation, Henry moved in the Superior Court that writs of restitution be issued in behalf of the evicted tenants; and the plaintiffs countered with a motion for the appointment of a receiver of the lands in controversy, pending the litigation of the title. The court refused to appoint a receiver, and ordered writs of restitution to issue, and from these orders the plaintiffs appealed to this Court.

In affirming the judgment, *Bynum, J.,* says: "Possession, entire and complete, must be given to the defendants; and it matters not to the plaintiffs whether this restitution is made directly to Henry himself or indirectly through his tenants, but the plaintiffs are to divest themselves of all possession as fully as they were divested before they sued out the writs under which they obtained the possession; and the defendants are to be placed in the same state and condition as they were at that time. Placed thus at arm's length, as they were before the wrongful eviction, the court will then be open to hear and determine such motions as may properly arise in the progress of the cause.

"While, therefore, the court properly enough refused to appoint a receiver or make any other order before the plaintiffs had restored their tortious possession, it does not follow that after such possession is delivered the plaintiffs may not present a case fit for the protective interference of the court. But as no such question can be raised until after the judgment of this Court, as determined at last term, has been complied with by the surrender of the premises to the defendants, we might properly say no more at this time." *Rollins v. Henry,* 77 N.C. 467.

True, the application was for the appointment of a receiver, an equitable remedy, rather than for judgment by default final for failure to file a defense bond, and the court had adjudged that plaintiffs make restitution *pendente lite.* But the underlying reasoning is consonant with the rule adopted herein, namely, the plaintiff is not entitled to the summary remedy of judgment by default final unless and until he first makes restitution of possession of the lands acquired by unlawful and unauthorized entry *pendente lite.*

The conclusion reached is that, if the facts set forth in said affidavit are true, the plaintiff was not entitled to have defendant's answer stricken or to judgment by default final.

But the court below failed to find the facts as to the matters set forth in said affidavit. The record does not show that defendant requested the

court to do so. True, defendant, after judgment, excepted to the court's failure to find such facts.

There are instances in which, by reason of statutory provisions, findings of fact must be made even in the absence of request. These include proceedings under the Workmen's Compensation Act; (G.S. Ch. 97, Art. I), *Guest v. Iron & Metal Co., ante,* 448, 85 S.E. 2d 596; where, under waiver of jury trial, the court determines the issues of fact, G.S. 1-184, 185, *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572; and in hearing on motion for alimony and expenses *pendente lite* in an action for divorce, G.S. 50-15, *Dawson v. Dawson,* 211 N.C. 453, 190 S.E. 749.

In the absence of statutory requirement, the applicable rules are these: The court must find the material facts to enable this Court to declare for or against its conclusions of law. *Smith v. Hahn,* 80 N.C. 240; *Norton v. McLaurin, supra.* But, in the absence of request that such findings of fact be made, "it is presumed that the judge, upon proper evidence, found facts sufficient to support his judgment." *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287. But "where rulings are made under a misapprehension of the law or the facts, the practice is to vacate such rulings and remand the cause for further proceedings as to justice appertains and the rights of the parties may require." *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796.

The facts set forth in said affidavit stand uncontroverted by pleading, affidavit or other evidence. Hence, the decision cannot be based on presumed findings from conflicting evidence. Moreover, the judgment, by its reference to undisputed matters of record and by its failure to refer to said affidavit or to the matters set forth therein, gives the definite impression that the court considered the facts stated in the affidavit, if true, insufficient in law to entitle the defendant to answer without giving a defense bond in conformity with G.S. 1-111. In this there was error.

It appearing that the judgment was entered under a misapprehension as to the applicable rule of law, the cause must be and is remanded to the end that findings of fact as to the matters set forth in said affidavit be made and for further proceedings not inconsistent with this opinion.

Error and remanded.

JAMES L. BOSWELL AND WIFE, BESSIE LEE BOSWELL; GRADY A. BOSWELL AND WIFE, LILLIE BOSWELL; A. JASPER BOSWELL AND WIFE, RUTH BOSWELL; WILLIAM HACKNEY BOSWELL; PERRY LEE BOSWELL; CLYDE BOSWELL, ADMINISTRATRIX OF DORSEY LEE BOSWELL, DECEASED, V. JESSIE ELIZABETH BOSWELL, A MINOR; BYERLY ANN B. YOW, A MINOR, AND HER HUSBAND, JOHN YOW, JR.; LINDA ANN BOSWELL, A MINOR; ALMERENE H. BOSWELL; RONEY M. WILLIAMSON; RENFROW LUCAS COMPANY, INC., AND LUKE LAMB, TRUSTEE.

(Filed 2 March, 1955.)

1. Appeal and Error § 1—

Since dissimilarity as to a material fact may call for application of different principles of law, where the specific determinative facts are not established in the lower court, the Supreme Court will not decide the question sought to be presented, since such decision would amount to an advisory opinion on abstract questions.

2. Mortgages § 9—

The mortgage in question secured payment of a note for advancements made and further advancements agreed to be made, and also "any other amount that the party of the second part may advance." *Held:* Whether the mortgage secures other items of indebtedness owed by the mortgagor to the mortgagee depends upon the origin and nature of such other debts and whether they were incurred prior or subsequent to the execution of the mortgage, and where the facts in regard thereto are not established, decision of the question may not be made.

3. Appeal and Error § 3—

Appellee may not maintain that appellant's claim is void and that, therefore, appellant is not the party aggrieved by judgment in his favor for a part of his claim, when it is admitted in the pleadings that the appellant's mortgage constituted a valid lien and only the amount of the indebtedness secured is controverted, *a fortiori* when the facts upon which the invalidity of the mortgage is asserted do not appear of record but only in the brief.

4. Appeal and Error § 50—

Where the controverted and determinative facts are not established by admission, or findings supported by evidence, or verdict of the jury, the cause must be remanded.

APPEAL by defendant Roney M. Williamson from *Martin, Special J.*, October Term, 1954, of WILSON.

Proceedings for partition sale of real property in Wilson County.

The undivided one-fifth (1/5) interest of defendant Grady A. Boswell, hereinafter called Boswell, was subject to mortgage and judgment liens. These lien creditors of Boswell were made defendants.

Sale of the property has been confirmed and completed. The controversy concerns the distribution of the Boswell share (1/5) in the net proceeds of sale.

We glean the foregoing facts from the caption, the stipulation, statements in the brief, and the (admitted) allegations of paragraph 1 of the supplemental petition. There is a stipulation as to issuance and service of summons in the special proceedings, but no part of such proceedings antecedent to the supplemental petition is included in the record before us.

The supplemental petition was filed by the Commissioner. Its allegations, in respect of matters relevant on this appeal, may be summarized as follows:

1. The one-fifth (1/5) share of Boswell in the proceeds of sale available for distribution "will be insufficient to discharge all of the record liens *asserted* or *outstanding* against his interest in said proceeds." (Italics added.) The following appear of record in the Wilson County Registry as liens against the interest of Boswell.

(a) A deed of trust dated 27 September, 1948, executed by Boswell to Luke Lamb, Trustee, registered in Book 385, Page 100. (This was admitted and adjudged to be a valid first lien on the share of Boswell now in the hands of said Commissioner in the amount of $700.00 with interest thereon from 27 September, 1951, at the rate of 6% per annum.)

(b) A mortgage dated 27 February, 1952, executed by Boswell to Roney M. Williamson, hereinafter called Williamson, registered in Book 285, Page 390. On account thereof, Williamson *asserts* a lien against the interest of Boswell; and petitioner is informed that the balance now due thereon is $1,661.65 plus interest. The provisions of this mortgage, being the subject of controversy, will be set out below.

(c) A mortgage dated 17 December, 1952, executed by Boswell to Renfrow-Lucas Company, Inc., registered in Book 285, Page 431. On account thereof, Renfrow-Lucas Company, Inc., hereinafter called Renfrow-Lucas, asserts a lien against the interest of Boswell in amount of $400.00 plus interest.

(d) A judgment dated 7 October, 1953, entitled, "E. C. Grice *v.* Grady Boswell, *et al.*," for $39.02 with interest from 1 October, 1953, plus costs in the sum of $4.80, recorded in Judgment Docket Book 16, Page 152, in the office of the Clerk of the Superior Court of Wilson County.

The Commissioner's report, "showing the payment of all expenses in connection with this proceeding to date, and showing the amount of surplus proceeds to be distributed to the persons entitled thereto," is referred to as attached to and made a part of the supplemental petition. However, it is not in the record before this Court.

The petitioner-commissioner asks the court for instructions as to the distribution of the Boswell share.

Answers were filed by Luke Lamb, Trustee, Williamson, Boswell and Renfrow-Lucas, to said supplemental petition. Since the status of the deed of trust to Luke Lamb, Trustee, is not in controversy, analysis of

the answer filed by him is unnecessary. Apparently (from the stipulation of counsel representing other parties), a copy of said supplemental petition was served on R. C. Grice, judgment creditor. No answer by Grice appears in the record.

Williamson admits the relevant allegations of said supplemental petition, except that he asserts the amount of the indebtedness due him by Boswell is $1,533.86, rather than $1,661.65. By way of further answer, he alleges that his mortgage is a valid lien in that amount against the interest of Boswell. He makes no allegations as to the origin and nature of the portion of this indebtedness in excess of the $400.00 described in his mortgage.

Boswell denies all allegations of said supplemental petition relating to the Williamson debt and mortgage. He admits all other relevant allegations. He alleges that "the only valid lien which the said Roney M. Williamson could assert against him (by reason of said alleged mortgage) is $400.00." He further alleges that "during the selling season for the crop year 1953 . . . Williamson seized and sold the crops" belonging to him (Boswell) and received $1,312.95 from the proceeds of sale thereof. He demands that he be given credit on the debt "justly due" on the Williamson mortgage for the amount found to be due him under a strict accounting by Williamson for the proceeds received from the sale of said crops. He prays that judgment be entered directing the Commissioner to discharge any valid liens against his share, and that any balance remaining after the discharge of said valid liens be paid over to him.

Renfrow-Lucas denies that the Williamson mortgage creates a valid lien in excess of the amount due on the $400.00 debt described therein. It alleges further that its mortgage lien is subject only to (1) the deed of trust to Luke Lamb, Trustee, securing $700.00 plus interest, and (2) the mortgage to Williamson, to the extent of a maximum of $400.00 plus interest. Except as admitted, the allegations of said supplemental petition are denied.

The Williamson mortgage, recorded in Book 285, Page 390, included the following provisions:

"AND WHEREAS, the party of the first party (*sic*) now indebted to party of the second part in the sum of Three Hundred and 00/100 Dollars, in the form of Note;

"AND WHEREAS, the party of the second part has agreed to make advances in money, merchandise and supplies to the party of the first part, during the year 1952, to the amount of One Hundred and 00/100 Dollars, including fertilizers.

"In consideration of One Dollar, and for the further consideration herein set forth, the party of the first part hereby conveys to the party of

the second part and to his heirs the following real estate and personal property:

"His 1/5 (one-fifth) undivided interest in that certain tract of land in Black Creek Township, containing 31 acres, more or less. Joining lands on North by Tom Barnes heirs, joining lands on East by Aycock heirs, same line on road leading from Munford road to Wilson, N. C. also lying on Munford road. . . .

"Now, if the said party of the first part shall on or before the 1st day of November 1952 pay the said note and the advances herein agreed to be made *and shall also pay any other amount that the party of the second part may advance to the part (sic) of the first part in addition to the amount herein specified to be advanced, and shall also pay all other debts that the said party of the first part may be owing to the party of the second part,* then this deed and lien is to be null and void. But if the party of the first part shall fail to pay the said note or said advances herein agreed to be made, *or the advances that may be made in excess of the amount agreed to be advanced or shall fail to pay any other debt that the party of the first part may be owing to the party of the second part,* then the said party of the second part are (*sic*) hereby authorized to sell said real estate, personal property and crops for cash, . . . (foreclosure provisions)." (Italics added.)

Upon consideration of the pleadings and records, the court ordered that the Commissioner disburse the Boswell share according to priorities as follows: *first,* pay the $700.00 plus interest secured by the deed of trust to Luke Lamb, Trustee, *second,* pay Williamson, on account of his mortgage, $400.00 plus interest; *third,* pay Renfrow-Lucas on account of its mortgage, $400.00 plus interest; *fourth,* pay Grice the amount of his judgment; and *fifth,* pay the balance, if any, to Boswell.

Williamson excepted and appealed, assigning as error the restriction or limitation of the amount secured by his mortgage to $400.00 plus interest.

Lucas, Rand & Rose for Roney M. Williamson, defendant, appellant.

Gardner, Connor & Lee for Renfrow-Lucas Company, Inc., respondent, appellee.

BOBBITT, J. The record does not disclose, by stipulation or otherwise, the facts necessary for decision. Issues of fact raised by the pleadings remain unanswered.

This Court declares the law as it relates to the facts of the particular case under consideration. A decision may be considered authority only within the framework of such facts. Dissimilarity as to a material fact may call for application of a different principle of law. *Light Co. v.*

Moss, 220 N.C. 200, 17 S.E. 2d 10. Hence, the Court will not give advisory opinions or decide abstract questions. *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532. Each decision of law is made in relation to specific determinative facts, established by stipulation or by appropriate legal procedure.

We note first that the record fails to disclose the amount available for distribution as the Boswell share. How much, if any, would remain available for distribution after payment of the $700.00 debt secured by the first lien deed of trust to Luke Lamb, Trustee? Would it be sufficient to pay more than $400.00 on account of the Williamson mortgage if it were determined that Boswell owed Williamson more than $400.00 and that such excess was secured by the mortgage? If so, would the debt to Williamson in the amount so established exhaust the fund and leave nothing for Renfrow-Lucas and Grice, or would Boswell alone be affected? These, and like questions, are not answered by facts stipulated or established. It is not our practice to decide causes where essential facts wander elusively in the realm of surmise.

The cause was presented to Judge Martin for decision solely on the basis of the pleadings and the records of the asserted liens. There was no waiver of jury trial. G.S. 1-184 *et seq.* If such was intended, no evidence was offered as a basis for findings of fact. Thus, the court was called upon to make rulings of law before the ultimate issues of fact had been determined. True, both Renfrow-Lucas and Boswell, in their answers, contend that the maximum amount for which the Williamson mortgage would constitute security, in any event, is the $400.00 debt described therein; but it is not admitted that Boswell is indebted to Williamson in the amount of $400.00, much less an amount in excess thereof. The allegations as to the debt due Williamson are denied both by Boswell and by Renfrow-Lucas. The amount of the debt, if any, owing by Boswell to Williamson has not been established.

Upon this record, the parties before us present arguments *pro* and *con* as to the validity of the "dragnet" provision in the Williamson mortgage. Appellant cites, in support of its validity, *Norfleet v. Insurance Co.,* 160 N.C. 327, 75 S.E. 937; *Milling Co. v. Stevenson,* 161 N.C. 510, 77 S.E. 676; *Edwards v. Buena Vista Annex,* 216 N.C. 706, 6 S.E. 2d 489. These cases concern the provision of a collateral form bank note, *e.g.,* as in the *Edwards case,* where it is provided that the maker has deposited described collateral security, "for the payment of this and any other liability or liabilities of the undersigned to said bank, or which may hereafter arise, whether due or not due, however arising or evidenced." We refer to these cases solely to point out that each was decided when the full facts as to the amount, origin and nature of the maker's "other debt to the bank" were stipulated or established; and each decision dealt with the

particular "dragnet" provision in relation to the particular facts. Reference to other decisions is sufficient to show that a different result may be reached when the exact facts of each case are considered. *Bank v. Furniture Co.*, 169 N.C. 180, 85 S.E. 381; *Newsome v. Bank*, 169 N.C. 534, 86 S.E. 499; *Powell v. McDonald*, 208 N.C. 436, 181 S.E. 277.

In *First Nat. Bank v. Corning Bank & Trust Co.*, 168 Ark. 17, 268 S.W. 606, the chattel mortgage described a debt, evidenced by note, and thereafter, in the defeasance clause, provided that on payment of the described note, "together with all other indebtedness which may be due" the mortgagee, the mortgage should be void. It was held that the mortgage secured the indebtedness evidenced by such note and additional advances, not indebtedness evidenced by prior notes. In relation to this particular "dragnet" provision, the Court took the view that, in the absence of a specific provision sufficient to show the contrary, the provision should not be construed as intended to cover any debt *outstanding when the mortgage was made* except the debt described therein.

In the later Arkansas cases of *Hendrickson v. Farmers' Bank & Trust Co.*, 189 Ark. 423, 73 S.W. 2d 725, and *Bank of Searcy v. Kroh*, 195 Ark. 785, 114 S.W. 2d 26, the rule adopted, as stated in the fourth headnote in the *Bank of Searcy case*, is as follows:

"A mortgage which is given to secure a specific debt named will not be extended to include antecedent debts unless the instrument so provides and identifies the antecedent debts in clear terms, and cannot be extended to cover debts subsequently incurred unless they are of the same class and so related to the primary debt that mortgagor's assent will be inferred."

Again, the Arkansas cases are referred to solely to point out the necessity that the full facts as to the amount, origin and nature of the mortgagor's "other debt to the mortgagee" be established before attempting to construe the "dragnet" provision.

Numerous cases from other jurisdictions, under the Annotation, "Debts included in provision of mortgage purporting to cover unspecified future or existing debts ('dragnet' clause)," are collected in 172 A.L.R. 1079.

Renfrow-Lucas takes the position that Judge Martin's order is not prejudicial to Williamson and should be affirmed. In support of this position the argument advanced is that the Williamson mortgage is void for uncertainty of description. *Holloman v. Davis*, 238 N.C. 386, 78 S.E. 2d 143, is cited as authority. Hence, the argument runs, since Judge Martin's order is more favorable to Williamson than he deserves, Williamson has no ground for complaint or appeal.

But this position of Renfrow-Lucas ignores two vital facts, viz.:

First, its answer admits that the Williamson mortgage is a valid lien, subject only to the deed of trust to Luke Lamb, Trustee. True, there is

no admission as to the amount of the debt; and it is alleged that, whatever Boswell may owe Williamson, the maximum debt for which the Williamson mortgage can be deemed security is the described debt of $400.00. Under this pleading, Renfrow-Lucas cannot on this appeal challenge the Williamson mortgage as void for uncertainty of description.

Second, the contention as to uncertainty of description is brought forward solely on the basis of the statement in the brief of Renfrow-Lucas to the effect that, while the Williamson mortgage purports to describe a tract of 31 acres in Black Creek Township, the lands sold in the partition sale proceedings consist of two non-contiguous tracts, one of 23 acres in Black Creek Township and the other of 8 acres in Cross Roads Township. The record before us does not show what lands were involved in the partition sale proceedings.

The court below was in error in ruling on the question of priorities when the ultimate issues of fact remained undetermined and when the facts as to the *origin* and *nature* of the alleged debt to Williamson (in excess of $400.00) was not disclosed. The result is that the proceedings will be remanded to the Superior Court so that the controverted and determinative facts may be established and rulings as to the law may be made in relation thereto.

Error and remanded.

JOHN REYNOLDS v. CLARENCE EARLEY AND WIFE, ELVETA EARLEY.

(Filed 2 March, 1955.)

1. Insane Persons § 12: Vendor and Purchaser § 5c: Pleadings § 31—

In an action by the assignee of an optionee, the owners of the land are not entitled to attack the assignment on the ground that at the time of its execution the optionee was mentally incompetent, and allegations setting forth this defense are properly stricken on motion, since the contracts of an insane person are not void but are voidable at the election only of the lunatic or his representative, or his heirs, executor or administrator.

2. Appeal and Error § 29—

A ground of objection not discussed by appellants in their brief is deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

3. Landlord and Tenant § 22—

Where the lease contains no forfeiture clause for failure to pay rent, lessors may assert forfeiture for nonpayment of rent only after 10 days from demand upon lessees for payment. G.S. 42-3.

4. Same—

Where a lease does not provide for forfeiture for nonpayment of taxes or the making of improvements, forfeiture may not be declared on these grounds.

5. Landlord and Tenant § 2—

A lease which describes the land as being in a named township and adjoining and bounded by the lands of named persons, will not be declared unenforceable on the ground that the description is too vague and indefinite.

6. Vendor and Purchaser § 5c—

In an action for specific performance of an option contained in a lease, instituted by the assignee of the optionee, defendants contended that the optionee had surrendered the lease to them, but there was no evidence that the assignee knew of it before the assignment was made to him. *Held:* Since an option in a lease giving lessee the right to purchase the premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited, defendants' motion to nonsuit on the ground of the surrender of the lease was properly denied on the evidence.

7. Pleadings § 22—

In an action on an option contained in a lease which sufficiently describes the premises, the trial court has the discretionary authority to permit amendment after verdict specifically describing the land, and the action of the trial court in permitting the amendment without notice to the adverse party will not be held prejudicial, particularly when the cause is remanded for a new trial.

8. Trial § 28—

Even in those instances in which the evidence justifies the court in instructing the jury to answer the issue in favor of the party upon whom rests the burden of proof if the jury believes the facts to be as all of the evidence tends to show, the court must leave it to the jury to determine the credibility of the testimony, and it is error for the court upon failure of the jury to return a verdict immediately to recall the jury and inform them that the court's instructions were to answer the issue "Yes" if the jury found the facts to be as all the evidence tended to show.

APPEAL by defendants from *Moore, Dan K., J.*, September Term 1954 of BUNCOMBE.

Civil action to compel specific performance of an option to purchase real estate assigned to plaintiff.

Plaintiff's evidence tends to show these facts: On 2 August 1948 the defendant Clarence Earley owned, and still does, the real property in Buncombe County, which is the subject matter of this action. On that date he and his wife, Elveta Earley, in consideration of $5.00 executed and delivered a lease and option under seal to purchase this property to H. R. Green, "or his assigns," which is recorded in the Office of the Register of Deeds of Buncombe County in Deed Book 662, p. 509. The lease to H. R. Green, "or his assigns," ran for five years, from 1 January 1949 to 1 January 1954, and provided for a rental of One Dollar per year. The option provision is as follows: "The parties of the first part give to

the party of the second part, or his assigns, the exclusive right and option to purchase the above designated farm for a total consideration of $5,000 at any time during the term hereof, and will, on demand execute to the party of the second part, or the party designated by him, a good and sufficient deed to said property, conveying the same free and clear of any and all encumbrances of any nature."

On 7 July 1950 H. R. Green and wife, for a valuable consideration, assigned under seal this lease and option to plaintiff: this assignment was recorded on 8 July 1950 in the public registry of Buncombe County.

The plaintiff, prior to the assignment of the lease and option, had had no conversation with the defendants. After the assignment he entered into possession of the premises, and is still in possession. He has made improvements thereon. After being in possession for several months and interested in exercising the option, he talked with the defendants, and told them the lease and option had been assigned to him. The defendants replied that they didn't know about the assignment, and before they talked to him, they wanted to talk to their attorney. On or about 22 July 1953 he went to the defendants, told them that he had a deed with him for their execution for the property and $5,000.00 in money, and wanted to exercise the option on the property. The defendants said they wanted to talk to their lawyer. He never paid defendants any rent, but tendered rent during the trial. He did not hear from the defendants, and because of their failure to execute and deliver a deed to him for the property, according to the terms of the option, instituted this action.

The defendants' evidence was to this effect: They executed and delivered the lease and option to Green. In the spring or summer of 1950 plaintiff came to their house, and said he had bought the lease. Clarence Earley told him Green had broken the lease by not paying the rent and taxes. Defendants told plaintiff he had bought no lease, because Green "had already breached the contract and had already submitted the same to us"; not to go upon the land, and if he did so, it would be at his risk. Plaintiff replied, "he had bought the lease as is and was paying no rent." In July 1953 plaintiff came to the defendants' home with his lawyer, and demanded the execution of a deed according to the option. Plaintiff said he had $5,000.00 with him. Clarence Earley replied his wife was not at home, and it was not the proper time to do business. The defendants have made no demand for the rent: they thought as plaintiff had built a fence on the land, they would give him three years rent. Defendants are not willing to execute and deliver a deed for the premises to plaintiff upon payment to them of $5,000.00.

This issue was submitted to the jury: "Is the plaintiff entitled to a deed in fee simple to the property described in the complaint, upon payment to the defendants of the sum of $5,000 cash purchase price as alleged in

the complaint?" Pursuant to a directed instruction the jury answered the issue "Yes."

From the judgment entered thereon, the defendants appeal, assigning error.

Ward & Bennett and McLean, Gudger, Elmore & Martin for Plaintiff, Appellee.

Cecil C. Jackson and Wm. W. Candler for Defendants, Appellants.

PARKER, J. The defendants during the pendency of the action filed three Answers. They assign as error No. One, Judge Clarkson, upon motion of the plaintiff, "striking out parts of defendant's answer." However, they bring forward and discuss in their brief only the striking out of all allegations to the effect that H. R. Green could not execute a valid assignment of the lease and option to the plaintiff, because at the time of its execution and delivery he was mentally incompetent. After Judge Clarkson's order, the defendants filed a second Answer making substantially the same allegations. Judge Moore, upon motion of the plaintiff, struck out of defendants' answer substantially the same allegations that Judge Clarkson did. Defendants assign as error No. Two, Judge Moore "striking out parts of defendants' answer." However, they bring forward and discuss in their brief only the striking out of the allegations as to H. R. Green's mental incompetency. Defendants discuss these two assignments of error together in their brief.

Defendants then filed a Third Answer in which was alleged a substantial part of the matters and things stricken out by Judges Clarkson and Moore, other than the allegations as to mental incompetency of Green.

The defendants contend that they can avoid Green's assignment of the lease and option to plaintiff upon the alleged ground of Green's mental incompetency at the time of its execution and delivery.

The executed contracts of an insane person "before such condition has been formally ascertained and declared, are voidable and not void, and it is also recognized that such contracts are usually voidable at the election of the lunatic or person properly appointed to act in his behalf . . ." *Ipock v. R. R.*, 158 N.C. 445, 74 S.E. 352.

It was held in *Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E. 2d 916, that an assignment by parol by the purchaser of a contract to convey real estate is no defense to an action on the contract by the assignee against the vendor, since the Statute of Frauds is a personal defense which may be set up only *inter partes*.

H. R. Green is dead. The fact that his heirs, executor or administrator might have a valid cause of action against the assignee because of Green's alleged mental incompetency does not affect the legal title of the plaintiff,

and is not available as a defense for the defendants in this action on the assignment of the option. *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809; 28 Am. Jur., Insane and Incompetent Persons, Sec. 79; 46 A.L.R. 433. See also *In re Holden,* 271 N.Y. 212, 2 N.E. 2d 631.

If any part of the allegations in their first and second answers stricken out, other than those referring to Green's mental incompetency, are not substantially alleged in their Third Answer, the defendants would seem to have abandoned their general exceptions thereto by not discussing them in their brief. Rule 28, Rules of Practice in Supreme Court, 221 N.C. 544.

Defendants' assignments of error Nos. One and Two are overruled. *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634, cited by defendants is distinguishable: the attack there on the validity of the deed on the ground of grantor's mental incompetency was made by his heirs at law.

The defendants assign as error the failure of the trial court to sustain their motion for judgment of nonsuit made at the close of all the evidence. They contend that Green, and also plaintiff, had forfeited the lease by failing to pay rent, taxes and make improvements on the premises. The lease contains no forfeiture clause upon failure to pay rent. A forfeiture under G.S. 42-3 for failure to pay rent is not effective until the expiration of ten days "after a demand is made by the lessor or his agent on said lessee for all past due rent." *Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367; *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12. No demand having been made by the defendants for the payment of rent, as required by the statute, the lease had not been forfeited for nonpayment of rent at the time the plaintiff notified the defendants of his intention to exercise the option. The plaintiff tendered the rent due at the trial. As to that see *Coleman v. Carolina Theatres,* 195 N.C. 607, 143 S.E. 7. The lease does not provide for the payment of taxes and the making of improvements.

The defendants further contend that the description of the land in the lease is too vague and indefinite to be enforceable. This is the description in the lease: "The following lands and premises, with the improvements thereon, or to be placed thereon, and, In Buncombe County, North Carolina, being a farm about 64 acres, in Hominy Township, adjoining Vincent Robinson on the west, Wheaton McMicken on the north and west; and by John McElreath and Spurgeon Poore on the south by Willie Jamerson." Later on in the instrument occurs this language: "If this option is not exercised the property is to be redelivered to the parties of the first part at the end of the lease, and all improvements placed thereon are to be and become the property of the parties of the first part."

The description is as definite as the description in *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176, which was held sufficient, and is as follows: "A

certain tract or parcel of land in Franklin County, State of North Carolina, adjoining the lands of P. A. Davis, surrounded by the lands of P. A. Davis, known as the Junius Alston Place."

The defendants also contend that Green had surrendered the lease to them. If he had, there is no evidence that plaintiff knew of it before the assignment was made to him.

This Court said in *Crotts v. Thomas,* 226 N.C. 385, 38 S.E. 2d 158: "An option in a lease, which gives the lessee the right to purchase the leased premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited. The lease is a sufficient consideration to support specific performance of the option of purchase granted therein."

The evidence, considered as we must on a motion for nonsuit, tends to show that the option to purchase the premises described in the lease was in effect when the plaintiff notified the defendants of his election to purchase the property. The assignment of error for failure to sustain the motion for judgment of nonsuit is overruled.

The defendants have many assignments of error as to the admission and exclusion of evidence. The defendants have cited no authority in respect to these assignments of error, except that they say several questions and answers "violate the Dead Man's Rule Statute, G.S. 8-51." As to several of these assignments of error, no argument is made. It would serve no useful purpose to discuss them in detail, for the reason that the action must go back for a new trial for error in the charge, and these questions may not arise again.

The defendants assign as error the trial court, upon motion of the plaintiff, in its discretion permitting the plaintiff after verdict and before judgment to amend his complaint so as to describe the land, the subject matter of this action, more definitely: the order being entered without notice to defendants or their counsel. The trial court had authority to make such an order in its discretion. G.S. 1-163; *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. While we do not know why the lower court made the order without notice to defendants' counsel, we do not see how the defendants have been prejudiced, particularly as the action must go back for a re-trial.

The defendants' assignment of error to the charge is sustained. The charge of the court is as follows: "Members of the Jury: The Court takes the view on this matter on the evidence the matter devolves itself into a matter of law. The Court therefore instructs the jury that if you find the facts to be as all the evidence which has been introduced in the case tends to show that you would answer the issue which the Court will submit to you YES." The jury, after the delivery of the charge, retired

to its room at 11:10 a.m. At 11:20 a.m. the court recalled the jury, and the following took place:

"THE COURT: Members of the jury, I call you back. Have you reached your verdict?

"FOREMAN: Give us five minutes more and we will.

"THE COURT: I didn't know if you understood my instruction. My instructions were: If you find the facts to be as all the evidence tends to show, you would answer it YES. You may retire."

The jury at 11:30 a.m. returned its verdict, answering the issue "YES."

Discussing a similar charge in *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757, this Court said: "A directed instruction in favor of the party having the burden of proof is error. Citing authorities. And when a peremptory instruction is permissible, conditioned upon the jury finding the facts to be as all the testimony tends to show, the court must leave it to the jury to determine the credibility of the testimony. Citing authorities. This the court below inadvertently failed to do."

The defendants are entitled to a new trial, and it is so ordered.

New trial.

JOHN DANIEL MORGAN, PLAINTIFF, v. HAROLD F. BROOKS, ORIGINAL DEFENDANT, AND VIRGIL LEE MILLSAP, ADDITIONAL DEFENDANT.

(Filed 2 March, 1955.)

1. Appeal and Error § 51c—

An opinion of the Supreme Court should be considered in the light of the facts in the particular case in which it was delivered.

2. Pleadings § 10—

An action was instituted by the owner of a car against the owner-operator of the other vehicle involved in the collision, to recover for damages to the car. The original defendant had the driver of plaintiff's car and an occupant thereof joined as additional parties defendant. *Held:* The occupant of plaintiff's car, who was joined as an additional defendant on motion of the original defendant, was under no legal obligation to set up a cross-action against the original defendant to recover for his personal injuries, but had he done so, the original defendant would not be entitled to have the cross-action dismissed.

3. Abatement and Revival § 9—

The owner of an automobile instituted action against the owner-operator of the other car involved in the collision. The original defendant had the driver of plaintiff's car and an occupant thereof joined as additional defendants. The occupant of plaintiff's car filed no cross-action against the original defendant, but thereafter instituted an independent action against him. *Held:* The second action is not subject to abatement on the ground

of the pendency of the first, since the issues in the second action were not essentially a part of the first action and did not have to be adjudicated therein.

4. Judgments § 32—

The guest in a car owned and operated by her husband brought action against the driver and the owner and the occupant of the other car involved in the collision, to recover for personal injuries, and judgment was entered in plaintiff's favor. Thereafter defendant occupant brought action against the husband, owner-operator, to recover for personal injuries. *Held:* The husband was not a party to the first action, and therefore, he was not entitled to set up the judgment in the first action as *res judicata* in the second.

APPEAL by plaintiff John Daniel Morgan and the defendant Harold F. Brooks, from *Sink, J.*, October Term, 1954, of ROCKINGHAM.

Civil action to recover for personal injuries sustained in an automobile collision resulting from the alleged negligence of the defendant Harold F. Brooks.

The facts necessary to an understanding of the questions presented for determination on this appeal are as follows:

1. On 5 September, 1951, the automobile of Beatrice Morgan was involved in a collision on U. S. Highway No. 29 near Greensboro, North Carolina, with an automobile owned and operated by Harold F. Brooks. The Morgan vehicle was operated by Virgil Lee Millsap, and John Daniel Morgan was riding with him. Lillian Louise Brooks, wife of Harold F. Brooks, was riding with her husband. (For convenience, whenever the name Brooks is used hereinafter, unless otherwise designated, it will mean Harold F. Brooks; and when the name Morgan is used, unless otherwise designated, it will mean John Daniel Morgan.)

2. Following the collision, Beatrice Morgan instituted an action on 8 October, 1951, in the Superior Court of Rockingham County, against Brooks, to recover for alleged property damage. Brooks brought in Virgil Lee Millsap and Morgan as additional defendants. In the answer filed by the additional defendants, Morgan made no mention of any claim against Brooks.

3. Thereafter, on 16 September, 1953, the plaintiff instituted this action against Brooks, seeking damages for personal injuries sustained in the collision which occurred on 5 September, 1951, resulting from the alleged negligence of Brooks. Brooks filed an answer to plaintiff's complaint and, among other things, set forth a plea in abatement, alleging that the plaintiff was required to assert such claim as he had in the suit brought by Beatrice Morgan, in which action Brooks brought Morgan in as an additional defendant. To this answer Morgan filed a reply in which he admitted the pendency of the action brought by Beatrice Morgan

against Brooks, but alleged that he was not fully aware of the injuries which he had sustained in said collision at the time he was made a party defendant in said action, and expressly denies that the suit instituted by Beatrice Morgan against Brooks is a bar to the prosecution of this independent action. Brooks, the original defendant in this action, also set up a cross-action against Virgil Lee Millsap and had him made an additional party defendant. Millsap filed an answer to the cross-action.

4. In January, 1954, Lillian Louise Brooks instituted an action against Virgil Lee Millsap, Beatrice Morgan and John Daniel Morgan in the Greensboro Division of the Guilford Superior Court, for the recovery of damages for alleged personal injuries she sustained in the above collision. She recovered a judgment against the defendants in the sum of $2,750.

When this cause came on to be heard at the October Term, 1954, of the Superior Court of Rockingham County, Brooks filed a motion seeking permission to amend his answer so as to plead as *res judicata* the verdict and judgment in the Guilford case referred to above, upon the ground that all, or substantially all, of the material matters in controversy had been determined. This motion was denied and the defendant Brooks entered an exception to the ruling. For the purpose of trial, the case was then consolidated, by consent, with the action entitled "Beatrice Morgan, plaintiff, *v.* Harold F. Brooks, defendant, and John Daniel Morgan and Virgil Lee Millsap, Additional Defendants." Thereupon, the original defendant Brooks demurred *ore tenus* to the pleadings of the plaintiff for that said pleadings do not state facts sufficient to entitle the plaintiff to assert his alleged cause of action in this suit, and also moved for judgment on the pleadings. The court then entered judgment, denying the motion of the original defendant Harold F. Brooks that he be allowed to file an amended answer so as to plead the verdict entered in the Guilford County case as *res judicata* of the matters and things alleged in this action, but sustaining the demurrer *ore tenus* to the plaintiff's pleadings, and dismissing the action.

The plaintiff Morgan and the defendant Brooks appeal and assign error.

Price & Osborne and J. C. Johnson for plaintiff.
Jordan & Wright for defendant Harold F. Brooks.

DENNY, J. We shall first consider the appeal of the plaintiff. The judgment of the court below, sustaining the demurrer *ore tenus* to the plaintiff's pleadings, is tantamount to an order to the effect that the plaintiff may not now assert any claim he might have against Harold F. Brooks, as a result of the collision which occurred on 5 September, 1951, since he failed to file a cross-action against Brooks in the suit instituted

by Beatrice Morgan, in which action Brooks brought him in as an additional party defendant.

The appellant Brooks is relying upon our decision in the case of *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796, to sustain the ruling of the court below. In order to interpret an opinion of this Court correctly, it should be considered in the light of the facts in the particular case in which it was delivered. *Brown v. Hodges,* 233 N.C. 617, 65 S.E. 2d 144, and cited cases.

In *Cameron v. Cameron, supra,* the plaintiff Bruce B. Cameron instituted an action for divorce, on the ground of two years' separation, against his wife, Mary Vail Cameron, in New Hanover County. At the time of the institution of the action, there was pending in the Superior Court of Sampson County an action instituted by Mrs. Cameron against her husband for divorce from bed and board under G.S. 50-7 (1) upon the ground that her husband had abandoned her. We held the second action was not maintainable since he could, with the permission of the court, if he desired to do so, set up his alleged cause of action for divorce in a cross-action against the plaintiff in the action pending in Sampson County. Moreover, a verdict on the merits in the Sampson County case would have been determinative of the question as to whether or not he was entitled to the relief he sought in the action instituted in New Hanover County. *Ervin, J.,* in speaking for the Court in the above case, said: "The ordinary test for determining whether or not the parties and causes of action are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded? . . . This test lends itself to ready application where both actions are brought by the same plaintiff against the same defendant, or where the plaintiff in the second action, as defendant in the first, has actually pleaded a counterclaim or cross-demand for the same cause of action. The ordinary test of identity of parties and causes is not appropriate, however, when the parties to the prior action appear in the subsequent action in reverse order, and the plaintiff in the second action, as defendant in the first, has failed to plead a counterclaim or cross-demand for the same cause of action. Under the law, a defendant, who has a claim available by way of counterclaim or cross-demand, has an election to plead it as such in the original action, or to reserve it for a future independent action, *unless the claim is essentially a part of the original action and will necessarily be adjudicated by the judgment in it.* . . . As a consequence, the general rule is that a subsequent action is not abatable on the ground that the plaintiff therein might obtain the same relief by a counterclaim or cross-demand in a prior action pending against him." (Italics ours.)

The facts in the instant case are not like those in the *Cameron case.* Beatrice Morgan, in so far as the record before us discloses, did not set up any action against John Daniel Morgan. Therefore, when he was brought in as an additional party defendant by Brooks, he was under no legal obligation to set up a cross-action against Brooks for any claim he had against him as a result of the collision which occurred on 5 September, 1951. However, since he was made an additional party defendant upon motion of Brooks, he could, had he desired to do so, have set up such an action against him, and Brooks could not have had it dismissed had he desired to do so. *Grant v. McGraw,* 228 N.C. 745, 46 S.E. 2d 849; *Powell v. Smith,* 216 N.C. 242, 4 S.E. 2d 524. But, on the other hand, if Morgan had been made an additional party defendant in the Beatrice Morgan case by someone other than Brooks, and he had filed a cross-action against Brooks, such cross-action would have been subject to dismissal upon motion of Brooks. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Horton v. Perry,* 229 N.C. 319, 49 S.E. 2d 734; *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397.

In the last cited case, *Devin, J.,* later *Chief Justice,* said: "The general rule seems to have been established by the decisions of this Court that one defendant, jointly sued with others, may not be permitted to set up in the answer a cross-action not germane to the plaintiff's action. A cause of action arising between defendants not founded upon or necessarily connected with the subject matter and purpose of the plaintiff's action should not be engrafted upon the action which the plaintiff has instituted. In order that a cross-action between defendants may be properly considered as a part of the main action, it must be founded upon and connected with the subject matter in litigation between the plaintiff and the defendants. . . . Section 602 of the Consolidated Statutes (now G.S. 1-222) provides that 'judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves.' This permits the determination of questions of primary and secondary liability between joint tort-feasors, but it may not be understood to authorize the consideration of cross-actions between defendants as to matters not connected with the subject to the plaintiff's action."

In *Wrenn v. Graham, supra,* in which this Court was considering the identical question now before us, *Barnhill, J.,* now *Chief Justice,* said: "In an action founded on allegations of negligence, may one of the three defendants file and prosecute a cross-action against his codefendants to recover compensation for personal injuries and property damage which he alleges arose out of and were proximately caused by the same auto-

mobile collision out of which plaintiff's cause of action arose? The statute, G.S. 1-123, and our decisions thereunder answer in the negative."

In light of our decisions, we hold the plaintiff's exception to the ruling of the court below in sustaining the demurrer *ore tenus* and dismissing the action is well taken and will be upheld.

DEFENDANT'S APPEAL.

The defendant Brooks appeals from the denial of his motion to permit him to set up the judgment entered in the case of Lillian Louise Brooks *v.* John Daniel Morgan, *et als.*, as *res judicata* as to the matters and things alleged in the present action. The defendant Brooks was not a party to the action brought by his wife in Guilford County. Moreover, it may be that in the trial of this case, an entirely different set of facts, as to the manner in which the collision between the two automobiles occurred, may be developed, either by additional evidence or by the estimate placed upon the evidence by the jury. Therefore, the ruling of the court below will be upheld on authority of our decisions in *Meacham v. Larus & Bros. Co.*, 212 N.C. 646, 194 S.E. 99, and *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167.

On plaintiff's appeal—Reversed.

On defendant's appeal—Affirmed.

GAITHER CORPORATION v. MARK L. SKINNER.

(Filed 2 March, 1955.)

1. Judgments § 32—

The doctrine of *res judicata* embodies the general rule that any right, fact, or question in issue and directly adjudicated, or which is necessarily involved in the determination of the action and which should have been presented for adjudication, is conclusively settled by the judgment on the merits rendered by a competent court, and cannot again be litigated between the parties and privies.

2. Same—

Under the doctrine of *res judicata*, a party defendant who interposes a part of a claim by way of recoupment, setoff, or counterclaim, is ordinarily barred from recovering the balance of his claim in a subsequent action.

3. Contracts § 25a—

Ordinarily, for the breach of an entire and indivisible contract only one action for damages will lie.

4. Contracts § 9—

A contract for the erection of a building in accordance with plans and specifications and the delivery of a turn-key job is an entire and indivisible contract.

5. Judgments § 32—

In an action by the contractor to recover the balance alleged to be due on the construction contract, the owner alleged a counterclaim for damages for the contractor's breach of the construction contract as to several specified items. Judgment by consent was entered. After the institution of that action, the owner sued the contractor for breach of the construction contract as to other specified items. The evidence disclosed that the owner was fully apprised of the defects complained of in the second action prior to the time the consent judgment was entered in the first. *Held:* In the absence of any evidence of fraud or deception, judgment in the first action is a bar to the second.

6. Same—

Ordinarily, upon the plea of *res judicata*, recitals of the judgment are conclusive as to the issues involved.

7. Trial § 24—

Where plaintiff's evidence establishes as a matter of law an affirmative defense set up by defendant, nonsuit is proper.

8. Trial § 22b—

While, ordinarily, defendant's evidence may not be considered in passing upon a motion for nonsuit, it may be considered in so far as it tends to explain or clarify plaintiff's evidence and is not in conflict therewith.

9. Judgments § 35—

On the plea of *res judicata*, defendant introduced in evidence with plaintiff's acquiescence the judgment roll in the prior action. The judgment roll was not in conflict with plaintiff's evidence, but merely explained and clarified the testimony of plaintiff's witnesses in respect thereto. *Held:* The judgment roll was competent to be considered with plaintiff's evidence upon defendant's motion to nonsuit on the ground of *res judicata*.

10. Same—

When the plea of *res judicata* is established as a matter of law upon the evidence adduced, the plea raises no issue of fact for the jury, and the court properly enters judgment of involuntary nonsuit.

APPEAL by plaintiff from *Grady, Emergency Judge,* at October Term, 1954, of PASQUOTANK.

Civil action to recover damages for alleged breach of contract to erect a building.

The plaintiff, Gaither Corporation, entered into a contract with the defendant Skinner by the terms of which the defendant agreed to erect a store building on property belonging to the plaintiff in Elizabeth City. The defendant was to furnish all labor and materials and receive the sum

of $88,454 for a turn-key job in accordance with plans and specifications prepared by the plaintiff's architect.

The building was completed in the late summer of 1950 and the plaintiff's tenant moved in on 14 September, 1950.

In February, 1951, Mark L. Skinner, the defendant herein, instituted an action in the Superior Court of Craven County against Gaither Corporation, the plaintiff herein. In that action Skinner sued for an alleged balance of $2,000 due on the contract, and for the further sum of $7,106.56 for additional work and materials in replacing a ceiling after the building was completed. Gaither Corporation by answer denied owing the alleged balance of $2,000 on the ground that Skinner had failed to perform the contract according to its terms. Gaither Corporation also denied owing Skinner anything for the replaced ceiling, and alleged on the contrary that the original ceiling did not conform to the architect's plans and had to be replaced in order to fulfill the terms of the contract. The answer in the Craven County action also contained a counterclaim in which Gaither Corporation sought to recover of Skinner the sum of $8,700 damages for his alleged failure in specified particulars to perform the contract.

The Craven County action was concluded by consent judgment entered at the November 1952 Term of court. The judgment decreed that Skinner recover of Gaither Corporation the total sum of $2,680.25, but allowed Gaither Corporation to retain the $2,000 balance remaining unpaid on the construction contract.

Thereafter, in February, 1953, Gaither Corporation instituted the instant action in the Superior Court of Pasquotank County against Skinner, alleging that Skinner had failed to construct the roof on the building according to the plans and specifications and that he had fraudulently and deceitfully placed on the building a roof of faulty materials, different from those called for in the contract, resulting in serious leakage and making it necessary that the roof be removed and replaced with one of the type specified in the contract, to the damage of Gaither Corporation in the amount of $5,041. The defendant Skinner by answer denied the material allegations of the complaint, and by way of further defense set up as *res judicata* the judgment roll in the prior action.

At the trial of the instant action the plaintiff's evidence disclosed that while the building was under construction the plaintiff's architect supervised and inspected the work as it progressed; that from time to time he issued progress certificates authorizing partial payments on the contract covering phases of the work completed; that when the roof was finished by subcontractor C. R. Hopkins, it was approved by the architect and a progress certificate was issued authorizing payment of $5,300 on the

contract based on completion of the roof, and such progress payment was made by Gaither Corporation on 10 July, 1950.

The evidence further disclosed that the plaintiff discovered defects in the roof in July, 1952; that he had it inspected at that time and again in October, 1952, at which latter time he was fully advised as to the defects in the construction of the roof. The consent judgment disposing of the prior Craven County action was entered 21 November, 1952.

At the close of the evidence, the defendant's motion for judgment as of nonsuit was sustained, and from judgment entered in accordance with such ruling the plaintiff appeals.

Worth & Horner for plaintiff, appellant.
Barden, Stith & McCotter and John H. Hall for defendant, appellee.

JOHNSON, J. The doctrine of *res judicata* embodies the general rule that any right, fact, or question in issue and directly adjudicated on or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies. *Armfield v. Moore,* 44 N.C. 157; *Southern Distributing Co. v. Carraway,* 196 N.C. 58, 144 S.E. 535; 50 C.J.S., Judgments, section 592.

In short, the general rule is that "A final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action." 30 Am. Jur., Judgments, section 172.

Also, the rules which preclude the splitting of a cause of action or the relitigation of the same cause of action between the same parties are applicable where a cause of action is adjudicated upon, even though all the relief to which the party asserting the cause of action is entitled is not requested or granted in such action. The general rule is that the whole cause of action must be determined in one action, and where an action is brought for a part of a claim, a judgment obtained in the action ordinarily precludes the owner thereof from bringing a second action for the residue of the claim. *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Allison v. Steele,* 220 N.C. 318, 17 S.E. 2d 339; 1 Am. Jur., Actions, section 96; 30 Am. Jur., Judgments, section 173.

It is to be noted that the phase of the doctrine of *res judicata* which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action. The bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise

of due diligence could have been presented for determination in the prior action. *Bruton v. Light Co., supra; Moore v. Harkins,* 179 N.C. 167, 169, 101 S.E. 564; *Wagon Co. v. Byrd,* 119 N.C. 460, 26 S.E. 144; 1 Am. Jur., Actions, section 96; 30 Am. Jur., Judgments, sections 179 and 180.

And under application of the rule precluding subsequent litigation of the same cause of action, a party defendant who interposes only a part of a claim by way of recoupment, setoff, or counterclaim is ordinarily barred from recovering the balance in a subsequent action. *Mann v. Mann,* 176 N.C. 353, 97 S.E. 175; *Manufacturing Co. v. Moore,* 144 N.C. 527, 57 S.E. 213; 30 Am. Jur., Judgments, section 189; Annotation: 8 A.L.R. 694, 734.

Ordinarily, for the breach of an entire and indivisible contract only one action for damages will lie. 12 Am. Jur., Contracts, section 459. An examination of the building contract sued here discloses it is an entire and indivisible contract. 9 Am. Jur., Building and Construction Contracts, section 14; Annotation: 53 A.L.R. 103; 12 Am. Jur., Contracts, section 315 *et seq.*

In the prior action in Craven County Gaither Corporation, the plaintiff herein, set up against Skinner by way of counterclaim a cause of action for damages for failure to perform the building contract. Several items of breach were declared upon in the counterclaim. In the instant case Gaither Corporation attempts to relitigate the same cause of action by seeking damages for another item of the alleged breach; that is, for Skinner's failure to construct the roof in accordance with the terms of the contract. Further recovery is precluded under application of the doctrine of *res judicata.*

True, under application of this doctrine, where the omission of an item from a single cause of action is caused by fraud or deception of the opposing party, or where the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item. 30 Am. Jur., Judgments, sections 202 and 203.

However, there is no evidence in the instant case of fraudulent or intentional misrepresentation or concealment on the part of the defendant Skinner in respect to the construction of the roof. And the evidence is plenary that the plaintiff, Gaither Corporation, was fully apprised of the defects in the roof in October, 1952; whereas the consent judgment disposing of the Craven County action was not entered until 21 November, 1952. Moreover, it is noted that this judgment expressly stipulates "that the parties take nothing further by reason of this action." And ordinarily recitals of a judgment are conclusive as to the issues involved. 50 C.J.S., Judgments, section 713, p. 182. See also *Bell v. Machine Co.,* 150 N.C. 111, 63 S.E. 680.

The judgment of involuntary nonsuit entered below will be upheld on the ground that the evidence clearly sustains the defendant's plea of *res judicata.*

We have considered the plaintiff's contention that the defendant's plea of *res judicata* raised an issue of fact for the jury. On this record the contention is without substantial merit. It is a well-established principle of procedural law with us that where the plaintiff's evidence establishes as a matter of law an affirmative defense set up by the defendant, nonsuit is proper. *Jarman v. Offutt,* 239 N.C. 468, 80 S.E. 2d 248; *Hedgecock v. Insurance Co.,* 212 N.C. 638, 194 S.E. 86. It is also established with us that while ordinarily the defendant's evidence may not be considered in passing upon a motion for nonsuit, nevertheless, where the defendant's evidence is not in conflict with that offered by the plaintiff, it may be considered in so far as it tends to explain or clarify the plaintiff's evidence. *Nance v. Hitch,* 238 N.C. 1, 76 S.E. 2d 461; *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869; *Harrison v. Railroad,* 194 N.C. 656, 140 S.E. 598. During the trial below the plaintiff's president and principal witness was cross-examined at length concerning the judgment roll in the prior action in Craven County. In the course of the cross-examination counsel for the plaintiff stated he was willing for the complaint, answer, and judgment in the prior action to be offered in evidence. Thereafter, on motion of the defendant, while the plaintiff was in process of offering its evidence, the judgment roll in the prior action was received in evidence, without objection. When the plaintiff rested its case, the defendant offered no further evidence. The contents of the judgment roll in nowise conflict with the plaintiff's evidence. On the contrary, the judgment roll merely explains and clarifies the testimony of the plaintiff's witness in respect thereto. Accordingly, it is proper for the contents of the judgment roll to be considered with the plaintiff's evidence on the question of nonsuit. And when this is done, it is manifest that the evidence adduced below establishes as a matter of law the defendant's affirmative defense of *res judicata.* This being so, the judgment of nonsuit entered below will be upheld.

Affirmed.

A. G. CARVER, AGENT, v. ARTHUR W. BRITT.

(Filed 2 March, 1955.)

1. Brokers § 3: Frauds, Statute of, § 9—

A contract between a broker and an owner of land to negotiate a sale of the land is not required to be in writing.

2. Contracts § 4—

While the acceptance of an offer must be identical and unconditional, where an offer is squarely accepted in positive terms, the addition of a statement relating to the ultimate performance of the contract does not make the acceptance conditional and prevent the formation of the contract.

3. Brokers § 3—

Defendant listed his land for sale with plaintiff broker at a specified price. Thereafter, plaintiff sent defendant a telegram stating that a purchaser for the price agreed had been obtained, and defendant sent a return wire stating "your telegram relative sale my property is accepted subject to details to be worked out . . ." *Held:* The words "subject to details to be worked out" referred not to the acceptance of the offer but to the performance of the contract and does not render the acceptance conditional, and therefore, in the broker's action for commission, nonsuit on the ground that there was no evidence of a valid contract to sell is error.

4. Contracts § 4—

Where an offer stipulates that acceptance must be wired by a specified hour, but the offerer, notwithstanding the offeree's failure to wire acceptance within the time stipulated, goes to the office of the offeree's attorney to complete the transaction in accordance with acceptance later received, the offerer waives the time limit, and the offeree may not maintain there was no contract because the offer was conditional.

5. Brokers § 11—

The fact that a brokerage contract stipulates that the broker was to be paid commission on the total price obtained from the property does not preclude recovery of commission by the broker upon his obtaining a purchaser ready, able, and willing to buy the property at the stipulated price when the sale is not consummated because of fault of the owner of the land.

APPEAL by plaintiff from *Moore, Dan K., J.,* December Civil Term 1954, of BUNCOMBE.

Civil action by broker to recover commissions for procuring purchaser ready, able and willing to buy land on terms allegedly authorized and accepted.

Plaintiff's evidence tends to show the facts stated below. The plaintiff is a licensed real estate broker in the City of Asheville. The defendant is a resident of the State of Kentucky. The defendant owned approximately 55 acres of land in Buncombe County, which is all the land de-

scribed in Deed Book 463, page 173, in the office of the Register of Deeds of Buncombe County, except 13.1 acres owned by Vincente Vallejo.

On 24 September 1952 plaintiff had a conversation with the defendant in Asheville. He told the defendant he thought he could sell his property, if he would give him a listing. Defendant said it was for sale, and he wanted to sell it. DeDfendant gave plaintiff a listing on it for $22,000.00, and said: "He would have to let Mr. Vallejo have refusal on it if he let me have it." Plaintiff told defendant his prospective purchaser would be in Asheville the next day, he would have to know quick; and how soon defendant could let him know whether Mr. Vallejo would take it? Defendant replied, "I will let you know within eight hours from the time you wire." Defendant asked plaintiff what he would charge, and he replied 5% of the selling price. Nothing else was said about the commissions.

On 25 September 1952 plaintiff showed this property to the International Resistance Corporation, and obtained it as a purchaser ready, able and willing to buy at the price of $22,000.00—of which $5,000.00 was paid to plaintiff then and $17,000.00 to be paid when the transaction was closed.

On the same day plaintiff sent defendant a telegram reading as follows:

"I have sold property northeast corner of Sweeten Creek Road and Airport Road described in Deed Book 463, page 173, excepting 13.1 acres sold Vallejo: About 55 acres $22,000 cash. Have $5,000 deposited. Balance $17,000 on closing date. To be closed on or before sixty days. Deed to purchaser to be good, marketable title free and clear. Must have answer by Western Union not later than 8:00 p.m. today or they will purchase other property."

Not hearing from defendant by 8:00 p.m. plaintiff called him by telephone, reaching him about 5:00 o'clock the following morning in Louisville, Kentucky. Plaintiff told defendant he had his property sold. Defendant replied, "Well, Mr. Vallejo was out and we had the property." Plaintiff said, "Mr. Britt, these people are here from Philadelphia, and want to go back this afternoon. They don't want to take our word and I want you to wire me accepting that offer immediately." Defendant agreed to wire. This is the telegram defendant sent plaintiff:

"Your telegram relative sale my property is accepted subject to details to be worked out by you and T. O. Pangle. Many thanks."

After receiving the wire plaintiff notified the International Resistance Corporation it had bought the property. On the day of receipt of defendant's telegram, or the day after, plaintiff went to T. O. Pangle's office, who is one of the defendant's counsel of record. Pangle told plaintiff "we had the property, that Mr. Vallejo was out." Pangle said he wanted to wait until the first of the year to close the property out. Plaintiff

replied his purchaser wanted to close the deal immediately, and asked him to call the defendant. Pangle got defendant over the telephone and plaintiff talked to him, saying it made no difference about the income tax whether the transaction was closed now or the first of the year. Defendant told plaintiff "he would come down tomorrow and we would straighten things out." The next day defendant sold the property to Vallejo, and conveyed it to him by deed on 3 October 1952. The consideration exceeded $22,000.00.

Defendant has made no payment of commissions to plaintiff.

From judgment of nonsuit entered at the close of plaintiff's evidence, the plaintiff appeals assigning error.

Harkins, Van Winkle, Walton & Buck for Plaintiff, Appellant.

Pangle & Garrison and Don C. Young for Defendant, Appellee.

PARKER, J. A mere contract between a broker and the owner of land to negotiate a sale of the latter's land is not required to be in writing. *White v. Pleasants,* 225 N.C. 760, 36 S.E. 2d 227; *Palmer v. Lowder,* 167 N.C. 331, 83 S.E. 464; 8 Am. Jur., Brokers, Secs. 22 and 62; 12 C.J.S., Brokers, Sec. 62.

Plaintiff's evidence tends to show that the defendant listed his land with him for sale at the price of $22,000.00, and that pursuant to his contract with the defendant he secured a purchaser ready, able and willing to buy at that price. That he telegraphed the defendant he had sold the property for $22,000.00, and that the defendant telegraphed him back, "your telegram relative sale my property is accepted subject to details to be worked out by you and T. O. Pangle."

The defendant contends that his telegram of acceptance was conditional upon the working out of the details, and as these were never worked out, he never accepted the offer, and, therefore, is not liable to plaintiff for commissions.

It seems that the contention of the defendant arises out of his failure to distinguish between a condition which goes to the making of a contract and a statement relating only to its ultimate performance or execution.

Where an offer is squarely accepted in positive terms, the addition of a statement relating to the ultimate performance of the contract does not make the acceptance conditional and prevent the formation of the contract. *Rucker v. Sanders,* 182 N.C. 607, 109 S.E. 857; *Townsend v. Stick,* 158 F. 2d 142; *Turner v. McCormick,* 56 W. Va. 161, pp. 170-171; *Grey v. Nickey Bros.,* 271 F. 249; *Baker v. Packard,* 98 N.Y.S. 804, 112 App. Div. 543, affirmed 82 N.E. 1124, 189 N.Y. 524; Anno. 149 A.L.R. 214 (d); Williston on Contracts, Rev. Ed., Vol. 1, Sec. 78.

It is said in 17 C.J.S., Contracts, p. 384: "If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offerer will change his terms, or as to future acts, or by the expression of a hope, or suggestion as to terms, or by the intimation that a time be fixed for the consummation of the transaction, or because the offerer otherwise expresses dissatisfaction with the offer or adds immaterial words which do not in legal effect qualify the offer . . ."

In *Townsend v. Stick, supra,* which was an action for specific performance, the appellant contended that the acceptance was not enforceable because these essential elements of a contract were still under negotiation: (a) The Nature of the Final Agreement; (b) The Manner of Reserving Oil and Mineral Rights; (c) The Purchase Price; (d) The Time, Place and Amount of Payment; (e) The Time Allowable for a Survey, a Title Examination and Removal of Title Defects; (f) The Quantity of Land to be Sold; (g) The Character of the Title to be Guaranteed; and (h) The Identity of the Purchaser. The Court said: "We have examined these contentions closely and are convinced that they are either matters of performance rather than matters involved in the formation of the contract, or that they are substantially covered by the contract or would be implied by law."

It is elementary learning that an acceptance to be enforceable must be identical with the offer and unconditional. 17 C.J.S., Contracts, Sec. 43. In order for the words "subject to details to be worked out by you and T. O. Pangle" to invalidate the contract, these words must amount to a qualification or condition imposed as a part of the acceptance itself, and defendant's telegram must be construed as a qualified acceptance to the effect that "I will accept your offer, provided the details are worked out." *Rucker v. Sanders, supra.*

The looking up of a title, the drafting and execution of a deed, the time and place of payment of the purchase price are customary details in working out a real estate conveyance. The defendant's acceptance of the offer was positive. How can a statement relating not to the making of the contract, but merely to the working out of the details of performance be deemed to change it?

The defendant further contends that the offer was conditional because it stated "must have answer by Western Union not later than 8:00 p.m. today or they will purchase other property," and no answer was received from defendant within the time limit. This contention seems without merit: the purchaser apparently waived the time limit of acceptance, as plaintiff went to Pangle's office to complete the transaction.

We are satisfied that the words as to the working out of the details relate to the performance of the contract, and that the telegrams contain

all of the essential elements of a valid contract. The case of *Richardson v. Storage Co.*, 223 N.C. 344, 26 S.E. 2d 897, 149 A.L.R. 201, relied on by the defendant, is distinguishable.

The defendant makes this additional contention: the plaintiff alleged in his complaint that he was to be paid 5% commissions on the total price obtained for the property, and as his purchaser never paid the sale price, no commissions are due. Defendant relies upon *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906. That case is not in point. There the plaintiff was to be paid a 5% commission "out of the sale price of the property." A recovery was denied because the purchaser was unable to comply with his contract. The plaintiff had not procured a purchaser able to buy.

"As a general rule, where a broker finds a customer ready, able and willing to enter into a transaction on the terms proposed by the principal, he cannot, unless there is a special contract to the contrary, be deprived of his right to his commissions by reason of the transaction failing on account of some fault of the principal." 12 C.J.S., Brokers, p. 221, where cases are cited from many states.

We said in *House v. Abell,* 182 N.C. 619, 109 S.E. 877: "It is a well established principle that a real estate broker employed by the owner to make sale of designated real estate, who, within the terms of the authority given, succeeds in bringing about a building (*sic*) contract of sale with a responsible purchaser, is entitled to his stipulated commission, or to the reasonable worth of his services if no definite amount is specified, and his claim therefor is not affected because the principal has seen proper to voluntarily surrender his rights under the contract."

The law is well settled in this jurisdiction that when a broker, pursuant to an agreement with the owner of land, procures a purchaser for his principal's land ready, able and willing to buy the land upon the terms offered, he is entitled to commissions or compensation for his services. *Eller v. Fletcher,* 227 N.C. 345, 42 S.E. 2d 217; *White v. Pleasants, supra; Lindsey v. Speight,* 224 N.C. 453, 31 S.E. 2d 371.

Plaintiff's evidence is to the effect that it was defendant's fault that he did not receive the purchase price of $22,000.00 from the International Resistance Corporation. The defendant cannot resist plaintiff's recovery on the ground of non-receipt of the purchase price under such circumstances.

The Complaint alleges a brokerage contract between plaintiff and defendant, and that plaintiff was to receive 5% commissions on the sale price of the property. The Complaint does not allege the price at which the property was listed with plaintiff for sale. The only mention of the sale price in the Complaint is in the telegram sent by plaintiff to defendant, which telegram, with defendant's telegram in reply, is set forth verbatim. The plaintiff does not allege an oral acceptance of the offer.

Therefore, he must rely upon defendant's telegram as an acceptance. The defendant in his answer denies the making of the sale contract, but admits the receiving and sending of the telegrams.

In our opinion, plaintiff's evidence tends to show a substantial agreement between the offer and acceptance in all material particulars sufficient to show a mutual intent between the parties directed to the purpose of conveying the land, *Richardson v. Storage Co., supra,* and the parties appear to have assented to the same thing in the same sense, *Trollinger v. Fleer,* 157 N.C. 81, 72 S.E. 795.

Plaintiff's evidence makes out a case for the jury, and it is ordered that the judgment below be

Reversed.

NASH COUNTY, A BODY POLITIC AND CORPORATE, v. S. R. ALLEN AND J. M. ALLEN.

(Filed 2 March, 1955.)

1. Process § 6—

Where service of summons is made by publication, the requirements of the statute must be strictly followed and everything necessary to dispense with personal service of summons must appear by affidavit.

2. Same—

An affidavit for service of summons by publication is fatally defective when it fails to allege that the person upon whom the summons is so served cannot, after due diligence, be found within the State.

3. Judgments § 27b: Taxation § 40g—

Where service of summons by publication in a tax foreclosure is fatally defective for failure of the affidavit to allege that the defendant cannot, after due diligence, be found within the State, the court acquires no jurisdiction over the person of defendant and the interlocutory order and decree of confirmation are void.

APPEAL by plaintiff and the interpleaders, Madeline D. Bobbitt and R. R. Davis, from *Carr, J.,* at December Term 1954, of NASH.

Civil action, in the nature of an action to foreclose a mortgage, to foreclose tax liens upon certain lands described in the complaint for unpaid taxes, duly and lawfully listed and assessed by plaintiff for the years 1931 to 1939, both inclusive, which with costs, penalties and interest amounts to $127.25.

The record on this appeal discloses (1) a purported judgment roll in the above entitled civil action beginning with summons dated 29 November, 1939, and culminating with final judgment dated Monday, 23 Sep-

tember, 1940, confirming sale of the lands by commissioners appointed by the court, to Nash County as the last and highest bidder therefor, and ordering commissioners to execute and deliver to Nash County a deed in fee simple for said land;

(2) A deed dated 25 September, 1940, from the commissioners purporting to convey the land referred to in last preceding paragraph to Nash County, purporting to have been executed and delivered pursuant to the final judgment of the court as aforesaid;

(3) A deed dated 11 June, 1941, from Nash County to W. N. Bobbitt and wife, Madeline B. Bobbitt, purporting to convey the same land;

(4) A deed, dated 25 February, 1947, from Mrs. Madeline B. Bobbitt purporting to convey to the Warrenton Box and Lumber Company of Warren County, N. C., certain timber on the land described in the purported deed to her from Nash County as aforesaid; and

(5) A deed, dated 25 February, 1947, from Mrs. Madeline B. Bobbitt, widow, purporting to convey to R. R. Davis the land, excepting the timber purported to have been conveyed to the Warrenton Box and Lumber Company as above stated.

The record also discloses that defendant S. R. Allen, by motion "verified 2-6-54" entered a special appearance in the above entitled action, and moved "the court to declare null and void, and set aside the purported interlocutory order in this cause, . . . the purported confirmation of the sale of the land described in the complaint herein, and the purported deed executed by commissioners appointed in said judgment . . . for that, S. R. Allen was not made a party to said action in that no summons was served on him either by personal service or by publication and as grounds therefor respectfully shows to the court":

"1. That the movant S. R. Allen is the owner of the lands described in the complaint herein by virtue of a deed recorded in Nash County Registry, Book 200, page 178.

"2. That movant S. R. Allen is now, and all his life has been, a resident of Franklin County, North Carolina, and was at the time of the beginning of this action living within twenty-five miles of Nashville, the County Seat of Nash County, and plaintiff knew or could have ascertained by reference to said deed that this movant was a resident of Franklin County.

"3. That no summons in this action was ever personally served upon said S. R. Allen, and he had no knowledge that his said land had attempted to be sold under an order of court until on or about the 4th day of January 1954.

"4. That the affidavit supporting the application for service of summons by publication in this action is defective and the order of publication made herein is null and void, in that—the statute providing for

service of summons by publication was not strictly complied with as said affidavit fails to state that movant, S. R. Allen, could not after due diligence be found in the State of North Carolina.

"5. That the summons purported to be issued in this action is defective and void, for that—same was not signed in the name of the Clerk of the Superior Court of Nash County.

"6. That the lands described in the complaint herein having been listed in the name of J. M. Allen, movant was not notified that any taxes were due thereon, but movant is willing, ready and able to pay any taxes which may be due on said land, and hereby offers to pay same upon the setting aside of the said judgment, confirmatory decree and deeds executed in consequence thereof.

"7. That at the purported sale of the land described in the petition, the plaintiff, Nash County, became the last and highest bidder at the price of $125.00, which was an unreasonably low price for same, as the fair market value of same at the time of said purported sale was more than $2,000.00, and if the said sale is allowed to stand S. R. Allen will be irreparably damaged."

Mrs. Madeline D. Bobbitt (manifestly the same person as Mrs. Madeline B. Bobbitt) and R. R. Davis came into court and filed separate answers to the motion of S. R. Allen, so made on special appearance, and denied in material aspect the matters therein set forth, and pleaded statutes of limitation. And the plaintiff also filed answer in which it adopted the answer of Mrs. Madeline D. Bobbitt.

And the record contains a deed dated 25 January, 1936, from F. H. Allen and wife to S. R. Allen purporting to convey among other the land the subject of this action.

The cause coming on for hearing before the Clerk of Superior Court of Nash County on 19 April, 1954, upon the motion of S. R. Allen, made under special appearance, the Clerk found facts accordant with facts set forth in the verified motion, and, thereupon, on 22 February, 1954, entered judgment granting the relief prayed by the movant. To this judgment plaintiff and the interpleaders, Mrs. Madeline D. Bobbitt and R. R. Davis, excepted and appealed to the Judge of Superior Court of Nash County.

Upon such appeal the cause came on to be heard before the Judge presiding at December Term 1954 of Nash County Superior Court. "The entire judgment roll in this proceeding was introduced and certain additional evidence was offered." And the Judge finds the following facts:

"1. The defendant, S. R. Allen, was at the time of the beginning of this action the owner of the land described in the complaint herein by virtue of a deed recorded in Nash County Registry, Book 200, at page 178, and said land was at said time listed for taxation in the name of S. R. Allen.

"2. The said S. R. Allen now is and all his life has been a resident of Franklin County, North Carolina, and was at the time of the beginning of this action living within twenty-five miles of Nashville, the County Seat of Nash County.

"3. The summons in this cause was not signed by the Clerk of the Superior Court or the Assistant Clerk of the Superior Court of Nash County. A blank space was left for said signature and under said space appears the following 'by John A. Daughtridge, Deputy Clerk of the Superior Court,' and the name of John A. Daughtridge was duly signed by said John A. Daughtridge, who was then an acting Deputy Clerk of the Superior Court of Nash County. The said summons was not personally served on S. R. Allen.

"4. The affidavit supporting the application for service of summons in this action is defective in that said affidavit fails to state that S. R. Allen could not, after due diligence be found in the State of North Carolina.

"5. An interlocutory order was entered on the 8th day of April 1940, by the Clerk of the Superior Court appointing J. P. Bunn and N. G. Lancaster as commissioners to sell the land described in the complaint to satisfy lien for taxes due and owing on said land according to law, and said Commissioners made a report to the court showing that they had sold the land on the 15th day of July, 1940, and that the plaintiff, Nash County, became the last and highest bidder for the same at the price of $125.00, and said Commissioners represented the price to be a fair and reasonable value for the land sold and recommended that the sale be confirmed. Final judgment was entered by the Clerk of the Superior Court on the 23rd day of September 1940, confirming the sale and deed was made by said commissioners to Nash County bearing date of September 25, 1940, filed for registration on the 3rd day of October 1940, and recorded in Book 455 at page 249, Nash County Registry.

"6. Nash County conveyed said land to W. N. Bobbitt and wife, Madeline D. Bobbitt, by deed dated the 11th day of June 1941, filed for registration on the 11th day of June 1941, and recorded in Book 464, at page 97, Nash County Registry. The said W. N. Bobbitt died on May 26, 1946. On February 25, 1947 Madeline D. Bobbitt, widow, executed and delivered a timber deed to Warrenton Box and Lumber Company for the timber located on said land, which deed was filed for registration on March 4, 1947, and recorded in Book 509, at page 435, Nash County Registry. Mrs. Madeline D. Bobbitt, widow, executed and delivered a deed to R. R. Davis conveying said land, dated February 25, 1947, and filed for registration on March 4, 1947, recorded in Book 509, at page 436, Nash County Registry."

(Appellants except to findings of fact 2, 3 and 4, their Exceptions 1, 2 and 3.)

Upon the foregoing findings of fact the court was "of the opinion that summons was never properly served in this action upon the defendant, S. R. Allen, and that the court did not get jurisdiction over the said S. R. Allen, and for that reason the interlocutory order and decree of confirmation referred to herein are void and of no effect."

The court thereupon "Ordered, Adjudged and Decreed that the said interlocutory order bearing date of April 8, 1940, and the final judgment confirming the sale of said land on September 23, 1940, are void in so far as they affect the interest of S. R. Allen in the land described in the complaint, and that the deed from J. P. Bunn and N. G. Lancaster, Commissioners, to Nash County, bearing date of September 25, 1940, recorded in Book 455, at page 249, Nash County Registry, is, subject to what is hereinafter said in respect to title by adverse possession, likewise void and of no effect in so far as said deed undertakes to convey the interest of S. R. Allen in said land.

"This judgment is not intended to and does not adjudicate the rights of any of the parties to this action, if there are any rights, which may arise under the statutes relating to the acquiring of title by adverse possession, and the adjudging that the Commissioners' deed referred to in this judgment is void is not intended to and does not bar any of the parties hereto from asserting their rights, if any they have, to title by adverse possession under color of title relying upon said deed.

"It was agreed that this judgment might be signed out of term and out of the county and the district at the convenience of the court."

(Appellants except to the above conclusion of law—their Exception 4.)

To the above judgment plaintiff, Nash County, and the interpleaders, Madeline D. Bobbitt and R. R. Davis, except (their Exceptions 5 and 6), and appeal to Supreme Court and assign error.

James D. Gilliland for R. R. Davis.
Cooley & May for Madeline D. Bobbitt.
J. P. Bunn for Nash County,—appellants.
Beam & Beam and Malone & Malone for S. R. Allen, appellee.

WINBORNE, J. While appellants in their brief present nine questions as being involved on this appeal, the first elicits the determinative answer. The question: "Was the service of summons upon the defendant, S. R. Allen, by publication fatally defective?" The court held that it was, and, upon the record and facts found, we affirm.

Decisions of this Court uniformly hold that where service of summons is made by publication, the requirements of the statute must be strictly followed,—and that everything necessary to dispense with personal service of summons must appear by affidavit. An affidavit on which publications

is predicated is fatally defective in the absence of an allegation that the person on whom the summons is so served cannot, after due diligence be found within the State. Among these decisions are: *Wheeler v. Cobb* (1876), 75 N.C. 21, and *Commrs. of Roxboro v. Bumpass* (1951), 233 N.C. 190, 63 S.E. 2d 144. In the latter case *Barnhill, J.*, reviews and cites authorities in this State. Also in *Groce v. Groce* (1938), 214 N.C. 398, 199 S.E. 388, opinion by *Stacy, C. J.*, the pertinent cases are assembled. Likewise the decisions are listed in the Annotation 21 A.L.R. 2d 934 n.

Further rehashing of the rule would be merely repetitious. Hence the judgment below is

Affirmed.

STATE v. GAITHER AUSTIN.

(Filed 2 March, 1955.)

1. Criminal Law § 47—

Ordinarily, where separate bills of indictment are returned and the bills are consolidated for trial, the counts contained in the separate bills will be treated as though they are separate counts in one bill.

2. Criminal Law §§ 62a, 62e—

Upon a general verdict of guilty or a plea of guilty to each of several indictments consolidated for trial, the court may enter judgment on each count and have the judgments run concurrently or consecutively as it may direct.

3. Same—

Upon defendant's plea of guilty to the counts in several indictments consolidated for trial, judgment that the defendant be imprisoned for a single specified term is not the imposition of consecutive sentences, and therefore, the court may not impose a sentence in excess of the maximum term for which defendant could have been legally sentenced upon any of his pleas.

4. Criminal Law § 62a—

The imposition of sentence by the court in excess of the statutory maximum does not render the legal and authorized portion of the sentence void, but leaves open to attack only such portion of the sentence as is excessive.

5. Habeas Corpus § 2—

Where it appears upon *certiorari* in a *habeas corpus* proceeding that the sentence imposed upon the defendant was in excess of the statutory maximum, but that defendant had not served as long as he might have been legally imprisoned, the judgment will be vacated and the cause remanded for proper sentence, giving defendant credit for the time served under the vacated judgment, but where defendant has served for a longer period than he might have been legally sentenced, he is entitled to his immediate discharge.

STATE *v.* AUSTIN.

CERTIORARI to review the order of *Clarkson, J.*, in *habeas corpus* proceeding upon petition of Gaither Austin, from RICHMOND.

This cause is here upon a writ of *certiorari* issued by this Court on 15 December, 1954, to review the judgment below dismissing the writ of *habeas corpus* and remanding the petitioner to custody under a former judgment of the Superior Court.

At the January Term 1952 of the Superior Court of Richmond County, North Carolina, the petitioner was charged in three bills of indictment with assault with intent to kill, and in a fourth bill with assault on a female. The defendant entered a plea of not guilty in each case. The cases were consolidated for trial.

After hearing a part of the State's evidence the defendant entered pleas of guilty of assault with a deadly weapon in three of the cases, and in the fourth case a plea of guilty of assault on a female, he being a male person over 18 years of age. Thereupon, the court imposed the following judgment: ". . . that the defendant be imprisoned in the common jail of Richmond County for a term of not less than six (6) nor more than seven (7) years and be assigned to work on the public highways under the supervision of the State Highway and Public Works Commission."

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

Max L. Childers and Hugh W. Johnston for defendant.

DENNY, J. Ordinarily, where separate bills of indictment are returned and the bills are consolidated for trial, as authorized by G.S. 15-152, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count. *S. v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895; *S. v. Harvell,* 199 N.C. 599, 155 S.E. 257; *S. v. Mills,* 181 N.C. 530, 106 S.E. 677.

Likewise, where there are several counts in a bill, and a general verdict of guilty is returned, "if the verdict on any count be free from valid objection and having evidence tending to support it, the conviction and sentence for that offense will be upheld." *S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151. Where cases are consolidated for trial and there is a conviction or plea of guilty on several counts, the court may enter a judgment on each count and have the judgments run concurrently or consecutively as it may direct. But the court is not authorized by law to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts upon which there has been a conviction or plea of guilty. *S. v. Murphy, supra;*

S. v. Cody, 224 N.C. 470, 31 S.E. 2d 445. The State concedes this to be true, but insists that this case should be remanded for proper judgment upon the separate counts.

It is true the trial court might have imposed a sentence of two years for each of the four offenses to which the defendant entered a plea of guilty and directed that such sentences run consecutively, but this was not done. Hence, the sentence imposed for not less than six nor more than seven years is clearly excessive since the maximum term for which the defendant could have been legally sentenced upon any of his pleas was two years.

There appears to be considerable conflict in the authorities on the question as to whether a judgment imposing an excessive sentence is wholly void or void only as to the excess. The greater weight of authority, however, is to the effect that where a court of general jurisdiction has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal and authorized portion of the sentence void, but leaves open to attack only such portion of the sentence as is excessive. Therefore, the person in custody under such sentence may not be discharged on *habeas corpus* until he has served so much of it as it was within the power of the court to impose. *S. v. Hooker,* 183 N.C. 763, 111 S.E. 351; 15 Am. Jur., Criminal Law, section 460, page 118, and cited cases. See also *United States v. Peeke,* 153 F. 166; *Wilson v. Bell,* 137 F. 2d 716; *Kitt v. United States,* 138 F. 2d 842; *National Discount Corp. v. O'Mell,* 194 F. 2d 452; *In re Bonner,* 151 U.S. 242, 38 L. Ed. 149; *Abeyta v. People,* 112 Colo. 49, 145 P. 2d 884; *Manning v. Commonwealth,* 281 Ky. 453, 136 S.W. 2d 28; *Adams v. Russell,* 179 Tenn. 428, 167 S.W. 2d 5; *Royster v. Smith,* 195 Va. 228, 77 S.E. 2d 855. For additional cases supporting the above view, see Annotation: 76 A.L.R. 476 where citations from thirty-nine jurisdictions are cited, including *S. v. Hooker, supra.*

It is the general rule in this jurisdiction that where a defendant has been properly convicted but given a sentence in excess of that authorized by law, and comes to this Court pursuant to a petition for writ of *certiorari* in a *habeas corpus* proceeding, when such defendant has not served as long under the sentence as he might have been legally imprisoned, we vacate the improper judgment and remand for proper sentence. In such case, the defendant should be given credit for the time served under the vacated judgment. *S. v. Templeton,* 237 N.C. 440, 75 S.E. 2d 243; *S. v. Miller,* 237 N.C. 427, 75 S.E. 2d 242; *In re Ferguson,* 235 N.C. 121, 68 S.E. 2d 792; *In re Sellers,* 234 N.C. 648, 68 S.E. 2d 308; *S. v. Silvers,* 230 N.C. 300, 52 S.E. 2d 877. But, where the defendant has served for a longer period than he might have been legally sentenced on any count or plea in the court below, he is entitled to his discharge on a writ of *habeas*

corpus. In re Holley, 154 N.C. 163, 69 S.E. 872; *United States v. Pridgeon,* 153 U.S. 48, 38 L. Ed. 631; *In re Swan,* 150 U.S. 637, 37 L. Ed. 1207; *In re Howard,* 69 Cal. App. 164, 158 P. 2d 408; *United States v. Peeke, supra.*

In the last cited case, the Court had before it the precise question we have here. The defendant had been convicted on five counts and might have been sentenced to two years on each count, but instead he was given a sentence of five years. The Court said: "The prisoner has already served two years, and it may be asked upon which count of the indictment did he serve this term . . .? . . . It is undoubtedly a single judgment for a single term of five years, and, the maximum time for which the defendant can be imprisoned for any offense of which he was convicted in the five different counts being two years, the sentence is good to that extent (*Goode v. United States,* 159 U.S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297), and as to that part of the sentence in excess of the power of the court to impose it is void (*In re Bonner,* 151 U.S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149), and it may be dealt with in this proceeding without disturbing the valid portion of the sentence. *United States v. Pridgeon,* 153 U.S. 62, 14 Sup. Ct. 746, 38 L. Ed. 631." The Court thereupon affirmed the order of the District Court, directing the discharge of the petitioner from custody.

The defendant having served more than three years under the sentence imposed, and all beyond two years of the sentence being excessive, he is entitled to be discharged and it is so ordered. Therefore, let this opinion be certified immediately to the Superior Court of Richmond County to the end that the petitioner may be released from custody as directed herein.

Reversed.

RICHARD W. REID v. THE MAYOR AND BOARD OF COMMISSIONERS OF THE TOWN OF PILOT MOUNTAIN, TO WIT: J. R. McCORMICK, MAYOR; D. B. LAWSON, J. WILKERSON GORDON, CLYDE W. FULK AND R. J. BOAZ, COMMISSIONERS, AND W. W. NORMAN.

(Filed 2 March, 1955.)

1. Judges § 5—

Article IV, Section 31, Constitution of North Carolina, states the causes for which, and provides the method by which, a judge or presiding officer of a court inferior to the Supreme Court may be removed from office, and the causes and method therein expressed are exclusive and preclude the removal of the judge of a Recorder's Court by the Mayor and Board of Commissioners of the municipality purporting to act under color of statutory authority.

2. Appeal and Error § 2—

Ordinarily, an order of the lower court overruling a demurrer *ore tenus* is not appealable, but when the case involves a matter of public interest and a continuance of restraining order, the Supreme Court may nevertheless entertain the appeal.

APPEAL by defendants from *Sink, J.*, at October Term 1954, of SURRY.

Civil action to restrain defendants from interfering with plaintiff in performance of his duties as Judge of the Recorder's (Mayor's) Court of Pilot Mountain, N. C., heard upon demurrer *ore tenus* to the complaint.

Plaintiff alleges in his complaint substantially and in summary the following:

1. That plaintiff and defendants, except W. W. Norman, are residents and citizens of Surry County, North Carolina, and that W. W. Norman is a resident and citizen of Stokes County, North Carolina.

2. That on 5 May, 1953, plaintiff was duly elected, and on 6 May, 1953, qualified, Judge of the Recorder's (Mayor's) Court of Pilot Mountain, having jurisdiction over Pilot Mountain Township in Surry County, N. C., for a term of two years, and entered upon his duties as such Judge "in accordance with the provisions of Chapter 176 of the Session Laws of North Carolina for 1947," and "is the only Judge of the Pilot Mountain Mayor's (Recorder's) Court, and can only be replaced at an election on the first Monday in May 1955, and that he is entitled to discharge the duties incident to his office until a resident of the territory embraced within the jurisdiction of this court has been duly elected and qualified to replace him."

3. That plaintiff was attentive to, and faithfully discharged and was able, ready and willing to perform, his duties of Judge as aforesaid, and incident to his office, until 31 August, 1954, when "an alleged and mock hearing was held by the Mayor and Board of Commissioners of the town of Pilot Mountain" attempting to dismiss him as such Judge, "and to replace him with W. W. Norman, a fine citizen of Stokes County, N. C., whose residence was outside the confines of the jurisdiction of the Pilot Mountain Township Recorder's Court"; that such action of Mayor and Board of Commissioners was invalid, in that they "were without authority to remove him from office, and to replace him"—alleging that the 1947 act, establishing the court, does not provide for such action on the part of the Mayor and Board of Commissioners of Pilot Mountain; and that notwithstanding the fact that plaintiff was ready, able and willing to discharge his duties as such Judge on 31 August, 1954, he was prevented from doing so by the action of the Mayor and Commissioners of Pilot Mountain, and W. W. Norman held said court in his place and stead, and all regular or called sessions since August 31 have been presided over

by him; and unless the Mayor and Commissioners and the appointed judge, W. W. Norman, are restrained from interfering with the duly elected and qualified judge of this court, they will continue to prevent him from performing the duties of his office, and from receiving compensation justly due him; and that he, the plaintiff, is without adequate remedy at law therefor against defendants.

Wherefore, the plaintiff prayed the Court:

1. That he be granted a temporary order, restraining the defendants from interfering or preventing him from performing his duties as such judge in the orderly conduct of said court, etc., and that defendants be required to show cause why such temporary order should not be continued until the final hearing of this action and made permanent for the term of his office.

Thereupon a temporary restraining order as prayed, and an order to show cause were entered, and ordered to be served upon defendants, requiring defendants to appear at certain time and place and show cause, if any they have, why this restraining order should not be continued to hearing.

The cause coming on to be heard and being heard before the Judge of Superior Court presiding at regular term of such court of Surry County upon the temporary restraining order, and after the reading of the complaint in the cause, defendants demurred *ore tenus*, and the court, after hearing argument of attorneys for both parties, being of opinion that the demurrer should be denied, entered an order overruling such demurrer, and ordered that the restraining order theretofore issued in the cause be continued until the termination of the matter.

Respondents excepted and appeal to Supreme Court, and assign error.

Allen, Henderson & Williams for plaintiff, appellee.

Woltz & Woltz, Hiatt & Hiatt, and Thomas M. Faw for defendants, appellants.

WINBORNE, J. Admitting the truth of the facts alleged in the complaint, as is done when the sufficiency of a pleading to state a cause of action is challenged by demurrer, this basic and determinative question arises on this appeal: Did the Mayor and Board of Commissioners of the Town of Pilot Mountain have the power and authority to remove plaintiff as the duly elected judge of the Mayor's Court of the Town of Pilot Mountain,—an established court of record inferior to the Supreme Court? The answer is "No,"—for the Constitution of North Carolina, Article IV, Section 31, provides otherwise.

The Constitution, Article IV, Section 2, declares that "the judicial power of the State shall be vested in a court for the trial of impeachments,

a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

And the Constitution, Article IV, Section 31, declares that "any judge of the Supreme Court, or of the Superior Courts, and the presiding officers of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability, upon a concurrent resolution of two-thirds of both houses of the General Assembly"; and this section of the Constitution goes on to provide that "The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon."

Thus it appears that the Constitution states the causes for which, and provides the method by which, a judge or presiding officer of a court inferior to the Supreme Court established by law may be removed from office. The principle that "the express mention of one thing is the exclusion of another" applies here.

"The Mayor's Court of the Town of Pilot Mountain" is a court of record having a seal; it is inferior to the Supreme Court; and it is a court established by law, and has jurisdiction of certain criminal offenses occurring not only within the town of Pilot Mountain, but outside thereof within the limits of Pilot Mountain Township, in Surry County. And plaintiff was duly elected judge or presiding officer of the court—for a term of two years next after the first Monday in May 1953. Private Laws 1891, Chapter 287, Section 12, as amended by Sections 1 and 2 of 1947 Session Laws of North Carolina, Chapter 176; and also 1953 Session Laws of North Carolina, Chapter 431, "an Act to amend G.S. 160-29 relating to municipal elections as applied to the Town of Pilot Mountain."

In passing, it may be noted that in the amended charter of the Town of Pilot Mountain, Private Laws 1891, Chapter 287, authority was given for the election of certain officers, and for the appointment of others. And in Section 17 of the Act, the Mayor is designated the chief executive officer of the town, and given the power and authority, with the concurrence of a majority of the commissioners, to remove "said officers . . . for misconduct in office or neglect of duty." While in Section 12 of the Act the Mayor is constituted an inferior court, there is no mention of a "judge" of such court.

But the General Assembly 1947 Session Laws of North Carolina, Chapter 176, amending Chapter 287 of the Private Laws of North Carolina, 1891, so as to enlarge the jurisdiction of the Mayor's Court of the Town of Pilot Mountain, provided in Section 2 that Section 12 of the 1891 Act be amended by adding at the end thereof a new paragraph in which

authority is given to the Board of Commissioners of the town to appoint (1) a judge of the Mayor's Court of the Town of Pilot Mountain, who shall serve for a given term, and (2) an assistant judge of that court to serve, in the absence of the Mayor or the judge, for a given period of time, and enlarging the jurisdiction of the court to cover Pilot Mountain Township outside the corporate limits of the Town of Pilot Mountain.

Apparently it is contended that by this latter amendment the judge and assistant judge were merged into the original term "said officers," to whom the provisions in Section 17 of Chapter 287 of Private Laws 1891 for removal related. But in the light of the constitutional provisions above related, it takes a very strained construction to entertain the thought that the General Assembly so intended.

Ordinarily an appeal from order of court below in overruling demurrer *ore tenus* will not lie. *Langley v. Taylor, post,* 573. However, since this case involves a matter of public interest—and the continuance of a restraining order—the Court deems it expedient to entertain this appeal.

Therefore, for reasons stated, the action of the court below in overruling the demurrer and continuing the injunction to final hearing is

Affirmed.

C. B. CUTLER v. H. G. WINFIELD, JR., FRANK KUGLER, MARY M. JENNETTE, HAROLD E. YERT, W. J. DUNN, W. D. WELCH, JR., WILSON LEGGETT, W. B. CARTER, AND TENNYS THORNTON BOWERS, AS TRUSTEES OF THE WASHINGTON CITY SCHOOL ADMINISTRATIVE UNIT, AND BEAUFORT COUNTY, BEAUFORT COUNTY BOARD OF EDUCATION, AND THE TRUSTEES OF THE WASHINGTON ACADEMY, JOHN A. WILKINSON, GUARDIAN AD LITEM.

(Filed 2 March, 1955.)

1. Trusts § 14b—

Where the trustees of a school, who had executed deed to defendants, are dead and there are no successors to them, the nonexistent trustees, in the absence of statutory provision, cannot be made parties and be represented by a guardian *ad litem* in an action to determine the legal effect of the conveyance.

2. Appeal and Error § 1—

The Supreme Court, in the exercise of its supervisory power over lower courts, will take cognizance *ex mero motu* of the lack of authority of a named guardian *ad litem* for a nonexistent party.

3. Parties § 3—

In an action to construe the reversionary clause of a deed executed by trustees, when it appears that all the trustees are dead and there are no successors to them, the University of North Carolina should be made a

party so that any right of escheat may be adjudicated, and all others who might claim an interest in the property in the event the title reverts, should also be made parties.

APPEAL by plaintiff and defendant John A. Wilkinson, as guardian *ad litem* for the Trustees of the Washington Academy, and the City of Washington, from *Nimocks, J.*, at October Term 1954, of BEAUFORT.

Civil action to enjoin defendants from making any sale of certain school property.

Plaintiff, a citizen and taxpayer of Washington, North Carolina, instituted this action against the Trustees of the Washington City School Administrative Unit, and in complaint filed alleges in presently pertinent part substantially these facts:

1. That the Trustees of the Washington City School Administrative Unit, a special school district created by authority of General Statutes, for the purpose of administering the public school needs of the City of Washington and part of Long Acre Township, claim to be owners of a certain parcel of land, with the buildings thereon, situated in the county of Beaufort and State of North Carolina, it being a composite of various parcels of land conveyed under several deeds to the Board of School Trustees of the City of Washington, and recorded in the Register of Deeds' office of said county, among others, from the Trustees of the Washington Academy, dated 4 August, 1904, and recorded in Book 127 at page 581, in which two lots Nos. 33 and 28 situated northwest of Bridge and Second Streets in the town of Washington and generally known as the Academy lots and buildings, are conveyed with a purported reversionary clause.

2. That that part of the above described property which was conveyed to the Board of School Trustees of the City of Washington by the Trustees of the Washington Academy by deed as aforesaid contains in its *habendum* a purported reversionary clause. And that in addition to said *habendum* clause, said deed contains other language which by its terms and import does not convey to said Trustees an indefeasible fee simple title, but title defeasible upon the happening of the contingency on which the reversion purports to hinge.

3. That defendant Trustees have abandoned said property for school purposes, and have ceased to use same for education or school purposes, and that part covered by the deed from the Trustees of the Washington Academy as aforesaid should revert to the Trustees of the Washington Academy.

4. That the defendant Trustees of the Washington City School Administrative Unit intend to sell at public auction the property above described and, unless restrained from doing so, will deprive the rightful owners of said property of its use and benefit.

5. That plaintiff's remedy at law for damages would be inadequate and defendants should be enjoined from making sale of the property.

The defendants, Trustees of Washington City School Administrative Unit, answering the complaint of plaintiff, admit in material part the allegations of fact therein set forth, but deny conclusions of law based thereon.

And these defendants aver, upon information and belief, (1) that the language used in the deed from the Washington Academy to the Board of School Trustees of the City of Washington is insufficient to effect a reversion of the title to the property to the Washington Academy or to any other person or persons and cannot have that legal effect;

(2) That plaintiff's claims as set out in his complaint cast a cloud upon their title to said property, and introduce into the controversy possible interest in the property of Beaufort County, Beaufort County Board of Education, City of Washington and the Trustees of the Washington Academy, all of whom are necessary and proper parties to this action in order that the same may be fully determined and the cloud removed from defendant's title to said property;

And (3) that "The Trustees of the Washington Academy are all now dead, with no successors, and a Trustee should be appointed by the court to represent their interest in said lands, if any they have."

Accordingly, thereafter the Clerk of Superior Court of Beaufort County entered an order in which after reciting (1) that Beaufort County, Beaufort County Board of Education, City of Washington and The Trustees of the Washington Academy are necessary and proper parties to this action without whose presence before the court a full and complete determination of this controversy cannot be had; (2) that the Trustees of the Washington Academy are all dead and no successors have been appointed and a guardian should be appointed to represent the interests of said Trustees, if any they have, in this action; and (3) that John A. Wilkinson, an attorney at law, is a fit and proper person to act as guardian for said Trustees in this matter, it is ordered that John A. Wilkinson is appointed as guardian *ad litem* for the Trustees of the Washington Academy; and, by consent, it is ordered "that Beaufort County Board of Education, Beaufort County, City of Washington, and the Trustees of the Washington Academy, the latter by their guardian *ad litem,* John A. Wilkinson, be made party defendants to this action," and allowed time to answer.

The appointment of John A. Wilkinson as guardian *ad litem* was accepted and service of process was waived by him, and he as such guardian *ad litem* filed an answer "for the Trustees of the Washington Academy," joining in the prayer of the complaint, and praying that it be adjudged that the two lots covered by the deed dated 4 August, 1904, and recorded

in Book 127, page 581, revert to the Trustees of the Washington Academy, and that he have whatever affirmative relief may to the court appear proper upon its consideration of all the pleadings and facts to it shown or appearing.

The parties stipulated facts accordant with the above, and thereupon "both plaintiff and defendants" in open court waived a trial by jury and agreed that the court might hear the cause upon the verified pleadings and an agreed statement of facts and render judgment thereon.

Thereupon the trial court adjudged that the title to the composit of all the property described in the complaint, as aforesaid, is vested in the Trustees of the Washington School Administrative Unit of Beaufort County in fee simple, and that they have the power and right to dispose of the same by sale, and that the two lots of land conveyed by the Trustees of the Washington Academy to the Board of School Trustees of the City of Washington, by deed as aforesaid, may be conveyed by the Trustees of the Washington School Administrative Unit in fee simple, free and clear of any conditions or restrictions, and, hence, the prayer for injunction is denied.

To the signing of the judgment plaintiff and defendant John A. Wilkinson as guardian *ad litem* for the Trustees of the Washington Academy and the City of Washington except and appeal to the Supreme Court, and assign error.

John A. Mayo for plaintiff, appellant.

John A. Wilkinson, Guardian ad litem for the Trustees of the Washington Academy.

W. B. Carter for the appellees.

WINBORNE, J. At the threshold of this appeal the admitted fact that the Trustees of the Washington Academy are dead, and there are no successors to them, presents an obstacle to a complete and proper decision in the present state of the record and case on appeal.

While the record shows that John A. Wilkinson is appointed guardian *ad litem* for the Trustees of Washington Academy, no such representation by guardian *ad litem* is sanctioned by law—and as stated by *Johnson, J.*, in *McPherson v. Bank*, 240 N.C. 1, 81 S.E. 2d 386, "The rule is that, in the absence of statute, capacity to be sued exists only in persons in being." Indeed, with this Court, in the absence of a statute, a nonexistent person cannot be made a defendant in an action and be represented by a guardian *ad litem*,—and no statute is called to our attention. Hence this Court, in the exercise of its supervisory powers over lower courts (N. C. Const., Art. IV, Sec. 8; *Elledge v. Welch*, 238 N.C. 61, 76 S.E. 2d 340; *McPher-*

son v. Bank, supra), will take cognizance *ex mero motu* of such lack of authority in a named guardian *ad litem* under such circumstances.

Moreover, the Trustees of Washington Academy being dead, and there being no successors to them, to whom would title revert in the event the purported reversionary clause in the deed to these Trustees be effective? It might be that an escheat to the University of North Carolina would take place. N. C. Const. IX, Sec. 7, G.S. 116-20. Hence it seems clear that the University of North Carolina should be made a party to this action so that any claim or interest it has or may not have in the old Washington Academy property, by escheat, may be adjudicated. Too, it may be there are others who might claim an interest in the property in the event the title reverts.

Therefore, this Court, of its own motion, orders that the cause be remanded to the Superior Court of Beaufort County, North Carolina, to the end that the University of North Carolina, and all others having or claiming to have an interest in the property in question may be made parties defendant to this action, and served with process, and permitted to plead all in accordance with law and procedure.

Error and remanded.

STATE v. FRED ADAMS.

(Filed 2 March, 1955.)

1. Homicide § 5—

Murder in the second degree is the unlawful killing of a human being with malice, and the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt of the presence of each essential element of the offense.

2. Homicide § 16—

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice.

3. Homicide § 27b—

Where defendant does not admit that he intentionally shot deceased, but contends that he was drunk and had no knowledge of firing the fatal shot and had no malice toward his victim, an instruction to find defendant guilty of murder in the second degree if the jury should find from the admission of defendant that he shot and killed deceased with malice, but without premeditation and deliberation, and that malice is implied from the use of a deadly weapon, must be held for prejudicial error.

STATE *v.* ADAMS.

APPEAL by defendant from *Johnston, J.*, November, 1954, Term of CHEROKEE.

The defendant was indicted and tried for the murder of Luther Carringer. The jury's verdict was: "Guilty of Murder in the First Degree with the recommendation that the prisoner, Fred Adams, be given life imprisonment." The court, in compliance with G.S. 14-17, pronounced judgment that the defendant be imprisoned for life in the State's Prison. Defendant appealed, assigning errors.

In brief, the State's evidence tended to show these facts:

Carringer and Adams were neighbors. They lived on opposite sides of the public road, the houses facing each other and being 300-400 feet apart. There had been no quarrel or difficulty between these men before the day of the homicide.

On Monday, 6 September, 1954, Roy Hogan was walking along the right side of the public road towards Carringer's house. Hogan is a nephew of Mrs. Carringer. Adams, driving an automobile, overtook and passed Hogan; and about 100 yards farther Adams turned from the road and went up into his yard.

When Hogan reached the point in the road between the two houses, he called and accused Adams of having tried to run over him. They quarreled fifteen minutes or more. Adams was on an eight foot bank, in front of his house, seated on a box. Hogan was standing in the public road. They were about ten feet apart. Taunts, dares and threats were exchanged. Finally, Adams said, "Roy, I will get my gun and fix you." Adams then left and went to his house. Hogan left the road and walked "angling" into Carringer's yard. While these events were taking place, Carringer was sitting in a chair, in his own yard, near the end of the porch, about 35 steps back from the public road.

Shortly thereafter, Adams came back through the front door of his house with his rifle. Thereupon, Carringer got up, walked towards the road and called, "Fred, don't point the gun towards the house"; and Mrs. Carringer called, "Fred, don't shoot down this way." (Hogan was then walking towards the end of the porch.) Adams called back to Carringer, "I will shoot you." After this Carringer turned, made a step or two; and then Adams fired the shot that killed Carringer. Hogan and Carringer were two or three yards apart when the rifle fired. Adams was accustomed to use a rifle when hunting.

Defendant's testimony tended to show that he had no recollection of what occurred after he left the quarrel with Hogan near the road; and that he did not remember getting the rifle, or any incidents involving Carringer or the firing of the rifle. There was evidence, including defendant's testimony, that defendant had been drinking heavily, was drunk, and did not know what he was doing at the time Carringer was shot.

The court restricted the jury to one of four possible verdicts, namely, (1) guilty of murder in the first degree, (2) guilty of murder in the first degree with recommendation that the punishment be life imprisonment, (3) guilty of murder in the second degree, (4) not guilty.

The presiding judge, in his final instructions to the jury, after giving instructions bearing upon first degree murder, concluded: "If you find from the evidence beyond a reasonable doubt, *or find from the admission of the prisoner* that he shot and killed Luther Carringer with malice, but without premeditation and deliberation, and malice is implied by the use of a deadly weapon, then and in that event it would be your duty to return a verdict of guilty of second degree murder. If you fail to so find, then you would return a verdict of not guilty. Or if upon a fair and impartial consideration of all the evidence in the case you have a reasonable doubt of his guilt, then and in that event you would give him the benefit of the doubt, and return a verdict of not guilty." (Italics added.)

This excerpt from the charge is made the basis of an exceptive assignment of error.

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

O. L. Anderson for defendant, appellant.

BOBBITT, J. Both in first degree murder and in second degree murder, there must be an unlawful killing with malice. The State must satisfy the jury from the evidence beyond a reasonable doubt of the presence of these indispensable elements. To convict of first degree murder the State must also satisfy the jury from the evidence beyond a reasonable doubt that the killing was "willful, deliberate and premeditated." G.S. 14-17.

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice. *S. v. Gordon, ante,* 356.

The quoted instruction includes the statement that the jury may "find *from the admission of the prisoner* that he shot and killed Luther Carringer with malice." (Italics added.)

We have searched the record in vain to find any judicial admission either by defendant or by counsel in his behalf. Nor does the record disclose testimony of defendant to the effect that he shot and killed Carringer with malice. Indeed, defendant's testimony tended to show that he had no knowledge of having fired the rifle; and further, that he had no malice towards Carringer and had no intention to shoot him. Thus, we find no basis in the record for the instruction to the jury stating, in effect,

that the defendant had made an admission that he had shot and killed Carringer with malice.

The reference to such admission of the defendant, while an inadvertence, must be regarded as prejudicial to defendant on a critical feature of the case. Compare *S. v. Redman,* 217 N.C. 483, 8 S.E. 2d 623; *S. v. Ellison,* 226 N.C. 628, 39 S.E. 2d 824; *S. v. Simmons,* 236 N.C. 340, 72 S.E. 2d 743; *S. v. Ham,* 238 N.C. 94, 76 S.E. 2d 346.

For the error stated, there must be a new trial. Hence, other assignments of error, which involve questions which may not arise upon such new trial, need not be discussed.

New trial.

STATE v. FRANK CEPHUS.

(Filed 2 March, 1955.)

1. Criminal Law § 54f—

Every defendant has the right to have the jury polled in order to determine whether the verdict is unanimous, but this right must be exercised before the jury is discharged or it is waived.

2. Assault § 14b—

The charge of the court construed contextually *is held* to have properly instructed the jury that the plea of self-defense was available to defendant if defendant did not provoke the assault and if he did not use more force than reasonably appeared to be necessary to repel an assault or threatened assault against him.

3. Criminal Law § 53b—

An instruction which has the effect of charging the jury that if it found beyond a reasonable doubt from the evidence that defendant was guilty of the offense charged in one indictment, they should find defendant guilty of the offense charged in the other indictment consolidated for trial, is error, since the burden rests upon the State in both cases and the weight and credibility of the evidence is for the jury alone to determine.

4. Criminal Law § 81c (4)—

Where defendant is convicted under both indictments consolidated for trial, and separate, equal and concurrent sentences are imposed in each case, an error in the charge relating to one case only is harmless.

APPEAL by defendant from *Fountain, S. J.,* 1954 Special Term, EDGECOMBE.

Criminal prosecutions on two bills of indictment, Nos. 1696 and 1697. In 1696 the defendant is charged with an assault with a deadly weapon, to wit: a knife, upon Lester Johnson. In No. 1697 he is charged with an

assault with a deadly weapon, to wit: a knife, on Charlie Taylor. The cases were consolidated for trial over defendant's objection.

The State offered the testimony of three witnesses. Lester Johnson testified in substance that on 25 September, 1953, he went to the home of his mother-in-law, Virginia Taylor, to get his five small children. The defendant was present in the Taylor home. He was cursing and the witness said to him, "Ceph, don't cuss before my children like that." An argument followed and, according to the witness, "we just got into it and he cut me . . . I grabbed him and he grabbed me. He hit me and I hit him. He cut me in my left arm. I had 22 stitches taken in my arm. Charlie Taylor tried to part us and Charlie come in and that's how he got cut. He was trying to keep Ceph from cutting me any more, I guess." On cross-examination, Johnson admitted that in the altercation he grabbed the defendant first and hit the defendant first, and that when he struck the defendant he knocked off the defendant's glasses.

Charlie Taylor testified the fight between the defendant and Johnson occurred at his house. Some words passed between them, whereupon Johnson knocked the defendant's glasses off. "I stepped between them and that's how I got it, right here. Ceph struck me with a razor or knife, one . . . I tried to part them and that's how I got cut. Frank Cephus cut me but he didn't intend to cut me."

Virginia Taylor testified that she was present at the time of the difficulty. Johnson told the defendant not to curse any more and when the defendant cursed again, Johnson hit him. "Ceph was cutting at Jug (Lester Johnson) and Charlie's arm caught it because Charlie was in the way trying to stop them. I don't know where Jug was when he got cut, he might have been outdoors." Defendant had a knife and was cutting at Lester Johnson when he struck Charlie.

There was evidence that Johnson had another fight outside the house with someone other than the defendant.

At the conclusion of the State's evidence, defendant made a motion for judgment as of nonsuit in each case. The motions were overruled. The defendant rested without introducing evidence, renewed the motions, which were again overruled. The defendant duly excepted.

The record discloses, "After the jury had returned its verdict and had been discharged from further consideration of the case, and after the jurors had resumed their seats in the courtroom, and after the examination of several witnesses who testified in the progress of another case . . . the defense counsel moved for the first time that the jury be polled. The court, from its own observation of the jurors in the Frank Cephus case, having determined that the jury in said case had not remained together, were sitting in various places in the courtroom, and had opportunity to talk with other people, denied the said motion." The defendant excepted.

The jury returned a verdict of guilty in both cases. From the judgment imposing a four months road sentence in each case, the sentences to run concurrently, the defendant appealed.

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

Weeks & Muse, by T. Chandler Muse, for defendant, appellant.

HIGGINS, J. Only three assignments of error require discussion. Defendant's Exception No. 7 relates to the refusal of the court to have the jury polled. In order to determine whether the verdict of the jury is unanimous, it is the right of every defendant to have the jury polled. *S. v. Young,* 77 N.C. 498; *S. v. Boger,* 202 N.C. 702, 163 S.E. 877. However, this right must be exercised at the time the jury returns its verdict or before the jury is discharged, otherwise the right is deemed to have been waived. *S. v. Toole,* 106 N.C. 736, 11 S.E. 168. In this case no request was made for a poll of the jury at the time the verdict was rendered. The jury was discharged, the jurors separated, took their seats in the courtroom. Under the circumstances, therefore, the defendant had waived his right to a poll of the jury.

Exceptions Nos. 6 and 10 relate to the charge of the court. After charging adequately and correctly on the right of self-defense in accordance with the principles approved in *S. v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10, and the cases there cited, the trial judge summarized as follows: "So you see that the self-defense plea is available to him if he, himself, did not provoke the assault, and if he did not use more force than was reasonably necessary to repel an assault, or threatened assault against him, *and* if he did not use more force than reasonably appeared to be necessary under the circumstances as they existed." The foregoing is the subject of Exception No. 3, Assignment of Error No. 10.

The court was detailing to the jury the circumstances under which self-defense plea of the defendant is available to him. The charge as given is equivalent to saying the plea of self-defense is available if the defendant did not provoke the assault, and if he did not use more force than was reasonably necessary to repel an assault or threatened assault. It is also available to him if he did not provoke the assault and did not use more force than reasonably appeared to be necessary under the circumstances as they existed. In view of the specific instructions theretofore given, it it difficult to see how the jury could have been misled.

Exception No. 5 is the basis of Assignment of Error No. 12 and is addressed to that part of the charge as follows:

"Under the evidence in this case, Gentlemen of the Jury, the Court instructs you that you will convict the defendant either of an assault with

a deadly weapon or a simple assault in both cases if you find from the evidence and beyond a reasonable doubt that he is guilty of an assault, either with a deadly weapon or simple assault, on Lester Johnson. Likewise, you will acquit the defendant on both cases if you fail to find from the evidence and beyond a reasonable doubt that he is guilty of assault with a deadly weapon or a simple assault upon Lester Johnson. So, as to both cases, you may return one of three verdicts: You may find the defendant guilty of assault with a deadly weapon or you may find him guilty of a simple assault, or you may find him not guilty."

The charge, as given, is equivalent to an instruction to the jury that if they found from the evidence beyond a reasonable doubt the defendant committed an assault on Johnson in case No. 1696, they must find beyond a reasonable doubt he likewise committed an assault on Taylor in case No. 1697. Notwithstanding a verdict of guilty in 1696, a verdict of guilty in 1697 could only be rendered by the jury upon a finding of guilt beyond a reasonable doubt in that case. The burden was upon the State in both cases. The jury might believe the evidence tending to show an assault on Johnson and might not believe the evidence tending to show an assault on Taylor. The jurors are the tryers of the facts. The law appoints them the keepers of the scales upon which the evidence is weighed. The instruction as it applied to the charge of assault on Taylor (No. 1697) was error. The error, however, is harmless.

While separate judgments, each for four months, were imposed, they were to run concurrently. The conviction and sentence in No. 1696 is without error and must stand. The sentence in No. 1697 imposes no additional burden upon the defendant. To permit the verdict in No. 1697 to stand would give the defendant his freedom when the valid sentence is served. To grant him a new trial would permit a further prosecution. The error, therefore, in so far as the appellant is concerned, is harmless. *S. v. Cody,* 224 N.C. 470, 31 S.E. 2d 445; *S. v. Register,* 224 N.C. 854, 29 S.E. 2d 464; *S. v. Williamson,* 238 N.C. 652, 78 S.E. 2d 763; *S. v. Cogdale,* 227 N.C. 59, 40 S.E. 2d 467; *S. v. Toole, supra.*

No error.

MABLE JEAN BARNWELL v. THOMAS P. BARNWELL.

(Filed 2 March, 1955.)

1. Divorce and Alimony § 12—

An order entered in the wife's action for alimony without divorce requiring defendant to pay subsistence and counsel fees *pendente lite* is void when the order is entered without notice to defendant.

2. Same—

Where it is conclusively established by judicial admission of the parties that an order, requiring defendant to pay subsistence and counsel fees *pendente lite*, was void because entered without notice to defendant, the court properly treats such order as a nullity upon challenge by defendant, and an order thereafter entered for subsistence and counsel fees *pendente lite* after due and proper notice to defendant will be upheld, notwithstanding want of formal decree that the prior order was void, which omission will be remedied *nunc pro tunc*.

3. Same—

After the wife instituted suit for alimony without divorce, in which action the question of the custody of the minor child of the marriage was not raised, the husband instituted suit for absolute divorce. *Held:* The amendment of G.S. 50-16 by Chapter 925, Public Laws of 1953, does not affect the jurisdictional power of the court to award subsistence for the mother and child *pendente lite* in her action for alimony without divorce.

APPEAL by defendant from *Whitmire, Special Judge,* at 22 November, 1954, Extra Mixed Term of BUNCOMBE.

Civil action for alimony without divorce under G.S. 50-16, heard below on application for allowances *pendente lite.*

At the May 1954 Term of court an order was entered requiring the defendant to pay the plaintiff subsistence and counsel fees *pendente lite.* The order provided for counsel fees of $100 and a lump-sum payment of $122.50 in addition to regular weekly payments of $15 for the support of the plaintiff and the infant child born of the marriage between the parties.

By affidavit filed 28 October, 1954, it was made to appear that the defendant had failed to comply with the order and was in arrears as to all the payments required. Thereupon Judge Dan K. Moore, then presiding, signed an order directing the defendant to show cause why he should not be held in contempt of court for failure to comply with the former order. The order to show cause was continued and made returnable before Judge Whitmire at the 22 November, 1954, Extra Mixed Term. When the cause came on for hearing, the defendant challenged the validity of the order of 18 May, 1954, on the ground it was entered without notice to the defendant. Whereupon, the plaintiff admitted that the challenged order was signed without notice to the defendant. It was also admitted by counsel for plaintiff that neither the defendant nor his counsel was before the Judge at the time the order was signed. The record discloses that upon these admissions Judge Whitmire declined to adjudge the defendant in contempt of court, but intimated the plaintiff might make a new motion for temporary subsistence and counsel fees. Plaintiff's counsel thereupon made such motion. Notice of the motion

was reduced to writing and signed by Judge Whitmire and service was then accepted in writing by the defendant.

On 2 December, 1954, the defendant and his counsel, together with plaintiff and her counsel, appeared before Judge Whitmire pursuant to the notice. The defendant objected to the hearing on the ground that the notice of the hearing "was without authority of law and therefore void." The objection was overruled and the defendant excepted. Defendant's Exception No. 1.

The defendant then objected to the hearing on the ground that an action for absolute divorce was then pending in the General County Court of Buncombe County between the plaintiff and the defendant, which action had been instituted by the defendant against the plaintiff, and that jurisdiction to award subsistence and counsel fees was exclusively in that court. It was admitted that the divorce action was instituted after the commencement of this action. The objection was overruled and the defendant excepted. Defendant's Exception No. 2.

The court then proceeded with the hearing and, after consideration of the plaintiff's verified complaint and the testimony of the defendant, found these facts: (1) that the plaintiff and the defendant are husband and wife; (2) that one child was born to the marriage—the child being twenty months old at the time of the hearing; and (3) that the defendant wrongfully abandoned the plaintiff and child and thereafter wilfully failed and refused to provide them "adequate support according to his means and ability."

On the facts found the defendant was ordered to pay $25 weekly for the support of the plaintiff and her infant child and the additional sum of $50 as counsel fees.

To the facts as found and to the order as entered the defendant excepted and appealed, assigning errors.

I. C. Crawford and L. C. Stoker for plaintiff, appellee.
Sanford W. Brown and Richard L. Griffin for defendant, appellant.

JOHNSON, J. The defendant's first assignment of error, based on Exception No. 1, is that the order appealed from is void for the reason that at the time it was entered by Judge Whitmire on 3 December, 1954, the previous order entered at the May Term, 1954, was in force. The defendant takes the position that Judge Whitmire was without authority of law to enter an order superseding the former order in the absence of allegations by the plaintiff and findings of the court showing changed conditions since the entry of the former order.

The defendant's position is untenable. The original order was entered in May without notice to the defendant. This was conclusively estab-

lished by judicial admission of the parties. Therefore the order was void. *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709. See also *Clapp v. Clapp, ante,* 281, 85 S.E. 2d 153. Judge Whitmire properly treated it as a nullity upon challenge by the defendant. True, no formal decree was made adjudicating that the order was void, but the omission is inconsequential and may be remedied *nunc pro tunc.* It is so ordered. The record stipulates that the latter order was entered after "due and proper notice" to the defendant. The hearing will be upheld.

Next, the defendant challenges the order of Judge Whitmire on the ground that the jurisdiction of the Superior Court in the instant action was ousted by the commencement of the action for absolute divorce in the General County Court. Here the defendant points to Chapter 925, Public Laws of 1953, which amplifies G.S. 50-16 so as to permit the custody of children to be determined in actions for alimony without divorce, but subject to the limitation that "Such request for custody of the children shall be in lieu of a petition for a writ of *habeas corpus,* . . ." From this the defendant reasons that the power to award custody in an action for alimony without divorce (G.S. 50-16) is the same as under writ of *habeas corpus,* wherein the rule is that jurisdiction as to custody is ousted upon the filing of a divorce action. *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906. The defendant contends that by analogy jurisdiction as to matters of custody or support of a minor child in an action for alimony without divorce is terminated by the filing of an action for divorce. The defendant's contention in respect to child-custody is not presented for review in this case. Neither parent seeks an adjudication of rights respecting custody of the child of the marriage, and the order is silent in respect thereto. Therefore we refrain from intimating what our decision would be under the 1953 amendment if custody were in issue. See 31 N.C.L.R. 407. In the instant case it is enough to say that the amendment of 1953 in nowise affects the jurisdictional power of the court to award subsistence for a mother and child in an action for alimony without divorce where, as here, the question of custody is not raised. The defendant's second assignment of error is overruled.

The remaining assignments of error are without merit. They involve no new question requiring extended discussion. The court's findings of fact support the order as entered. It will be modified, however, so as to declare the order of 18 May, 1954, a nullity, and as so modified let the order appealed from be affirmed.

Modified and affirmed.

CITY OF ELIZABETH CITY (ORIGINAL PLAINTIFF) AND FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY (ADDITIONAL PARTY) v. RICHARD N. HOOVER AND MRS. NEVA HOOVER.

(Filed 2 March, 1955.)

1. Insurance § 51: Parties § 10a—

The trial court has discretionary power, upon motion of defendant, to join as an additional party plaintiff the insurance company which had paid part of plaintiff's loss sustained in the collision in suit.

2. Appeal and Error § 7—

The question of the sufficiency of the evidence to justify the submission of an issue to the jury must be properly raised in the trial court and may not be presented for the first time on appeal, and where there is no exception to the submission of the issue of contributory negligence and no request for instructions thereon, appellant may not challenge the sufficiency of the evidence to support the verdict of the jury on that issue, notwithstanding formal motion to set aside the verdict on that issue as being contrary to the law and the evidence.

3. Trial § 49—

Motions to set aside the verdict as being contrary to the law and the evidence on the ground of the insufficiency of the evidence to support the verdict are addressed to the discretion of the trial court, and denials of the motions are not subject to review when no abuse of discretion is shown.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at October Term, 1954, of PASQUOTANK.

Civil action in tort involving collision of two motor vehicles—one a police car belonging to the plaintiff City of Elizabeth City, the other a passenger car driven by the defendant Richard N. Hoover.

The action was originally instituted by the plaintiff city to recover for damage to its police car in the alleged amount of $900. At a term of court prior to trial, it was made to appear that Farm Bureau Mutual Automobile Insurance Company was interested in the litigation as subrogee to the extent of $711.25, the amount paid by it under its policy of insurance on the police car. Whereupon, on motion of the defendants, Judge Nimocks, then presiding, entered an order making the Insurance Company a party. Exception.

When the case came on for trial, issues of negligence and contributory negligence were submitted to the jury. Both issues were answered in the affirmative, and from judgment entered on the verdict decreeing that the plaintiffs take nothing by their action, they appealed.

LeRoy & Goodwin for plaintiffs, appellants.

John H. Hall for defendants, appellees.

JOHNSON, J. Plaintiffs by their first assignment of error challenge the order making the original plaintiff's insurance carrier a party to the action. The assignment is without merit. The order bringing in the Insurance Company was entered in the exercise of the court's discretion as allowed by the rule explained and applied in *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

Next, the plaintiffs seek to challenge the sufficiency of the evidence to support the verdict of the jury as to the issue of contributory negligence. However, this question is not presented by the record. There was no exception to the submission of the issue and no requested instruction thereon. The question as to the sufficiency of the evidence to justify the submission of an issue to the jury may not be raised for the first time on appeal. *Burcham v. Wolfe,* 180 N.C. 672, 104 S.E. 651; 3 Am. Jur., Appeal and Error, section 384.

Here there was only the formal motion to set the verdict aside as being contrary to the law and the evidence, and a like motion to set the verdict aside on the issue of contributory negligence. These motions were addressed to the discretion of the court and, on this record, no abuse of discretion having been shown, the denials of the motions are not subject to review. No error of law has been made to appear. *Braid v. Lukins,* 95 N.C. 123.

Our examination of the other exceptions brought forward discloses no error of law. The verdict and judgment will be upheld.

No error.

LEVI LAWSON v. EDNA HANCOCK LAWSON.

(Filed 2 March, 1955.)

Judgments § 27e—

Findings of the general county court on motion to set aside a judgment previously rendered by it that plaintiff had perpetrated a fraud upon the court in the service of process by publication *held* supported by competent evidence and to sustain the decree setting aside the judgment.

APPEAL by plaintiff from *Whitmire, Special Judge,* November Civil Term 1954 of BUNCOMBE.

Motion by defendant to set aside a decree of divorce *a vinculo* rendered in the General County Court of Buncombe on 13 April 1954, and heard on appeal in the Superior Court.

On 14 September 1954 this motion was heard in the General County Court, which found the following material facts: The plaintiff is a patient at a Veterans' Hospital in Buncombe County. The defendant is

a nonresident of the State of North Carolina, and lives and resides at 925 North 34th Street, Richmond, Virginia. In 1951 the defendant instituted an action against the plaintiff in the Law and Equity Court, Part II, of the City of Richmond, Virginia, and the action is still pending. On 8 December 1953 plaintiff instituted an action for divorce against the defendant in this court, and service of process was attempted by publication. On 21 January 1954 defendant made a special appearance and motion to dismiss for lack of jurisdiction: the action was dismissed on 3 February 1954. The present action was instituted on 4 February 1954, and service of process was again attempted by publication. The Clerk of the Superior Court, *ex officio* Clerk of the General County Court, mailed a copy of the notice of service of publication on 3 February 1954 to the defendant at Adner Post Office, Gloucester County, Virginia, by ordinary mail—this was the address given by plaintiff in his affidavit for service of process by publication. The defendant did not receive the notice. The plaintiff knew that defendant did not live at Adner Post Office. The divorce decree was rendered on 13 April 1954. The defendant had no knowledge of the present action until she received a copy of this divorce decree in April 1954. The defendant has a good and meritorious defense. Upon the facts found the county court made the following conclusions of law: The provisions of G.S. 1-99.2 (5)c (*sic*) were not strictly complied with in that the notice of service of process by publication was mailed before the present action was pending; the defendant had no knowledge, actual or constructive, of the pendency of the action, until after the rendition of the judgment; that the plaintiff furnished the Clerk of the Court an address for the defendant which he knew was false, and this was a fraud upon the court; that the court had no jurisdiction; that the defendant has a good and meritorious defense, and has been guilty of no laches. Whereupon the county court vacated and set aside the divorce decree, and allowed the defendant 30 days in which to plead.

The plaintiff appealed to the Superior Court assigning as error that the findings of fact, particularly findings 4, 6, 8 and 9, are not supported by competent evidence, that the conclusions of law are not supported by the findings of fact, and the signing of the decree.

Upon Appeal in the Superior Court all of the plaintiff's assignments of error were overruled, and the judgment of the General County Court was affirmed.

Plaintiff excepted and appealed, and his assignments of error are substantially the same as those made on appeal to the Superior Court.

S. Thomas Walton for Plaintiff, Appellant.

Meekins, Packer & Roberts for Defendant, Appellee.

PER CURIAM. A study of the evidence shows that the court's findings of fact are supported by competent evidence, and that they are sufficient to sustain the judgment based thereon. *Woody v. Barnett,* 239 N.C. 420, 79 S.E. 2d 789; *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138. It would seem that the exceptions to the findings of fact are too general and indefinite to bring up for review the findings of the court. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

The judgment of the Superior Court is

Affirmed.

STATE v. CARL BANKS.

(Filed 2 March, 1955.)

1. Constitutional Law § 32—

The Superior Court has no jurisdiction to try an accused on the original warrant when it does not appear in the record that defendant was ever tried and convicted for the offense in the inferior court or that there was an appeal from the inferior court to the Superior Court.

2. Criminal Law § 67—

Where the record fails to disclose jurisdiction in the court below, the Supreme Court acquires no jurisdiction by appeal, and the appeal must be dismissed. Rule 19 (1), Rules of Practice in the Supreme Court.

APPEAL by defendant from *Sharp, Special J.,* August Criminal Term, 1954, of BUNCOMBE.

The record shows that defendant was tried in the Superior Court of Buncombe County on a *warrant,* purporting to have been issued by a deputy clerk of the Asheville Police Court, and found guilty of illegal transportation of whiskey, a misdemeanor; and that judgment was pronounced, from which defendant appeals. The errors assigned relate to the trial in the Superior Court.

While the warrant was returnable to the Asheville Police Court, it does not appear in the record that defendant was ever tried in that court or that there was an appeal therefrom to the Superior Court.

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

Henry C. Fisher for defendant, appellant.

PER CURIAM. "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 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." *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189.

"The record fails to disclose jurisdiction in the court below. *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267. As that court was without jurisdiction, in so far as this record discloses, we have none. *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700. Therefore, the appeal must be dismissed on authority of *S. v. Patterson, supra.*" *S. v. Morris,* 235 N.C. 393, 70 S.E. 2d 23.

For such failure of this record to show jurisdiction, the appeal must be dismissed. Rule 19 (1), Rules of Practice in the Supreme Court, 221 N.C. 544 (553).

Appeal dismissed.

DAVID LANGLEY v. GEORGE TAYLOR, CHAIRMAN, AND TOMMIE SPARROW AND J. L. LANCASTER, MEMBERS COMPRISING THE BEAUFORT COUNTY ABC BOARD ON JUNE 15, 1951.

(Filed 2 March, 1955.)

Appeal and Error § 2—

An order overruling a demurrer *ore tenus* is not appealable.

APPEAL by defendants from *Nimocks, J.,* October Term, 1954, of BEAUFORT.

Civil action to recover damages for the alleged negligent failure of the defendants to require William A. Patrick, an ABC enforcement officer, to give bond as prescribed by G.S. 128-9. The plaintiff herein instituted an action against Patrick, *et al.,* in 1952, which case was disposed of at the Fall Term, 1953, of this Court. See *Langley v. Patrick,* 238 N.C. 250, 77 S.E. 2d 656.

In the instant case the defendants demurred *ore tenus* to the plaintiff's complaint. The court below overruled the demurrer and the defendants appeal, assigning error.

LeRoy Scott and John A. Wilkinson for plaintiff.

Rodman & Rodman for defendants.

PER CURIAM. An order overruling a demurrer *ore tenus* is not appealable. *Morgan v. Oil Co.,* 236 N.C. 615, 73 S.E. 2d 477. Hence, this

appeal will be dismissed on authority of the above decision and the cases cited therein.

Appeal dismissed.

GEORGE SLAYDON v. OLIVIA MARION, ORIGINAL DEFENDANT, AND SANFORD MARION, ADDITIONAL DEFENDANT.

(Filed 2 March, 1955.)

APPEAL by plaintiff from *Sharp, S. J.*, at November Special Civil Term 1954, of SURRY.

Civil action to have certain deed adjudged to be void.

Plaintiff alleges, in his complaint, substantially these facts: (1) That on 22 February, 1944, while he and *feme* defendant, Olivia Marion, now Olivia Slaydon Marion, were husband and wife, he, at her instance and request, and in consideration of and in reliance upon her promise to execute and deliver to him a warranty deed conveying and releasing to him all her right, title and interest in and to certain land in Surry County, North Carolina, title to which rested in them as husband and wife, and for which he had paid the purchase price, plaintiff "executed and turned over to defendant a deed to certain land belonging to him, which said deed was filed for registration and is of record" in Book 148 at page 300 in office of Register of Deeds of Surry County;

(2) That defendant failed and refused to execute such deed of conveyance and release to plaintiff, but abandond him and left, and has since remained outside the State; and

(3) "That said deed . . . was secured by the defendant from the plaintiff fraudulently and deceitfully, and utterly lacking in consideration."

Defendants demurred *ore tenus* upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained. And from judgment in accordance therewith plaintiff appeals to Supreme Court, and assigns error.

Frank Freeman for Plaintiff, Appellant.

Woltz & Barber and Thomas M. Faw for Defendants, Appellees.

PER CURIAM. In the light of well settled principles applicable to actions based upon fraud, applied to the allegations of the complaint, it is readily seen that the facts alleged are insufficient to state a cause of action. Hence the ruling of the court below, in sustaining the demurrer, is

Affirmed.

A. P. DABBS v. GABRIEL P. GRAVES.

(Filed 2 March, 1955.)

APPEAL by defendant from *Sharp, S. J.*, October Term 1954, CASWELL.

This is a civil action brought by plaintiff against the defendant on a promissory note for $927.90 executed 18 April, 1952, payable to Weaver Fertilizer Company and assigned after maturity to the plaintiff.

The defendant admitted the execution of the note but denied liability thereon, alleging that it was executed without consideration, assigned without consideration, and nothing was due thereon.

The plaintiff testified he sold fertilizer as agent for five different fertilizer manufacturers, among them Weaver Fertilizer Company and Robertson Chemical Company; that he sold defendant Weaver fertilizer for the crop years 1950 and 1951, and on 18 April, 1952, he and the defendant went over the account and defendant executed the note sued on, which represented the amount due Weaver as of that date. The plaintiff guaranteed payment of the note. Upon failure of the defendant to pay the note at maturity the plaintiff paid Weaver and took Weaver's assignment; that the full amount of the note was due and payable to him; and that defendant from time to time promised to pay; he did not question the validity of the note until after suit was brought.

The defendant testified in substance that he did not buy any Weaver fertilizer from the plaintiff for the years 1950 and 1951. For those years he bought his fertilizer from D. O. Chandler; that he never admitted to the plaintiff he owed Weaver anything or that he promised to pay anything. Defendant testified also that for the crop years 1950 and 1951 he cultivated seven and one-half acres of tobacco and used about 1,000 pounds of fertilizer per acre; that he cultivated 13 to 15 acres of corn and used about 200 pounds per acre; that he sowed about 10 acres of wheat and used about 200 pounds per acre. D. O. Chandler testified he sold the defendant for the crop year 1950 one ton of fertilizer for wheat, two tons for tobacco, one ton for corn, and one ton for top dressing; and in 1951, two tons for tobacco, one ton for corn, and one ton for wheat. The defendant introduced in evidence a receipt signed by plaintiff for $460.00 paid on 11/2/50 and for $31.00 paid on 12/3/50.

On cross-examination, plaintiff admitted that in 1950 he had canceled a chattel mortgage executed by defendant, payable to Robertson Chemical Company. The amount of the mortgage was not given. He testified, however, that the mortgage may have been given for fertilizer for the year 1949.

An issue of indebtedness was submitted to the jury, answered for the plaintiff. From a judgment on the verdict, the defendant appealed.

D. Emerson Scarborough for defendant, appellant.

Clarence L. Pemberton and Norwood E. Robinson for plaintiff, appellee.

PER CURIAM. The evidence was in conflict. It presented a jury question. Under a charge free from error the jury returned a verdict for the plaintiff. No reason appears why the verdict should be disturbed.

No error.

STATE v. R. G. COLE.

(Filed 9 March, 1955.)

1. Criminal Law § 52a (3)—

To withstand nonsuit, the circumstances and evidence must be such as to produce a moral certainty of guilt and to exclude any other reasonable hypothesis.

2. Automobiles § 30d—Evidence of defendant's guilt of driving while under the influence of intoxicating beverage held sufficient for jury.

Testimony of a patrolman to the effect that he saw defendant driving his car from one side of the road to the other, that he followed defendant's car along the highway and then along a dirt road, where defendant parked, and saw defendant slump down behind the wheel, apparently drunk, and that less than a half hour thereafter, when officers got defendant out from behind the steering wheel, he exuded the odor of alcoholic beverage and was staggery drunk, *is held* sufficient to be submitted to the jury on the charge of driving while under the influence of intoxicating beverage, and the suggested hypothesis that defendant might have drunk liquor after he stopped the car is not a reasonable one under the evidence.

3. Criminal Law § 81c (1)—

Appellant must show that the alleged error was material and prejudicial in order to be entitled to a new trial.

4. Criminal Law § 81c (7)—

Defendant was tried for driving an automobile on the public highways while under the influence of intoxicating liquor. During the solicitor's argument, the court and the solicitor made remarks as to the necessity of a warrant, one of the arresting officers having testified in regard to getting a warrant before making the arrest. *Held:* The officer's testimony was relevant only in explanation of his failure to make the arrest at once, and the statements of the solicitor and judge were wholly immaterial to the issue and cannot be held prejudicial.

5. Criminal Law § 48c—

Where the court, upon defendant's general objection to certain testimony, overrules the objection and instructs the jury that the evidence is offered

for the purpose of corroborating another witness, defendant may not contend that the instruction limiting the evidence was inadequate in the absence of objection thereto or request for further elaboration.

6. Criminal Law § 79—

Assignments of error in support of which no argument is made or authority cited are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

7. Automobiles § 34b—

The Superior Court has no authority to pronounce judgment suspending or revoking a defendant's automobile driving license, exclusive authority having been given the State Department of Motor Vehicles to issue, suspend, and revoke, upon conditions prescribed by the General Assembly, licenses to operate motor vehicles on our public highways. G.S. 20, Art. 2.

8. Criminal Law § 60a—

The courts may impose only such punishments as are authorized by the Constitution of North Carolina, Art. XI, sec. 1.

9. Automobiles § 34b: Criminal Law § 62f—

Upon defendant's conviction of operating a motor vehicle while under the influence of intoxicating beverage, the court may not suspend judgment upon condition that the defendant not operate a motor vehicle upon the public roads during the period of suspension unless defendant consents thereto, expressly or by implication.

10. Automobiles § 30d: Criminal Law § 62h—

Where a statute prescribes a higher penalty for repeated convictions for similar offenses, whether defendant theretofore had been convicted under the statute is for the jury to determine and not the court. G.S. 20-138; G.S. 20-179.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Nettles, J.*, November Term, 1954, of RUTHERFORD.

Criminal prosecution on warrant charging that defendant, on or about 2 September, 1954, operated a motor vehicle on the public highway in Rutherford County while under the influence of intoxicating liquor in violation of G.S. 20-138. The phrase, "this being a second offense," is included in the charge.

Defendant was first tried in the Recorder's Court of Rutherford County. The jury in that court returned a verdict of "Guilty." Thereupon, judgment was pronounced, and defendant appealed.

Upon trial *de novo* in the Superior Court, on said warrant, the State's witnesses were J. H. Hatcher, State Highway Patrolman, and Earl Bowers, police officer of the Town of Rutherfordton. Their testimony tended to show the facts narrated below.

About 7:25 p.m., on 2 September, 1954, defendant drove a 1949 Buick south on U. S. Highway 221. Other cars, traveling north and south, were on the highway. Hatcher lives just south of Rutherfordton. He was backing out of his driveway into the highway when he saw defendant approach and pass. Observing that defendant's car was "being driven back and forth across the highway," and that defendant "would pull over in the center," Hatcher got into the highway at first opportunity and followed defendant's car. As he followed defendant, he observed his car "going back and forth across the road." Defendant turned from the highway, some four-tenths of a mile south of the Hatcher driveway, and then traveled about the same distance on a dirt road, pulled over to the left side thereof and stopped. Hatcher pulled up beside defendant, observing that defendant "was slumped down in the front seat of the car," and that "he appeared to be drunk." There was no conversation. There was no arrest.

In Rutherfordton, while on his way to get a warrant, Hatcher met Bowers. At Hatcher's request, Bowers followed him to the place where defendant had stopped. Hatcher left again for Rutherfordton, to get the warrant, while Bowers remained where he had a distinct view of defendant's entire car.

Having obtained a warrant, Hatcher returned to the place where defendant had stopped; and Hatcher and Bowers then went to defendant's car. Bowers testified: "Mr. Cole was in the front seat under the steering wheel when we got him out. When he stepped out, he was staggery and fell against the door of the car and against me. He had a very foul odor of alcoholic beverage. I would say he was in a drunken condition." Hatcher testified: "He was staggery drunk at that time, and I smelled liquor. He did not have any liquor that we saw." Then, defendant was arrested under the warrant.

Hatcher estimated that about five minutes elapsed between the time he left defendant's parked car until he met Bowers, and some six or seven minutes from then until he and Bowers arrived where the car occupied by defendant was parked. Bowers estimated that about fifteen minutes, "maybe a little longer," elapsed from the time Hatcher left him to watch defendant until he returned with the warrant.

It was daylight when Hatcher first observed defendant; but, as events progressed, daylight was fading into the somewhat uncertain period referred to as "dusky dark."

Hatcher testified, without objection: "This is the second offense of driving under the influence of liquor. He plead guilty on the first offense, approximately two years ago."

Defendant did not testify and offered no evidence.

Upon the jury's verdict of "Guilty," the court pronounced judgment as follows:

"The judgment of the Court is that the defendant be confined in the common jail of Rutherford County for a term of six months and assigned to work on the public highways under the supervision of the State Highway & Public Works Commission.

"This Prison sentence is suspended for a term of five years on the following express conditions:

"1. That the defendant will not operate a motor vehicle on the public roads of the State of North Carolina during said five-year period.

"2. That he will not violate any criminal laws of the State of North Carolina or of the United States of America.

"3. That he pay a fine of $300.00 and the costs of this action.

"Permission is given to the Court during any subsequent term during the said five-year period to place the prison sentence into effect if it shall appear that the defendant has violated any of the terms of this suspended sentence; that he surrender his driver's license to the Clerk of the Court, that the same may be transmitted to the Director of the Safety Division, Raleigh, North Carolina, for the purpose of having his license revoked as provided by law, and that said license is to be accompanied by a certified copy of this judgment."

Defendant, in open court, excepted and appealed, assigning errors.

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

Stover P. Dunagan and Charles L. Dalton for defendant, appellant.

BOBBITT, J. Defendant's primary contention is that the evidence, considered in the light most favorable to the State, was insufficient to warrant submission to the jury and to support the verdict and judgment.

The ultimate test is whether or not defendant was under the influence of intoxicating liquor when driving a motor vehicle upon a public highway. G.S. 20-138; *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

Defendant emphasizes the expression, "the guilt of an accused is not to be inferred merely from facts consistent with his guilt, but they must be inconsistent with his innocence," *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472, often used in the statement of the rule applicable to the sufficiency of circumstantial evidence. But this expression is in agreement rather than in conflict with the basic rule "that the facts established or adduced on the hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis." *S. v. Harvey, supra.* It is well to note, as did *Dick, J.,* in *S. v. Matthews,* 66 N.C. 106: "The true rule is that the circumstances

and evidence must be such as to produce a moral certainty of guilt and to exclude any other *reasonable hypothesis.*"

Hatcher observed defendant's manner of driving on the highway and his position and appearance immediately after he pulled to the left side of the dirt road and stopped. At that time defendant was slumped down, apparently drunk. When Hatcher brought Bowers to this place for further direct observation, defendant was in his car at the place he had stopped. He remained there until Hatcher returned with the warrant. When the officers got him out from under the steering wheel, he exuded the odor of alcoholic beverage and was staggery drunk. No liquor was found.

The evidence as to these facts was direct and positive. This evidence, when considered in the light most favorable to the State, was sufficient to warrant submission to the jury and to support the verdict and judgment. The suggested hypothesis, that defendant might have drunk liquor after he stopped and slumped down in his car and before the actual arrest, cannot be regarded as reasonable under the evidence here presented. Hence, defendant's assignment of error #3, based on the court's refusal to allow defendant's motion for judgment as of nonsuit, is overruled.

Defendant assigns as error certain alleged erroneous statements of law made by the solicitor and judge during the progress of the trial. The facts relevant to defendant's position are set out below.

In the solicitor's argument to the jury, he stated that "under the law it was necessary for Patrolman Hatcher to procure a warrant before he had any authority to arrest the defendant Cole." Upon objection by defendant's counsel, the judge, in the presence of the jury, stated: "Your objection is overruled, and for your information I will state that I will instruct the jury that under the law the said Patrolman did not have any right to make the arrest without a warrant." The record does not show any further instruction by the judge to the jury on this subject.

If the statements by the solicitor and judge were erroneous, a question that need not be discussed on this appeal, defendant has failed to show that the error was material and prejudicial. This he must do, else the error will not be ground for a new trial. *S. v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39; *S. v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791; *S. v. Davis,* 229 N.C. 386, 50 S.E. 2d 37.

Neither the lawfulness of the arrest nor the sufficiency of the warrant was controverted or in any way involved in the trial. Apparently, defendant contends that Hatcher had the right to arrest him without a warrant, under G.S. 20-183, as a "person found violating" the provisions of G.S. 20-138. Hatcher's testimony, admitted without objection, is that he thought it proper to get a warrant before arresting defendant. Whether the warrant was a prerequisite to a lawful arrest is wholly immaterial

to the issue as to defendant's guilt or innocence in relation to the offense for which he was being tried. Hatcher's testimony was relevant only in explanation of his action in leaving defendant for the purpose of getting a warrant before arresting defendant. Defendant cannot reasonably complain because Hatcher did not arrest him without a warrant. Nor do we perceive that the statements of the solicitor and judge, under the circumstances disclosed, were material or prejudicial to defendant. Hence, defendant's assignment of error #4 is overruled.

Defendant also assigns as error the court's failure to instruct the jury in a complete and satisfactory manner as to certain testimony of Bowers.

Defendant objected generally to testimony of Bowers tending to show that, when he and Hatcher met in Rutherfordton, Hatcher told him "about a drunken driver" and asked Bowers to follow him. The court overruled such objection, to which defendant excepted. Thereupon the court, on its own initiative, instructed the jury: "This evidence is offered for the purpose of corroborating the witness Hatcher." No further objection was made or exception taken.

Defendant does not contend that the testimony of Bowers was incompetent, but that the instruction as given by the court was not adequate. While we do not approve the instruction given as a complete and satisfactory explanation of the purpose for which the testimony was admitted for consideration by the jury, under the circumstances disclosed by the case on appeal defendant's assignment of error #2 is overruled. Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558; *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449; Stansbury, North Carolina Evidence, sec. 52.

No reason or argument is stated and no authority is cited in defendant's brief in support of his assignments of error #1 and #5. Hence, they are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

While the trial and verdict are upheld, defendant's assignment of error #6, directed to the judgment, is well taken.

The State Department of Motor Vehicles has exclusive authority to issue, suspend and revoke, upon conditions prescribed by the General Assembly, licenses to operate motor vehicles on our public highways. G.S., Ch. 20, Art. 2; *Fox v. Scheidt, Comr. of Motor Vehicles, ante,* 31, 84 S.E. 2d 259. When a person is convicted of a criminal offense, the court has no authority to pronounce judgment suspending or revoking his operator's license or prohibiting him from operating a motor vehicle during a specified period. *S. v. Warren,* 230 N.C. 299, 52 S.E. 2d 879; *S. v. Cooper,* 224 N.C. 100, 29 S.E. 2d 18; *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793. This is true, apart from G.S., Ch. 20, Art. 2, by reason of the provisions of sec. 1, Art. XI, Constitution of North Carolina,

which, in part, provides: "The following punishments only shall be known to the Laws of this State, viz.: death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State."

The punishment, upon conviction of a first, second, third or subsequent violation of G.S. 20-138, is prescribed by G.S. 20-179. Judgment pronounced must consist of a fine or imprisonment or both.

True, courts having jurisdiction may pronounce judgment as by law provided; and then, *with the defendant's consent,* express or implied, suspend execution thereof upon prescribed conditions. Long recognized as an inherent power of the court, such authority is now recognized expressly by statute. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143, and cases cited; G.S. 15-197.

When the defendant consents to such prescribed conditions, expressly or impliedly, he may thereafter contest a judgment putting the sentence into effect only on the following grounds, viz.: (1) for that there is no evidence to support a finding that the conditions of suspension have been breached; and (2) for that the conditions are invalid because unreasonable or for an unreasonable length of time. *S. v. Smith,* 233 N.C. 68, 62 S.E. 2d 495, and cases cited. By this means, a defendant, at his request or with his consent, may avoid, by observance of the prescribed conditions, the execution of the sentence.

It is noteworthy that in *S. v. Smith, supra,* the defendant was convicted of the crime of larceny. Too, the prison sentence pronounced was suspended on the general conditions set forth in the Probation Statute (G.S. 15-197 *et seq.*) and on the additional special condition that the defendant "be denied the right to operate a motor vehicle on the highways of North Carolina during the first twelve months of probation." It was held that this special condition was reasonable and the violation thereof ground for putting into effect the suspended sentence.

This excerpt from an opinion of *Barnhill, J.* (now *C. J.*), is equally appropriate here: "But here the defendant did not consent. He in apt time entered his exception and noted his appeal. Hence, since the form of punishment imposed is neither sanctioned by statute nor assented to by defendant, the judgment cannot stand." *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706. Also, see *S. v. Griffis,* 117 N.C. 709, 23 S.E. 164.

The judgment entered is stricken and the cause remanded for proper judgment.

In remanding the cause for the stated purpose, we observe that, while there is allegation and evidence that defendant had been adjudged guilty of violating G.S. 20-138 on a prior occasion, this feature was in no way submitted to or passed on by the jury. Hence, the verdict cannot be regarded as a conviction of a second offense within the meaning of G.S.

20-179. It is well established that "where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty." *S. v. Miller,* 237 N.C. 427, 75 S.E. 2d 242, and cases cited. "Whether there was a former conviction or not was for the jury, not for the court." *Clark, J.* (later *C. J.*), in *S. v. Davidson,* 124 N.C. 839, 32 S.E. 957; G.S. 15-147.

Error and remanded.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

ISADORE GOLDSTEIN AND WIFE, IDA S. GOLDSTEIN, v. WACHOVIA BANK & TRUST COMPANY, A CORPORATION, AND MARION GREEN JOHNSTON, AS EXECUTORS AND TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GAY GREEN, DECEASED.

(Filed 9 March, 1955.)

1. Vendor and Purchaser § 26—

Ordinarily, where the owner of land makes an enforceable contract to convey the land, and the title to the property proves defective in some particular, or his estate is different from that which he agreed to convey, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest.

2. Easements § 2—

A conveyance or contract to convey a part of an estate ordinarily includes by implication those easements over the remaining land which are visible and apparently permanent and which are in use and reasonably necessary to the fair enjoyment of the property conveyed or contracted to be conveyed.

3. Vendor and Purchaser § 26—Complaint held to allege cause of action for damages for failure of vendor to convey easement appurtenant.

The complaint alleged that defendants contracted to convey certain property with all rights and easements appertaining thereto, that the property consisted of a two-story building with offices on the second floor, that at the time of the execution of the contract the only means of ingress and egress to the second floor was by a stairway and hall through two other buildings owned by defendants and that defendants conveyed the servient properties to third persons by registered deed without reserving the easements defendants were obligated to convey to plaintiffs, thus making it impossible for defendants to convey to plaintiffs the easements appurtenant, to plaintiffs' damages. *Held:* The complaint states a cause of action against vendors and their demurrer *ore tenus* should have been overruled.

4. Registration § 5c—

As between the parties thereto, an unregistered contract to convey is as valid and binding as though duly recorded.

5. Pleadings § 15—

In passing upon a demurrer *ore tenus* for failure of the complaint to state a cause of action, whether or not defendants can make good on the defenses set up in their pleadings is not germane to the decision.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Whitmire, Special Judge,* October Term, 1954, of BUNCOMBE.

This is an action to recover damages from the defendants for failure to convey title to certain property, hereinafter described, with all the rights and easements appertaining thereto, which it is alleged the defendants contracted to convey.

The defendants are and were at the times hereinafter set forth, the duly qualified and acting executors and trustees under the last will and testament of Gay Green, deceased.

It is alleged in the plaintiffs' complaint that on or about 15 August, 1952, the defendants were the owners in trust, with the power to convey under the authority contained in the last will and testament of Gay Green, deceased, in fee simple, of a piece, parcel and lot of land lying and being on the north side of Pack Square, on the south side of College Street and the east side of Broadway in the City of Asheville, and particularly described in that certain deed from Universal Liquidating Company to Gay Green dated 1 July, 1936, and recorded 6 August, 1936, in Book of Deeds, Vol. 486, page 352, etc. That on 15 August, 1952, the defendants, acting pursuant to the power of sale contained in the aforesaid will, entered into a contract of sale with one B. Gordon, in which the defendants agreed to sell and the said B. Gordon agreed to purchase, a portion of the said property above described (designated as No. 2 North Pack Square) for $45,125.00, $2,500.00 of which was paid upon the execution and delivery of the contract, "and the balance of said purchase money to be paid as follows: In cash on closing." That this contract was duly assigned to the plaintiffs.

According to the pleadings, the property referred to above is improved business property; that there is located on said premises three buildings known and designated as Nos. 2, 4 and 6 North Pack Square; that each of the said buildings has a second floor; that said buildings have storerooms fronting on North Pack Square and running north to College Street; that No. 2 North Pack Square has offices on the second floor thereof; that according to the contract of sale, the rents from the first

floor amounted to $5,400.00 per year and the rents on the second floor amounted to $540.00 per year. That under the contract, the leases were to be assigned to the purchaser of the property at the time of the delivery of the deed therefor.

It is likewise alleged that on 15 August, 1952, and on 15 September, 1952, the only means of ingress and egress to the second floor of each of the three buildings referred to herein was over a stairway, leading from the street and located between the walls of Nos. 4 and 6 North Pack Square, which stairway led into a hallway which went through the walls of all three buildings and served each building; that said "openings, passageway and stairway were of such appearance as to be deemed permanent and that said stairway, openings and passageway had for many years been used as the only access to the offices on the second floor of No. 2 North Pack Square . . ."

It is further alleged that, in the contract referred to herein the defendants agreed to convey to B. Gordon, or his assignee, the property designated as No. 2 North Pack Square "with all rights and easements appertaining thereto." That on 15 September, 1952, the defendants delivered their deed to the plaintiffs on payment of the balance of the purchase price; "that said deed purported to grant to the plaintiffs No. 2 North Pack Square with all the appurtenances thereunto belonging"; that the plaintiffs received said deed and caused the same to be recorded in the office of the Register of Deeds for Buncombe County, North Carolina, in Book of Deeds, Vol. 723, at page 527, on 15 September, 1952.

It is also alleged in the complaint that, some time after 15 September, 1952, the passageway hereinbefore referred to was obstructed permanently by persons other than these plaintiffs, and without the consent of the plaintiffs, by the destruction of the stairway and the closing of the openings in the walls between Nos. 4 and 6 North Pack Square and also by closing the opening in the wall between Nos. 2 and 4 North Pack Square; that prior to 15 September, 1952, and subsequent to 15 August, 1952, without the consent of these plaintiffs, the defendants by deeds recorded prior to 15 September, 1952, conveyed No. 6 North Pack Square to one Morris Chizik and conveyed No. 4 North Pack Square to M. B. Blomberg and David Sandman without reserving to these plaintiffs the way of passage hereinbefore referred to, and that the defendants have breached their contract with these plaintiffs by placing the conveyance of said right of passage to these plaintiffs beyond the control of said defendants and by making the conveyance to these plaintiffs of such way of passage an impossibility.

It is alleged that the stairway and openings in the walls of the buildings referred to herein were obstructed by M. B. Blomberg, David Sandman and Morris Chizik, grantees of the defendants, and by reason of said

obstruction the second floor of the premises conveyed by the defendants to the plaintiffs has been made inaccessible and uninhabitable to the great damage of these plaintiffs, etc.

The defendants filed an answer to the plaintiffs' complaint and allege among other things that, Nos. 6, 4, and 2 were sold as separate buildings; Nos. 4 and 6 being sold and conveyed first and deeds therefor properly drawn and executed and recorded before the delivery of the deed to the plaintiffs for building No. 2; and that plaintiffs had actual knowledge before they accepted the deed for building No. 2 that each of said buildings was handled as a separate unit; that Morris Chizik closed the passageway in controversy on or about 1 January, 1954, "as he had a right to do."

The defendants likewise set up as a further answer and defense a plea of estoppel as a bar to the action, alleging that prior to the execution of the contract and deed (upon which the plaintiffs base their action), assignor of the plaintiffs was expressly told by the defendants that the three buildings were being sold as separate units, and that the purchaser of any one of said buildings had no claim or right to claim any passageway, stairway, or other easement over the others; and plaintiffs were expressly told at the time of the closing of their transaction and delivery of said deed that building No. 2, as above described, did not have any easement or right of way or passageway over the other buildings, or either of them.

The plaintiffs made a motion to strike certain parts of the defendants' answer. When the matter came on for hearing, the defendants demurred *ore tenus* to the plaintiffs' complaint on the ground that it did not state a cause of action against the defendants. The court, by consent of all parties, heard the argument of counsel on the demurrer. Whereupon, the court sustained the demurrer *ore tenus* and dismissed the action. Plaintiffs appeal, assigning error.

William J. Cocke, Charles N. Malone, and James S. Howell for plaintiffs, appellants.

Wright & Shuford and Don C. Young for defendants, appellees.

DENNY, J. The sole question presented on this appeal is whether or not the court below committed error in sustaining the demurrer *ore tenus* to the plaintiffs' complaint.

Ordinarily, where the owner of land makes an enforceable contract to convey the land and the title to the property proves defective in some particular, or his estate is different from that which he agreed to convey, the vendee, at his election, may compel the conveyance of such interest as the vendor may have and obtain "a pecuniary compensation or abate-

ment of the price proportioned to the amount and value of the defect in title or deficiency in the subject matter . . ." *Flowe v. Hartwick,* 167 N.C. 448, 83 S.E. 841; *Timber Co. v. Wilson,* 151 N.C. 154, 65 S.E. 932, 134 Am. St. Rep. 982; *Rodman v. Robinson,* 134 N.C. 503, 47 S.E. 19, 65 L.R.A. 682, 101 Am. St. Rep. 877; Pomeroy on Contracts, section 434; 49 Am. Jur., Specific Performance, section 105, page 123, *et seq.*

In *Timber Co. v. Wilson, supra,* this Court said: ". . . it is well settled that, though the vendor is unable to convey the title called for by the contract, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest. *Kores v. Covell,* 180 Mass. 206; *Corbett v. Shulte,* 119 Mich. 249; 29 A. & E. 621, and cases cited." *Morris v. Basnight,* 179 N.C. 298, 102 S.E. 389.

It would seem that the allegations of the plaintiffs' complaint which for the purpose of our discussion are admitted to be true, are sufficient to support the view that if a duly executed conveyance of the property described in the contract under consideration, with all the rights and easements appertaining thereto, had been recorded prior to the registration of the conveyances executed by the defendants to the properties known as Nos. 4 and 6 North Pack Square, such deed would have given to the plaintiffs the right to use the stairway and hallway referred to herein for the purpose of ingress and egress to the second floor of No. 2 North Pack Square. *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517, 155 A.L.R. 536; *Ferrell v. Trust Co.,* 221 N.C. 432, 20 S.E. 2d 329; *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224; *Bowling v. Burton,* 101 N.C. 176, 7 S.E. 701, 2 L.R.A. 285.

In *Ferrell v Trust Co., supra, Winborne, J.,* speaking for the Court, said: "It is a general rule of law that where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part," citing numerous authorities. "Notwithstanding the fundamental principle that a person cannot have an easement in his own land, 'it is a well settled rule that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant.' 17 Am. Jur., 945; Easements, Implied, section 33."

On the other hand, there is a distinction between a grant and a reservation by implication. Ordinarily, a grantor can impose no reservation on land he conveys in favor of other land retained by him in derogation of his grant without an express reservation to that effect, except as to "ways of strict or imperious necessity." Thompson on Real Property (Per. Ed.), Vol. 1, section 370 (332), page 599. In *Blankenship v. Dowtin,* 191 N.C. 790, 133 S.E. 199, this Court quoted with approval the distinction in this respect as set forth by Gould on Waters (3rd Ed.), section 354, as follows: " 'The general rules relating to severance of tenements are that a grant by the owner of a tenement or part of that tenement, as it is then used and enjoyed, passes to the grantee by implication, and without the use of the word "appurtenances" or similar words, all those easements which the grantor can convey, which are necessary to the reasonable enjoyment of the granted property, and have been and are, at the time of the grant, used by the owners of the entirety for the benefit of the granted tenement; and that, except in the case of ways or easements of necessity, there is no corresponding implication in favor of the grantor, who, if he wishes to reserve any right over the granted part, should reserve it expressly in the grant.' "

The plaintiffs, therefore, bottom their right to recover against the defendants on the ground that after the defendants contracted to convey No. 2 North Pack Square, including the easement rights appurtenant thereto, they conveyed the servient properties to third parties and did not reserve the easement rights they contracted to convey in connection with the sale of No. 2 North Pack Square.

Counsel for the appellees state in their brief and contended in the oral argument before this Court, that the plaintiffs allege unqualifiedly in their complaint that the defendants conveyed to them the property described in the complaint, and also an easement to the passageway and stairway. They seem to overlook the fact that the appellants do not allege in their complaint that their deed conveyed to them No. 2 North Pack Square and the easements appurtenant thereto. They allege that the deed purported to do so, but did not. They expressly alleged that the defendants by conveying No. 4 North Pack Square to M. B. Blomberg and David Sandman, and No. 6 North Pack Square to Morris Chizik, without reserving to these plaintiffs the passageway over the granted lands, made it impossible for them to convey to the plaintiffs an easement over Nos. 4 and 6 North Pack Square.

The appellees, through their counsel, on oral argument, likewise contended that the plaintiffs instituted this action against the wrong parties; that these defendants are in no way responsible for the destruction of the stairway, or the closing of the walls between Nos. 4 and 6 North Pack Square, or the closing of the wall between Nos. 2 and 4 North Pack

Square. This argument, in light of the facts alleged in the complaint, is without merit on the question as to whether or not the complaint states a cause of action against the present defendants. The situation would be entirely different, however, if the contract entered into on 15 August, 1952, between the defendants and the assignor of the plaintiffs, had been registered prior to the execution and registration of the deeds to the present owners of Nos. 4 and 6 North Pack Square. But, the contract was not so registered. Even so, it is as valid and binding as between the plaintiffs and the defendants as it would have been had it been duly recorded the day it was executed. *Freeman v. Bell,* 150 N.C. 146, 63 S.E. 682.

In our opinion, the plaintiffs' complaint does state a cause of action against the present defendants, and the court below committed error in sustaining the demurrer *ore tenus.* Whether or not the defendants can make good on the defenses set up in their pleadings is a matter with which we are not concerned, and about which we express no opinion.

The ruling of the court below is

Reversed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

SUSANNA KEATON v. BLUE BIRD TAXI COMPANY OF ASHEVILLE, INC., AND ROY LEE LANNING.

(Filed 9 March, 1955.)

1. Automobiles §§ 16, 18h (2)—

The portions of the evidence favorable to plaintiff, considered in the light most favorable to her and giving her every reasonable intendment therefrom, to the effect that she was crossing at an intersection of streets and was struck, when she was approximately two-thirds of the way across, by defendant's taxi which was driven out from behind the bus plaintiff intended to board, *is held* to justify the inference of negligence on the part of the taxi driver as a proximate cause of her injuries, and nonsuit was improper.

2. Trial § 22c—

Discrepancies and contradictions, even in the plaintiff's evidence, are for the jury and not for the court, and do not justify nonsuit.

3. Automobiles § 16—

The driver of a vehicle is required to yield the right of way to a pedestrian crossing a street along an unmarked crosswalk at an intersection at which traffic control signals are not in operation.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Sharp, Special Judge,* at 23 August, 1954, Extra Term of Buncombe.

Civil action in tort by pedestrian who while crossing a street in the City of Asheville was injured in a collision with a taxi, heard below on appeal from the General County Court.

The collision occurred in the daytime near the intersection of Cherry and Flint Streets. Cherry Street runs east and west; Flint runs north and south. The plaintiff alleges in her complaint that just before being struck she had walked eastwardly along the south margin of Cherry Street to the intersection of Flint Street; that when she reached the southwest corner of the intersection she stopped on the curb and looked in both directions for approaching vehicles; that she observed a vehicle which she took to be a White Transportation Company bus approaching from the south on Flint Street, then about 300 feet to her right; that she started to cross Flint Street from the west to the east side at a place designated for pedestrians to cross, where she was accustomed to board the bus in the mornings; that as she was crossing the street eastwardly, keeping a lookout in all directions, she observed a vehicle following just behind the bus which she intended to get on; that about the time she was two-thirds across the street, the driver of the car which was following the bus suddenly and in a careless and reckless manner came out from behind the bus, upon her without warning, and in so doing struck and knocked her a distance of 40 to 60 feet, against the curb on the west side of Flint Street.

The defendants by answer admitted that the plaintiff was injured by contact with one of the corporate defendant's taxis, then being operated by driver Lanning in the course of his employment. However, they deny all allegations of negligence and set up facts materially different from those alleged by the plaintiff, the gist of the defendants' allegations being: that the plaintiff was injured north, rather than south, of the intersection of Flint and Cherry Streets above the cross-walk for pedestrians; that the bus near the scene of the injury was traveling south, rather than north, on Flint Street, and that therefore the bus and the taxi were meeting and traveling in opposite directions rather than in the same direction; that as the driver of the taxi proceeded northwardly on Flint Street he noticed two motor vehicles approaching from the opposite direction, the first a passenger car and the second a White Transportation Company bus; that after the taxi had passed the passenger car, and while it was in the act of passing the bus, the plaintiff suddenly and without warning negligently and carelessly darted out from behind the passing bus and ran

into the left front of the taxi, in such manner that the driver had no opportunity to stop the taxi or turn it to avoid colliding with the plaintiff, the result being that the plaintiff suffered the injuries of which she complains by reason of her own failure to exercise due care, which the defendants plead as contributory negligence.

The plaintiff testified in substance: That on the morning of her injury she proceeded along the south sidewalk of Cherry Street to the intersection of Flint Street; that on arriving at the southwest corner of the intersection, she looked up and down each street leading to the intersection, "and upon seeing nothing coming, except a White Transportation Company . . . bus some distance away, she started across the street to the southeast corner of the intersection, where she was to catch the oncoming bus; that after she proceeded one-half to three-fourths of the way across Flint Street, still keeping a close lookout, she was struck by some object, which she had not theretofore seen; that she was rendered unconscious by being struck, and that she had no recollection of any further happenings until she came to herself in the hospital; that although she looked in all directions, both before and after she started across the street, she had been able (unable) to see within her line of vision any vehicle other than the bus hereinbefore mentioned." On being recalled, the plaintiff testified further she "intended to catch the bus that was traveling in a northerly direction on Flint Street . . . and it was the bus she stated she had seen."

K. W. Partian testified for the plaintiff in substance: That at the time of the injury he was proceeding south on Flint Street; that as he crossed the intersection of Starnes Avenue, one block from the intersection of Cherry Street, "he noticed a taxicab stopped at the east side of the street and a White Transportation Company bus, drawn up to the curb just behind it; that one or more men came from about the stopped vehicles and proceeded across the street to where the plaintiff was lying, partly in the gutter on the street, and partly on the sidewalk on the west side of the street; that the place where she was lying was at a driveway between two apartment houses and about 50 feet from the intersection of Flint and Cherry Streets; that the stopped bus was pointed a north direction and that there was no bus proceeding south on Flint Street ahead of him, . . ."

The plaintiff offered these portions of taxi-driver Lanning's previous adverse examination: "I was driving down Flint Street on the east side, going north. There was a car parked on right hand side of Flint Street. The car was parked across from 60 Flint Street. Plaintiff, Susanna Keaton, was pushed or knocked down not more than 20 feet by impact of my car. I did not measure it. My car skidded 30 to 35 feet the way it was raining. I finally stopped the car. They measured it down Flint Street. . . . We traveled about 40 feet from where they measured, no marks on the street at all."

Other evidence offered by the plaintiff, in apparent conflict with her testimony, is omitted as not being pertinent to decision.

The defendant Lanning's testimony as narrated in the case on appeal is in part: ". . . (that) he was proceeding in a northern direction, along Flint Street; that it was raining, and the streets were wet, and he was traveling approximately 20 to 25 miles an hour. That he did not observe any pedestrians or vehicles about the time he was crossing the intersection of Flint and Cherry Streets, at which time he observed a White Transportation bus proceeding southward along Flint Street, coming towards him. That he did not observe any pedestrians at all at that time; that just as the front of his cab was passing the rear of the bus, the plaintiff came from behind the bus, and ran into the front side of the taxicab, which he was operating. That he did not observe any bus or other vehicle traveling north on Flint Street. . . . That he applied his brakes immediately upon seeing plaintiff and that he skidded some 35 feet prior to the impact of her body with his cab. . . . That the bus proceeded south on Flint Street and did not stop, either before or after the plaintiff was hit. . . . there was a car parked on my right side of the street and I couldn't make it; I was in between the bus and the car parked on Flint Street and could not run over that way to avoid her coming in contact with my cab. I didn't see her until the time she came from behind the bus, at which time she was about two or three feet from me."

At the conclusion of all the evidence in the County Court, the defendants' motion for judgment as of nonsuit was allowed. To this ruling the plaintiff excepted and appealed to the Superior Court. There, on review, the judgment of the County Court was affirmed. The plaintiff appeals.

Styles & Styles for plaintiff, appellant.
John C. Cheesborough for defendant, appellees.

JOHNSON, J. It may be conceded that the plaintiff's evidence is not free of discrepancies and contradictions. It also appears that portions of the plaintiff's evidence are at variance with the facts alleged by her. However, when the portions favorable to the plaintiff—some offered by her and some by the defendants—are weighed and considered and given every reasonable intendment favorable to her, enough evidence is found in harmony with the general theory of her case alleged to overthrow the motion for nonsuit and justify the inference of negligence on the part of taxi-driver Lanning as the proximate cause of the plaintiff's injuries. Discrepancies and contradictions, even in the plaintiff's evidence, are for the jury and not for the court, and do not justify nonsuit. *Fowler v. Atlantic Co.*, 234 N.C. 542, 67 S.E. 2d 496; *Brafford v. Cook*, 232 N.C. 699, 62 S.E. 2d 327.

Here the plaintiff is entitled to call to her aid these provisions of G.S. 20-173 (a): "Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked cross-walk or within any unmarked cross-walk at an intersection. . . ." See also G.S. 20-174 (a) and (e). And on the question of contributory negligence as a matter of law, see *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762, and *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649.

We conclude that the case is one for the jury.

Reversed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

THOMAS DUNLAP HUNTER v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 9 March, 1955.)

Insurance §§ 13c, 34c—Doctrine of waiver applies to forfeiture provisions, but cannot operate to increase the coverage of the policy.

The policy in suit provided for disability coverage until the anniversary of the policy nearest insured's fifty-fifth birthday, with reduction of the annual premiums after the expiration of the disability coverage. Through error, after the expiration of the disability period, insurer continued to mail insured premium notices without reduction, and insured continued to pay the total premium for four years after he was fifty-five, and became disabled during the period covered by the last payment of premium. *Held:* The doctrine of waiver applies to forfeiture provisions, but cannot be applied to bring within the coverage of the policy risks expressly excluded therefrom. and therefore, insured is entitled to return of the premiums paid for disability after the expiration of the coverage of this risk, but is not entitled to recover disability benefits under the policy.

WINBORNE and JOHNSON, JJ., took no part in the consideration or decision of this case. Also neither BARNHILL, C. J., nor DEVIN, J., took part in the consideration or decision of this case.

APPEAL by defendant from *Patton, Special Judge,* August Term, 1954, of BUNCOMBE.

The defendant, on 2 October, 1935, issued its policy of insurance, No. 557,814, on the life of the plaintiff in which it agreed to pay to the plaintiff's beneficiary, upon his death, the sum of $10,000, and for an extra premium of $49.60 per year it attached a rider to the policy in which it

agreed to waive the annual premiums and pay plaintiff, in case of his becoming totally and permanently disabled, one-half of one per cent of the face amount of the policy, to wit: $50.00 per month for each month of total and permanent disability subsequent to the first six months thereof; provided, such disability occurred prior to the anniversary of the policy on which the insured's age at nearest birthday is fifty-five years. Thereafter, the annual premiums were to be reduced by $49.60.

On 2 October, 1946, according to the terms of the policy, the provisions for the waiver of premiums and the payment of monthly benefits for total and permanent disability expired. However, the defendant company continued to mail to the plaintiff notices for premiums without reducing the yearly amount thereof by $49.60 as provided in said rider. These premiums were collected up to and including the annual premium due 2 October, 1950. Thereafter, on 10 July, 1951, the defendant notified the plaintiff that the disability premium feature of his policy was being removed in accordance with the terms of its policy and that premiums had been reduced accordingly, effective 2 October, 1951.

The plaintiff alleges in his complaint that he became totally and permanently disabled on 14 November, 1950, or soon thereafter; that on 31 July, 1951, he duly notified defendant of his disability and requested the necessary forms for filing due proof of his claim. That thereafter, the company denied liability on the ground that its liability for the payment of such benefits under the terms of its policy expired on 2 October, 1946.

The defendant in its answer denied that the plaintiff is totally and permanently disabled. It admitted that it collected premiums as alleged after 2 October, 1946, through error, and alleged that upon discovery of this error in July 1951, it notified the plaintiff of such error and made tender of $306.51 which included the amount that was paid by the plaintiff on "Total and Permanent Disability" benefits subsequent to 2 October, 1946, and that tender was refused. The tender was renewed in the answer and it is alleged that the amount tendered above was paid into the office of the Clerk of the Superior Court of Buncombe County at the time it filed its answer. The defendant expressly denies liability for any disability which the plaintiff may have that commenced subsequent to 2 October, 1946.

The court submitted the following issues to the jury and they were answered as indicated below:

"1. Has the plaintiff since November 14th 1950 been totally disabled and prevented thereby from engaging in any occupation or employment for remuneration or profit, as alleged in the complaint? Answer: Yes.

"2. Did the defendant by accepting premiums from plaintiff for a period of more than four years after he became 55 years of age waive the termination date for discontinuance of liability under total and permanent disability rider attached to said policy of insurance, and is it estopped thereby to assert the age limitation therein provided? Answer: Yes.

"3. Did the defendant by its acts and conduct in denying liability waive the filing by plaintiff of proof of claim for benefits? Answer: Yes.

"4. What amount, if any, is plaintiff entitled to recover of defendant? Answer: $921.20."

Judgment was entered on the verdict and the defendant appeals, assigning error.

Lee & Lee for plaintiff, appellee.

Smith, Moore, Smith & Pope and Harkins, Van Winkle, Walton & Buck for defendant, appellant.

DENNY, J. We deem it unnecessary to consider and discuss all the exceptions and assignments of error set forth in the record since, in our opinion, the question which is determinative of this appeal is as follows: Did the defendant by accepting premiums from the plaintiff covering a period of more than four years, after he became 55 years of age, waive the termination date for discontinuance of liability under the provisions of the total and permanent disability rider attached to his policy?

While there is some conflict in the authorities on this question, the greater weight of authority supports the view laid down in Anno.—Insurance—113 A.L.R. 857, *et seq.*, as follows: "It is well settled that conditions going to the coverage or scope of the policy, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action, without an express agreement to that effect supported by a new consideration. This rule may be, as it often is, otherwise stated that the doctrine of waiver may not be applied to bring within the coverage of the policy risks not covered by its terms, or risks expressly excluded therefrom."

It is also said in 29 Am. Jur., Insurance, section 903, page 690, "The doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom; and the application of the doctrine in this respect is, therefore, to be distinguished from the waiver of, or estoppel to deny, grounds of forfeiture."

We likewise find in 45 C.J.S., Insurance, section 674, page 616, "As a general rule, the doctrines of waiver or estoppel can have a field of operation only when the subject matter is within the terms of the contract,

and they cannot operate radically to change the terms of the policy so as to cover additional subject matter. Accordingly, it has been held by the weight of authority that waiver or estoppel cannot create a contract of insurance or so apply as to bring within the coverage of the policy property, or a loss or risk, which by the terms of the policy is expressly excepted or otherwise excluded."

In the case of *McCabe v. Casualty Co.*, 209 N.C. 577, 183 S.E. 743, a policy of insurance was issued to Jos. T. McCabe on 25 July, 1929, at which time the insured was over 65 years of age. The policy contained the following provision: "20. Age Limits of Policy: The insurance under this policy shall not cover any person under the age of 18 years nor over the age of 65 years. Any premium paid to the company for any period not covered by this policy will be returned upon request."

The jury found that the defendant had waived the age limitation, but upon appeal to this Court we held otherwise. *Stacy, C. J.*, speaking for the Court, said: ". . . the suit is upon the policy as written. *Burton v. Ins. Co.*, 198 N.C. 498, 152 S.E. 396. The stipulation in question is not a condition working a forfeiture, which may be waived, *Mahler v. Ins. Co.*, 205 N.C. 692, 172 S.E. 204; *Horton v. Ins. Co.*, 122 N.C. 498, 29 S.E. 944, but a limitation upon liability. *Foscue v. Ins. Co.*, 196 N.C. 139, 144 S.E. 689; *Lexington v. Indemnity Co.*, 207 N.C. 774, 178 S.E. 547; *Spruill v. Ins. Co.*, 120 N.C. 141, 27 S.E. 39."

The above view is in accord with numerous decisions from other jurisdictions, among them being *Pothier v. New Amsterdam Cas. Co.* (C.C.A. 4th), 192 F. 2d 425; *Bankers Life Co. v. Sone* (C.C.A. 5th), 86 F. 2d 780; *Barnett v. Travelers' Ins. Co.* (C.C.A. 8th), 32 F. 2d 479; *Kinard v. Mutual Benefit Health & Accident Ass'n.*, 108 F. Supp. 780; *Metropolitan Life Ins. Co. v. Stagg*, 215 Ark. 456, 221 S.W. 2d 29; *Conner v. Union Auto. Ins. Co.*, 122 Cal. App. 105, 9 P. 2d 863; *Railey v. United Life & Accident Ins. Co.*, 26 Ga. App. 269, 106 S.E. 203; *Pierce v. Homesteaders Life Ass'n.*, 223 Iowa 211, 272 N.W. 543; *Ridgeway v. Modern Woodmen*, 98 Kan. 240, 157 P. 1191, L.R.A. 1917A 1062; *Foote Lumber Co. v. Svea F. & L. Ins. Co.*, 179 La. 779, 155 So. 22; *Prudential Ins. Co. of America v. Brookman*, 167 Md. 616, 175 A. 838; *Palumbo v. Metropolitan Life Ins. Co.*, 293 Mass. 35, 199 N.E. 335; *Henne v. Glens Falls Ins. Co.*, 245 Mich. 378, 222 N.W. 731; *Smith v. Aetna Life Ins. Co.*, 58 Ohio App. 412, 16 N.E. 2d 608; *Owens v. Metropolitan Life Ins. Co.*, 178 S.C. 105, 182 S.E. 322; *McLain v. American Glanzstoff Corp.*, 166 Tenn. 1, 57 S.W. 2d 554; *Powell v. American Casualty & Life Co.* (Court of Civ. App. of Tex.), 250 S.W. 2d 744; *Carew, Shaw & Bernasconi v. General Casualty Co.*, 189 Wash. 329, 65 P. 2d 689, and *Two Rivers Dredge & Dock Co. v. Maryland Casualty Co.*, 168 Wis. 96, 169 N.W. 291.

Each of the decisions of this Court cited and relied upon by the appellee, except the case of *Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879, which is not controlling on the question before us, involved the question of forfeiture which we have repeatedly held may be waived.

While the plaintiff is entitled to the return of the premiums paid for disability coverage since 2 October, 1946, on his pleadings as cast, the motion for judgment as of nonsuit, interposed by the defendant in the trial below, should have been sustained.

The judgment of the court below is

Reversed.

WINBORNE and JOHNSON, JJ., took no part in the consideration or decision of this case. Also neither BARNHILL, C. J., nor DEVIN, J., took part in the consideration or decision of this case.

DR. JAMES E. OWEN AND EVA B. OWEN v. CLAUDE DEBRUHL AGENCY, INC., AND CLAUDE DEBRUHL, PERSONALLY.

(Filed 9 March, 1955.)

1. Injunctions § 5—

G.S. 1-490 prescribes that a temporary restraining order issued without notice shall not be granted for a longer period than 20 days, but the statute does not require a hearing within 20 days, and when a date fixed in the order for the hearing is within the 20-day period the fact that the hearing is postponed by the judge for good and sufficient reason does not require the dissolution of the order.

2. Appeal and Error § 40c—

Where the complaint and affidavits are sufficient to support the conclusion that defendants had entered upon plaintiffs' land and were maintaining thereon a continuous nuisance, defendants may not contend that plaintiffs had waived the allegations as to nuisance by agreeing to defendants' statement of case on appeal that the action was for trespass to try title, since the verified complaint, affidavits and orders also appear in the case on appeal.

3. Injunctions § 4d—

Verified allegations to the effect that defendants had entered upon plaintiffs' land, established a shooting gallery where high powered firearms were frequently discharged over plaintiffs' land, endangering aircraft approaching and leaving plaintiffs' landing field, and constituting a continuous nuisance, both private and public in character, are *held* sufficient to support and warrant the issuance of a temporary restraining order, and defendants' contention that the action was one in trespass to try title and that plaintiffs have an adequate remedy at law, is untenable.

4. Injunctions § 8—

An order continuing the temporary restraining order to the hearing on the merits relates back to the findings and prohibitions of the original order and continues it in effect.

5. Same—

Where the facts alleged in the verified complaint are sufficient to warrant and require the issuance of a restraining order, the judge may properly continue the temporary order to the hearing without further findings.

6. Appeal and Error § 40c—

On appeal from the continuance of a temporary restraining order, the Supreme Court may review the evidence in order to determine on appeal whether the order was justified.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Nettles, Resident Judge,* in Chambers at Asheville, 27 November, 1954, BUNCOMBE.

This is a civil action in which the plaintiffs allege that they are the owners of certain described lands containing 32.11 acres on the French Broad River in the City of Asheville, and being what is known as the Carrier or Owen Flying Field; that some of the plaintiffs' lots embraced in the boundaries adjacent to the airfield were cultivated in corn and shrubbery and that a private road crossed these lands; that defendants wrongfully entered upon the lands, destroyed the corn and shrubbery, tore up the road, and established a shooting gallery where high powered firearms were frequently discharged over plaintiffs' land, especially endangering aircraft approaching and leaving the landing field; that defendants' use of the plaintiffs' premises was unlawful, wanton and willful, and constituted a continuous nuisance, both private and public in character. Plaintiffs asked for $5,000.00 actual and $10,000.00 punitive damages, and for an order restraining the defendants, their agents, etc., from further trespassing upon the premises.

On 23 October 1954, and without notice, and upon plaintiffs' complaint being treated as an affidavit, Judge Nettles, Resident Judge of the Nineteenth Judicial District, issued an order enjoining and restraining the defendants, etc., from doing the acts complained of, to wit: Trespassing upon the lands and roadway of the plaintiffs, blocking said lands and roadway, and interfering with the operation of airplanes, firing high powered .22 rifles and shotguns in, upon and around said premises, or in any manner interfering with the use and ownership of the plaintiffs as described in the complaint. The order was to become effective upon service.

The defendants were ordered to appear before the Resident Judge at Chambers in the Courthouse in Asheville at eleven o'clock, 12 November 1954, or as soon as counsel could be heard, and show cause why the order, or some order of like purport, should not be continued to the hearing. On 10 November, Judge Nettles notified the plaintiffs' counsel and the Clerk Superior Court that due to a death in his family he would be unable to hold the hearing on the 12th. On 12 November, defendants, their counsel not having been notified of the continuance, appeared at the courthouse at the time set. Neither the plaintiffs nor their counsel, nor the judge appeared.

Judge Nettles filed an order *nunc pro tunc* as of 12 November, setting the hearing for 20 November. On that day all parties and counsel appeared. However, another hearing before Judge Nettles consumed the entire day. The hearing was reset for 27 November. The defendants filed numerous affidavits as to their readiness for the hearing set for 12 November and the failure of the court, clerk and defense counsel to give them notice of the postponement.

The defendants filed an affidavit of William DeBruhl, who testified that he was employed by the defendants to operate and manage the turkey shooting operations which were carried on lawfully and in accordance with police requirements, and were without danger either to aircraft or persons. A hearing was held on 27 November with all parties and counsel present. The defendants' motions to dismiss on account of the continuances and on the merits were all overruled. The order entered stated: "The court finds that the temporary restraining order issued herein should be continued until the final hearing." An additional bond was required and approved. The defendants objected to the findings of fact and conclusions of law, excepted to the signing and entry of the order, and appealed.

McLean, Gudger, Elmore & Martin, By: Harry C. Martin, for defendants, appellants.

J. W. Haynes for plaintiffs, appellees.

HIGGINS, J. The defendants insist the temporary restraining order issued without notice should have been dissolved because of the failure of the resident judge to give the defendants a hearing within 20 days as provided in G.S. 1-490. The statute does not require a hearing within 20 days. It provides that no order for a period longer than 20 days shall be granted. It provides also, any order issued shall continue until vacated. The date fixed for the hearing in the order in question was within the 20-day period. However, due to death in the family of the judge two days before the hearing date, the judge notified counsel for the plaintiff

and the Clerk Superior Court of Buncombe County he would not be able to hold the hearing as scheduled on the 12th. Neither the court, nor the clerk, nor plaintiffs' counsel notified defendants' counsel of the postponement. Up to that time the defendants had filed no pleadings, consequently no counsel appeared of record. Another hearing was scheduled for 20 November. However, on that date the judge was engaged in another hearing that consumed the entire day.

Finally, a hearing was held on 27 November, when all parties and counsel were present. The defendants filed motions to dismiss because of the court's failure to hold the hearing on the 12th, and upon the merits. Both motions were supported by affidavits. After the hearing, and presumably considering all matters presented, the judge continued the restraining order until the trial.

In this case, the court was amply justified in continuing the hearing scheduled for 12 November.

The defendants argue the purpose of this action is to try title to land and that the plaintiffs have an adequate remedy at law. They argue that the equitable remedy of relief by injunction is not available and the restraining order should be dissolved. In support of this position they cite *Armstrong v. Armstrong,* 230 N.C. 201, 52 S.E. 2d 362; *Whitford v. Bank,* 207 N.C. 229, 176 S.E. 740; *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143. The defendants further argue that while the complaint may contain sufficient allegations which, if true, will support the temporary restraining order, yet "the attempted allegations by the plaintiff as to nuisance have been waived by their stipulation as to the case on appeal." The stipulation of counsel as appears in the record is silent on the question of the purpose of the action. What defendants' counsel evidently referred to as a stipulation is the defendants' statement in the case on appeal as follows: "This is a civil action instituted in the Superior Court of Buncombe County by the plaintiffs for trespass to try title upon the lands described in the complaint and for actual and punitive damages, together with a restraining order and order to show cause as appears of record." Plaintiffs' counsel agreed that the defendants' statement shall constitute the case on appeal. However, in the case on appeal, appears also the verified complaint, the affidavits, orders, etc. So, we have before us not only what the defendants say the case is about, but what the complaint and affidavits say it is about.

The allegations of the verified complaint are sufficient to support and warrant the temporary restraining order. As an answer to some of the allegations of the complaint, the defendant offered the affidavit to Mr. William DeBruhl who stated he was employed by the defendants to operate and manage their turkey shoots, which conformed to police require-

ments, and that only shotguns with skeet loads were used; and that the shooting did not affect or impair the operations of the airstrip.

After hearing and, so far as appears, considering all affidavits, the resident judge found the temporary order should be continued to the final hearing and entered an order accordingly. This order relates back to the findings and prohibitions of the original order and continues it in effect. The defendant argues that since the court in continuing the restraining order did not find any facts, that it is impossible for the defendants to point out wherein the order is deficient, except to say that it contains no findings and that the objection to the order is the only method of attack left to them. Findings of fact were not required if the allegations of the complaint and supporting affidavits, if any, and the affidavits in opposition, if any, show facts sufficient to warrant and require a restraining order, the judge may properly issue it without further findings. This is so for the reason that even if the judge below were to find facts, the findings would not be conclusive on appeal. In determining whether a restraining order was properly issued, the Supreme Court may look into and review the evidence in order to determine on appeal whether the order was justified. *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452.

The defendants' exceptive assignments do not disclose error.

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

MRS. BEATRICE MARIE FIELD NOBLE v. MRS. PHYLLIS GANT FIELD PITTMAN.

(Filed 9 March, 1955.)

1. Constitutional Law § 28: Judgments § 31: Divorce and Alimony § 21—

A property settlement contained in a decree of divorce entered by a court of another state is void in so far as it attempts to affect title to land in this state.

2. Husband and Wife § 12c—Deed from wife to husband executed and delivered prior to divorce decree must conform to statutory requirements.

Decree of absolute divorce was rendered and quitclaim deed from the wife to the husband was executed the same day. The evidence was conflicting as to whether the deed was executed and delivered prior to the rendition of the divorce decree or was executed and delivered subsequent thereto. It was admitted that the requirements necessary to the validity of a deed from a married woman to her husband as prescribed by statute then in effect were not observed. *Held:* The conflicting evidence presents

a question for the jury as to whether the deed was executed and delivered prior to the rendition of the divorce decree, in which event it would be void, or whether it was executed and delivered subsequent thereto, in which event it would be valid. An instruction that if the deed were executed and delivered at approximately the same time as the rendition of the divorce decree as a simultaneous transaction, that the deed would be valid, is error.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Patton, S. J.*, August 1954 "A" Term, BUNCOMBE.

This is a civil action for the recovery of a one-half undivided interest in a tract of land in Buckeye Cove, Swannanoa Township, Buncombe County, North Carolina. The material allegations in the complaint, briefly stated, are: The plaintiff was formerly the wife of Henry Field. During their marriage they acquired the disputed lands as tenants by the entireties. They were legally divorced on 8 September, 1944, in Wayne County, Michigan. Whereupon they became tenants in common, each owning a one-half undivided interest. Subsequent to the divorce, Henry Field married the defendant. The plaintiff asks that she be declared to be the owner of a one-half undivided interest in the land.

In the answer the defendant admits: (1) The plaintiff at one time was married to Henry Field; (2) the land in dispute was acquired during that marriage; (3) the plaintiff and Henry Field were divorced in the State of Michigan in 1944. Other material averments in the answer are that Henry Field acquired by deed and by judgment in the divorce action the interest of the plaintiff in the lands in controversy and that thereafter Henry Field conveyed the land to the defendant in fee simple; that she is now the owner in fee.

The plaintiff filed reply, averring "that any attempted order or judgment concerning said property entered therein is null and void because of the failure to comply with the statutory law of North Carolina;" that the purported deed is null and void for the same reason.

The plaintiff testified in substance that she and Henry Field were married 1 July, 1938. They bought the land in dispute, built a house and lived on the property for two or three years, then moved to Detroit, Michigan, where the divorce action between them was tried on 8 September, 1944. At nine o'clock on that day she and her uncle, Jim Owen, went to the office of her attorney, Mr. DeWitt, in the Hammond Building. Mr. Porter, the attorney for Henry Field, came to DeWitt's office. The plaintiff, her attorney and uncle, after the conference with Porter, went to the courthouse where the divorce decree was granted about 11:30 a.m.

Neither Mr. Field nor his attorney was present in court when the divorce was granted.

Jim Owen, uncle of the plaintiff, testified in substance: He went with the plaintiff to DeWitt's office about nine o'clock on the morning of 8 September, 1944. Mr. Porter came to DeWitt's office, brought with him the quitclaim deed from plaintiff to Field, a notary public was called in from some other office, the deed was signed and acknowledged before the Notary Public, Miss Virginia J. Marshall. Mr. Porter placed his o.k. on the proposed divorce decree, stated he had some other business to attend to, and left DeWitt's office. The witness, the plaintiff and Mr. DeWitt went to the courthouse where the divorce decree was entered about 11:30 a.m. Neither Field nor Porter, his attorney, was present in the court at any time during the divorce proceeding.

Clinton C. DeWitt testified by deposition: "I am an attorney . . . I was counsel of record for Beatrice Marie Field in the divorce case . . . The divorce judgment was entered on September 8, 1944, . . . it was at 11:30 in the morning. I saw Mrs. Field before I went to court . . . What purported to be a quitclaim deed was delivered at that time. It was delivered in my office about eleven o'clock, September 8. . . . the instrument was signed by Mrs. Field before the trial of the divorce matter and the granting of the decree."

The plaintiff, for the purpose of attack, introduced the quitclaim deed. It shows to have been acknowledged before Virginia J. Marshall, a notary public.

The defendant offered in evidence the following documents: (1) The decree of divorce entered 8 September, 1944, in the Circuit Court of the County of Wayne, State of Michigan; (2) the quitclaim deed dated 8 September, 19....., from Beatrice Field to Henry Field; (3) a fee simple deed dated 24 November, 1951, from Henry David Field to Phyllis Gant Field for the land in controversy.

The defendant offered by deposition the evidence of Norris A. Porter: "I am an attorney . . . I knew Henry Field . . . I represented him in a divorce case in 1944. His wife's name was Beatrice Field. Her attorney . . . was Mr. DeWitt. In the divorce action we finally agreed upon a property settlement. Mr. Field, by stipulation, withdrew his bill of complaint and answer to cross bill and we permitted Mrs. Field to take a decree of divorce uncontested on her cross bill . . . Mr. DeWitt and I did not have the parties in to discuss property settlement. They worked out the deal . . . and we merely prepared the necessary instruments. The wife was to sign the quitclaim deed to the husband and the husband was to pay the wife $500.00 . . . To the best of my memory on the date in question, I met Mr. DeWitt at the Assignment Clerk's office . . . I o.k.'d the divorce decree . . . and I did not stay when Mr. DeWitt was

assigned to the judge . . . To the best of my memory, I met Mr. DeWitt at about twelve o'clock in his office . . . Mrs. Field was there at the time . . . I witnessed her signature to the deed and delivered a check for $500.00. At that time I received a deed and certified copy of the divorce." Cross-examination: "I don't know who Virginia J. Marshall is. I never met her. I don't recall ever hearing her name before."

The defendant testified: "I was the wife of Henry Field. We were married November 11, 1948. He died December 28, 1951. We lived on the property in Buckeye Cove. I never heard of any claim of the plaintiff until the suit was brought."

The court submitted the following issue: "(1) Is the plaintiff the owner of an undivided one-half interest in the property described in the complaint?" The jury answered the issue, "No," and from the judgment dismissing the action, the plaintiff appealed.

Don C. Young for plaintiff, appellant.

Harkins, Van Winkle, Walton & Buck for defendant, appellee.

HIGGINS, J. The outcome of this case in the trial below was made to depend upon the validity of the quitclaim deed signed, acknowledged and delivered on 8 September 1944, by Beatrice Marie Field to Henry Field. The examining or certifying officer before whom the execution of the deed was acknowledged did not take the privy examination of the grantor and did not certify that "it appeared to the satisfaction of such officer that the wife freely executed such contract and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her." Such were the requirements of the statute in effect at the time the deed was executed in order that a married woman might pass title to her husband to any part of her real estate. It may be noted that the privy examination of the wife was made unnecessary and the form of the further certificate was slightly changed by Chapter 73, Session Laws 1945 of the North Carolina General Assembly, ratified on 7 February 1945. Compliance with the statutory requirement in effect at the time the deed was executed was necessary to its validity. Failure to comply with the requirements rendered the deed of a married woman to her husband absolutely void. *Butler v. Butler,* 169 N.C. 584, 86 S.E. 507; *Caldwell v. Blount,* 193 N.C. 560, 137 S.E. 573.

It is conceded both in the briefs and on the argument here that the deed to Henry Field was not executed in the formality required in the case of a deed from a married woman to her husband. It is conceded, also, that if the deed was executed after the decree of divorce was entered in the Chancery Division of the Circuit Court of Wayne County, Michigan, then the certificate of the examining officer is in proper form and the

deed would be valid to pass title to the plaintiff's interest in the land in controversy. It may be conceded, also, if the deed was executed and delivered before the decree of divorce was entered, the deed would be void and would not pass title.

The defendant sets up as a defense to plaintiff's action the property settlement in the divorce decree, contending the decree gave to Henry Field the land in controversy in consideration of the payment by him of $500.00 in cash to the plaintiff; that the plaintiff is, therefore, estopped to deny title of the defendant, his grantor. The answer is that the Circuit Court of Wayne County, Michigan, was without power to enter any decree affecting title to land in North Carolina and to the extent the decree attempted to do so, it is void. *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27, and cases there cited.

The evidence in the case was conflicting as to the time of the execution and delivery of the plaintiff's deed to Henry Field. According to the plaintiff's evidence the deed was executed and delivered in Mr. DeWitt's office before the divorce decree had been entered. According to the defendant's evidence the deed was witnessed by Mr. Porter and delivered after the divorce had been granted. There is no evidence in the record indicating the deed was either executed or delivered at or during the hearing of the divorce proceeding. Notwithstanding the fact the deed and the certificate of acknowledgment recite that Beatrice Marie Field is a single woman, the former wife of Henry Field, all the evidence shows the divorce decree and the deed were prepared by the lawyers in anticipation of the divorce and before it was actually granted.

After delivering a clear, accurate and comprehensive charge on all other aspects of the case, the judge charged the jury as follows:

"(a) The Court further instructs you that if you find that the quit-claim deed which is in evidence in this cause from this plaintiff to Henry Field, purporting to convey the property described in the complaint, was signed by her and delivered to the grantee therein or his representative as a simultaneous transaction, that is, the granting of the divorce and the signing and delivery of the quit-claim deed occurred at or approximately the same time with the intention of the parties, that all of the actions be performed by all the parties as one transaction—simultaneous—then the Court instructs you that the deed in question would be a valid instrument and would transfer whatever title this plaintiff had to Henry Field; . . ."

The necessity for the certificate of acknowledgment in the manner provided for married women continued up to the moment the divorce decree was entered and became effective. Thereafter the plaintiff was free to contract as if she were unmarried. It is not enough for the wife to execute a deed without the certificate required of married women *"at or*

approximately the same time as her divorce decree is granted." She must be free *before* she executes and delivers the deed.

The evidence in the case presented a clear-cut question of fact. If the deed was executed before the divorce, it is void. If it was executed simultaneously with the divorce, it is void. If it was executed after the divorce, it is valid. The judge so should have instructed the jury. The instruction that if the signing and delivery of the deed and the granting of the divorce occurred at or approximately the same time with the intention of the parties that all of the actions be performed by all the parties as one transaction—simultaneous—that the deed in question would be valid, was erroneous.

This record does not present, and we do not decide, the question as to whether a deed executed by a married woman before divorce, and void for failure to comply with the statutory requirements as to its execution, can become valid by a delivery after divorce.

For the error in the charge, it is ordered there be a

New trial.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA ON RELATION OF CHARLIE GARLAND, ADMINISTRATOR OF THE ESTATE OF MOSES GARLAND, DECEASED, v. MARY F. GATEWOOD, ADMINISTRATRIX OF J. Y. GATEWOOD, DECEASED, TOM BUCK, DEPUTY SHERIFF, PRIVATE J. R. HARRIS, STATE HIGHWAY PATROLMAN, NATIONAL SURETY CORPORATION AND ST. PAUL MERCURY INDEMNITY COMPANY.

(Filed 9 March, 1955.)

1. **Negligence § 17—**

In an action to recover for negligence, the burden rests on plaintiff to establish a negligent act or omission and that such act or omission proximately caused the injury or death.

2. **Negligence § 9—**

In order to be actionable, negligence must constitute the proximate cause of injury, and foreseeability is an essential element of proximate cause.

3. **Convicts and Prisoners § 4—Any negligence in failing to take proper precaution to prevent escape held not proximate cause of prisoner's death from being struck on railroad tracks.**

The evidence tended to show that after intestate was arrested, handcuffed, and placed in a patrol car, he was left unattended in a drunken state, that he left the car, that after being apprised of his departure, the officers failed to look for him, that he went to a filling station and asked

to be taken to his employer's house for the purpose of arranging bail but was refused, and that his mutilated body was found the next morning on the railroad tracks between the filling station and his employer's house. *Held:* Even conceding that the officers were negligent in failing to guard intestate, or in failing to search for him immediately when they heard he had escaped, or in any other respect, such negligence was not the proximate cause of intestate's death, since the circumstances resulting in intestate's death were not reasonably foreseeable.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Sharp, Special Judge,* October Civil Term 1954 of CASWELL.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate.

Plaintiff's evidence tended to show the following facts: About 8:00 or 8:30 p.m. on 8 August 1952 plaintiff's intestate Moses Garland was arrested without a warrant by Deputy Sheriff Tom Buck and State Highway Patrolman J. R. Harris on a charge of public drunkenness. At the time of his arrest Moses Garland was standing outside of a filling station located at the intersection of N. C. Highways 57 and 119 in Semora. Garland was handcuffed by Buck, and placed in Harris' patrol car, which was parked near the filling station. They told him to stay in the car. The officers then proceeded to check traffic: they stood in about the middle of the highway in front of the filling station twenty-five feet from the car in which Garland was.

In a brief time after the officers left Garland, he got out of the car, and was seen going along Highway 119. The officers were told Garland was out of the car. Buck said: "It don't make any difference; we'll get him." They did not look for him. One witness said Garland "did not walk too good anyhow."

Victoria McCain lives at Semora. About 9:00 p.m. this night she saw Garland in her yard. He was drunk, and had handcuffs on. He said he was looking for someone to carry him to his employer Mr. Fuller, because he wanted him to stand his bail so he would not have to spend the night in jail. Victoria McCain told him to go back to the filling station, and get Buck to carry him to Mr. Fuller.

Between 9:00 and 9:15 p.m. this night Garland came to Willard Brandon's filling station, located on Highway 57 just a little west from the filling station where he was arrested. He was still handcuffed. About 50 yards back of Brandon's filling station is the railroad track of the Atlantic and Danville R. R. Company. Mr. Fuller lives in Semora northeast of Brandon's filling station; and a person would have to cross the railroad track from Brandon's place of business to get to his house. Gar-

land asked Brandon to carry him to Fuller, and he refused to do so. When Garland left Brandon's, he went across Highway 57 away from the railroad track.

On the following morning Moses Garland was found dead on the railroad tracks of the Atlantic and Danville R. R. Co. near the depot at Semora. His mutilated body was scattered along the tracks for a distance of 30 to 40 feet, with the handcuffs on his wrists. The crew of the morning train saw the mutilated body upon arrival. The body was about one-quarter of a mile from where Garland was arrested and from Brandon's filling station. A train was scheduled to pass over the railroad tracks about 9:40 p.m. on 8 August 1952.

At the close of the plaintiff's evidence, the court allowed defendants' motions for judgment of nonsuit.

From the judgment of involuntary nonsuit the plaintiff appeals, assigning error.

C. O. Pearson, E. H. Gadsden, and William A. Marsh, Jr., for Plaintiff, Appellant.

John W. Hardy for J. R. Harris.

Jordan & Wright and Charles E. Nichols for St. Paul Mercury Indemnity Company.

PARKER, J. This case is based on negligence. The burden rests on the plaintiff to produce evidence sufficient to establish the two essential elements of actionable negligence: one, that the defendants were guilty of a negligent act or omission; and two, that such act or omission proximately caused the death of decedent. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670.

"Negligence does not create liability unless it is the proximate cause of injury, and foreseeability is an essential of proximate cause." *Wood v. Telephone Co.,* 228 N.C. 605, 46 S.E. 2d 717.

Moses Garland had not been in the custody of the officers for sometime before he was killed. Cases concerned with injuries to prisoners while in *custody* of a sheriff or officer of the law, like *Dunn v. Swanson,* 217 N.C. 279, 7 S.E. 2d 563, are not in point. Did he step in front of the train, did he attempt to board a moving train, or was he down on the railroad tracks, when struck? The evidence gives no answer. Had he partially or practically sobered up before death? We do not know, for the Record is silent as to the hour of his death. The exact circumstances of his death are left in the realm of speculation and conjecture. Even if we concede, which we do not, that the officers were negligent in not locking the doors of the patrol car to prevent Garland getting out, or in not keeping him guarded in the car, or in not searching immediately for him when they

heard he had escaped, or in any other respect, we are of opinion, and so hold, that such negligence was not a proximate cause of Moses Garland's untimely death, that is "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84.

There was no error in entering the judgment of nonsuit, and it is therefore

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

STATE v. ANDREW JUNE FAULKNER.

(Filed 9 March, 1955.)

1. Arrest § 3: Criminal Law § 56—

A warrant which charges that defendant "unlawfully and wilfully, did resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office . . ." is insufficient to charge the offense of resisting an officer, and defendant's motion in arrest of judgment must be allowed.

2. Indictment and Warrant § 9—

The use of the disjunctive "or" instead of the conjunctive "and" is disapproved.

3. Indictment and Warrant § 13: Criminal Law § 56—

A defect appearing in a warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment, and may not be presented by motion to nonsuit.

4. Criminal Law § 79—

An assignment of error brought forward in the brief but in support of which no argument is stated or authority cited upon any germane ground, is deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

5. Criminal Law § 53b—

An instruction susceptible to the construction that defendant's evidence must raise a question as to his guilt beyond a reasonable doubt, must be held for prejudicial error.

6. Criminal Law § 81c (2)—

An erroneous instruction on the burden of proof is not corrected by prior and subsequent correct instructions upon the point.

7. Criminal Law § 56—

The legal effect of arresting the judgment is to vacate the verdict and sentence, and the State may thereafter proceed upon a new and sufficient warrant or bill of indictment if it so desires.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Clarkson, J.*, August Term 1954 of UNION.

Criminal prosecution upon a warrant and bill of indictment, which charges, without objection, were consolidated for trial.

E. L. Dutton, a member of the State Highway Patrol, made a complaint under oath to the deputy clerk of the Recorder's Court of Union County that on 25 April 1954 "E. L. Dutton, S. H. P., . . . unlawfully and wilfully, did resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office . . ." The warrant issued upon the complaint commanded the arrest of June Faulkner, the defendant. On this warrant the defendant was tried in the Recorder's Court, and from a judgment of imprisonment there he appealed to the Superior Court, where he was tried *de novo*.

The bill of indictment charged the defendant Andrew June Faulkner on 24 April 1954 with feloniously assaulting E. L. Dutton with a deadly weapon, to wit: a knife, with felonious intent to kill and murder E. L. Dutton and inflicting upon him serious injuries not resulting in death by cutting him about the head, face, body and limbs.

Plea of Not Guilty. Verdict guilty as charged. Judgment: imprisonment in the common jail of the county for a period of three to four years, and assigned to work the public roads.

The defendant appeals, assigning error.

Harry McMullan, Attorney General, and Ralph Moody, Assistant Attorney-General, for the State.

W. B. Nivens for Defendant, Appellant.

PARKER, J. In this Court the defendant made a motion for arrest of judgment on the charge in the warrant upon the alleged ground that the warrant is void, because in the complaint attached to the warrant Dutton's name is written, where the defendant's should have been.

In the recent case of *S. v. Scott, ante,* 178, 84 S.E. 2d 654, an indictment charging that the defendant did "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office . . ." was held insufficient to charge the offense of resisting an officer. Upon the authority of that case we hold that the warrant here does not charge the offense of resisting an officer, that the motion in arrest of judg-

ment raises the question for decision, and it is ordered that the judgment be arrested.

Therefore, it is not necessary for us to decide whether the warrant is void on the ground alleged by defendant. On this point see *S. v. Hammonds, ante,* 226, 85 S.E. 2d 133, and the cases therein cited.

The use of the word "or" in the warrant, to wit: "resist, delay *or* obstruct a public officer in discharging *or* attempting to discharge, etc.," instead of the word "and" is bad pleading. *S. v. Williams,* 210 N.C. 159, 185 S.E. 661; 42 C.J.S., Indictments and Informations, Sec. 101.

The defendant assigns as error the failure of the lower court to allow his motion for judgment of nonsuit. This exception is brought forward by the defendant, but in support of it no reason or argument is stated or authority cited, except argument that the warrant is void. We have said in *S. v. Tola,* 222 N.C. 406, 23 S.E. 2d 321, "a defect appearing in a warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment." It would seem that the defendant by virtue of Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, has abandoned his exception as to the insufficiency of the evidence to carry the case to the jury.

The defendant assigns as error this part of the charge: "If the defendant's evidence raised a reasonable doubt as to his guilt or if such evidence caused to linger in the minds of the jury from the original presumption of innocence *beyond* a reasonable doubt as to his guilt or, if upon all the evidence, the jury entertained a reasonable doubt as to his guilt, the defendant is entitled to a verdict of not guilty, although the defendant's evidence may not have *justified* the jury of the matters and justifications or excuse." (Italics ours.)

It is evident that the trial court in this part of its charge intended to quote what we said in *S. v. Carver,* 213 N.C. 150, 195 S.E. 349, which has been quoted with approval in *S. v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147. The words used in the charge are the same as those in the *Carver Case* with these exceptions: one, in the charge the word "beyond" is inserted; two, in the charge the word "justified" is used instead of "satisfied," and three, the charge used the words, "of the matters and justifications or excuse," when the Court's words were "of matters in justification or excuse."

Just before the part of the charge excepted to above the trial court correctly charged as follows: "Now, there is no burden on the defendant at all in this case. The burden rests on the State to satisfy you from the evidence and beyond a reasonable doubt as to all of the elements." But when the judge went on to charge that if the defendant's "evidence caused to linger in the minds of the jury from the original presumption of inno-

cence beyond a reasonable doubt as to his guilt" he would be entitled to a verdict of acquittal, it would seem that those words meant that the defendant's evidence must raise not a reasonable doubt, but beyond a reasonable doubt as to his guilt, before he could be acquitted. That, of course, is not the law and the error is prejudicial. *S. v. Cephus, supra.* The statement of the law correctly before and later in the part of the charge assigned as error, except as to the unfortunate use of the word "justified" instead of "satisfied," does not cure the error. *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313.

For error in the charge, there must be a new trial in the case of a felonious assault.

In the case of resisting arrest the legal effect of arresting the judgment is to vacate the verdict and sentence, and the State may proceed against the defendant, if it so desires, upon a new and sufficient warrant or bill of indictment. *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154; *S. v. Sherrill,* 82 N.C. 695; 15 Am. Jur., Criminal Law, Sec. 441.

It is therefore ordered.

In the Resisting an Officer Case—Judgment Arrested.

In the Felonious Assault Case—New Trial.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

F. C. PARKER, SR., AND F. C. PARKER, JR., TRADING AS F. C. PARKER & SON, A PARTNERSHIP, v. D. M. ROBERSON AND ETHEL ROBERSON.

(Filed 9 March, 1955.)

Judgments § 20—

The rule that a judgment is *in fieri* only during the term relates to judicial and not to clerical errors therein, and at a subsequent term another judge of the Superior Court has jurisdiction to correct an error in the judgment, which the record itself discloses to be a clerical error, in order to make the record speak the truth.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Carr, J.,* December Term, 1954, of MARTIN.

Action to recover balance owing on promissory notes; and, ancillary thereto, claim and delivery proceedings to recover possession of personal property covered by chattel mortgage held by plaintiffs as security.

At September Term, 1953, after jury trial, judgment for plaintiffs was entered by Bone, J. Defendants excepted and appealed, but did not perfect their appeal.

At March Term, 1954, based on his finding that defendants had abandoned their appeal, Morris, J., entered judgment providing: "Now, therefore, it is ordered, adjudged, and decreed that said *action* be dismissed, and that the plaintiffs recover their costs of the defendants, to be taxed by the Clerk." (Italics added.)

At December Term, 1954, Carr, J., upon motion and after notice, entered judgment, which corrected the judgment entered at March Term, 1954, by striking therefrom the word "action" and substituting therefor the word "appeal." Defendants excepted and appealed. Their only assignment of error is directed to said judgment of Carr, J.

R. L. Coburn for plaintiffs, appellees.

Peel & Peel for defendants, appellants.

PER CURIAM. "The rule that a judgment is *in fieri* during the term only and cannot be altered after adjournment relates to judicial and not to clerical errors therein." *Land Bank v. Davis,* 215 N.C. 100, 1 S.E. 2d 350.

"The power of the Superior Court, on motion in the cause after notice, to correct clerical errors in the judgment and to make the record speak the truth may not be denied." *Land Bank v. Cherry,* 227 N.C. 105, 40 S.E. 2d 799.

The error in the judgment entered at March Term, 1954, plainly disclosed by the record itself, is an obvious clerical error. Judge Carr's judgment was the appropriate procedure to correct such error. The assignment of error, upon which defendants' appeal is based, is wholly without merit. The judgment of Judge Carr is

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

GEORGE W. PATRICK, ADMINISTRATOR OF THE ESTATE OF JOHNNIE PATRICK, DECEASED, v. PILOT LIFE INSURANCE COMPANY.

(Filed 9 March, 1955.)

Insurance § 38—

Where an accident and health policy excludes from its coverage death of the insured caused by intentional act of any person, evidence establishing that insured was intentionally shot and killed by his wife justifies nonsuit. G.S. 58-253 (6), referring to death by unlawful conduct of insured, is not applicable, and the fact that the exclusion clause in the policy is not in the terms of that statute is immaterial.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Carr, J.*, October 1954 Term, WASHINGTON.

Civil action in which plaintiff administrator of Johnnie Patrick seeks to recover $1,200.00 under a health and accident insurance policy No. 2364820, issued by the defendant on 26 February, 1951. The policy obligated the defendant, under specified conditions, to pay to the beneficiary $1,000.00, the face amount of the policy, plus an additional $100.00 each year for a term of 10 years. The policy contained the following: "This policy does not cover death or injury resulting: (2) From the intentional act of any person." The above exclusion clause was pleaded as a bar to plaintiff's right to recover.

By consent, a jury was waived. The judge heard the case without a jury. Plaintiff's counsel admitted, and the court found as a fact: "That on the fourth day of March, 1953, without provocation, either by words or actions on the part of said Johnnie W. Patrick, his wife, Dorothy L. Patrick, intentionally shot and killed the said Johnnie W. Patrick; and that the said Dorothy L. Patrick was tried in the Superior Court of Washington County, January 1954 Term, convicted of the crime of manslaughter and sentenced by the court to a term of 10 years in State Prison." The court held that the death of insured was not covered by the policy and entered judgment denying recovery. Plaintiff excepted and appealed.

P. H. Bell and Charles V. Bell for plaintiff, appellant.

Wharton & Wharton and Norman & Rodman for defendant, appellee.

PER CURIAM. The plaintiff seeks to get around the exclusion clause in the policy by claiming the clause is contrary to the optional standard provision as set out in G.S. 58-253 (6). The section cited refers to the unlawful conduct of the insured. In this case it is admitted that the insured was without fault. The section cited, therefore, has no applica-

tion. On the authority of *Whitaker v. Insurance Co.*, 213 N.C. 376, 196 S.E. 328, the judgment is

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

STATE v. CECIL CARL NICHOLS.

(Filed 9 March, 1955.)

Bigamy and Bigamous Cohabitation § 3—

In a prosecution for bigamy, it is not error to exclude defendant's testimony that he had employed a lawyer to obtain a divorce for him, was informed that it would require about thirty days, and that after the expiration of that period he contracted the second marriage, believing that he was divorced.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Paul, Special Judge*, September Term, 1954, of WILSON.

Criminal action tried upon a bill of indictment charging the defendant, he being already married, feloniously did contract a marriage with Betty Jean Ruffin, outside of this State and thereafter feloniously and bigamously did cohabit with the said Betty Jean Ruffin in the State of North Carolina.

The State's evidence shows that the defendant married Dorothy Reasons Nichols on 14 January, 1954, in Wilson, North Carolina, and that they lived together as man and wife for six weeks; that the defendant thereafter, on 19 May, 1954, married Betty Jean Ruffin in Emporia, Virginia, and since that time she and the defendant have been living together in Wilson, North Carolina.

The defendant testified that he had not obtained a divorce from his first wife.

The jury returned a verdict of guilty, and from the judgment entered thereupon the defendant appeals, assigning error.

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

W. D. P. Sharpe, Jr., for defendant.

PER CURIAM. The defendant excepts to and assigns as error the refusal of the court below to permit him to testify to the effect that he employed a lawyer to obtain a divorce for him and was informed that it would require about thirty days to do so; that after the expiration of thirty days from that time, he went home and got married, believing that he was divorced. The exception is without merit.

In the trial below we find no error.

No error.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

ARTHUR M. DEBRUHL AND WIFE, JANIE DEBRUHL, v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 9 March, 1955.)

Appeal and Error § 2—

An appeal from an order entered on pre-trial hearing specifying the issue to be submitted to the jury, is premature and will be dismissed without prejudice.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Moore, Dan K., J.*, at 4 October 1954 Civil Term, of BUNCOMBE.

Special proceeding in the nature of condemnation to assess damages by reason of appropriation by defendant of petitioners' home and adjoining land for highway purposes.

An appeal having been taken from report of Commissioners, the Judge of Superior Court, on pre-trial hearing, entered an order specifying the issue to be submitted to the jury in the trial of the proceeding. Petitioners excepted to the order, and gave notice of appeal therefrom to Supreme Court, assigning the order as error.

Sanford W. Brown and Richard L. Griffin for Petitioners, Appellants.

R. Brookes Peters, General Counsel, and McLean, Elmore & Martin, Associate Counsel, for Respondent, Appellee.

PER CURIAM. It appearing upon the face of the record that the order from which appeal is taken is interlocutory, from which appeal does not lie, the appeal will be dismissed, but without prejudice (1) to petitioners'

exception to the order, or (2) to their rights in accordance with law and procedure in such cases.

Appeal dismissed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

LILLIAN PHILLIPS v. CLYDE PHILLIPS.

(Filed 9 March, 1955.)

APPEAL by defendant from *Nettles, J.*, at October Term 1954, of RUTHERFORD.

Civil action for divorce from bed and board on ground of abandonment, G.S. 50-7.1, heard, after due notice, upon application of plaintiff for alimony *pendente lite*, G.S. 50-15. Upon the pleadings and affidavit filed the court found facts, and made an allotment.

Defendant appeals therefrom to Supreme Court, and assigns error.

A. Clyde Tomblin for Plaintiff, Appellee.

Hamrick & Hamrick for Defendant, Appellant.

PER CURIAM. Perusal of the record of case on appeal reveals (1) evidence sufficient to support the findings of fact made by the court, and (2) facts found sufficient to support the allotment of alimony. No error appears therein. Hence, judgment on facts found is

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

O. F. YOUNG v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, THE BEAVERDAM WATER AND SEWER DISTRICT, A MUNICIPAL CORPORATION, AND JOHN C. VANCE, COKE CANDLER AND GEORGE D. YOUNG, COUNTY COMMISSIONERS, AS TRUSTEES OF THE BEAVERDAM WATER AND SEWER DISTRICT.

(Filed 23 March, 1955.)

1. Waters and Water Courses § 1—

Land must be in actual contact with a stream in order for the owner of the land to have riparian rights therein, and mere proximity without contact is insufficient.

2. Same—

In this action for invasion of riparian rights along a natural stream, plaintiff lessee alleged title to the land in his lessor by deed containing a general description of the land as being in a named township "and on Beaverdam Creek," with particular description by course and distance, which particular description made no reference to the creek. *Held:* The allegations are insufficient to show that the land was in actual contact with the creek so as to give plaintiff's lessor riparian rights therein.

3. Boundaries § 2—

Where a deed contains a specific description by metes and bounds, words in the general description ordinarily may not vary or enlarge the specific description.

4. Pleadings § 24—

Proof without allegation is unavailing.

5. Waters and Water Courses § 1—

If riparian rights attached to a small tract of land, whether such rights extend to a larger tract acquired by the owner of the first tract from a different source, *quaere?*

6. Same—

Plaintiff alleged that his lessor was granted authority and license by a riparian owner to locate an intake for an irrigation system in the creek and to use the water of the creek for irrigation purposes. *Held:* In the absence of evidence in support of such allegation, plaintiff may not assert riparian rights under such license, even if it be conceded that a riparian owner may transfer his riparian rights to a nonriparian owner.

7. Waters and Water Courses § 1½—

Ordinarily, water rights may be acquired, even by a nonriparian owner, by adverse user which is visible, notorious, continuous and adverse under claim of right for the period required to acquire rights in real property adversely to the owner.

8. Same—

Allegations to the effect that plaintiff and his predecessor had pumped water from a certain creek for the purpose of irrigating crops for a number of years, and that the existence, location, and use of the said irrigation

system was obvious and well-known, is insufficient to allege the right to use the waters of the creek by prescription in the absence of any allegation or proof that his user was adverse.

9. Municipal Corporations § 15b: Waters and Water Courses § 3—

Where municipal corporations negligently permit sewage to pollute the waters of a creek, they may be held liable by riparian owners for damages for the invasion of their rights to have the stream flow in its natural purity, and damages to nonriparian owners for invasion of property rights by the actual deposit of sewage on their land or the emanation of foul odors which invade the land in natural course.

10. Same—

Plaintiff's allegation and evidence were to the effect that he operated an overhead irrigating system for his crops, using waters of a natural stream, that defendant municipalities negligently allowed raw sewage to be discharged into the stream and that plaintiff's pumps and overhead irrigating system pumped the sewage from the creek over plaintiff's land, so that the crops grown thereon had to be destroyed. *Held:* Riparian rights in plaintiff not being established, the allegations and evidence fail to show an invasion of plaintiff's property as a result of the acts of defendants complained of, since the deposit of the sewage on plaintiff's land was the result of the operation of the irrigating system and not the acts of defendants.

11. Pleadings § 24—

Both allegation and proof are necessary, and plaintiff, if he is to succeed at all, must do so on the case set up in his complaint.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by both defendants from *Dan K. Moore, J.*, at Regular October Term 1954 of BUNCOMBE.

Civil action to recover damages for the loss of a crop of cabbages and collards growing on leased land by reason of the negligent maintenance and use of a sewer line along the banks of Beaverdam Creek by both defendants, which permitted live human sewage and poisonous and deleterious substances to be discharged into the waters of the Creek, thereby contaminating and polluting its waters used by plaintiff to irrigate by overhead irrigation his crop of vegetables.

Plaintiff's evidence tended to show these facts: During the year 1953 he had under lease from R. F. Young, his father, 12 acres of land. Three acres, more or less, of this land R. F. Young had purchased in 1915 from J. H. Brittain and Forrest Brittain. South of this 3 acre tract R. F. Young owned 11 or 12 acres, which he had bought from S. K. Young and wife. The land bought from the Brittains and Youngs was the land leased to plaintiff. R. F. Young also owned about an acre of woodland on the road adjoining this land which he purchased from Verne Rhoades. On the 3 acre tract of land was a pump house and irrigation system owned

by R. F. Young and leased to plaintiff. From the pump house to the waters of Beaverdam Creek is somewhere in the neighborhood of 100 feet. A standard gauge railroad track runs between the 3 acre tract and Beaverdam Creek. From the pump house to the railroad track is 25 or 30 feet, maybe further. The railroad track is on the south side of the Creek. Pipes extended from the pump house to the waters of Beaverdam Creek and from the pumphouse over the 12 acres of land to irrigate it with waters pumped from the Creek. The pump is down at the foot of the hill. The overhead irrigation system is up on the top of the hill. The cabbages were up on the hill from the pump house. It was overhead irrigation, and from the pipes water was sprayed or sprinkled over the crops. R. F. Young had used this irrigation system continually for 30 or 35 years in growing vegetables on his land, twelve acres of which was "cultivatable truck farm land."

The City of Asheville—hereafter called the City—and The Beaverdam Water and Sewer District—hereafter called the District—are municipal corporations, which since 1929 have jointly maintained, operated and used a sewer line which runs along the bank of Beaverdam Creek, sometimes 10, 15 or 20 feet from the bank and sometimes right against the bank. The intake of the pipe of the irrigation system used by plaintiff was near the center of the Creek, and its closest point to the sewer line of the defendants was 6 or 8 feet. This sewer line ran along the side of the Creek, as it passed by plaintiff's intake pipe.

In the early part of 1953 plaintiff made a bean crop on the leased land. He saw no sewage in the waters of Beaverdam Creek, when this crop was made. About 1 August 1953 plaintiff set out on this leased land about 150,000 cabbage plants and about 50,000 collard plants. By 10 August all these plants were in the ground. The normal growing period from the time of setting out to maturity of his type of cabbages was 60 days and of his type of collards was 45 to 50 days. July, August and September 1953 was a period of extreme drought. Plaintiff could not have grown his cabbages and collards without irrigating them by water from Beaverdam Creek: no other water was available to him. In August he used the water by irrigation from Beaverdam Creek. He observed nothing wrong with the waters of the Creek that month. The last of August his cabbages and collards were growing and maturing properly.

On 1 September 1953 his irrigation pipes began stopping up. He went to Beaverdam Creek. It was full of sewage: running raw human sewage. He had had no trouble of that kind prior to that day. On this day sewage was sprayed on his vegetables. In September and October he had continuous trouble with the pipes of the irrigation system stopping up with sewage from the waters of the Creek, while irrigating his vegetables. Some days there would be lots of sewage coming from the sewer line into the

Creek, some days not so much: at times the whole sewage line came into the Creek.

Both defendants used the sewer line when it was old and worn out, had holes in the line and had the manholes partially filled and obstructed, which permitted the sewage to leak and flow from the line into the waters of Beaverdam Creek. That both defendants knew of this condition. The defendants would repair the holes in the sewer line, and new ones would come before their employees could get back to the city. A witness for the defendants testified that in September and October 1953 there were a number of breaks in the sewer line; that essentially all the liquid in Beaverdam Creek at that time was sewage, and the condition there was a nuisance.

Because plaintiff had sprayed or sprinkled the polluted and contaminated waters of Beaverdam Creek upon his crop of cabbages and collards during August, September and October, an action was brought against him and his father by L. Y. Ballentine, Commissioner of Agriculture of the State of North Carolina, to prohibit the sale or disposition of the cabbages and collards. The court issued an injunction as requested, whereupon plaintiff cut up his cabbages and collards, and disked them into the land, resulting in the loss of his entire crop, and a loss to him of $17,000.00.

The following issues were submitted to the jury, and answered as appears below:

"1. Was the plaintiff's property damaged by a nuisance created by the negligence of the defendants on Beaverdam Creek, as alleged in the Complaint? Answer: YES.

"2. Was the plaintiff guilty of contributory negligence, as alleged in the Answer? Answer: No.

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? Answer: $4500.00."

From judgment signed in accordance with the verdict both defendants appealed, assigning error.

Williams & Williams for Plaintiff, Appellee.

Robert W. Wells and George H. Wright for Defendant, City of Asheville, Appellant.

Roy A. Taylor and Don C. Young for Defendant, The Beaverdam Water and Sewer District, Appellant.

PARKER, J. The defendants' sole assignments of error are the refusal of the Trial Court to sustain their separate motions for judgments of nonsuit made at the close of plaintiff's evidence, and renewed at the close of all the evidence.

The defendants have filed a joint brief. Their argument that the action should have been nonsuited is based upon three grounds. First, that the plaintiff has neither alleged, nor offered evidence tending to show that his lessor was a riparian owner, or had acquired in some way riparian rights in the waters of Beaverdam Creek, and if they, or either of them polluted the waters of the Creek, they breached no duty as to him. Second, if there was a breach of duty, it was not the proximate cause of plaintiff's damage. And third, if they, or either of them, proximately caused plaintiff's damages, then the plaintiff is barred from recovery by his contributory negligence as a matter of law.

A riparian proprietor is an owner of land in actual contact with the water; proximity without contact is insufficient. An indispensable requisite of the riparian doctrine is actual contact of land with water. *Illinois C. R. Co. v. Illinois,* 146 U.S. 387, 36 L. Ed. 1018 at p. 1040; *Stratbucker v. Junge,* 153 Neb. 885, 46 N.W. 2d 486; *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N.W. 781, 60 L.R.A. 889, 108 Am. St. Rep. 647; *Hilt v. Weber,* 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238; 56 Am. Jur., Waters, 731; 67 C.J., Waters, 685, Coulson & Forbes, Waters and Land Drainage, 5th Ed. pp. 110-111.

In *Lyon v. Fishmongers,* (1876) L. R. 1 App. Cas. 662, p. 683, *Lord Selborne* said: "It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream . . ."

Plaintiff in his Complaint does not allege the description of the 11 or 12 acre tract of land R. F. Young purchased from S. K. Young and wife. The sole description of the location of the land leased by plaintiff is of the 3-acre tract, and is contained in Paragraph 12 of his Complaint reading as follows:

"That on said 1st day of September, 1953, this plaintiff had under lease from R. F. Young a certain parcel or tract of land consisting of 12 acres, a part of which said acreage was deeded to the said R. F. Young by J. H. Brittain and Forrest Brittain by deed dated the 5th day of December, 1915, and recorded in the Office of the Register of Deeds of Buncombe County in Deed Book 205, page 168, and more particularly described as follows:

"A certain piece, parcel or lot of land, situate, lying and being in Asheville Township and Beaverdam Ward, and on Beaverdam Creek and joining lands of J. H. Brittain and R. F. Young, and bounded and more particularly described as follows:

"BEGINNING at a stake on west side of branch, said stake being the 3rd corner from spring and the J. H. Brittain Home Tract, also R. F. Young's corner, and runs with said Young's naked line S. 67 deg. 30' W. 495 feet to a Black Oak; thence with the Vance old Line N. 10 deg. 40' 292.6 to stake 25 ft. N. of the middle of the Craggy Mt. RR; thence

parallel to 25 ft. from the center of said RR as follows: N. 35 deg. E. 100 ft. N. 50 deg. E. 50 ft. N. 70 deg. E. 50 ft. E. 100 ft. South 86 deg. 30' E. 185 ft. to a stake situated 25 ft. from the middle of said RR; thence South 4 deg. 191½ feet to the BEGINNING, containing three acres more or less."

Plaintiff says in his Brief that he has alleged a riparian ownership in Paragraphs 12 and 16 of his Complaint. Paragraph 16 reads as follows:

"That the aforementioned property and the irrigation system located thereon lie below and to the west or northwest of the aforementioned pollution and contamination and that as a result thereof the aforementioned polluted waters of Beaverdam Creek, on or about the 1st day of September, 1953, were picked up by said irrigation system and sprayed upon the crops belonging to this plaintiff and being grown upon the aforementioned 12 acres, including a large quantity of collards and cabbages which this plaintiff was producing for public sale as his livelihood."

Plaintiff's evidence as to the location in reference to Beaverdam Creek of the land leased by him from R. F. Young comes from his witness R. F. Young, largely on cross-examination, and himself. R. F. Young's testimony tends to show these facts: He owns 20 acres of land in the Newbridge area on Beaverdam Creek. He used the acreage on the Creek to grow vegetables. On cross-examination by the City he said he bought the 3 acre tract of land from the Brittains, the 11 or 12 acres south of the three acres from S. K. Young and wife, and about one acre of woodland on the road from Verne Rhoades. On cross-examination by the District he testified: "I know about the railroad that runs down to Elk Mountain and the Creek. That railroad runs right between my three-acre tract and the Creek. It is a standard gauge railroad. I didn't say there was no cabbages on this three-acre tract; there was. The pump house is down at the foot of the hill. The cabbages was up on the hill from the pump house. There was a water line running from the pump house up to the top of the hill. This overhead irrigation system is up on top of the hill. The pump is down at the foot of the hill. The water line runs from the pump house to near the top of the hill, then starts the overhead irrigation. The pump house is about 100 yards or something like that up to and from where the irrigation starts. The railroad I speak of was between my land and the pump house and the creek. Mr. Verne Rhoades owns that land in there between my three acres and the creek, that is, last year he owned it, and he still owns it. I guess my property line runs to the creek, as well as I know, with just the railroad between us there. Q. You said a moment ago that Verne Rhoades owns the land between your property line and— A. (Interrupting) On the other side of the creek. I don't know whether my deed calls for 25 feet of the railroad. Q. Doesn't your deed call for 25 feet from the railroad and running parallel with it? A. There is a

deed. I don't know whether it calls for the creek or the center of the railroad. You can read it. My property goes on down the other side over there. The only property that I have got there near that was the three acres that I got from Mr. Brittain, that is the nearest at that point. Whatever the Brittain deed says is what I have there." On redirect-examination he said: "The Verne Rhoades property runs up and down the creek; it is on the north side. My property is more on the south side. This is my deed for the Brittain property. Mr. Verne Rhoades has owned the north bank for approximately 15 or 20 years. Q. During the time that that pump has been in have you been in continuous possession of it all that time? Objection—overruled—exception. EXCEPTION No. 11. A. Yes, I have been in possession of it." On recross-examination he said: "I have a fence between the pump house and the railroad to keep my stock in. Q. That fence goes along the northern line of your tract of land? A. It goes along the line of the railroad there. Q. It goes along your line? A. No, I don't know. It lacks quite a little bit of being on the line so far as I know."

Plaintiff's testimony is to this effect: In 1953 he leased from his father, R. F. Young, 12 acres of land "on Beaverdam Creek." On cross-examination by the City plaintiff said: "There is a railroad track just north of this 12 acre tract that I had under cultivation. That railroad track is between my twelve acres and the Creek; it comes to the tract that my father bought . . . From the pump house to the railroad tracks it is 25 or 30 feet, maybe further . . . I couldn't tell you exactly how far it is from the pump house to the Creek. It is somewhere in the neighborhood of 100 feet. Along the north side of the property under cultivation part of it is under fence and part of it is not. Part of the fence is on the south side of the railroad track, and part there is no fence. All the south side of the railroad, part is fenced and part is not."

The Complaint in the Ballentine Case against R. F. Young and plaintiff is plaintiff's Exhibit 3. No answer to this Complaint is in the Record. In that Complaint the land upon which plaintiff was growing cabbages and collards is described as "near Beaverdam Creek," and it further alleges "that said defendants through various mechanical devices and pipes are pumping water from Beaverdam Creek from a point approximately 800 feet from that area where the cabbages are being raised through a series of pipes to said area where the cabbages are being raised to irrigate same."

There is no evidence of the defendants of which the plaintiff can avail himself to show whether the land leased by him had actual contact with the water of Beaverdam Creek.

This Court said in *Von Herff v. Richardson*, 192 N.C. 595, 135 S.E. 533, in respect to description of land in a deed: "But as between two

descriptions, the law ordinarily prefers the specific to the general, or that which is more certain to that which is less certain."

The specific description in the deed of the 3 acre tract is not ambiguous or insufficient, nor is there a reference in the general description to a fuller and more accurate description of the land, so as to require the general description to control the specific description under the principles stated in *Lee v. McDonald,* 230 N.C. 517, 53 S.E. 2d 845; *Quelch v. Futch,* 172 N.C. 316, 90 S.E. 259.

In *Prentice v. R. R.,* 154 U.S. 164, 38 L. Ed. 947, the second headnote is: "Where, in a deed, there is a specific description, by metes and bounds, of the lands conveyed, other words therein intended to describe generally the same lands, do not vary or enlarge the specific description." See also *Lee v. McDonald, supra.*

The specific description of the 3 acre tract of land controls, and the boundary line called for in the specific description is the track of the railroad, and not Beaverdam Creek. Therefore, the plaintiff has not alleged that his lessor is a riparian proprietor, and he has no better rights than his lessor. See *Durham v. Cotton Mills,* 141 N.C. 615, at p. 627, 54 S.E. 453, where it is said: "They do not allege that the City of Durham is the owner of any part of the banks of that stream. . . ."

It is a serious question as to whether plaintiff's evidence tends to show that his lessor is a riparian proprietor. It is not necessary for us to decide that question, because proof without allegation is insufficient. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

If plaintiff had had *allegata* and *probata* that his lessor was a riparian proprietor as to the 3 acre tract of land, *quaere,* would this right extend or attach to the 11 or 12 acres R. F. Young purchased from S. K. Young and wife south of the 3 acre tract? 56 Am. Jur., Waters, 732; Anno. 14 A.L.R. 330; Anno. 54 A.L.R. 1411.

Paragraph 15 of plaintiff's Complaint reads as follows: "That in addition to the foregoing, this plaintiff's lessor, R. F. Young, procured and was granted authority and license by one Sol Carter, riparian owner of the north bank of said Beaverdam Creek at the location of said irrigation intake and pump house, to locate the intake for said irrigation system in said creek and to use the waters of said creek for irrigation purposes about the year 1935 and said authority and license has continued since said date and has been ratified from time to time by the successors in title of the said Sol Carter." Plaintiff has offered no evidence to support the allegations of this paragraph of his Complaint. If R. F. Young, plaintiff's lessor, was a riparian owner, why did plaintiff allege that R. F. Young procured from Sol Carter, a riparian owner, authority and license to use the waters of Beaverdam Creek? *Quaere,* can a riparian owner transfer his riparian rights to a nonriparian owner? *Mt. Shasta Power*

Corporation v. McArthur (Cal.), 292 P. 549; *Harvey Realty Co. v. Borough of Wallingford,* 111 Conn. 352, 150 A. 60; *Hendrix v. Roberts Marble Co.,* 175 Ga. 389, 165 S.E. 223.

Paragraphs 13 and 14 of plaintiff's Complaint are as follows:

"That located on said aforementioned 3-acre tract of land was a pump house and irrigating system owned by the said R. F. Young and leased to this plaintiff, by which for many years the said R. F. Young, or this plaintiff as lessee, had pumped waters from the aforementioned Beaverdam Creek onto the aforementioned three-acre tract and adjacent property owned by the said R. F. Young for the purpose of irrigating crops grown thereon.

"That said irrigation system located on said property and taking water from the aforementioned Beaverdam Creek, has been used by the said R. F. Young, or this plaintiff as lessee, for many years and its existence, location and use was well known to the defendants and their employees and representatives."

"It is generally recognized that, subject to certain exceptions and limitations hereinafter noted, title to water or a water right may be acquired by prescription or adverse user." 56 Am. Jur., Waters, Sec. 323. It seems that it is not necessary that a claimant to water rights by prescription or adverse user should be a riparian owner on the stream. 67 C.J., Waters, 953.

"The user on which a prescriptive right is claimed may be either by claimant himself or by one holding under him, such as a lessee or tenant." 67 C.J., Waters, 937-938.

The adverse user of water, in order to ripen into a right to use, must be visible, notorious, continuous, adverse and under a claim of right for the period required to acquire rights in real property adversely to the owner. 2 Farnham, Waters and Water Rights, Secs. 537-541; 56 Am. Jur., Waters, Sec. 326 *et seq.;* 67 C.J., Waters, Secs. 395-402.

It is said in 67 C. J., Waters, 1058: "Where plaintiff claims as appropriator, he should allege the fact of appropriation, describe the lands in connection with which or for the benefit of which his appropriation was made, and show the need of the water and the amount which he uses or to which he claims to be entitled."

In *Cannon v. A. C. L. RR.,* 97 S.C. 233, 81 S.E. 476, an allegation in the Complaint that ditches obstructed by the construction of a railroad had been used to drain the lands occupied by plaintiff, including the place upon which plaintiff planted his cabbages, for more than 20 years, was held not sufficient to allege a prescriptive right to the use of such ditches without an allegation that the user was adverse.

In *Durham v. Cotton Mills, supra,* the City of Durham and its inhabitants for the past 17 or 18 years had been supplied with drinking water

from a plant located on Eno River. The Court stated, p. 627: "There is nothing in this case, as now presented, which tends to prove that the plaintiffs are riparian proprietors in respect to the Eno River."

The plaintiff has neither allegation nor proof that he, or his lessor, has acquired a right to use the water of Beaverdam Creek by prescription or adverse user.

The plaintiff has no allegation in his Complaint that he or his lessor is a riparian proprietor; neither allegation nor proof that he or his lessor have acquired a right to use the waters of Beaverdam Creek to irrigate his crops by prescription or adverse user; nor proof that he or his lessor have authority and license from Sol Carter, an alleged riparian owner, and his successors in title, to use the waters of Beaverdam Creek for the purposes of irrigation, even if such alleged authority and license were valid, about which we express no opinion. Therefore, the plaintiff has not shown that he or his lessor have a right to have the waters of Beaverdam Creek flow with undiminished quantity and unimpaired quality. *Durham v. Cotton Mills, supra,* p. 627; *Cook v. Mebane,* 191 N.C. 1, 131 S.E. 407; *Dunlap v. Light Co.,* 212 N.C. 814, 195 S.E. 43.

Plaintiff's evidence, and also the defendants', shows that the defendants, both municipal corporations, have negligently permitted sewage to pollute to a large extent the waters of Beaverdam Creek. This Court said in *Sandlin v. Wilmington,* 185 N.C. 257, 116 S.E. 733: "A municipal corporation has no more right than an individual to maintain a nuisance, and is equally liable for damages resulting therefrom; and authorized acts of a governmental character which create a nuisance causing damage to a private owner are regarded and dealt with as an appropriation of property to the extent of the injury thereby inflicted." This Court also said in *Clinard v. Kernersville,* 215 N.C. 745, p. 748, 3 S.E. 2d 267: "The liability of the town is not to be determined by any negligent conduct on its part in the operation of its disposal plant. If in so doing it in fact discharges foul matter upon the lands of the plaintiffs, or it so pollutes the water of the stream which crosses plaintiffs' land that foul and noxious odors emanate therefrom it is liable for the resulting damage, even though in so doing it is exercising a governmental function."

In *Masonite Corp. v. Burnham,* 164 Miss. 840, 146 So. 292, 91 A.L.R. 752—a case cited in the briefs of appellants and appellee here—the Court said: "A stream wholly on the land of another which has been polluted by the owner or any other person is not a nuisance *per se* to one who is not a riparian owner; as to such person it is not a nuisance unless his rights are invaded by the pollution; they may or may not be."

These are cases of an invasion of property rights: *Williams v. Greenville,* 130 N.C. 93, 40 S.E. 977 (drain choked with refuse by negligence

of municipal corporation overflows premises of adjacent landowner); *McManus v. R. R.*, 150 N.C. 655, 64 S.E. 766 (blasting rock and throwing pieces of rock on plaintiff's house and loathsome and nauseous odors from rock quarry, containing dead animals and other refuse, spreading over plaintiff's land); *Moser v. Burlington*, 162 N.C. 141, 78 S.E. 74 (sewage from defendant's sewerage system in time of freshet brought down and lodged upon lands of plaintiff, causing offensive odors); *Hines v. Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (foul stench and odors); *Donnell v. Greensboro*, 164 N.C. 330, 80 S.E. 377 (offensive matter cast upon plaintiff's bottom-lands and offensive odors); *Rhodes v. Durham*, 165 N.C. 679, 81 S.E. 938 (foul odors); *Sandlin v. Wilmington, supra* (overflow of sewage upon land and consequent deposit thereon of refuse and noxious sediment causing vile odors); *Ivester v. Winston-Salem*, 215 N.C. 1, 1 S.E. 2d 88 (foul odors).

Stowe v. Gastonia, 231 N.C. 157, 56 S.E. 2d 413, is not in point, because there was an allegation in the Complaint that the waters of the Creek flowed through plaintiff's lands, which would seem to indicate plaintiff is a riparian owner. Neither is *Hampton v. Pulp Co.*, 223 N.C. 535, 27 S.E. 2d 538, in point, as plaintiff was a riparian owner.

Plaintiff cites in his brief *Midland Oil Co. v. Ball* (Oklahoma), 242 P. 161. In that case water supply in a pasture enclosed by fences and in possession of plaintiff was polluted by oil and salt water making the water unfit for cattle to drink. As a result of drinking this polluted water some of plaintiff's cattle died, and others were injured. A recovery was sustained, and properly so, because here was an invasion of plaintiff's possession and rights.

In the present case not one drop of the polluted waters of Beaverdam Creek fell upon plaintiff's cabbages and collards by any act of the defendants. The plaintiff, or his lessor, not being a riparian proprietor, and not having riparian rights, and not having a right to use the waters of Beaverdam Creek by prescription or adverse user, had his pump house about 100 feet from the waters of this Creek, and pumped the waters of the Creek into his overhead irrigation system sprinkling and spraying the water on his cabbages and collards growing up on top of the hill—to quote a vivid phrase of the Psalmist—in "a dry and thirsty land," even farther than the pump house from the waters of Beaverdam Creek. There has been no invasion of his rights by the defendants: their pollution of Beaverdam Creek did not cause his damage.

It is elementary learning that there must be both allegation and proof, *Whichard v. Lipe*, 221 N.C. 53, 19 S.E. 2d 14; and if a plaintiff is to succeed at all, he must do so on the case set up in his Complaint. *Sale v. Highway Commission*, 238 N.C. 599, 78 S.E. 2d 724.

For the reasons stated above the motions for judgment of nonsuit should have been allowed. It, therefore, follows that the judgment below must be reversed, and it is so ordered.

Reversed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

E. PEARL SEAWELL, L. SHELL JONES, J. CRAIGE JONES, JOHN WESLEY HARTSFIELD, MABEL HARTSFIELD, LOUISE H. JOHNSON, SUSIE M. HARTSFIELD, NINA H. GRIMES, RICHARD D. HARTSFIELD, JOHN HARTSFIELD, MARY H. JONES, DAVID M. HARRIS, MARY L. HARRIS, JENNY B. HARTSFIELD, JENNY M. HARTSFIELD, WILLIAM HARTSFIELD, CHARLES HARTSFIELD, MAUDE B. HARTSFIELD, JACOB A. HARTSFIELD III, MABEL H. HOLTON, AND MARSHALL B. HARTSFIELD, NELLIE M. SCARLETTE, MAY S. MYATT, WILLIAM A. MYATT, BETSY HIGGINS, HARRIET ALEXANDER MYATT, DOTTY YINGLAND, MARGARET MYATT EDMUNDSON, PEARLE SCOTT HOOD, MILDRED M. AYCOCK AND ROBERT L. MYATT, PLAINTIFFS, v. JOSEPH B. CHESHIRE, SUCCESSOR TRUSTEE UNDER THE WILL OF B. S. HARRISON (DECEASED), AND ANN HARRISON, EXECUTRIX OF THE ESTATE OF EDWIN M. HARRISON (DECEASED), AND ANN HARRISON INDIVIDUALLY.

(Filed 23 March, 1955.)

1. Wills § 33c—

The will in suit provided that the trustee should hold the estate for the use and benefit of testator's son during his natural life, and after his death, convey the estate to the son's children, "but if he have no lawful issue, then convey . . ." the estate to named beneficiaries in fee. *Held:* The will created a contingent executory devise after a fee conditional, and upon the death of the son without lawful issue then surviving, the ulterior beneficiaries are entitled to the estate.

2. Same: Wills § 32½—

Where there is a contingent executory devise to named persons in the event the first taker should die without issue, the persons who are to take the contingent limitation over are certain and only the event upon which they are to take is uncertain, and the contingent remaindermen take a transmissible estate which is not dependent upon their surviving the first taker, and upon the death of the contingent remaindermen prior to the death of the first taker without children then surviving, the estate goes to the heirs, next of kin, and successors of interest of the contingent remaindermen.

3. Trusts § 18—

Under the facts of this case, the costs of the administration of the trust estate were properly charged entirely to income and not to principal.

APPEAL by defendant Ann Harrison, individually, and as Executrix and Ancillary Executrix of the will of Edwin M. Harrison, deceased, from *Hall, S. J.*, at Special August 1954 Civil Term of WAKE.

Civil action by plaintiffs alleging to be "sole heirs, next of kin and distributees of ultimate takers" under the provisions of the will of B. S. Harrison, deceased, to wit: "Mrs. Octavia Carver, Ham T. Jones, John W. Jones and Jacob A. Hartsfield" for authority and direction to defendant Joseph B. Cheshire, Successor Trustee, to distribute to them funds in his hands in accordance with schedule of their respective interests—Exhibit B attached to complaint.

Defendant Ann Harrison, individually and as Ancillary Executrix of the will of Edwin M. Harrison, deceased, referred to also as Edwin Marriott Harrison, answering the complaint denies that plaintiffs are entitled to relief sought, averring that under paragraph 2 of Item 3 of the will of B. S. Harrison, deceased, the stated bequests to Mrs. Octavia Carver, Ham T. Jones, John W. Jones and Jacob A. Hartsfield, respectively, were gifts which could not become vested in them during the life of Edwin M. Harrison; and that they all died "during the lifetime of Edwin M. Harrison, the only son of the testator, and before any interest or right under the will of B. S. Harrison became vested" in them, "or in any wise transmissible by them to their heirs at law"; and that hence "their respective shares in remainder or otherwise in the estate terminated and the purported devises or bequests to them became void and of no effect"; and that, therefore, Edwin M. Harrison became "absolute owner of both the beneficial life estate and of the entire estate in remainder of his father," and, as such, "he was entitled to hold and possess the same free and clear of any claim or ownership asserted, or to be asserted by any person whomsoever."

And defendant Ann Harrison, individually and as Ancillary Executrix of Edwin M. Harrison, deceased, further avers that she has offered the last will and testament of Edwin M. Harrison, deceased, for probate in the Probate Court of Cook County, Illinois, in which said will she is named as sole executrix; and that pending the administration upon the estate of Edwin Marriott Harrison she will be entitled to be paid all sums of money payable by the trustee and to receive from the trustee all assets held by him as principal assets and accumulated income from the will of B. S. Harrison, deceased.

And for another and further answer and defense to complaint of plaintiff this answering defendant avers, summarily stated, that by reason of failure of original trustee, and their various successors in office, to comply with the directions given, Edwin Marriott Harrison has been required to bear all expenses of the trust from the income to which he was by law and by the terms and provisions of his father's will entitled to receive;

that Edwin Marriott Harrison was entitled "upon demand to recover from said trustees, and as a charge against the principal assets of the trust estate at any time in the hands of said trustees, the full amount of all costs of the administration of said trust estate from the 24th day of June, 1900" (when he became 21 years of age), "to the date of his death . . . 15th day of July, 1953," "a sum greatly in excess of the entire principal assets and said trust estate now in the hands of the trustee."

And thereupon the answering defendant prays judgment (1) that the successor trustee under the will of B. S. Harrison, deceased, be "authorized and empowered and directed" to account to her, as executor and ancillary executor under the will of Edwin Marriott Harrison, deceased, "for all sums of money expended by him, or by his predecessors in office since the 24th day of June, 1900 for the administration of the trust estate"; and (2) that plaintiffs take nothing by their action, but that the trustee be "authorized, empowered and directed to pay over to her all of the trust property now in his hands"; (3) for costs.

Thereupon Joseph B. Cheshire, successor trustee under the will of B. S. Harrison, replying to the further answer contained in the answer filed by defendant Ann Harrison, denies all material averments upon which she bases claim for expenses of administering the estate, and to the property held by him.

And plaintiffs replying to answer of defendant Ann Harrison as hereinabove recited, deny all material averments on which she bases claim to the property held by the trustee; and for further reply they plead various statutes of limitation, and estoppel.

When the cause came on for hearing the following stipulation was made a matter of record:

"The defendant, Ann Harrison, both in her individual capacity and in her capacity as Executrix and Ancillary Executrix of the Estate of Edwin M. Harrison, deceased, stipulates and agrees with Joseph B. Cheshire, successor trustee under the will of B. S. Harrison, deceased that the claim asserted in the second further answer and defense of the answer filed by her herein is made against the trust estate only, and is not to be construed in any fashion as being any personal claim of any sort against Joseph B. Cheshire.

"This 8th day of March 1954."

The cause, having come on for hearing in regular order at special August Term 1954 of Wake County Superior Court, before Honorable C. W. Hall, Special Judge Presiding, the parties stipulated and agreed that the Judge should hear the cause, make necessary finding of fact without intervention of a jury, state his conclusions of law and render judgment thereon.

Pursuant thereto the Judge presiding, "after consideration of the admissions in the pleadings, the stipulations of facts, the evidence presented and argument of counsel, finds the facts, states conclusions of law and renders judgment thereon as follows:

"1. B. S. Harrison died in Wake County, North Carolina, in 1889, leaving a last will and testament which was duly probated in the office of the Clerk of the Superior Court of Wake County, North Carolina, now appearing of record in Will Book B, page 342; and that all beneficiaries designated in said will were living at the time of the death of the said testator, B. S. Harrison.

"2. By the terms of said will (Item 3, paragraph 1), the testator devised and bequeathed to his executors and trustees one-third of his estate to be set apart and held for the use and benefit of his wife, V. S. Harrison for her lifetime, and at her death to convey same 'to such person or persons as she may by her last will and testament appoint to receive and have the same; and in default of a disposition by her by last will and testament, the said share so set apart for her benefit shall be held for the use and benefit of my son, Edwin Marriott Harrison, in the same manner and upon the same limitations as the share hereinafter given to him is directed to be held.' "

"3. Item 3 of paragraph 2 of said will provided as follows:

" 'That they (the executors or trustees) will set apart and hold the remaining two-thirds (⅔) of my estate to them, their heirs and successors, for the use and benefit of my son Edwin Marriott Harrison, during his natural life, paying to him such part of the net annual income thereof as they may deem proper for his education, support, maintenance and needs, having due regard to his condition in life and the amount of his estate, and after his death convey what may be in their hands to his children, if he have lawful issue, in fee, and if he has no lawful issue, then convey two-fifth thereof to Mrs. Octavia Carver, daughter of Mrs. E. J. Jones, and her heirs, and one-fifth each to Ham T. Jones, John W. Jones and Jacob A. Hartsfield respectively in fee.' "

"4. Item 4 of said will provides as follows:

" 'I direct and empower my said executors both as executors and trustees as aforesaid, their heirs and successors, to collect, sell and convey for the purpose of carrying into effect the provision of this my will or for the purpose of investment and reinvestment, any part of my estate or its proceeds or the shares above given to them as trustees and to make any sales, conveyances and reinvestments from time to time as they may deem best for the interests and enhancement of the same, and I recommend that before the majority of my son as much of the share set apart for the use and benefit of my son as is convenient and wise in the opinion of said trustees, shall be invested in improved real estate, such real estate to be

conveyed to them and held by them as trustees upon the trust and with the powers hereinbefore set out. The rents and profits of all real estate in which said trustees may invest shall be collected by them during the minority of my said son, but after his majority the said real estate shall be managed and the rents and profits thereof received collected and enjoyed by him during his life.' "

"5. That V. S. Harrison, widow of the testator dissented from her husband's will and thereby relinquished all benefits provided for her thereunder, taking instead the benefits she would have been entitled to receive had her husband died intestate. The entire balance of said estate thereby became impressed with the trust as set out in paragraph 2 of Item 3 of said will.

"6. Mrs. Octavia Carver died in 1923 and by descent and other processes of devolution of property rights, any transmissible interest which she had in said trust is now vested in E. Pearl Seawell.

"7. John W. Jones died in 1930 and by descent and other processes of devolution of property rights, any transmissible interest which he had in said trust is now vested in J. Craige Jones.

"8. Ham T. Jones died in 1931 and by descent and other processes of devolution of property rights, any transmissible interest which he had in said trust is now vested in L. Shell Jones, Nellie M. Scarlette, Mary S. Myatt, William A. Myatt, Betsy Higgins, Harriet Alexander Myatt, Dotty Yingland, Margaret Myatt Edmundson, Pearle Scott Hood, Mildred M. Aycock and Robert L. Myatt in the proportions as set out hereinafter.

"9. Jacob A. Hartsfield died in 1918 and by descent and other processes of devolution of property rights, any transmissible interest which he had in said trust is now vested in the persons set out in Schedule B attached to the plaintiffs' complaint and in the proportions as set out hereinafter.

"10. Edwin Marriott Harrison, the only child of B. S. Harrison, reached his majority on June 24, 1900, and died June 24, 1953, in Cook County, Ill., without having had or leaving any lawful issue.

"11. Edwin Marriott Harrison left a last will and testament which has been duly probated in Cook County, Ill., and Ann Harrison, widow of Edwin Marriott Harrison, is named as sole executrix, and she has qualified as executrix of his estate in the Probate Court of said Cook County, Ill., and has also qualified as ancillary executrix under said will in the office of the Clerk of the Superior Court of Wake County, North Carolina.

"12. All parties to this action are all properly before the court, are over 21 years of age and otherwise *sui juris*, and they are all the persons who have any interest in the said B. S. Harrison trust estate.

"13. Joseph B. Cheshire, Jr., was appointed as successor trustee in 1931 and has properly administered said estate since his appointment and now has in hand as such trustee approximately $25,000, consisting entirely of personal property.

"14. The costs and expenses of the administration of the trust estate including trustees' commissions, have been deducted and paid from the income of the estate by the present trustee and no demand has been made upon him to pay such costs and expenses from the *corpus* thereof.

"15. Edwin Marriott Harrison all during his lifetime accepted from the trustees of the estate, the net income from the estate, and never made any demand upon the present trustee to make any investments in real estate.

"16. None of the trustees of said trust estate ever invested any of the trust funds in improved real estate.

"17. All defendants have been served with process and have filed answers."

CONCLUSIONS OF LAW

"1. Upon the death of the testator, B. S. Harrison, and the probate of his will, Mrs. Octavia Carver, Ham T. Jones, John W. Jones, and Jacob A. Hartsfield, the ulterior takers designated in paragraph 2 of Item 3 of said will, acquired in the trust estate, created under the will, interests known in law as contingent remainders, contingent limitations or executory devises and such interests so acquired were and are transmissible by descent, as said persons who were to take the same were certain, although the event upon which they were to take was uncertain.

"2. Upon the death of the life tenant, Edwin Marriott Harrison, on June 24, 1953, without having had or leaving lawful issue, the plaintiffs herein who are the respective heirs, next of kin and successors in interest of the said Mrs. Octavia Carver, Ham T. Jones, John W. Jones, and Jacob A. Hartsfield, became absolutely vested with the absolute ownership of said trust property, and are now entitled to distributive shares therein as follows:

"2/5 to E. Pearl Seawell, as sole heir of Mrs. Octavia Carver, deceased.

"1/5 to J. Craige Jones as sole heir of John W. Jones, deceased.

"1/5 to L. Shell Jones and the Myatt heirs as set out above in paragraph 8 of Findings of Facts.

"1/5 to the heirs and successors in interest of Jacob A. Hartsfield, deceased,

who are the persons listed as such in the schedule attached to plaintiffs' complaint and marked Exhibit B and their respective interests in the entire trust are in the proportions set forth in said schedule and as shown hereinafter.

"3. The trustees of said trust were not required to invest any of the trust estate in improved real estate and Edwin Marriott Harrison, therefore, had no rights to rents and profits from any such real estate after reaching his majority.

"4. Ann Harrison has no interest in the said B. S. Harrison trust estate either individually or as executrix of the estate of Edwin Marriott Harrison, deceased, and she is not entitled to recover anything by reason of the matters set up in her answers.

"Wherefore, it is Ordered, Adjudged and Decreed as follows:

"1. That Ann Harrison, have and recover nothing in this action, either individually or as executrix of the estate of Edwin Marriott Harrison, deceased.

"2. That Joseph B. Cheshire, Jr., successor trustee, is hereby authorized, empowered, and directed to make distribution of said trust funds in his hands as follows:

"(a) Pay all of the proper costs and expenses of administration and all proper costs and expenses of this litigation.

"(b) Pay net balance of said trust *corpus,* together with all income accrued since the date of the death of Edwin Marriott Harrison to the following persons in the proportions hereinafter set out.

(Here follows a list of descendants of Mrs. Octavia Carver, John W. Jones, Ham T. Jones and Jacob A. Hartsfield, as set forth in findings of fact 6, 7, 8 and 9 hereinabove.)

"3. That Joseph B. Cheshire, successor trustee under the will of B. S. Harrison, deceased, upon his distribution of said trust in accordance with this judgment and his accounting therefor to the Clerk of the Superior Court of Wake County, shall be forever relieved and discharged of all liability on account of any matters connected with the administration of said trust by either himself or his predecessors in office."

"Upon the signing of the foregoing judgment the defendant, Ann Harrison, individually and as executrix and as ancillary executrix, gave notice of exception to the findings of fact, the conclusions of law stated therein, and to the signing of the judgment, and gave notice of appeal in open court to the Supreme Court," further notice being waived, and appeals to Supreme Court, and assigns error.

Allen Langston for appellant Ann Harrison.

Mordecai, Mills & Parker, Poyner, Geraghty & Hartsfield, and Bell, Bradley, Gebhart & DeLaney for plaintiffs, appellees.

Harris, Poe & Cheshire for defendant, appellee.

WINBORNE, J. The appellant states in brief filed in this Court two questions as being involved on this appeal. The first reads as follows:

"Should the residue of the trust estate created under the will of B. S. Harrison, deceased, be now paid over to the executrix of the will of Edwin Marriott Harrison, the only son, and sole surviving heir at law of the testator, or should it be paid to the descendants and collateral heirs of persons named by the testator to take by conveyance to be made by the trustees after the death of testator's son without lawful issue?"

This question raises the basic inquiry as to what interest or estate, if any, did Mrs. Octavia Carver, Ham T. Jones, John W. Jones and Jacob A. Hartsfield acquire under the provisions of the will of B. S. Harrison.

In this connection, it is noted that V. S. Harrison, the wife of B. S. Harrison, having dissented from his will, relinquished thereby all benefits provided for her thereunder, and the entire balance of the estate became impressed with the trust as set out in paragraph 2 of Item 3 of the will.

And in accordance with the provisions of paragraph 2 of Item 3 of the will the testator declared that the trustees would "hold the remaining" part "of my estate . . . to the use and benefit of my son Edwin M. Harrison, during his natural life . . . and after his death convey what may be in their hands to his children, if he have lawful issue, in fee, but if he have no lawful issue, then convey two-fifths thereof to Mrs. Octavia Carver . . . and one-fifth each to Ham T. Jones, John W. Jones and Jacob A. Hartsfield, respectively, in fee."

Therefore, in the light of decisions of this Court, these provisions of the will of B. S. Harrison "created a contingent executory devise, after a fee conditional," for the benefit of Mrs. Octavia Carver, and Ham T. Jones, John W. Jones and Jacob A. Hartsfield if Edwin M. Harrison have no lawful issue at his death. *Sain v. Baker,* 128 N.C. 256, 38 S.E. 858. In the *Sain case, Clark, J.,* speaking for the Court of a like factual situation, declared that: "This limitation over is not void for remoteness, and took effect at the death of devisee Wesley Leonhardt, without issue, by virtue of the Act of 1827." (This act was Chapter 7, later codified as R. C. Chap. 43, Sec. 3, Code of 1883, Vol. 1, Sec. 1327, Revisal 1581, C.S. 1737, and now G.S. 41-4). In the instant case Edwin M. Harrison occupies similar position to that of Wesley Leonhardt.

The 1827 Act, *supra,* provides that: "Every contingent limitation in any deed or will made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it . . ." And in case in hand no such intention appears so

expressly and plainly declared. This statute has been construed and applied in many decisions of this Court. They are cited and discussed by *Clark, C. J.*, in *Patterson v. McCormick* (1919), 177 N.C. 448, 99 S.E. 401, and by *Denny, J.*, in *House v. House* (1949), 231 N.C. 218, 56 S.E. 2d 695.

Indeed decisions of this Court hold that the interest in an executory devise or bequest is transmissible to the heir or executor of one dying before the happening of the contingency upon which it depends. *Lewis v. Smith*, 23 N.C. 145; *Fortescue v. Satterthwaite*, 23 N.C. 566; *Moore v. Barrow*, 24 N.C. 436; *Weeks v. Weeks*, 40 N.C. 111; *Sanderlin v. De-Ford*, 47 N.C. 75; *Newkirk v. Hawes*, 58 N.C. 265; *Mayhew v. Davidson*, 62 N.C. 47. See also *Trust Co. v. Waddell*, 234 N.C. 34, 65 S.E. 2d 317, and cases cited.

In the *Fortescue case, supra*, referring to a cited case, it is said: ". . . The judges seem to have considered it as settled that contingent interests, such as executory devises to persons who are certain, were assignable. They may be assigned both in real and personal property, and by any mode of conveyance by which they might be transferred had they been vested remainders."

Also in the *Mayhew case, supra*, it is said: "We have here then a contingent limitation, where the persons are certain and the event uncertain. Interests of this sort, if in land, are transmissible by descent; if in personalty, devolve upon the personal representative," citing the *Newkirk case, supra*.

In the *Moore case, supra*, the will of E. Barrow, who died in 1832, was involved. In it he declared, "I lend my daughter Nancy E. Moore" the following property, to wit: (Slaves and articles of furniture), and, continuing, "If my daughter Nancy E. should depart this life without issue, then it is my will that her husband, William C. Moore, should have one-half of the property I have lent to her; but the property is to be held in trust by my executors until the death of my daughter Nancy E., and then her half of the property is to be equally divided between her brother Joseph and her two sisters, Martha and Rachel." William C. Moore died in 1838 after the testator, leaving his wife Nancy surviving him, and then Nancy died in 1839, having made a will, but without issue. The administrator of William C. Moore brought suit to recover one-half of the property. This Court held that William C. Moore took a contingent interest in remainder in one-half of the property, which upon his death was transmitted to his administrator, and that upon the death of Mrs. Moore, without issue, his administrator had a right to recover it. And *Ruffin, C. J.*, writing for the Court, said: "The limitation over after the death of the first taker 'without issue' is within the letter of the act of 1827 (Rev. Stat. Chap. 122, Sec. 11) and is made effectual by it . . . The gift over

to the husband, brother, and sisters of Mrs. Moore is simply on the contingency of her 'dying without issue,' and it is not to him or them 'if then living,' or 'to such one or more of them as might be then alive.' Consequently, as Mrs. Moore never had issue, and is now dead, the legacy has become absolutely vested. That contingent interests of this description are transmissible to executors, and are not lost by the death of the person before the event happens on which they are to vest in possession, though once doubted, has long been settled" (citing cases).

And in *Trust Co. v. Waddell, supra, Barnhill, J.*, speaking to a like situation to that in hand, said: "To ascertain who are the ultimate takers the roll must be called as of the day of the death of the last surviving life beneficiary . . .," citing G.S. 41-4 and cases.

Moreover, in respect to the claim of Ann Harrison, wife of Edwin M. Harrison, and executrix of his will, this headnote in *Sain v. Baker, supra,* epitomizing the opinion, is appropriate: "When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son dying without children, cannot by will give his wife a life estate with the remainder to a third party."

Therefore, the conclusions of law numbered 1 and 2, as set forth in the judgment below, are proper, and are hereby affirmed.

The second question stated by appellant is as follows: "Is the defendant, Ann Harrison, as executrix of the will of Edwin Marriott Harrison, entitled to recover from the trust estate the costs of administration of the trust estate which have been charged entirely to income and not to principal?"

In the light of the findings of fact set forth in the judgment as shown in the record on appeal, this Court is of opinion, and holds that conclusions of law numbered 3 and 4 as set forth in said judgment are proper, and are hereby affirmed.

The Court has given careful consideration to the argument of counsel for appellant, as well as to all citations of authority. However, they are deemed inapplicable to the factual situation in hand.

Therefore, the judgment from which appeal is taken is

Affirmed.

CAROLINA CENTRAL GAS COMPANY v. CLAY HYDER AND WIFE, OLA GRACE HYDER, AND W. O. McGIBONY, TRUSTEE.

(Filed 23 March, 1955.)

1. Eminent Domain § 26—

Ordinarily, a mere private easement for the purpose of ingress and egress across agricultural lands does not deprive the owner of the fee of the full enjoyment of his property not inconsistent of the rights granted in the easement.

2. Eminent Domain § 18e—

Damages for an easement taken under eminent domain are to be determined by the rights the condemner or grantee actually acquires and not the extent to which he exercises such rights.

3. Same—Damages for easement must be assessed in accordance with rights acquired without reference to possibility of nonuser.

Under the stipulation of the parties, petitioner acquired an easement for the purpose of laying, constructing, maintaining, altering, and repairing pipelines, with right of ingress and egress over and across the said lands and other lands of respondents, and with right to cut trees, underbrush, and other obstructions that might interfere with the use of the easement. *Held:* The trial court properly refused a requested instruction that the petitioner would acquire only an easement in the land and that the respondent might subject the land to any use not inconsistent with the use taken, and properly instructed the jury that the compensation should be assessed on the basis of the rights acquired and not on the basis of the petitioner's subsequent exercise of such rights, and that the possibility of reversion to petitioner for nonuser was too remote to be considered on the question of damages.

4. Same—

The parties stipulated as to the measure and extent of the easement acquired, which stipulations made no mention of any right reserved in respondent to build a lake on the property which would back water over the designated right of way, and it appeared that petitioner had refused a reassessment reducing the damages in contemplation of the reservation of such right in respondent. *Held:* The court properly followed the stipulations of the parties in respect to the right of way acquired, and correctly refused to give an instruction as to damages if respondents were permitted to build the contemplated lake, since the court may not make the contract for the parties.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by petitioner from *Nettles, J.*, November Term, 1954, of HENDERSON.

The petitioner instituted this proceeding pursuant to the provisions of Chapter 40 of the General Statutes, for the purpose of obtaining a 50-foot

right of way through the 104-acre farm of the respondents for a distance of approximately 2,000 feet, within which area the petitioner had already laid its pipeline. The land lies some two and one-half miles north or northeast of the City of Hendersonville, near or adjacent to Clear Creek Road.

Commissioners were duly appointed and qualified to ascertain and assess the amount of damages the respondents will suffer, if any, from the taking and use of the right of way by the petitioner. The damages were assessed at $4,000. The petitioner filed exceptions to the commissioners' report, which were overruled. Thereafter, counsel for the respective parties undertook to work out a compromise settlement and agreed to recommend to their respective clients the sum of $2,700. Whereupon, the commissioners were requested to re-assess the damages in that amount. They did so, after being assured that the petitioner did not seek a right of way that would prevent the flooding thereof by the construction of a lake or prevent the owners from using the right of way for any purpose they might desire, except for the construction of a house directly over the pipeline. The petitioner, however, declined to approve the agreement and filed exceptions to the report which were overruled, and the report was confirmed. The petitioner appealed to the Superior Court.

When the case was called for trial, counsel for the petitioner and the respondents stated to the court that at a pre-trial conference, they had entered into certain stipulations which limited the trial to one issue, to wit: What amount of damages, if any, are the respondents entitled to recover from the petitioner? The stipulations, in brief, included the following: The petitioner is a public utility company and has the power and authority to take and appropriate the lands in question for its pipeline; that the respondents are the owners in fee of the lands so taken; that the petitioner and respondents having been unable to agree as to the compensation petitioner should pay to the respondents, this proceeding has been duly and properly instituted. ". . . that the specific use of said land is a right of way and easement for the purpose of laying, constructing, maintaining, operating, repairing, altering, replacing and removing pipelines in connection with the business of the said petitioner. . . . That the petitioner's further use of said land is to replace one or more additional lines of pipe approximately parallel with the first pipeline laid by said petitioner or to remove and change the size of said pipeline with all other rights herein granted, including but without limiting the same to, the free and full right of ingress and egress over and across said lands and other lands of the respondents to and from said right of way and easement, and the right from time to time to cut all trees, undergrowth, and other obstructions that may injure, endanger or interfere with the construction, operation, maintenance and repair of said pipelines."

The evidence as to the value of the respondents' land before and after the taking, was in sharp conflict. Evidence was offered to the effect that the location of the pipeline had destroyed a very valuable lake site, passed through a heavily timbered section of the farm, and destroyed several valuable building sites. The petitioner introduced evidence to the effect that to have gas available for residences or industrial enterprises had enhanced the value of the respondents' property to the extent of several thousand dollars. Upon motion of petitioner and over the protest of the respondents, the court in its discretion permitted the jury to go out and view the premises. The jury assessed respondents' damages at $6,000. Judgment was accordingly entered against the petitioner and in favor of the respondents for that amount, and the petitioner was granted a right of way 50 feet in width across the lands of the respondents, as described by metes and bounds in the stipulations entered into by counsel, and to the extent, scope, and character set out therein as set forth above. The petitioner appeals, assigning error.

L. B. Prince for petitioner, appellant.

B. A. Whitmire and M. M. Redden for respondents, appellees.

DENNY, J. The petitioner assigns as error thirty exceptions to rulings of the court in the course of the trial below. However, we deem it necessary to discuss only those which present these questions. (1) In view of the rights acquired by the petitioner, was it error to refuse to instruct the jury that, "When land is appropriated under the power of eminent domain for a right of way or easement, the condemner acquires an easement only in the land so taken, and the fee of the property remains in the landowner, who may subject the land to any use which is not inconsistent with its use for the purpose for which it is taken"? (2) Did the court commit error in instructing the jury that it should disregard testimony as to the value of the respondents' property if they were permitted to build a lake over the condemned right of way, and in refusing to permit the witness Dalton to give his opinion to the jury as to the damage to the property if the lake could be constructed? (3) Did the court err in giving the following instructions to the jury? "As a consequence, compensation is to be assessed by you members of the jury in this case on the basis of the rights acquired by the condemner at the time of the taking, and not on the basis of the condemner's subsequent exercise of such rights. It is well settled that the respondent is entitled to recover not only the value of the land taken, but also the damages thereby caused to the remainder of the land. Even if the petitioner should not use the entire right of way, the rule would be the same as it is not what the petitioner actually does, but what it acquires the right to do, that determines the amount of dam-

ages. Since the condemner acquires the complete right to occupy and use all the land covered by the perpetual easement for all time to the exclusion of the landowner, the bare fee remaining in the landowner is, for all practical purposes, of no value, and the value of the perpetual easement acquired by the condemner is virtually the same as the value of the land embraced by it. The petitioner cannot demand a perpetual easement with one breath and insist with the next that he be excused from paying full compensation for the perpetual easement on the ground there is a bare possibility that he may abandon the perpetual easement on some uncertain day. This is true because the law of Eminent Domain deems the possibility of the abandonment of a perpetual easement by the nonuser so remote and improbable that it will not allow the contingency to be taken into consideration in determining the value of the easement."

The first and third questions may be considered together. Ordinarily, a mere private easement for the purpose of ingress and egress across agricultural lands carries with it no implication of a right to deprive the owner of the fee to full enjoyment of his property. The use, however, must be such as not to materially impair or unreasonably interfere with the exercise of the rights granted in the easement. *Light Co. v. Bowman,* 229 N.C. 682, 51 S.E. 2d 191, and cited cases; *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906; 18 Am. Jur., Eminent Domain, section 115, page 741, *et seq.* See also Anno. 68 A.L.R. 837.

Barnhill, J., now *Chief Justice,* pointed out, however, in *Chesson v. Jordan, supra,* that, "Generally speaking, the nature of the easement acquired rather than the character of the use must control the rights of the parties. Hence, no hard and fast rule may be prescribed. Each case must be controlled, in large measure, by the particular facts and circumstances being made to appear." In other words, in assessing damages for easement rights, it is not what the condemner or grantee actually does, but what it acquires the right to do that determines the *quantum* of damages. *R. R. v. McLean,* 158 N.C. 498, 74 S.E. 461; *R. R. v. Land Co.,* 137 N.C. 330, 49 S.E. 350, 68 L.R.A. 333, 107 Am. St. Rep. 490.

In the instant case, the nature of the easement is stipulated and does not purport to limit the petitioner's use to the exercise only of such rights as may be reasonably necessary to carry out the purposes for which the easement is sought. On the contrary, the judgment entered in this cause grants the right of way sought by the petitioner as set out by metes and bounds in the stipulations, and further recites that, "The right of way hereby awarded includes all of the rights allowed by law and specifically includes the right of way and easement for the purpose of laying, constructing, maintaining, operating, repairing, altering, replacing and removing pipelines in connection with the business of the petitioner, *and including, but without limiting the same to, the free and full right of*

ingress and egress over and across said lands and other lands of the respondents to and from said right of way and easement, and the right from time to time to cut all trees, undergrowth and other obstructions that may injure, endanger or interfere with the construction, operation, maintenance and repair of said pipelines." (Emphasis added.)

Therefore, in light of these provisions, we think the requested instructions were properly refused and that the instructions complained of were not prejudicial to the petitioner. *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479; *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778.

The second question must likewise be answered in the negative. Damages as compensation for the taking were to be determined in light of the rights granted in accordance with the stipulations entered into by the respective parties. As to whether the damages should have been mitigated by permitting the respondents to build a lake and back water over the condemned right of way, was a question for the respondents to determine, not the court. The court had no authority to contract for the parties in this respect. *Proctor v. Highway Commission, supra.*

Moreover, it should be kept in mind that the petitioner refused to accept a re-assessment of the damages, which reduced the amount previously assessed by $1,300, on the ground that the respondents be permitted to build a lake that would back water over the designated right of way, and appealed to the Superior Court from the order confirming the re-assessment. Furthermore, in a pre-trial hearing in this proceeding, the parties entered into certain stipulations. These stipulations fixed the nature and scope of the designated right of way and made no mention of the respondents' right to build a lake that would cover it. In fact, the petitioner in its brief states that, ". . . while the respondents may be, under the present judgment, deprived of using it as a lake site, the result of its decision would result in an economical loss to the community since certainly the petitioner is not going to use it as a lake site, and could not under the law as it did not acquire this right."

We cannot agree with the above reasoning. The judgment entered in the court below, with respect to the right of way granted, simply follows the stipulations of the parties in that respect. If the petitioner is getting more than it wants, such fact flows from the stipulations made by the parties themselves and cannot be charged to any action of the court in connection with the trial below.

In *Proctor v. Highway Commission, supra,* the Highway and Public Works Commission entered the land of the petitioner and appropriated a portion of the same to public use as a right of way for a highway. Parts of the petitioner's residence and store stood on the right of way taken by the respondent. The respondent insisted that it had proposed that the

petitioner might move the buildings on the right of way at her own expense and that the court should coerce removal by the petitioner by means of a judgment impounding a portion of the recovery. We said: "Whether the presence of parts of the dwelling and store on the right of way interfered with the free exercise of the easement condemned was for the determination of the respondent. Whether she (petitioner) should accept the proposal of the respondent that she remove these parts of the buildings from the right of way to her remaining lands at her own expense, was for the decision of the petitioner. These things were not concerns of the court."

The trial below seems to have been free from prejudicial error, and the result will not be disturbed.

No error.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

IVEY HENDRIX v. B & L MOTORS, INC.

(Filed 23 March, 1955.)

1. Sales § 27—

The measure of the damages ordinarily recoverable for breach of warranty of personal property is the difference between the reasonable market value of the article as warranted and as delivered, with such special damages as were within contemplation of the parties.

2. Same—

The purchaser, at his election, may sue for rescission of a contract of sale for breach of warranty even in the absence of fraud, unless he is barred by retention and use of the property after he discovers or has reasonable opportunity to discover the defect. The purchaser is not required to reject the machinery purchased at once, but has a reasonable time to operate and test it to ascertain whether it fills the specifications of the contract and warranty.

3. Same: Automobiles § 6—Action held one for rescission of sale of automobile for breach of warranty.

Plaintiff's allegations and evidence were to the effect that he was induced to purchase an automobile by defendant's warranty that it was in perfect mechanical condition and that it was guaranteed against mechanical defects for 30 days, that upon discovery of mechanical defects, plaintiff made demand that defendant take back the car and return to plaintiff the car which plaintiff had traded as part of the purchase price, all within the 30 day period, that upon defendant's refusal, plaintiff put the car in his garage where it was later repossessed by the finance company, the car having been driven only some 50 to 60 miles while in plaintiff's possession. *Held:* The action was for rescission of the sale for a breach of warranty,

and the car which plaintiff had traded in as part payment of the purchase price having been sold, the damages were properly predicated in part upon the value of that car at the time it was traded in.

4. Trial § 22c—

Discrepancies and contradictions even in plaintiff's evidence are for the jury to resolve, and do not justify nonsuit.

5. Trial § 48½—

Where the cause is correctly submitted on the theory made out by plaintiff's allegations and evidence, the denial of defendant's motion for a mistrial on the ground that during the course of the trial the theory of the trial had been changed so as to take defendant by surprise, will not be held for error when it appears that the court, after it had returned to the original theory of trial, re-opened the evidence in its discretion, and that defendant then introduced its testimony upon the relevant question.

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

APPEAL by defendant from *Pless, J.*, October Term, 1954, of WILKES.

Plaintiff sued to recover damages in the amount of $845.00, alleged to constitute its loss on account of defendant's breach of its express warranty of a 1952 Hudson Hornet sold by defendant to plaintiff.

The trade, made 16 December, 1953, was as follows: Plaintiff delivered to defendant a Buick car, as part purchase price for the Hudson. Defendant took the Buick subject to a $200.00 lien thereon. Plaintiff executed "papers" on the Hudson for the balance of the purchase price therefor. These "papers" are not in the record. Later, "the finance company" had them. Conflicting evidence as to valuations placed on the respective cars and as to other terms of the transaction is not material on this appeal.

Plaintiff alleged, and offered evidence tending to show, the following facts:

1. That he was induced to purchase the Hudson by defendant's warranty that it was in perfect mechanical condition and was guaranteed against any mechanical defects whatever for thirty days.

2. That the Hudson became overheated when driven from defendant's place of business to plaintiff's home; that it was taken promptly to defendant for repairs; that, after the repair of this condition was attempted, plaintiff's son got the Hudson from defendant, but soon took it back because "the transmission was hung in second gear, it wouldn't go no farther"; and that, after defendant had undertaken to repair this condition, plaintiff's son got the car from defendant again, but soon thereafter it was discovered that water was leaking into the oil.

3. That plaintiff made demand that defendant give him the Buick and take back the Hudson, but defendant refused to do so, etc., as pointed out

in the opinion; and plaintiff advised defendant that he would make no payment to "the finance company."

4. That the above events occurred during the thirty-day period; that the Hudson was then put in the garage at plaintiff's home; and that the Hudson was driven some 50-60 miles while in plaintiff's possession.

5. That "the finance company" got the Hudson from plaintiff's home after the second payment had become due, some ninety days after 16 December, 1953.

Other evidence tends to show that defendant got the Hudson from "the finance company"; that defendant sold the Hudson to another purchaser on 31 March, 1954; and that defendant had previously sold the Buick on 11 January, 1954.

Defendant denied the material allegations of the complaint, averring there was no warranty or breach thereof. Defendant also set forth its version of the terms of the sale.

The jury found that the defendant warranted the Hudson as alleged by plaintiff; that the defendant breached its warranty; and fixed the damages, on the basis of the reasonable market value of the Buick, less $200.00, at $645.00.

Judgment in plaintiff's favor, for $645.00 and costs, was entered on the verdict. Defendant excepted and appealed. Its assignments of error, as brought forward in its brief, are directed to three subjects: (1) the admission of evidence and instructions to the jury on the issue of damages; (2) the failure to allow its motion for judgment of nonsuit; and (3) the failure to grant its motion for a mistrial.

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

BOBBITT, J. The measure of the damages ordinarily recoverable for breach of warranty of personal property is the difference between the reasonable market value of the article as warranted and as delivered, with such special damages as were within contemplation of the parties. *Cable Co. v. Macon,* 153 N.C. 150, 69 S.E. 14; *Underwood v. Car Co.,* 166 N.C. 458, 82 S.E. 855; *Kime v. Riddle,* 174 N.C. 442, 93 S.E. 946; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; *Harris v. Canady,* 236 N.C. 613, 73 S.E. 2d 559. Appellant insists that plaintiff's damages, if any, should have been determined by the application of this rule to the (warranted) Hudson car.

If plaintiff had elected, after discovery of the breach of warranty, to accept and keep the Hudson car, appellant's position would be well taken; for the court applied the rule of damages applicable to an action for rescission. On the issue of damages, the court's instruction was that the

burden of proof was on plaintiff to satisfy the jury from the evidence and by its greater weight as to the reasonable market value of the Buick when delivered by plaintiff to defendant on 16 December, 1953; that, after the jury had determined this amount, they would subtract $200.00 therefrom; and that the remainder would be the measure of plaintiff's loss and their answer to the issue. In so doing, we think the court analyzed correctly the complaint and evidence; and that the plaintiff's action was to rescind the transaction of 16 December, 1953, on account of breach of warranty, and to recover the consideration paid by plaintiff to defendant.

True, plaintiff did not allege in express terms that he was entitled to recover the Buick. Nor did he allege in express terms that the purpose of his action was to rescind the transaction of 16 December, 1953. Defendant had sold the Buick on 11 January, 1954. This action was commenced 18 March, 1954. Therefore, upon rescission of the transaction of 16 December, 1953, plaintiff could not recover the Buick but only the value thereof. The amount of damages alleged was $845.00, the exact amount plaintiff alleged was the valuation placed upon his equity in the Buick in the transaction of 16 December, 1953. There is allegation and supporting evidence that, upon discovery of the defective condition of the Hudson, plaintiff endeavored to get defendant to return the Buick to plaintiff and to take back the Hudson but that defendant refused to do so. Plaintiff's evidence tends to show that in so doing plaintiff offered "to pay all costs of transferring title, whatever he was out . . ."

Where the basis of the plaintiff's action is breach of warranty, may a buyer, at his election, and in the absence of fraud, maintain an action for rescission? The answer is "Yes," unless he is barred by retention and use, after he discovers or has reasonable opportunity to discover the defect, or other ground recognized as a defense to such action.

Before the Uniform Sales Act, the majority common-law view, based on English precedents, denied any right on the part of the buyer, in the absence of fraud, to rescind for breach of a warranty as to quality. North Carolina was regarded as one of a minority of jurisdictions which upheld the right of rescission in case of express and implied warranties, although unaccompanied by fraud. 46 Am. Jur. 886, Sales, sec. 758. The writer of this text cites *Baker v. Brem,* 103 N.C. 72, 9 S.E. 629, 4 L.R.A. 370, and *W. F. Main Co. v. Field,* 144 N.C. 307, 56 S.E. 943, 11 L.R.A. (N.S.) 245, 119 Am. St. Rep. 956, as indicative of the rule recognized in North Carolina.

Since the wide adoption of the Uniform Sales Act, there is no longer a serious division of authority. Williston on Sales, Rev. Ed., sec. 608a. Section 69 thereof provides that a buyer may, at his election, rescind the contract for breach of warranty. While the Uniform Sales Act has not been adopted by our General Assembly, other jurisdictions, by reason of

its provisions, are now largely in accord with the North Carolina view on the subject under consideration.

Furches, J., in a comprehensive statement of a buyer's rights upon breach of warranty by the seller, says: "The purchaser is not compelled in all cases to reject the property, at once, upon its receipt; if it is machinery, he has a reasonable time to operate the machinery for the purpose of testing it. But when this is done, and it is found that the machine or the machinery does not fill the specifications of the contract and warranty, he must then abandon the contract and refuse to accept and use the property; and if he does not do this, but continues the possession and use of the property, he will be deemed in law to have accepted the property, and his relief then will be an action for damages upon the breach of warranty. 2 Benjamin on Sales, p. 1147." *Mfg. Co. v. Gray,* 124 N.C. 322, 32 S.E. 718. In the case cited, the buyer did not undertake to rescind. He kept and used the machinery involved and resisted the seller's action to recover possession thereof. Hence, the quoted excerpt may be regarded as *dicta.* Even so, it is in accord with North Carolina decisions.

When a sale is made of an article with knowledge of the use for which it is intended, and the article is wholly unfit for such use, the right of the purchaser to rescind and to recover the consideration paid has been recognized by this Court. *Aldridge Motors, Inc., v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469; *Pool v. Pinehurst, Inc.,* 215 N.C. 667, 2 S.E. 2d 871; *Williams v. Chevrolet Co.,* 209 N.C. 29, 182 S.E. 719, and cases cited. While emphasis is placed upon the concept of total failure of consideration, it would seem that in essence such action is to rescind for breach of implied warranty. *McConnell v. Jones,* 228 N.C. 218, 44 S.E. 2d 876; *Ashford v. Shrader,* 167 N.C. 45, 83 S.E. 29; Williston on Sales, Rev. Ed., sec. 239.

In *Turner v. Chevrolet Co.,* 209 N.C. 587, 183 S.E. 742, the record discloses the following facts. The plaintiff purchased a LaSalle from defendant. As purchase price, he delivered to defendant a Chevrolet valued at $107.50. In addition he paid $54.00 as installments on title retention contract held by defendant for balance of purchase price. He paid also a title fee of $1.50. The LaSalle was damaged in collision. It was taken to defendant's place of business where repairs were made. The plaintiff offered to pay $50.00 on the repair bill. The defendant demanded $100.00. Upon refusal of plaintiff to meet such demand the defendant retained possession of the LaSalle. Plaintiff brought and successfully prosecuted his action to rescind, recovering $163.00, the total of what he had paid. The jury answered the fraud issue in defendant's favor but found that defendant breached its agreement to procure a $50.00 deductible collision policy on the LaSalle protecting plaintiff from loss. True, the contract provision breached did not relate to the quality of the

LaSalle. Even so, as in case of a warranty as to quality, it went to the substance of the contract.

The underlying reasons for the rule that the buyer may, at his election, and in the absence of fraud, maintain an action to rescind for breach of warranty, express or implied, are stated cogently by Professor Williston as follows:

"If a sale is induced by fraudulent statements, rescission is admittedly proper. And if a seller knows of the falsity of the statements he makes which constitute a warranty, he is fraudulent, and the bargain may be rescinded in jurisdictions which deny the remedy of rescission for breach of warranty generally. The morality of taking advantage afterwards of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale. It is a difficult question of fact, and one which arises in very many cases of broken warranty, how far the seller knew that his warranty was false. It is a practical advantage if the decision of this question becomes immaterial as it does where rescission is allowed for breach of warranty." Williston on Sales, Rev. Ed., sec. 608.

Appellant assigns as error the court's refusal to allow its motion for judgment of involuntary nonsuit. Its contention is that the evidence discloses that plaintiff was not the real party in interest. G.S. 1-57. True, plaintiff's minor son gave testimony, somewhat contradictory, part of which tended to show that he owned the Buick or had an interest in it. However, the transaction was between plaintiff and defendant; and plaintiff's testimony to the effect that he owned the Buick is direct and positive. It is for the jury, not the court, to resolve discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff. *Cozart v. Hudson*, 239 N.C. 279, 78 S.E. 2d 881, and cases cited.

Appellant also assigns as error the court's refusal to grant its motion for a mistrial. During the testimony of plaintiff, the first witness, the question arose as to whether plaintiff's recovery, if allowed, should be on the basis of the reasonable market value of the Buick, as contended by plaintiff, or on the basis of the difference between the reasonable market value of the Hudson as warranted and as delivered, as contended by defendant. Testimony of plaintiff and of his son was admitted, over defendant's objection, directed to the reasonable market value of the Buick. Later, it appears that the court was inclined to adopt defendant's view; for testimony was admitted as to the value of the Hudson. However, the court's final ruling was correct and in accord with its original ruling; and, when the defendant rested without offering evidence as to the reasonable market value of the Buick, the court, in its discretion, reopened the

evidence; and thereupon defendant offered evidence as to the reasonable market value of the Buick.

Under the foregoing circumstances, defendant made its motion for a mistrial, which was denied. The ground for its motion was that the theory of the trial had been changed to such extent that it was taken by surprise, offguard and unprepared. While the record indicates that the court wavered for a time after making its original ruling and before returning thereto, the record hardly supports the view that defendant was taken by surprise or otherwise prejudiced thereby. The complaint disclosed the theory of plaintiff's case. Plaintiff, the first witness, offered testimony as to the reasonable market value of the Buick. Before the case was submitted to the jury, defendant offered three witnesses, who knew the Buick well, who gave testimony as to the reasonable market value of the Buick.

As stated by *Barnhill, J.* (now *C. J.*): "It is altogether discretionary with the presiding judge whether he will re-open the case and admit additional testimony after the conclusion of the evidence and even after argument of counsel. *Williams v. Averitt,* 10 N.C. 308; *Ferrell v. Hinton,* 161 N.C. 348, 77 S.E. 224; *Worth v. Ferguson,* 122 N.C. 381; *Dupree v. Ins. Co.,* 93 N.C. 237. When the ends of justice require this may be done even after the jury has retired. *Parish v. Fite,* 6 N.C., 258; see also *Gregg v. Mallett,* 111 N.C. 74, and *Wood v. Sawyer,* 61 N.C. 251, at p. 274." *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708.

The jury, on conflicting evidence, decided the issues of fact in plaintiff's favor; and no prejudicial error in law sufficient to disturb the judgment has been made to appear.

No error.

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

STATE v. SHERWOOD BAREFOOT.

(Filed 23 March, 1955.)

1. Rape § 18—

The evidence in this prosecution for carnal knowledge of a female over 12 and under 16 years of age *held* sufficient to take the case to the jury, and the court's refusal to direct a verdict of not guilty is without error.

2. Rape §§ 1, 15—

The offenses of rape of a female over 12 years of age and carnal knowledge of a female over 12 and under 16 years of age are separate and distinct. In the first, the female's chastity is immaterial and her consent is a

complete defense; in the second, her former chastity is a material part of the charge and her consent is not a defense.

3. Criminal Law § 21—

A prosecution for rape of a female over 12 years of age will not bar a subsequent prosecution for carnal knowledge of a female over 12 and under 16 years of age.

4. Same—

The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.

5. Same—

If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise it does not.

6. Criminal Law § 26—

Where it is apparent from the two indictments that the facts alleged in the second bill, if offered as evidence in the first prosecution, are insufficient to sustain a conviction under the first, defendant's plea of former acquittal in the second prosecution is properly overruled as a matter of law.

7. Criminal Law § 50f—

The solicitor and counsel have the right to argue every phase of the case supported by the evidence without fear or favor and to deduce from the evidence offered all reasonable inferences which flow therefrom, and wide latitude must be allowed in the argument of hotly contested cases.

8. Same—

The evidence in this prosecution for carnal knowledge of a female child over 12 and under 16 years of age tended to show that defendant persisted in his efforts to have intercourse with prosecutrix and finally pulled her from the front to the back seat of the car. *Held:* Argument of the solicitor to the effect that they were not dealing with an ordinary boy of 18, but that while defendant was undeveloped in size he was overdeveloped in passion, was warranted by the evidence.

9. Criminal Law § 78g—

An agreement between the solicitor and defense counsel that objection to the solicitor's argument might be shown at the end of every sentence on the reporter's transcript is disapproved since such agreement could not relieve the trial court of his duty at all times to see that the argument remain within proper bounds, and counsel should make timely objections to the court, and the court should pass on the objections as they arise.

10. Criminal Law § 50f—

While the solicitor may not comment on defendant's failure to testify, comment in this case upon the demeanor of the defendant in the courtroom, when reasonably interpreted, *held* not to amount to comment upon such failure.

11. Same—

Control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and it is only in extreme cases of abuse when the trial court does not intervene or correct an impropriety that a new trial may be allowed on appeal.

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

APPEAL by defendant from *Morris, J.*, January 1955 Term Superior Court, HARNETT.

Criminal prosecution tried upon the following bill of indictment:

"The Jurors for the State upon their oath present, That Sherwood Barefoot, late of the County of Harnett on the 29th day of November in the year of our Lord one thousand nine hundred and fifty-three, with force and arms, at and in the County aforesaid, unlawfully, willfully, and feloniously did carnally know and abuse one Ruthlene McLamb, a female child under the age of sixteen years of age and over the age of twelve years who had never before had sexual intercourse with any person against the form of the statute in such case made and provided and against the peace and dignity of the State."

When the case was called for trial at the January 1955 Term, Harnett Superior Court, before pleading to the bill of indictment, the defendant entered a plea of former jeopardy and tendered the following issue, requesting that it be submitted to the jury:

"Has the defendant been formerly acquitted of the offense with which he now stands charged?"

On the plea of former jeopardy the defendant offered in evidence the following:

1. The bill of indictment returned at January 1954 Term Superior Court, Harnett County, as follows:

"The Jurors for the State upon their oath present, That Sherwood Barefoot, in Harnett County, on or about the 29th day of November 1953, with force and arms, at and in the County aforesaid, did, unlawfully, willfully, and feloniously ravish and carnally know Ruthlene McLamb, a female, by force and against her will, against the form of the statute in such case made and provided and against the peace and dignity of the State."

2. Minute Docket 16, page 425, Office Clerk Superior Court, showing the verdict of not guilty at the trial in January, 1954.

3. The charge of Judge Joseph Parker at the January 1954 Term Superior Court in the case of State *v.* Sherwood Barefoot.

4. The bill of indictment returned at the January 1955 Term, to which he is now called to plead.

Upon the records offered, the court ruled: "The matter becomes a question of law for me to determine. . . . I rule that legally the bill of indictment in the first case did not include the charge upon which the State proposed to try the defendant in the present case and that your plea of former acquittal does not avail you."

The defendant excepted. The defendant called the prosecuting witness to be heard on the plea of former jeopardy. The court declined to hear the witness and ordered the trial to proceed on the merits. The defendant excepted.

The State called as a witness Ruthlene McLamb, who testified in substance that on 29 November, 1953, she was 15 years of age; that she weighed 120 pounds. On that day she left home about six o'clock in the evening in company with her sister, also a sister of the defendant and James Corbitt Barefoot, with whom she had had regular dates for some time. When James Corbitt Barefoot parked the car in which the witness and the others were riding at the truck terminal near Benson, the defendant drove up in his car. He asked the witness to accompany him to the home of a Miss Allen. The witness asked James Corbitt Barefoot if he cared if she went with the defendant and after James Corbitt said she could do as she pleased, she got in the car with the defendant, who drove some distance on a dirt road, turned off on a path and stopped. The defendant made advances, all of which she repelled as best she could; that she cried and fought until she became weak and exhausted, but that finally the defendant pulled the witness from the front seat of the car into the back seat, where he had sexual intercourse with her by force and against her will; that prior thereto she had never had sexual intercourse with any person. Upon returning with the defendant to the truck terminal, she told James Corbitt Barefoot what had happened. She also told her younger sister, and on the following day, Monday, she told a friend at school. On Tuesday, she told her mother. The witness accompanied her mother to the office of Dr. Stanfield, who did not make an examination until Thursday. The doctor testified that he found evidence of penetration and a bruise on the girl's hip. On cross-examination, he testified that from a medical standpoint it was impossible to tell whether the prosecuting witness had been of previous chaste character. Other evidence was offered, tending to corroborate in part the evidence of Ruthlene McLamb, and a number of witnesses testified to her good character. All the witnesses for the State who gave testimony material to the issue were asked if they did not testify to substantially the same facts on the trial for rape in January, 1954, and in each case the answer was, yes.

At the conclusion of the State's evidence the defendant moved for a directed verdict of not guilty. The motion was denied. The defendant offered to place in evidence the charge of Judge Parker in the trial for

rape in the case of State *v.* Sherwood Barefoot at the January 1954 Criminal Term, Harnett Superior Court. Upon objection the evidence was excluded. The defendant again requested the court to submit to the jury the issue of former acquittal. The court declined to submit the issue. To all the foregoing rulings, the defendant in apt time excepted.

The jury returned a verdict of guilty as charged. Motions to set aside the verdict and for a new trial were made and overruled, to which exceptions were taken. Judgment was pronounced that the defendant be committed to the common jail of Harnett County to be assigned to work on the roads under the supervision of the State Highway and Public Works Commission for not less than 18 months and not more than 24 months. The defendant excepted to the judgment, and from it appealed.

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

Doffermyre & Stewart, by Everette L. Doffermyre, for defendant, appellant.

HIGGINS, J. During the progress of the trial exceptions to the introduction of evidence and to portions of the judge's charge were taken. These exceptions are not stressed in the brief and are not stated as questions involved in the appeal. Examination of the record discloses they are without merit. The exception based on the court's refusal to direct a verdict of not guilty is also without merit. The evidence was amply sufficient to take the case to the jury.

The defendant's counsel, both in the brief and in the oral argument, contend the plea of former jeopardy should have been sustained and the defendant discharged, or at least that the issue tendered with regard to the plea should have been submitted to the jury, and the court's failure to do so entitles the defendant to a new trial.

The indictment for rape upon which the defendant was tried and acquitted was drawn under G.S. 14-21. The indictment in this case was drawn under G.S. 14-26. The two offenses are separate and distinct. The constituent elements are not identical. If the victim in a prosecution for rape is over 12 years of age, the intercourse must be *by force and against her will.* Her former chastity is immaterial. Her consent is a complete defense. In a prosecution for carnally knowing and abusing a female child over 12 and under 16 years of age, her former chastity is a material part of the charge and must be proved. Her consent is not a defense. The crimes are different. The prosecution for one is not a bar to a prosecution for the other, even though they are related in character and grow out of one transaction. *S. v. Hall,* 214 N.C. 639, 200 S.E. 375. The test is not whether the defendant has already been tried for the same

act, but whether he has been put in jeopardy for the same offense. *S. v. Dills,* 210 N.C. 178, 185 S.E. 677; *S. v. Nash,* 86 N.C. 650; *S. v. Gibson,* 170 N.C. 697, 86 S.E. 774. "To support a plea of former acquittal it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense—*the same both in fact and in law.*" *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248; *S. v. Taylor,* 133 N.C. 755, 46 S.E. 5; *S. v. Williams,* 94 N.C. 891. "If two statutes are violated even by a single act and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute." *S. v. Stevens,* 114 N.C. 873, 19 S.E. 861; *S. v. Robinson,* 116 N.C. 1046, 21 S.E. 701. The rationale of the rule seems to be: If the facts alleged in the second indictment, when offered in evidence, would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise it does not. *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871.

From a comparison of the two indictments it is plain the facts alleged in the second bill, if offered in evidence, are insufficient to sustain a conviction of the charge of rape. It follows the defendant's plea of former acquittal is not good. This result is apparent as a matter of law. When no issues of fact are involved as to the identity of the parties or of the offenses, the question of jeopardy is to be decided by the court. *S. v. Dills, supra; S. v. Cale,* 150 N.C. 805, 63 S.E. 958. The trial judge was correct in so holding. The cases of *S. v. Bell,* 205 N.C. 225, 171 S.E. 50, and *S. v. Clemmons,* 207 N.C. 276, 176 S.E. 760, are factually different and are not applicable.

More difficult of disposition are the questions of law presented in the appeal by the defendant's exceptions to the solicitor's argument. The Office of Solicitor is created by the Constitution of the State. It is an office of great power and grave responsibility. The ideal would be for the office always to be filled by a man of judicial poise and of unruffled disposition. Few can thus qualify. The writer knows from personal experience that prosecutors are human and that they often react quickly and sometimes vigorously to the needling of adroit defense counsel. That the trial of a case in the Superior Court often develops into a spirited contest is recognized by this Court. "Counsel must be allowed wide latitude in the argument of hotly contested cases." *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466. "It is the undoubted right of counsel to argue every phase of the case supported by the evidence without fear or favor, and to deduce from the evidence offered all reasonable inferences which flow therefrom." *Lamborn v. Hollingsworth,* 195 N.C. 350, 142 S.E. 19.

In the argument to the jury, the solicitor said: "In my opinion we are not dealing with an ordinary boy of 18 years of age. While he is under-

developed in size, he is overdeveloped in passion." Objection to the argument was overruled. We think the statement was within the permissible rule of legitimate argument. The prosecuting witness had detailed in evidence how the defendant persisted in his efforts to have intercourse with her and finally pulled her from the front to the back seat of the car. From the point of view of the State, the evidence seemed to warrant the argument.

After the trial judge had overruled the objection to the foregoing argument, the solicitor made the following proposition, presumably to defense counsel: "If you will permit the reporter to take my entire argument, I will agree to let your objection come at the end of every sentence. Let it be shown by the reporter."

By the court: "You may take the argument."

The agreement did not in any wise relieve the trial judge of his duty, at all times, to see that the argument, both of counsel for the defendant and the solicitor for the State, remained within proper bounds. We do not approve the type of agreement entered into, because counsel should make timely objections to the court, and the court should pass on the objections as they arise. The record shows objections were entered to the following arguments:

"Mr. Doffermyre in his zeal for a guilty client, I expect would object to this trial even being continued and if he had been asked about it he would have objected to the trial being started and if he had been asked further about it he would have said, 'Forget the whole thing and let it go,' but that is not what I am interested in and that is not what you are interested in, I don't believe, as citizens of this County. That is certainly not the purpose for which the criminal courts are held, To Go to DEFENSE COUNSEL AND ASK HIM HOW TO RUN OR WHAT TO DO ABOUT CRIME IN THIS COUNTY. HE IS NOT INTERESTED IN CRIME. HE IS INTERESTED IN PREVENTING THE CRIME FROM COMING OUT AND HE IS HERE TO PREVENT JUSTICE BEING DONE IF HE CAN IN SO FAR AS IT AFFECTS HIS CLIENT, and if justice points an accusing finger and takes hold of the shoulder and neck of this man and says, 'You have committed a crime against society,' then, I am sure counsel would object, but thank the Lord the courts of this county are run on a different principle, and the law in this county is in the saddle as long as the people in this county run it and NOT COUNSEL FOR THE DEFENDANT and when the law gets out of the saddle you just as well close up your courthouse and schools and churches, and say, 'Take it over and run rampant over the people and the children of this county.'" . . .

"He said the Solicitor was not satisfied with the verdict in the other case. No, I was not, and won't be satisfied with it from now on, and thank God we had some way to indict and convict this defendant, some

lawful manner and bring him to justice as he ought to be brought to justice, when there sits the child he has ruined and him to sit up here, Mr. Big Man, and walk around the courtroom with that air of irresponsibility, 'let her suffer,' he says; 'let her suffer,' by his conduct and 'get me if you can, catch me if you can.'"

"Try the man who is charged here. The man who has caused all of this. The man who has ruined that child's life, and never again will she be able to raise her head and look the world straight in the face, because she has been carried off down there and debauched and ruined, contrary to her will and desire."

The defendant's objections to the portions of the solicitor's argument above quoted are made upon two grounds: (1) The remarks amount to a comment on the fact the defendant did not go upon the stand to testify; (2) the argument so far transgressed the rules of fair comment and legitimate debate as to amount to a prejudicial invasion of the defendant's rights.

It does not appear that the solicitor's remarks amount to comment upon the defendant's failure to testify. Of course, any comment to that effect would be such error as would require a new trial. However, when reasonably interpreted, the solicitor's remarks do not amount to such comment.

It is rather apparent from the record that the solicitor had been prodded during the progress of the trial and his reaction, as shown by his argument, was rather vigorous. To what extent he was provoked, we do not know, for the record does not disclose the argument of defense counsel. Even though he may, and probably did have considerable provocation, it is regrettable that the State's prosecutor permitted his zeal to carry him quite so far in his argument. But, after all, a conscientious judge heard both sides and refused to intervene. As was said in *S. v. Bowen, supra,* "Counsel must be allowed wide latitude in the argument—but what is an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge 'and we will not review his discretion unless the impropriety of counsel was gross and well calculated to prejudice the jury.'"

In the case of *S. v. Bryan,* 89 N.C. 531, this Court said: "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the latitude that ought to be allowed to counsel in the argument of any particular case. It is only in extreme cases of the abuse of the privilege of counsel, and when this is not checked by the court, and the jury is not properly cautioned, this Court can intervene and grant a new trial." (Citing *S. v. Suggs,* 89 N.C. 527; *S. v. Underwood,* 77 N.C. 502.)

In view of the evidence of this case, it is difficult to see how the solicitor's argument could have influenced the verdict. Prejudicial error, therefore, is not disclosed by the record.

No error.

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

BOBBITT, J., concurring: Where the Solicitor, on the basis of defendant's personal appearance in the courtroom, characterizes defendant in abusive terms, a distinction may be drawn between a case where the defendant testified and a case where he did not testify. Compare, *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466, and *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720. In this case, the defendant offered no evidence.

There is one portion of the Solicitor's argument which, when isolated and subjected to close scrutiny, poses a serious question, viz.:

"(For) him to set up here, Mr. Big Man, and walk around the courtroom with that air of irresponsibility, 'Let her suffer,' he says; 'Let her suffer,' by his conduct, and 'Get me if you can, catch me if you can.' "

When I consider now the quoted statement, I realize that it might convey the idea that the defendant, unwilling to testify as a witness, had declared his attitude more loudly by his courtroom appearance and behavior than by any words he might have uttered.

Even so, I concur in the decision of the court.

Except in death cases, exception to improper remarks of counsel during the argument must be taken before verdict. *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656.

The record shows that only one objection was interposed. The remarks to which this objection was addressed, as pointed out in the Court's opinion, had their roots in the evidence and were within the bounds of permissible argument.

After this incident occurred, the Solicitor, presumably to avoid annoyance by further interruptions, stated to defense counsel that the reporter might take his entire argument and the transcript thereof might show an objection at the end of each sentence. The trial judge directed that the reporter take the argument.

The record does not disclose that defendant addressed the court as to any remarks thereafter made by the Solicitor. Having offered no evidence, defense counsel had the last speech to the jury; and it may be that he felt fully capable of answering the Solicitor's argument.

Neither the Solicitor nor the trial judge had authority to set aside by agreement the rules of procedure applicable to the necessity for inter-

posing timely objection to arguments of counsel challenged as improper. If the circumstances were such as to give assurance to defendant's counsel that he need not interrupt the Solicitor *during* his further remarks, it was his duty to call the court's attention to portions thereof deemed improper at the conclusion of the Solicitor's argument. In any event, it was his duty to do so at some time before the trial judge completed his charge and submitted the case to the jury.

Our rule permitting an exception to the court's charge to be entered for the first time when appellant makes out his case on appeal, based upon consideration of "the cold record," should not be extended to permit an appellant to pursue the same course as to an alleged objectionable remark by counsel.

C. J. SPEARS AND LEONARD E. SPEARS v. PEYTON RANDOLPH.

(Filed 23 March, 1955.)

1. Boundaries § 5e—

Where the complaint refers to a map on file in the office of the clerk of the Superior Court of a county in a prior proceeding, and the map is introduced in evidence from the plat book of the clerk's office, with identification that it was the same map referred to in the complaint, and the map purports to be over 30 years old, it is competent in evidence under the Ancient Documents Rule, and may be used as a basis of testimony by the witness, proper custody of the map having been shown.

2. Appeal and Error § 23—

An assignment of error should present a single question of law for consideration by an appellate court.

3. Boundaries § 5c—

Common reputation, to be admissible, should have its origin at a time comparatively remote, always *ante litem motam*, and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location. Testimony in this case *held* substantially in accord with the rule, or at any rate, its admission was not prejudicial since testimony of like import was thereafter admitted without objection.

4. Appeal and Error § 39e—

Exceptions to testimony cannot be sustained when it appears that testimony of like import was thereafter admitted without objection.

5. Boundaries § 5c—

The witness' testimony in this case as to the boundaries *held* based on general reputation, and not what a particular person told the witness as to the boundaries.

6. Boundaries § 5d—

The mere fact that a deceased declarant owns an adjoining tract of land does not make him interested and render his declaration as to boundaries incompetent, but the adverse party must make his interest appear in order for an exception to the testimony to be sustained.

7. Boundaries § 5c—

Testimony as to a boundary line based upon general reputation is not rendered incompetent because the witness, who had testified that he knew the general reputation, also testified that a predecessor in title, while owning the land, had told the witness the location of the line.

8. Appeal and Error § 38—

The burden is on appellants not only to show error, but to show prejudicial error amounting to the denial of some substantial right.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by petitioners from *Hubbard, Special Judge,* November Special Term 1954 of HALIFAX.

Processioning proceeding to determine the true boundary line between the lands of the petitioners and respondent.

This proceeding was brought before the Clerk of the Superior Court, and upon denial of petitioners' title it was transferred to the Superior Court for trial. At the trial in the Superior Court the parties stipulated that neither denied the title of the other to the lands described in the petition and answer.

One issue was submitted to the jury: "What is the true dividing line between the lands of the plaintiffs and the lands of the defendant?" The jury answered the issue, "CD," which was the line as contended for by the defendant.

From judgment on the verdict, the petitioners appealed, assigning error.

George C. Green and Buxton Midyette for Plaintiffs, Appellants.
Johnson & Branch and Allsbrook & Benton for Defendant, Appellee.

PARKER, J. The plaintiffs discuss their assignments of error under three heads in their brief. In all of these they contend that the Trial Court erred in the admission of evidence.

Under their first head in their brief plaintiffs group, and assign as error their Exceptions 1, 2, 3, 4, 22, 23, 24 and 25, contending that the court erred in admitting in evidence a map of the Jennie B. Hunter Estate, and testimony based on the map, all over their objections, and assign three reasons for their contention: First, the map was not identi-

fied as being part of the records in the Office of the Clerk of the Superior Court of Halifax County. Second, the map is not self-proving and the defendant failed to offer evidence that it was made at the instance of the owner of the land at the time it purports to have been made, or that it has been accepted or recognized by the owner. Third, the defendant failed to offer evidence that the map was a true representation of plaintiffs' land.

The plaintiffs offered in evidence the description of their land from their Complaint, which reads in part as follows: "It being a part of Tract No. 6 allotted to the late Dr. Norman C. Hunter in that Special Proceeding entitled 'In the Matter of Thomas B. Hunter, Walker F. Hunter, Dr. Norman C. Hunter, Misses Bessie and Janie R. Hunter, *Ex Parte,*' said proceeding recorded in Special Proceeding Book 9, at page 149, in the office of the Clerk of the Superior Court for Halifax County; said tract or parcel of land later devised to Carrie J. Hunter by the Will of her husband, the late Dr. Norman C. Hunter, said Will on record in Will Book 13, at page 162, in the office of the Clerk of the Superior Court for Halifax County."

This description from the Complaint contains this further language: "The calls in the line running with the meanders of Fishing Creek, the calls in the line running from Fishing Creek to the corner of Thomas Whitaker property and the calls in the line running from the Thomas Whitaker property to the Atlantic Coast Line Railroad were taken from a map prepared by A. M. Atkinson during November 1914, said map to be found filed with the papers of that Special Proceeding entitled 'In the Matter of Thomas B. Hunter, Walker F. Hunter, Dr. Norman C. Hunter, Misses Bessie and Janie R. Hunter, *Ex Parte,*' in the office of the Clerk of the Superior Court for Halifax County."

The map introduced in evidence by the defendant to which plaintiffs objected, is thus described in the Record: "DEFENDANT OFFERS in evidence Plat Book 2, page 22 of the Clerk of the Superior Court of Halifax County, Map of Jennie B. Hunter Estate, with a legend thereon reading as follows: 'Halifax County near Enfield, N. C. survey by A. M. Atkinson, November 1914, signed Commissioners B. D. Mann, F. C. Pittman and J. H. Sherrod, Docketed in Special Proceedings Volume 9, page 149. Marked Defendant's EXHIBIT 1."

It would seem that the map introduced in evidence by the defendant is the same map referred to in plaintiffs' Complaint. Defendant's map of Jennie B. Hunter Estate was prepared by A. M. Atkinson in November 1914, and docketed in Special Proceedings Volume 9, page 149. Plaintiffs' Complaint describes their land as "being a part of tract No. 6 allotted to the late Dr. Norman C. Hunter in that Special Proceeding entitled 'In the Matter of Thomas B. Hunter, Walker F. Hunter, Dr. Norman C. Hunter . . . Janie R. Hunter, *Ex Parte,*' said Proceeding

recorded in Special Proceeding Book 9, at page 149 . . ." And further on the Complaint refers to "a map prepared by A. M. Atkinson during November 1914, said map to be found filed with the papers of that Special Proceeding entitled 'In the Matter of Thomas B. Hunter, . . . Janie R. Hunter, *Ex Parte,*' in the office of the Clerk of the Superior Court for Halifax County."

The description in the Complaint of plaintiffs' land is that it is a part of tract No. 6 of the division of the Hunter land, and refers to the Atkinson map filed in the Special Proceeding in the office of the Clerk of the Superior Court in Halifax County. Jake Shearin, a registered engineer and witness for the plaintiffs, testified on cross-examination: "Yes, I also looked at this map of Record in Halifax in making my survey. I consulted this map. Lot No. 6 shown on this map is the same property owned by Mr. Spears." Then Shearin was asked: "Would you read to the jury what that map shows the call to be?" Over the plaintiffs' objection and exception No. 1 the witness was permitted to answer.

Julian Trailer, a registered engineer and witness for the plaintiffs, testified on cross-examination: "Yes, I checked this map on my survey, also ran this complete line out and then made an angle. Yes, there is one turn on that map. There are two turns in my map. Q. And the one you took from the record, isn't there? Objection. Overruled. Plaintiffs' Exception No. 2. A. There is two turns in here."

It appears to us that the evidence clearly shows that the map introduced in evidence by the defendant, over the plaintiffs' objection, was a part of the Records in the Office of the Clerk of the Superior Court of Halifax County.

It also seems from the Records referred to in the pleadings and from the evidence that Janie R. Hunter and Jennie B. Hunter are the same person. In addition, plaintiffs in objecting to the admissibility of the map, make no intimation that they were different persons.

The Atkinson map is referred to in plaintiffs' Complaint, was consulted by their witness Shearin, was checked by their witness Trailer, in their surveying the line contended for by plaintiffs, purports to be over 30 years old, seems to have been made at the instance of Janie R. Hunter and the others in the *Ex Parte* Proceeding, and accepted by her and them while owning the land as a true representation of Janie R. Hunter's land, was relevant to the inquiry, was produced from proper custody, and on its face was free from suspicion. It was admissible in evidence under the Ancient Documents Rule. *Nicholson v. Eureka Lumber Co.,* 156 N.C. 59, 72 S.E. 86, 36 L.R.A. (N.S.) 162; *Thompson v. Buchanan,* 195 N.C. 155, 141 S.E. 580; 20 Am. Jur., Evidence, Secs. 932-934; Stansbury, N. C. Evidence, Sec. 196; 32 C.J.S., Evidence, Sec. 746.

Gates v. McCormick, 176 N.C. 640, 97 S.E. 626, relied upon by plaintiffs is distinguishable because proper or natural custody was not shown.

The plaintiffs make no contention in their brief that any of the testimony based on this map was incompetent, except that the introduction of the map was error. There was no error in admitting the map in evidence, and in admitting the testimony based thereon, and Exceptions 1, 2, 3, 4, 22, 23, 24 and 25 are overruled.

Under their second head in their brief plaintiffs group, and assign as errors their Exceptions 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, contending that the Trial Court erred in admitting evidence as to the general reputation of the beginning of the boundary line and of the boundary line between the lands of plaintiffs and defendant because the evidence did not show, as plaintiffs contend, that such reputation arose *ante litem motam.*

Under their third head in their brief plaintiffs group, and assign as errors their Exceptions 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, contending that the Trial Court erred "in admitting testimony as to declarations made by a person deceased when he was the owner of defendant's land and testimony based upon such declarations."

It is elementary learning that an assignment of error must present a single question of law for consideration by an appellate court. As to when it is proper to group more than one exception under one assignment, see *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785.

Such grouping of exceptions necessitates "a voyage of discovery" to ascertain which of the evidence admitted over objection and exception was of general reputation, and which of declarations, and would seem to approximate a broadside assignment.

This Court said in *Peltz v. Burgess,* 196 N.C. 395, 145 S.E. 781: "We have often held that common reputation, to be admissible, should have its origin at a time comparatively remote, always *ante litem motam,* and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location."

The summons in this case was issued 16 September 1953, and served upon the defendant the next day. One of the plaintiffs testified, "I have owned this land that is in contention since 1951." There is no evidence in the Record that there was any dispute over the boundary line before 1951.

Plaintiffs' Exceptions 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 appear in the testimony of the defendant Peyton Randolph, Sidney Randolph and Jack Whitehead. The evidence admitted over objections and these exceptions is substantially this: There has been in the community for some forty years or more a general reputation as to the boundary line between

the land of plaintiffs and defendant—Sidney Randolph testified he was 51 years old and had known the general reputation of the boundary line since he was big enough to walk around—; and that the general reputation is that the beginning of the line was a Hickory Tree that fell into Fishing Creek, and that a wire fence attached to the tree ran along the line.

Afterwards without objection Henry Clay, Calhoun Braswell and Frank Whitehead gave substantially the same testimony as to the general reputation of the beginning of the boundary line and the line.

This general reputation seems to have arisen *ante litem motam.* Even if this evidence were incompetent, exceptions to its admission cannot be sustained, because it appears that testimony of like import was thereafter admitted without objection. *Teseneer v. Mills Co.,* 209 N.C. 615, 184 S.E. 535; *Edwards v. Junior Order,* 220 N.C. 41, 16 S.E. 2d 466; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366.

During the testimony of Sidney Randolph he said on direct examination he was familiar with the boundary line. Counsel for plaintiffs at that point was permitted to question him and the Record shows this:

"Mr. Randolph, who told you what the dividing line was?

"A. Well, it has been there ever since I can remember. Father and everybody around there knew that was the line.

"He owned it at the time he told you?

"A. Yes.

OBJECTION

"THE COURT. I will permit him to say whether he knows the reputation but not what it is."

Afterwards Sidney Randolph gave testimony as to the general reputation. The testimony of Sidney Randolph as to the boundary line was not what his father told him, but its general reputation.

The assignments of error based on exceptions 5 to 15, both inclusive, are overruled.

Jack Whitehead, a witness for defendant testified that he knew the general reputation as to the beginning point of the dividing line between the lands of plaintiffs and defendant, and had known it since he was 6 years old. He then testified as to the general reputation of the line. Whitehead was then asked by counsel for plaintiff, who was permitted to interrupt the direct examination: "Who told you where that line was? A. Mr. Paul Randolph and Mr. Walker Hunter. Mr. Hunter was interested in the lands? A. Yes." Motion to strike witness' testimony. Overruled. Plaintiffs' Exception 16. "And Mr. Randolph, he owned it too? A. At that time he did, yes." Motion to strike witness' testimony. Overruled. Plaintiffs' Exception 17. On cross-examination this appears in

the Record in narrative form, not in questions and answers: "Mr. Paul Randolph is one who told me what I have testified to about the dividing line, the fence being the dividing line. I have had Mr. William Randolph tell me the same thing. I think Paul Randolph was the owner of the land at the time he made the statement. MOTION TO STRIKE witness' testimony—OVERRULED—plaintiffs' EXCEPTION 18."

There is no evidence in the Record that William Randolph had ever had any interest in defendant's land. It would seem that Walker Hunter owned adjoining land, but that Walker Hunter had never had any interest in the defendant's land.

The mere fact that a deceased declarant as to boundaries owns an adjoining tract of land does not necessarily make him interested, and render his declaration incompetent. *Bethea v. Byrd,* 93 N.C. 141; *Lewis v. Lumber Co.,* 113 N.C. 55, 18 S.E. 52; *Sullivan v. Blount,* 165 N.C. 7, 80 S.E. 892. Declaration of a deceased owner of adjoining land as to where his corner was is incompetent, because he is interested. *Chrisco v. Yow,* 153 N.C. 434, 69 S.E. 422. Walker Hunter told Whitehead where the boundary line was between the land owned by plaintiffs and that owned by defendant. No interest of Hunter's is made to appear.

Plaintiffs say in their brief: "Likewise it was error to have allowed the witness Jack Whitehead to testify, 'Mr. Paul Randolph is one who told me what I have testified to about the dividing line, the fence being the dividing line' (Plaintiffs' Exception 18 (R p 25) when Paul Randolph was the owner of the defendant's land at the time he made the statement and therefore the other testimony given by Mr. Whitehead covered by plaintiffs' exceptions numbers 12, 13, 14, 15, 16 and 17 (R pp 23, 24) was inadmissible."

What Paul Randolph told Jack Whitehead was brought out by plaintiffs' counsel. The source of Jack Whitehead's knowledge of the general reputation of the boundary line was not derived solely from Paul Randolph. Even conceding that what Paul Randolph told him was incompetent as a source of information as to general reputation, Jack Whitehead's testimony as to the general reputation should not have been stricken out, because of testimony of like import later, without objection, by Henry Clay, Calhoun Braswell and Frank Whitehead. Exceptions 16, 17 and 18 are overruled.

The burden is on the appellants not only to show error, but to show prejudicial error amounting to the denial of some substantial right. *Billings v. Renegar,* 241 N.C. 17, 84 S.E. 2d 268. This they have not done.

No error.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

ROBERT BROWN, BY AND THROUGH HIS NEXT FRIEND, PAUL BROWN, v. THE FIDELITY & CASUALTY COMPANY OF NEW YORK.

(Filed 23 March, 1955.)

1. Insurance § 13—

Statutory provisions applicable to a policy of insurance enter into and form a part of the contract to the same extent as if they were actually written in it.

2. Insurance § 43a—

A policy of insurance endorsed on its face "N. C. Assigned Risk Plan" is governed by the Motor Vehicles Safety and Responsibility Act, G.S. 20, Art. 9.

3. Insurance § 43b—

Insurer in an assigned risk policy on a truck is not liable for injuries inflicted by insured while driving a farm tractor, since a farm tractor is not a motor vehicle within the purview of the Uniform Drivers' License Act, the statute relating to the registration and certificate of titles of motor vehicles, or the Motor Vehicles Safety and Responsibility Act, G.S. 20-226, G.S. 20-6, G.S. 20-7, G.S. 20-8.

BARNHILL, C. J., took no part in the consideration and decision of this case.

APPEAL by plaintiff from *Pless, J.*, at September Term 1954, of WILKES.

Civil action by third party to recover on automobile policy issued by defendant to Council Pat Hayes under "N. C. Assigned Risk Plan," on judgment in prior action for personal injuries sustained by plaintiff as result of actionable negligence of insured in operation of an agricultural tractor—pulling a hay rake upon public highway—on which execution has been returned *nulla bona*.

These facts appear to have been admitted in the pleadings:

1. The plaintiff, Robert Brown, is a minor child, for whom the plaintiff Paul Brown, his father, has been appointed next friend, both being residents of Wilkes County, North Carolina.

2. The defendant, a corporation, duly organized and existing under the laws of the State of New York, was on 20 February, 1951, and prior thereto, and on 29 June, 1951, duly authorized and empowered to engage in the business of writing casualty insurance in the State of North Carolina by the proper agencies of said State, and issued to one Council Pat Hayes an insurance policy designated as an automobile policy, numbered VF-1323995, covering the period from 20 February, 1951 to 20 February, 1952, which was in effect on 29 June, 1951.

In addition to these matters, plaintiff alleges in his complaint substantially the following:

1. That at January Term 1952 of Wilkes County Superior Court plaintiff recovered judgment against Council Pat Hayes in sum of $8,000 as damages for personal injuries to Robert Brown sustained on 29 June, 1951 as result of the negligent operation of "a motor vehicle" by said Hayes; that said judgment has been duly docketed in office of Clerk of Superior Court of said county; and that execution was duly issued thereon to Sheriff of Wilkes County, and has been returned *"nulla bona"*; and that Council Pat Hayes is without sufficient property of any character to satisfy the judgment.

2. That pursuant to the terms of the automobile policy of insurance Number VF-1323995, issued to Council Pat Hayes as above stated, defendant agreed to pay on his behalf all sums of money which he should become obligated to pay by reason of liability imposed upon him for damages because of bodily injury sustained by any person,—within a limit of $5,000 as to each person.

3. That the said policy of automobile insurance was issued by the defendant to Council Pat Hayes under and pursuant to the laws of the State of North Carolina and specifically the statute known as The Financial Responsibility Act, under what is known as the assigned risk plan.

4. That defendant was duly notified of the injuries to the person of Robert Brown at the time, or shortly after, they occurred and defendant had due opportunity to defend the suit instituted by plaintiff against Council Pat Hayes; but that defendant denied that the policy covered the case, and would not defend the action.

5. That defendant is justly indebted to plaintiff in amount of $5,000 with interest.

Defendant answering denied these allegations of the complaint.

And at the September Term 1953 of Wilkes County Superior Court, and upon motion of defendant, plaintiff was ordered to amend his complaint in such manner as to describe the motor vehicle to which reference is made in the complaint and which the insured is alleged to have been operating.

Pursuant to this order plaintiff amended his complaint by alleging that "the said Council Hayes was operating a four-wheel, self-propelled motor vehicle, being used at the time of said accident as a passenger vehicle and while being so used, possessing the nomenclature of an automobile; that said vehicle is capable of being used as a tractor and when so being used as a tractor possesses the nomenclature of a farm tractor."

And the record shows that at September Term 1954, "after the jury was impaneled, the court conferred with the attorneys, and following said

conference the attorneys for the plaintiff and defendant stipulated as follows:

"The recovery obtained at the January 1952 Term of Wilkes Superior Court in the cause of the plaintiff against Council (Pet) Hayes, was based upon an accident occurring June 29, 1951 on Roaring River Street in the village of Mountain View (population approximately 400), Wilkes County. The evidence for the plaintiff tends to show that he was riding a bicycle on said street, that he overtook and passed Council (Pet) Hayes, who was operating a 1946 Ford tractor pulling a hay rake, a picture of said tractor and rake being made a part of these stipulations. After the plaintiff had passed this vehicle he heard a noise as if the motor had speeded up and was struck from the rear by said vehicle, sustaining certain personal injuries. Upon suit being brought by the plaintiff against Council (Pet) Hayes, the defendant insurance company herein was notified of the pendency of the action and declined to defend the same upon the grounds that it was not liable under its policy No. VF 1323995 with the endorsements thereto, upon which the premiums had been paid, and which was in effect at the time of said accident under the provisions of the Financial Responsibility Act as it existed in 1951. Judgment by default and inquiry was obtained, and upon the inquiry at the January Term 1952 plaintiff obtained a recovery of $8,000. This suit was instituted for the purpose of holding the defendant Insurance Company liable to the plaintiff for said judgment after execution had been returned 'unsatisfied' against Council (Pet) Hayes. The policy together with the endorsements, is hereby made a part of these stipulations.

"The plaintiff is in position to offer evidence tending to show that the tractor was not the property of the insured, Council (Pet) Hayes, and the defendant is in position to show that it did belong to Council (Pet) Hayes. The plaintiff proposed to offer evidence of C. C. Faw, Jr., of the Faw Insurance Agency, through whom said policy was assigned, and to whom the premium was paid, that an endorsement was made to said policy changing the vehicle designated in said policy from a 1948 Model half ton pickup truck to a 1948 Ford two-door sedan. That this endorsement was made and was in effect prior to June 29, 1951, the date of the injury to the plaintiff. That in the issuance of the insurance policy, the paragraph appearing in the insurance policy, to-wit, paragraph five, designated as 'the purpose for which the automobile is to be used' is governed by the character and type of motor vehicle described in the policy. That when the motor vehicle is described as a truck, the purpose is designated under paragraph five as commercial. That when the motor vehicle described in the policy is a passenger vehicle, that the purpose, under paragraph five, is designated as pleasure and business.

"The defendant objects to the introduction of this evidence of C. C. Faw, Jr., and the court, for the purpose of this stipulation, overruled said objection.

"The above stipulations are made in the interest of time and to save unnecessary expense to constitute the evidence which would have been offered by the plaintiff, and are accepted by the court in order that the main point at issue, that being whether or not the tractor described in the stipulations is covered by the insurance policy, can be presented and determined by the Appellate Court."

And that "upon the foregoing stipulations, the court was of the opinion that the plaintiff's cause of action should be dismissed as of nonsuit, and in deference to said opinion, the plaintiff submitted to judgment of voluntary nonsuit and gave notice of appeal to the Supreme Court."

"Consented to:

W. H. McElwee, Jr.
Trivette, Holshouser & Mitchell,
Attorneys for Plaintiff.

Patrick & Harper,
Attorneys for Defendant."

This judgment followed: "This cause was heard before the undersigned presiding Judge, and a jury. Upon the stipulations entered in the record, the Court was of the opinion and so held that the cause should be dismissed as of nonsuit, and in deference thereto the plaintiff submits to judgment of voluntary nonsuit.

"It is therefore ORDERED, ADJUDGED AND DECREED that the cause be and is hereby dismissed as of voluntary nonsuit, and the plaintiff is taxed with the cost."

To the respective rulings of the court that the plaintiff's cause of action should be dismissed as of nonsuit, and to the signing of the judgment, plaintiff excepted, and appeals to Supreme Court and assigns error.

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

Patrick & Harper for defendant, appellee.

WINBORNE, J. The stipulations on which the ruling of the trial court was made to rest are manifestly insufficient to make a case for the jury.

Admittedly the main point at issue is whether or not the tractor described in the stipulations is covered by the insurance policy on which the action is based.

The automobile, described in the policy, is a "1948 Ford ½ T. Pickup Truck," and the purpose for which it is to be used is "Commercial."

And the term "commercial" is defined "as use principally in the business occupation of the named insured as stated in declaration 1, including occasional use for personal, pleasure, family, and other business purposes." The occupation of the named insured is "Farmer & Garage Owner."

Moreover, the policy provides in paragraph V as to "Use of other automobiles." "If the named insured is an individual who owns the automobile classified as 'pleasure and business' . . . such insurance as is afforded by the policy for bodily injury liability, . . . applies with respect to any other automobile subject to the following provisions:

"(a) With respect to the insurance for bodily injury liability . . . the unqualified word 'insured' includes (1) such named insured (2) . . . or (3) any other person . . . responsible for the use by such named insured . . . of an automobile not owned by or hired by such other person . . ."

Also it may be noted that the vehicle is mentioned in the policy as "Automobile," and not as "Motor vehicle."

Furthermore the policy is endorsed on its face "N. C. Assigned Risk Plan." That plan is provided for in the Motor Vehicle Safety and Responsibility Act, 1947 Session Laws of N. C., Chapter 1006, codified as Art. 9 of Chapter 20 of General Statutes.

"Where a statute is applicable to a policy of insurance, provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it," so wrote *Ervin, J.*, in the recent case of *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610.

Turning now to the Motor Vehicle Safety and Responsibility Act, G.S. 20-226, in effect on 29 June, 1951, the date on which plaintiff sustained the injury here involved, it is seen that the General Assembly declared that "unless a different meaning is clearly required by the context," the term "'motor vehicle' means every vehicle which is self-propelled, or designed for self-propulsion, and every vehicle drawn, or designed to be drawn, by a motor vehicle, and includes every device in, upon or by which any person or property is or can be transported or drawn upon a highway, except devices moved by human or animal power, and devices used exclusively upon stationary rails or tracks, *and vehicles used in this State but not required to be licensed by the State.*" (Italics ours.)

And now adverting to Part 3 of Chapter 20 of the General Statutes, entitled "Registration and Certificates of Titles of Motor Vehicles," likewise effective on 29 June, 1951, it is seen in G.S. 20-51 that there shall be exempt from the requirement of registration and certificate of title, among others, "f. Farm tractors equipped with rubber tires and trailers or semi-trailers when attached thereto and when used by a farmer, his tenant, agent or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from

one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor and trailer or semi-trailer while on any trip within a radius of ten miles from point of loading . . ."

Indeed in Article 2 of Chapter 20 of General Statutes, entitled "Uniform Drivers' License Act" it is provided in G.S. 20-6 that unless another meaning is clearly apparent from the language or context or unless such construction is inconsistent with the manifest intention of the Legislature, terms used in this article shall be construed as follows: "'Motor vehicle' shall mean any rubber tired vehicle propelled or drawn by any power other than muscular, *except* aircraft, road rollers, street sprinklers, ambulances owned by municipalities, baggage trucks, and tractors used about railroad stations and yards, *agricultural tractors,* industrial tractors used in and around warehouses and yards, and such vehicles as run only upon rails or tracks." (Emphases ours.)

And in G.S. 20-7 it is declared, among other things, that "except as otherwise provided in Sec. 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the Department under the provisions of this article."

And in G.S. 20-8 there is exempted from license "(b) any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway."

Therefore it is manifest from a reading of the provisions of the Motor Vehicle Act, Chapter 20 of the General Statutes, that farm tractors are not to be considered motor vehicles within the provisions of the Uniform Drivers' License Act, the statute relating to the registration and certificate of titles of motor vehicles, or in the Motor Vehicles Safety and Responsibility Act. Hence the farm tractor involved in the case in hand is not covered by the policy of insurance on which this action is founded. Thus whether or not the stipulation of the parties on which decisions below rests declares the ownership of the farm tractor, is immaterial.

The judgment of nonsuit from which this appeal is taken is

Affirmed.

BARNHILL, C. J., took no part in the consideration and decision of this case.

H. M. KEITH AND J. H. WICKER T/A KEITH AND WICKER v. M. O. WILDER, WADE WILDER, JOHN SNIPES AND C. S. GAINES AND H. B. GAINES, T/A GAINES LUMBER COMPANY.

(Filed 23 March, 1955.)

1. Fraud §§ 9, 12—Allegations and evidence held sufficient to make out case of fraud in sale of timber.

The allegations and evidence were to the effect that defendants were acting in concert in procuring plaintiffs to purchase timber, that one of defendants pointed out the lines and boundaries of an adjacent tract and represented that it was included in the sale, that the timber on the adjacent tract was of considerable value, constituting an inducement to plaintiffs to purchase, that the defendants admitted the adjacent tract was not included in plaintiffs' deed, and that defendants made the misrepresentation with knowledge of its falsity or in conscience ignorance of its truth for the purpose of inducing plaintiffs to purchase. *Held:* The allegations were sufficient to overrule defendants' demurrer and the evidence was sufficient to overrule defendants' motion to nonsuit.

2. Fraud § 1—

An action will lie to recover damages for false and fraudulent representations in the sale of property when it is made to appear that such representations were calculated and intended to induce the purchase and were reasonably relied on by the purchaser to his injury and damage. A misrepresentation is material if it induces the other party to act.

3. Fraud § 5—

The rule that if the parties are on equal terms and the purchaser has knowledge of the facts or means of information readily available, an action for fraud will not lie for material misrepresentation unless the seller prevents the purchaser from making use of his knowledge or information, is subject to the exception that an action will lie when the seller makes a positive and definite representation which the purchaser does and is entitled to rely upon, and the representation is of a character to induce a person of ordinary prudence to act to his damage.

4. Same—

Where standing timber is conveyed by a deed describing the lands as a named tract without setting out the boundary lines, and one of the brokers points out the boundary lines of an adjacent tract and falsely and fraudulently represents that such adjacent tract is embraced in the description in the deed, the purchasers are entitled to rely upon such positive representation and may maintain an action for fraud, notwithstanding that they could have ascertained by an accurate survey whether the adjacent tract was included in the description in the deed.

5. Partnership § 5—

Each person engaged in a joint or common enterprise in the sale of timber to purchasers is responsible for the acts and representations of the others in negotiating the sale, and if any one or more of them makes false representations to the purchasers or either of them, such representations are regarded in law as having been made by all the sellers.

6. Same: Trial § 17—

Where testimony of an admission made by one defendant after the consummation of the transaction is properly limited by the court to be considered only against the individual making the statement, exception thereto cannot be sustained.

7. Appeal and Error § 29—

Exceptions not brought forward as separate assignments of error and not discussed in the brief are deemed abandoned. Rule 28; Rule 19 (3).

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

APPEAL by defendants Wilder from *Bone, J.*, September Term 1954 of LEE.

Civil action to recover damages for fraudulent representation in the sale of standing timber on described lands.

Plaintiffs entered voluntary nonsuit as to the defendants Gaines. The defendant Snipes did not perfect his appeal. Only the defendants Wilder are now involved.

The plaintiffs Keith and Wicker are and were associated together in the purchase of timber and the manufacture of lumber and were partners in the transaction out of which this controversy arose. Briefly stated, the plaintiffs' evidence tended to show that the defendants Wilder and Snipes were acting together as agents or brokers in the sale of timber and timber lands, and that they negotiated with the plaintiffs and succeeded in inducing them to purchase the standing timber on a tract of land in Orange County known as the Thompson-Hicks or Umstead land, containing 713 acres, belonging to C. S. and H. B. Gaines, at and for the price of $32,000. Upon delivery of the deed executed by the owners of the land, the plaintiffs paid, as directed, $27,500 for the benefit of the owners, and $4,500 to the defendants Wilder and Snipes as their commissions.

The plaintiffs alleged—and offered testimony tending to show—that in the negotiations leading up to the purchase, and at the time of the personal inspection and examination of the standing timber on the land, the defendants Wilder and Snipes represented to the plaintiffs that the timber then being sold included that on a tract of 29.70 acres, which is particularly described in the complaint. It was testified by the plaintiffs that one of the defendants Wilder showed the 29.70-acre tract to the plaintiffs and pointed out the lines and boundaries thereof and represented that the timber thereon, which was of considerable value, was a part of the timber being sold; that after the sale was consummated and the price paid, it was found that the 29.70-acre tract belonged to someone else, and the defendants admitted it was not covered by the deed the plaintiffs received. Plaintiffs' testimony was also to the effect that de-

fendant Snipes signified his willingness to refund a portion of the purchase price equivalent to the value of the timber on the 29.70-acre tract, but the defendants Wilder declined to do so, contending the transaction was free from fraud.

The plaintiffs alleged that the representations made by the defendants were false; that the defendants knew they were false or that the representations were made by the defendants with conscious ignorance of their truth for the purpose of inducing plaintiffs to purchase the timber; and that the plaintiffs relied thereon and were induced thereby to purchase and pay the price, to their damage in the sum of $2,500.

The defendants denied that they made the representations as alleged, and, on the contrary averred that they were ignorant as to the correct boundaries of the land which belonged to Gaines and so advised the plaintiffs. The defendants also denied that they showed the plaintiffs the boundary lines of the 29.70-acre tract and alleged that the plaintiffs knew the land belonged to Gaines and that information as to its extent was equally open to the plaintiffs. They pointed out that the deed which the plaintiffs accepted described and identified the entire body of 713 acres of land merely by the names of former owners, and was without covenants of warranty, and that the plaintiffs had ample opportunity by survey to determine accurately the lines and boundaries of the land on which the timber purchased was standing; and that the transaction was without fraud or fraudulent representation on their part.

In response to issues submitted without objection, the jury found for its verdict that (1) the defendants falsely and fraudulently represented that the timber on the 29.70-acre tract was within the boundaries of the timber being sold; (2) that plaintiffs were damaged thereby; and (3) that plaintiffs were entitled to recover $1,500 therefor.

From judgment in accordance with the verdict the defendants Wilder appealed.

Hoyle & Hoyle and J. G. Edwards for plaintiffs, appellees.
Gavin, Jackson & Gavin for defendants, appellants.

DEVIN, J. The defendants demurred *ore tenus* on the ground that insufficient facts were alleged in the complaint to sustain an action for damages for fraud, and again at the conclusion of all the evidence moved for judgment of nonsuit on the ground that the evidence was insufficient to warrant its submission to the jury. The trial judge overruled the demurrer and denied the motion to nonsuit.

The assignments of error based on these rulings cannot be sustained. The allegations of the complaint are sufficient to state a cause of action for the recovery of damages for false and fraudulent representations

inducing the purchase of the timber described, and the evidence offered by the plaintiffs tended to support these allegations. *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811; *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131; *Mfg. Co. v. Taylor,* 230 N.C. 680, 55 S.E. 2d 311.

It is an established principle of law that an action will lie to recover damages for false and fraudulent representation in the sale of property when it is made to appear that such representations were calculated and intended to induce the purchase and were reasonably relied on by the purchaser to his injury and damage.

The rule is accurately stated in *Cofield v. Griffin, supra,* as follows:

"The essential elements of fraud are these: (1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation, and acted upon it; and (6) that plaintiff thereby suffered injury. *Parker v. White,* 235 N.C. 680, 71 S.E. 2d 122; *Foster v. Snead,* 235 N.C. 338, 69 S.E. 2d 604; *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202. A false representation is material when it deceives a person and induces him to act. *Starnes v. R. R.,* 170 N.C. 222, 87 S.E. 43; *Machine Co. v. Bullock,* 161 N.C. 1, 76 S.E. 634."

The able judge who presided over the trial of this case quoted the language of the *Cofield case* in his charge to the jury.

Again in *Gray v. Edmonds,* 232 N.C. 681, 62 S.E. 2d 77, this Court stated a principle applicable to the facts of record here as follows:

"The defendants bottom their defense on the principle that the purchaser of property seeking redress on account of loss sustained by reliance upon a false representation of a material fact made by the seller may not be heard to complain if the parties were on equal terms and he had knowledge of the facts or means of information readily available and failed to make use of his knowledge or information, unless prevented by the seller. *Harding v. Ins. Co.,* 218 N.C. 129, 10 S.E. 2d 599; *Peyton v. Griffin,* 195 N.C. 685, 143 S.E. 525. But the rule is also well established that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon. 23 A.J. 970, Restatement Torts, secs. 537, 540."

The principles of law embodied in these and other similar decisions of this Court support the ruling of the trial judge. *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785; *Garland v. Penegar,* 235 N.C. 517, 70 S.E. 2d 486; *Haywood v. Morton,* 209 N.C. 235, 183 S.E. 280; *Ward v.*

Heath, 222 N.C. 470, 24 S.E. 2d 5; *Whitehurst v. Ins. Co.,* 149 N.C. 273; *Lamm v. Crumpler,* 240 N.C. 35 (44), 81 S.E. 2d 138; *Roberson v. Williams, supra; May v. Loomis,* 140 N.C. 350.

The defendants cite *Queen v. Sisk,* 238 N.C. 389, 78 S.E. 2d 152, and *Williamson v. Holt,* 147 N.C. 515, in support of their argument that the rule of *caveat emptor* applies to the facts of this case to defeat the plaintiffs' action, but we do not think the principle stated in these cases and in the other cases of similar import cited are controlling here. While the deed conveying the standing timber to the plaintiffs described the land on which the timber stood as the Thompson-Hicks land and did not set out the boundary lines, there was evidence from the plaintiffs that a particular parcel of land was falsely and fraudulently represented as being embraced within the description in the deed.

True the plaintiffs could have ascertained by an accurate survey of the lines and boundaries of the land whether the 29.70-acre tract was included (*Plotkin v. Bond Co.,* 204 N.C. 508, 168 S.E. 820; *Peyton v. Griffin, supra*), but the defendants cannot complain if the plaintiffs relied upon the defendants' positive representation, as testified by plaintiffs, that the timber on this parcel of land was a part of that being sold. *Gray v. Edmonds, supra; Ferebee v. Gordon,* 35 N.C. 350.

Defendants excepted to the following instruction given by the court to the jury:

"Since it appears from the testimony without contradiction that the defendants were engaged in a common or joint enterprise in connection with the sale of the Gaines timber, the acts and representations of any one of them would be regarded in law as the acts and representations of all. If any one or more of the defendants made false and fraudulent representations to the plaintiffs, or either of them, such representations would be regarded in law as having been made by all of the defendants to both plaintiffs."

The court correctly stated a principle of law applicable to the evidence in this case. *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892; *Hall v. Younts,* 87 N.C. 285; *Mode v. Penland,* 93 N.C. 292; G.S. 59-43.

The defendants' exception to the evidence offered by plaintiffs of statements subsequently made by certain of the defendants, indicating willingness to repay to plaintiffs for the loss suffered, cannot be sustained as the court limited this evidence as competent to be considered only against the individual making the statement.

The defendants noted numerous exceptions to rulings of the court in the admission and exclusion of testimony during the progress of the trial, but these were not brought forward as separate assignments of error, and some of them are not discussed in the brief. Rule 28; Rule 19 (3); *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299. However, we have examined these

exceptions as they appear in the record and reach the conclusion that none of them are of sufficient merit to justify a new trial.

Likewise we have considered the exceptions to the judge's charge and to the court's failure to charge as indicated in defendants' brief, and we are unable to discover any error of which the defendants can in law complain. The jury accepted the plaintiffs' view of the case on competent evidence, and the court's rulings were free from substantial error. The verdict and judgment will be upheld. In the trial we find

No error.

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

CINDY McDEVITT, VIANA RAMSEY, ROBBIE NORTON, CORA GOSNELL, ROLLA BULLMAN, JAY CHANDLER, JOE CHANDLER, INEZ CHANDLER, MABEL CHANDLER, SADIE CHANDLER, CORA LEE CUTSHALL, OMA B. HILLIARD, PATTERSON BULLMAN, HARLEY BULLMAN, ROBBIE BULLMAN, BERLIE B. CUTSHALL, FAYE B. THOMAS, WILLIAM CHANDLER, STARLING CHANDLER, BENJAMIN CHANDLER, RUTH C. RAY, HUBERT CHANDLER, MARION CHANDLER, ROSA C. BULLMAN, ELMER DAVIS, VIAN D. DOCKERY AND ANDREW CHANDLER, v. DEWEY CHANDLER AND PATTERSON CHANDLER.

(Filed 23 March, 1955.)

1. Judgments § 33a—

A judgment of compulsory nonsuit or dismissal not involving the merits of the case is not a bar to a subsequent action.

2. Same—

Where after plea of sole seizin in a partition proceeding, the proceeding is nonsuited for matters not involving the merits, the judgment will not bar a subsequent action between the parties to cancel a deed as being a cloud on title.

3. Deeds § 2a (2)—

Whether a grantor has sufficient mental capacity to execute a deed is not a question of fact, but is a conclusion which the law draws from certain facts as a premise, such as whether the grantor understood the nature and consequences of his act in making the deed, whether he knew what land he was disposing of and to whom, etc.

4. Same: Evidence § 47—

In this action to set aside a deed for want of mental capacity in the grantor, a new trial is awarded for comments made and testimony elicited by the presiding judge which had the effect of permitting the witnesses to testify that grantor did not have sufficient mental capacity to execute the

deed rather than limiting the testimony to the facts from which the law might draw the inference of mental incapacity.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Whitmire, Special Judge,* and a jury, at October Term, 1954, of MADISON.

Civil action to set aside a deed made by Aldenas Chandler, widow of D. F. Chandler, to two of her sons, Patterson Chandler and Dewey Chandler, conveying lands located in Madison County.

The deed is dated 3 March, 1950. It was acknowledged and filed for registration the next day. Aldenas Chandler died intestate the following 6 February, 1951. Thereafter her other children and heirs at law instituted this action against Patterson and Dewey Chandler, asking that the deed be set aside upon allegations of mental incapacity and undue influence.

The defendants by answer denied the material allegations of the complaint and set up as *res judicata* a former judgment in a proceeding for the partition of the *locus in quo,* to which the defendants and most of the plaintiffs herein were parties. The partition proceeding was instituted 21 March, 1950, during the lifetime of Aldenas Chandler, apparently on the erroneous theory that the land was owned in fee by D. F. Chandler at the time of his death. In the former proceeding the defendants herein denied petitioners' allegations of title and pleaded sole seizin. At the trial of the former proceeding, when the petitioners had put on their evidence and rested their case, the defendants' motion for judgment as of nonsuit was allowed and judgment was entered in accordance with the ruling.

When the instant case came on for trial the court, after consideration of the judgment roll in the former proceeding, concluded as a matter of law that the judgment as of nonsuit was not a bar to the instant action and resolved the plea of *res judicata* against the defendants. To this ruling and to others made during the course of the trial relating to the exclusion of evidence bearing on the plea of *res judicata,* the defendants excepted. The instant case was submitted to the jury on these issues, which were answered as indicated:

"1. Was Aldenas Chandler mentally incompetent on March 3, 1950, to execute the paper writing purporting to be a deed from her to the defendants Dewey Chandler and Patterson Chandler, as alleged in the Complaint? Answer: Yes.

"2. Was the execution of the said paper writing procured by the undue influence of Dewey Chandler and Patterson Chandler, as alleged in the Complaint? Answer: No."

From judgment entered on the verdict, declaring the deed a nullity and setting it aside, the defendants appeal, assigning errors.

Calvin R. Edney for plaintiffs, appellees.

A. E. Leake and Charles E. Mashburn for defendants, appellants.

JOHNSON, J. The court below properly ruled that the judgment in the former proceeding is no bar to the instant action. The general rule is that a judgment rendered on any ground not involving the merits of the action may not be used as a basis for the operation of the doctrine of *res judicata. Steele v. Beaty,* 215 N.C. 680, 2 S.E. 2d 854; 30 Am. Jur., Judgments, section 208; 50 C.J.S., Judgments, section 626. See also *Gaither Corporation v. Skinner, ante,* 532. And the rule is well established that a judgment of compulsory nonsuit or dismissal not involving the merits of the case is not a bar to a subsequent action. *Bradshaw v. Bank,* 172 N.C. 632, 634, 90 S.E. 789, 790; *Batson v. Laundry Co.,* 206 N.C. 371, 174 S.E. 90; 17 Am. Jur., Dismissal and Discontinuance, sections 77, 78, and 79; 50 C.J.S., Judgments, section 632. The judgment of compulsory nonsuit entered in the partition proceeding was no more than a decision that as a matter of law the petitioners had not produced evidence sufficient to sustain the cause of action alleged. It decided nothing on the merits. Hence it is no bar to the instant action to set aside the deed. *Bradshaw v. Bank, supra; Steele v. Beaty, supra.*

By another group of exceptions brought forward the defendants urge that the presiding Judge propounded questions and made comments of a prejudicial nature while the plaintiffs were offering their evidence. It suffices to review three exceptions in this group:

1. *Exception No. 22.*—The plaintiff Viana Ramsey testified on direct examination that in her opinion Aldenas Chandler "did not have sufficient mental capacity on 3 March (1950) to know and understand what property she had, what she wanted to do with it, and the legal effect of a deed." On redirect examination the witness was further interrogated as follows: "Q. Did your mother ever make any statement in regard to the paternity of any of your sisters, and, if she did, is that part of the facts you base your opinion as to her mental capacity?" Objection; no ruling. "Q. Is that statement she made, if she made a statement, is that statement part of the facts that you base your opinion on her mental incapacity?" Objection; overruled. "A. Well, she was at my house and she denied Cora and Cindy of being my daddy's children; she said they didn't belong to my daddy." Motion to strike. Thereupon the court propounded the following question, to which Exception No. 22 relates: "Is that a part of what she said upon which you base your opinion that she didn't have the mental capacity to make a deed? A. Yes, she didn't have."

2. *Exception No. 24.*—Plaintiffs' witness Nell Ramsey testified on direct examination: "It's my opinion that she did not have sufficient mental capacity to make the deed on 3 March, 1950, and know and understand what property she had, what she wanted to do with it and the effect of making a deed. Q. Upon what did you base that opinion, what observation that you saw, what did she say to you that made you think—(interrupted)—A. On the day she was going back home she said to me, she said, I hate to go back home because the boys want me to make a deed to them and I want the girls to have their share and I will not do it." Motion by defendants to strike answer. Then followed the court's comment to which Exception No. 24 relates: "Well, sir, she says that is something Aldenas Chandler said upon which she bases her opinion that she did not have sufficient mental capacity to make a deed. Motion denied."

3. *Exception No. 40.*—This exception relates to a question propounded by the presiding Judge to plaintiff's witness Hazel Landers on direct examination. The challenged question and the answer thereto, shown below, were preceded by this line of testimony: "Q. Do you have an opinion satisfactory to yourself on the day you saw her, on the 17th day of February, 1950, as to whether she had sufficient mental capacity on that day that you saw her to understand without prompting the business of making a deed or the business she might have been engaged in, the kind and extent of the property to be conveyed in a deed, the way she wished to dispose of it, and the effect of making a deed, do you have an opinion?" Objection; overruled. "A. No sir, not the day I seen her she didn't know anything." By the court: "He asked you if you had an opinion; you must answer that yes or no. Do you have such an opinion? A. Yes. Q. What is that opinion?" Objection; no ruling. "A. The day I saw her she didn't." The court then propounded the question to which Exception No. 40 relates: "Is it your opinion on that day she didn't have sufficient mental capacity to make a deed? A. No, she didn't." Motion to strike; denied.

The rule is well established that a nonexpert witness may not be permitted to make the abstract statement that a grantor "did not have sufficient mental capacity to make a deed." This is so for the reason that mental capacity to make a deed is not a question of fact. Rather, it is a conclusion which the law draws from certain facts as a premise, such as whether the grantor understood what he was doing—the nature and consequences of his act in making the deed; that is, whether he knew what land he was disposing of, to whom, and how. *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181; *Lamb v. Perry,* 169 N.C. 436, 86 S.E. 179; *In re Will of Lomax,* 224 N.C. 459, 31 S.E. 2d 369; *In re Will of York,* 231 N.C. 70, 55 S.E. 2d 791; *In re Will of Tatum,* 233 N.C. 723, 65 S.E. 2d 351. See also Wigmore on Evidence, Third Edition, Vol. VII, Section 1958.

In the trial below the presiding Judge inadvertently made comments and elicited testimony violative of the foregoing rule. See also G.S. 1-180. The errors so made seem to be of sufficient gravity to entitle the defendants to a new trial. *In re Will of Lomax, supra; In re Will of York, supra.* It is so ordered.

New trial.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

HOWARD M. SAWYER v. SUE D. COWELL (ORIGINAL PARTY DEFENDANT) AND V. S. COWELL, ADMINISTRATOR OF THE ESTATE OF SUE D. COWELL, DECEASED, AND V. S. COWELL, INDIVIDUALLY (ADDITIONAL PARTY DEFENDANT).

(Filed 23 March, 1955.)

1. Abatement and Revival § 16½—

An action which survives disability or death does not abate until a judgment of the court is entered to that effect.

2. Same—

The power of the court to allow an action which survives the death of defendant to be continued against defendant's personal representative or successor in interest may not be invoked by a plaintiff who has kept his action in a semi-dormant condition for a number of years and then called defendant's heir into court after the heir, by lapse of time, is unable to make good his defense or that defense which the ancestor might have made. G.S. 1-74.

3. Same—Granting of motion to abate after action had been dormant for almost seven years held within discretionary power of trial court.

In this action to remove cloud on title, it appeared that some 6 years elapsed after the death of the original defendant before a purported summons was served on the heir in his capacity as administrator, and almost 7 years elapsed before plaintiff served an amended complaint on him and sought to have him joined as a party defendant in his individual capacity as heir. *Held:* The action of the trial court in denying plaintiff's motion that the heir be joined as a party defendant and granting the heir's plea in abatement was within the discretionary power of the court, and no abuse of discretion being made to appear, the ruling is affirmed. The heir not being made a party renders academic plaintiff's right to amend.

4. Pleadings § 22—

Whether the trial court should allow an amendment to the pleadings rests in the court's sound discretion, G.S. 1-163, and the court's ruling thereon is not reviewable on appeal.

BARNHILL, C. J., DEVIN and PARKER, JJ., took no part in the consideration or decision of this case.

SAWYER *v.* COWELL.

APPEAL by plaintiff from *Morris, J.,* in Chambers, 31 July, 1954. From CAMDEN.

This matter was heard by his Honor at Chambers in Elizabeth City, North Carolina, by consent of all parties. It was also agreed that the matter might be heard out of term and out of the county; that the court might find the facts and render judgment thereon.

The facts are as follows:

1. This action was instituted against Sue D. Cowell, a citizen and resident of Currituck County, North Carolina, to remove an alleged cloud upon plaintiff's title to certain lands situate in Camden County, North Carolina. (The alleged cloud upon plaintiff's title is the deed referred to in the defendant's answer, which deed purports to have been executed pursuant to the foreclosure of the deed of trust referred to in the complaint. The plaintiff alleges no such foreclosure took place and that the defendant Sue D. Cowell acquired no rights under said deed.) Summons was issued 28 September, 1946, and it, together with a copy of the verified complaint, was duly served on the defendant 4 October, 1946. The defendant filed her answer and denied plaintiff's title to the property described in the complaint, and alleged that she was the sole owner thereof, having acquired title thereto at a foreclosure sale regularly advertised and conducted, in accordance with law, and that she received her deed to said premises on 30 November, 1940, which deed is of record in the office of the Register of Deeds in Camden County in Book 23 at page 270. Sue D. Cowell, the original defendant, died 7 October, 1947, and V. S. Cowell was appointed as her administrator on 18 October, 1947, and filed his final account on 14 December, 1948, in Currituck County.

2. That on 25 August, 1952, an order was entered that V. S. Cowell, as administrator of the estate of Sue D. Cowell, be made a party defendant and that summons be served upon him together with a copy of the complaint. That, subsequently, on 17 August, 1953, a paper writing on the usual summons form headed "State of North Carolina, Pasquotank County, Howard M. Sawyer, plaintiff, *v.* Sue D. Cowell, V. S. Cowell, Administrator of the Estate of Sue D. Cowell, Deceased," was delivered to V. S. Cowell by the Sheriff of Currituck County. That the purported summons bore no date other than the year "1953," was not signed by the Clerk of the Superior Court of any county, and bore no seal. That at said time the original action above referred to was pending in the Superior Court of Camden County. That within a few days thereafter V. S. Cowell entered a special appearance and filed a motion to dismiss.

3. That on 19 June, 1954, plaintiff, through his counsel, served notice on counsel for the defendant V. S. Cowell, that he would move to have V. S. Cowell, the sole heir of Sue D. Cowell, made the defendant herein. That attached to the said notice and order was an "Amended Complaint,"

the first five paragraphs of which are identical in substance with the original complaint; the sixth paragraph of said complaint alleges damages against V. S. Cowell by way of rents and profits and the removal of timber from the lands involved since the foreclosure of the said land under deed of trust. That promptly thereafter V. S. Cowell filed an affidavit, plea in abatement and motion to dismiss.

Upon the foregoing facts, the court held that the motion to dismiss the action against V. S. Cowell, administrator of the estate of Sue D. Cowell, deceased, filed by V. S. Cowell, should be allowed; that plaintiff's motion to make said V. S. Cowell, individually, a party defendant should be denied, and that V. S. Cowell's plea in abatement and motion to dismiss the action should be allowed, and entered judgment accordingly. Plaintiff appeals, assigning error.

Jennette & Pearson for plaintiff, appellant.
LeRoy & Godwin for defendant, appellee.

DENNY, J. The appellant concedes that the attempted service on V. S. Cowell as administrator of the estate of Sue D. Cowell was a nullity and, therefore, totally void. He contends, however, that V. S. Cowell is the real party in interest and should be made the party defendant by proper amendment since he acquired the *locus in quo* with full knowledge of the pending litigation.

It is provided in G.S. 1-74 that, "No action abates by the death, or disability of a party, or by the transfer of any interest therein, if the cause of action survives, or continues. In case of death, except in suits for penalties and for damages merely vindictive, or in case of disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by, or against, his representative or successor in interest. . . ."

The law is settled with us that an action which survives disability or death does not abate until a judgment of the court is entered to that effect. *Rogerson v. Leggett,* 145 N.C. 7, 58 S.E. 596; *Moore v. Moore,* 151 N.C. 555, 66 S.E. 598.

In the present action, the court, after finding the facts, sustained the defendant's plea in abatement. The facts disclose that the action was originally instituted on 28 September, 1946; that complaint and answer were duly filed and that the original defendant died on 7 October, 1947. No effort was made to make her administrator a party defendant until 25 August, 1952, approximately two years after the estate had been administered, the final account filed and the administrator discharged. Likewise, the plaintiff made no effort to make V. S. Cowell, the sole heir of Sue D. Cowell, a party defendant until after the expiration of nearly

seven years from her death. Moreover, there is nothing in the record before us to indicate that V. S. Cowell knew anything about this litigation which was pending in Camden County, prior to 17 August, 1953, the date on which he was served with a purported summons which appellant now admits was a nullity. In light of these facts, an abuse of discretion in sustaining the plea in abatement has not been made to appear. *Roger-son v. Leggett, supra.*

In the last cited case the Court said: "Certainly the law does not contemplate that the plaintiff may keep his action in a semidormant condition for seven years, and then, when it suits his pleasure or possibly his interest, call the heir at law into court, to find that by a legal fiction he has been deprived of his defenses and called to answer, when by the lapse of time he has become disabled to make good his defense, or that which his ancestor may have made. The liberal provisions of the statute permitting the continuation of the action after the death of the defendant should not be permitted to work out such results."

Furthermore, it will be noted that the plaintiff not only sought in the court below to make V. S. Cowell the party defendant, but also to amend his complaint and set up a claim for rents and profits received by V. S. Cowell, as well as for rents and profits received by him as administrator of the estate of Sue D. Cowell, including such rents and profits as he may have received as agent for Sue D. Cowell prior to her death. However, the refusal of the court below to make V. S. Cowell a party defendant, but, on the contrary, to sustain his plea in abatement, makes the question as to the plaintiff's right to amend academic. Even so, had the court allowed the motion to make V. S. Cowell the party defendant in this action, whether or not an amendment to the plaintiff's pleadings should have been allowed, would have raised a question to be determined in the discretion of the court. G.S. 1-163; *Parker v. Realty Co.,* 195 N.C. 644, 143 S.E. 254. A discretionary ruling on a motion to amend pleadings is not reviewable on appeal. *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466; *Hooper v. Glenn,* 230 N.C. 571, 53 S.E. 2d 843.

The ruling of the court below will be sustained.

Affirmed.

BARNHILL, C. J., DEVIN and PARKER, JJ., took no part in the consideration or decision of this case.

JESSE A. OSBORNE, ADMINISTRATOR OF THE ESTATE OF DOROTHY JEAN OSBORNE, v. CHARLES GILREATH.

(Filed 23 March, 1955.)

1. Automobiles § 24½e—Evidence held insufficient to show defendant was driving or that he interfered with the operation of the car.

Plaintiff's intestate, a 15-year-old girl, was a guest in defendant's car. Plaintiff alleged that the car was being operated by defendant or by someone under defendant's direction and control. Plaintiff's only evidence on the point was testimony of a statement made by defendant after the accident to the effect that the accident was defendant's fault, and that the intestate was driving the car at the time of the fatal collision. *Held:* Plaintiff's evidence tends to show that his intestate was driving at the time, and the statement of defendant that it was his fault was merely an expression of his distress of conscience in permitting an inexperienced person to drive, and therefore, nonsuit was properly entered, there being no evidence that defendant was driving at the time or that defendant in any manner interfered with the operation of the car.

2. Same—Sole purpose of G.S. 20-71.1 is to prove agency when it is alleged that negligence of nonowner operator caused the accident.

Where the theory of the complaint is that defendant was driving the car or that it was being driven by another under defendant's direction and control, and there is no allegation of agency or of negligence of an alleged agent, plaintiff cannot call to his aid the provisions of G.S. 20-71.1 to prove that defendant himself was operating the car or had entrusted its operation to one he knew or should have known was likely to cause an accident by reason of incompetency, carelessness or recklessness, since the sole purpose of the statute is to prove agency in those cases in which it is charged that the negligence of a nonowner operator caused the accident.

3. Pleadings § 24—

Allegation and proof are both essential, and plaintiff, if he is to succeed at all, must do so on the case alleged in his complaint.

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

APPEAL by plaintiff from *Rousseau, J.*, Regular January Term 1955 of WILKES.

Civil action to recover damages for wrongful death.

In his complaint the plaintiff alleges in Paragraph 4 that at the time his intestate was killed, she "was riding as a guest passenger in a motor vehicle belonging to the defendant and being operated by him"; and further on in the same paragraph he alleged his intestate, "was riding in the motor vehicle of the defendant which motor vehicle was being operated by the defendant at the time, or by someone under the direction and control of the defendant," and further on in the same paragraph the plaintiff alleges that at the time his intestate was killed, "that the defendant was either operating said motor vehicle or controlling the operation of the

same and that if the defendant was not operating said motor vehicle that he interfered with the operation of said motor vehicle, causing said motor vehicle to leave the road and causing the same to overturn, resulting in the death of the plaintiff's intestate."

The parties stipulated that plaintiff's intestate met her death by reason of injuries sustained when a car overturned, which was registered in the name of the defendant, and owned by him.

A summary of plaintiff's evidence tends to show these facts: Plaintiff's intestate was a 15-year old girl. Her mother had never seen her drive a car. Her father said he had "seen her under the wheel with help just a little; I held her out of hitting a light post and wire fence and a bank; that is how much I have seen her drive." About 10:15 p.m. on the night of 10 December 1953, she left her home with Clint Johnson. About 1:00 a.m. the following morning she was killed, when the automobile in which she was riding overturned on Highway 268 leading to North Wilkesboro. These people were in the automobile when it overturned: plaintiff's intestate, Charles Gilreath, the defendant, Clint Johnson and Margaret Hayes. There were marks along the left shoulder of the highway for a distance of about 250 feet and skid marks across the highway leading up to the car a distance of about 33 feet. There were cut and torn places in the highway leading up to the rear of the automobile; some of the dugout places were as much as 2 inches, and others just scarred the surface of the road. All parts of the automobile were torn up: one wheel was off. The body of plaintiff's intestate was found with her head against the right rear wheel of the car.

The only evidence as to the operation of the automobile at the time it overturned is in the testimony of Dean Arledge, a State Highway Patrolman and witness for plaintiff. Arledge testified that the defendant in his home, "told me four or five times that it was all his fault, and in the same conversation he stated to me that the deceased girl was driving the automobile at the time of the fatal collision. He told me that one time."

The defendant offered no evidence.

At the close of plaintiff's evidence the defendant's motion for judgment of nonsuit was granted.

From judgment signed in accord therewith, plaintiff appeals, assigning error.

W. H. McElwee, Jr. and Ralph Davis for Plaintiff, Appellant.

Larry S. Moore, Trivette, Holshouser & Mitchell and Robert M. Gambill for Defendant, Appellee.

PARKER, J. In his complaint plaintiff first alleges that the defendant was operating the automobile at the time it overturned. Further on he

alleges that at the time it was being operated by the defendant, or by someone under his direction and control. And further on he alleges that the defendant was either operating the automobile or controlling its operation.

All of plaintiff's evidence as to the operator of the automobile at the time it overturned is the statement of the defendant to the State Highway Patrolman Arledge, "that it was all his fault . . . the deceased girl was driving the automobile at the time of the fatal collision."

It seems to us, considering the evidence in the light most favorable to the plaintiff, that the evidence shows that plaintiff's intestate was driving the automobile when it overturned, and that defendant's repeated statements it was all his fault was an expression of his distress of conscience in permitting an inexperienced 15-year old girl to drive his automobile and to turn it over causing her tragic and untimely death. The statement of defendant here is a far cry from the statement in *Wells v. Burton Lines, Inc.; Stanley v. Burton Lines, Inc.*, 228 N.C. 422, 45 S.E. 2d 569, in which the appellant said, without qualification, that the collision was his fault. See also the remorseful statement of the defendant in an automobile collision in *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383. While the plaintiff has allegation that the defendant was driving the automobile at the time, he lacks proof. While there is allegation that the defendant interfered with the operation of the automobile, there is no proof of such allegation.

Plaintiff further alleges that the automobile at the time was being operated by the defendant, or by someone under his direction and control, and contends in his brief, that if either plaintiff's intestate or Clint Johnson or Margaret Hayes was operating the automobile, he is entitled to go to the jury by virtue of G.S. 20-71.1, entitled, "Registration evidence of ownership; ownership evidence of defendant's responsibility for conduct of operation."

G.S. 20-71.1 establishes a rule of evidence, but does not relieve a plaintiff from alleging and proving negligence and agency. *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767; *Parker v. Underwood*, 239 N.C. 308, 79 S.E. 2d 765. In *Parker v. Underwood*, plaintiff alleged that the driver of defendant's vehicle was his son and at the time was operating his father's automobile "with the express consent, knowledge and authority" of his father. The provisions of G.S. 20-71.1 could not save the complaint when a demurrer was filed. In *Jyachosky v. Wensil*, 240 N.C. 217, 81 S.E. 2d 644, plaintiff alleged that the automobile owned by defendant Wensil was operated by defendant Garmon, who, upon the occasion, was an employee of defendant Wensil, and then and there acting within the scope of his employment.

Plaintiff in his complaint alleged that his intestate met her death as a proximate result of defendant's negligence. And in his amended complaint he alleges that his intestate's death was caused by defendant's negligence, and set forth five specifications of defendant's negligence. He has alleged no negligence against any other person.

By reason of plaintiff's total failure to allege agency and negligence of his intestate or Clint Johnson or Margaret Hayes, he cannot invoke the aid of G.S. 20-71.1.

Plaintiff cannot call to his aid the principle that a person, who by his independent and wrongful breach of duty entrusts his automobile to one he knows or should know is likely to cause injury by reason of incompetency, carelessness or recklessness, and injury to a third person results proximately from such incompetency, carelessness or recklessness, is liable in damages, because he has no allegations in his complaint and amended complaint to invoke the application of this principle of law. *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373; *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104; *McIlroy v. Motor Lines,* 229 N.C. 509, 50 S.E. 2d 530; *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162; *Taylor v. Caudle,* 210 N.C. 60, 185 S.E. 446; *Cook v. Stedman,* 210 N.C. 345, 186 S.E. 317.

The plaintiff states in his brief, "We think, therefore, that certainly G.S. 20-71.1 is applicable to this case and that proof of ownership alone is sufficient to send the case to the jury on the theory that the defendant himself was operating the motor vehicle."

To adopt plaintiff's view would require us to overrule what was said by *Barnhill, J.,* in speaking for a unanimous Court in *Hartley v. Smith, supra,* and by *Barnhill, C. J.,* for a unanimous Court in *Roberts v. Hill, supra.* In *Hartley v. Smith,* speaking of G.S. 20-71.1, it is said: "This statute was designed to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another. *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309. It does not have, and was not intended to have, any other or further force or effect." In *Roberts v. Hill, supra, Barnhill, C. J.,* said, after quoting the above excerpt from *Hartley v. Smith,* except the first sentence: "This language appearing in the *Hartley case* was used advisedly. We adhere to what is there said." The plaintiff contends that this construction of G.S. 20-71.1 makes a man responsible for the acts of his agents and not responsible for his acts, and is a novel legal phenomenon. The language of this Court in the *Hartley* and *Roberts cases* bears no such construction, and in no way relieves a man from responsibility for his own wrongful act proximately causing injury. We adhere to what was said in the excerpts from those two cases quoted above.

While there is a modern tendency to question, or to modify, or to overrule many ancient landmarks of the law by court decisions and legislative fiats, these principles of law seem, as yet, to be unchallenged, that if a plaintiff is to succeed at all, he must do so on the case alleged in his complaint, *Sale v. Highway Commission,* 238 N.C. 599, 78 S.E. 2d 724, and that allegation and proof are both essential, *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911.

The Trial Court ruled correctly, and the judgment of nonsuit entered below is

Affirmed.

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

STATE v. NELLIE COLLIS STREET.

(Filed 23 March, 1955.)

1. Criminal Law § 53d: Trial § 31b—

G.S. 1-180 requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts.

2. Homicide § 27f—

In this case defendant killed deceased in her home after she had requested him to leave, claiming that she killed in self-defense. The court, in illustrating what is meant by real and apparent danger, charged that if "somebody jumps out in the dark and flashes a pistol on you and says he is going to kill you, you have the right to protect yourself and kill him," notwithstanding the pistol may not be loaded or could not be fired. *Held:* The use of hypothetical facts wholly unrelated to the facts in evidence was prejudicial.

3. Same—

The court in charging upon the right of a person in his home to order an intruder to leave the premises and to use such force as is reasonably necessary to cause the intruder to leave, stated "On the other hand one cannot use the excessive force of taking human life." *Held:* The charge was prejudicial, the question for the jury being whether under all of the circumstances defendant had reasonable cause to believe and did believe that the force used was necessary to protect herself from impending danger or great bodily harm from the assault or threatened assault which defendant contended deceased was making upon her.

4. Homicide § 27b—

An instruction susceptible to the interpretation that if the jury found that defendant killed deceased with a deadly weapon, but were satisfied

from defendant's evidence that in shooting the deceased defendant was justified and did so without malice, defendant would be guilty of manslaughter, must be held for error, since if defendant was justified in shooting the deceased and did so without malice, defendant would be entitled to a verdict of not guilty.

5. Homicide § 16—

The intentional killing of a human being with a deadly weapon raises the presumptions that the killing was unlawful and was done with malice.

6. Homicide § 3—

An unlawful killing of a human being with malice and with premeditation and deliberation is murder in the first degree.

7. Homicide § 5—

The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree.

8. Homicide § 7—

The unlawful killing of a human being without malice and without premeditation and deliberation is manslaughter.

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

APPEAL by defendant from *Pless, J.*, September Term, 1954, of MITCHELL.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one Billy Cooper.

The solicitor announced that the State would not ask for a verdict of murder in the first degree but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant.

The State's evidence tends to show that around eight o'clock on the evening of 9 March, 1954, B. M. Peterson, B. M. Peterson, Jr., and Billy Cooper went to the home of the defendant at Green Mountain in Mitchell County, where she lived with her half-sister, Cora Collis. Mary Garland and Aileen Garland came to the defendant's home shortly after Cooper and his friends arrived. The Petersons and Cooper were drinking. When they entered the home of the defendant, Billy Cooper was carrying a half-gallon jar which contained white liquor. Billy Cooper wanted some home-brew but the defendant did not have any. He and his two associates then proceeded to take two or three additional drinks of the white liquor. They were noisy and acted like they were drunk. No other person took a drink. One of the State's witnesses testified that the defendant "opened the door and asked them to leave nice; they didn't go." She then went to her bedroom. B. M. Peterson, Jr., testified that Billy Cooper began gritting his teeth and the defendant jumped up and said, "Get that damned s.o.b. out of here or I will kill him." The evidence further tends

to show that instead of leaving, the deceased followed the defendant to her bedroom and stood with his hand on the door, facing the bedroom, and said he was going out, "but to talk nice to him." One of the Petersons told Cooper "to come back and behave himself." The deceased remained at the door of the bedroom for probably as much as five minutes before the shot was fired. He was twenty-eight years old and weighed somewhere between 170 and 200 pounds.

The defendant is a widow sixty-five years of age, who lived at her home with her half-sister, Cora Collis, at the time the two Petersons and the deceased Cooper went to her house. Her evidence tends to show that the three men were drinking when they entered her home; that they brought with them a half-gallon jar containing about a quart of white liquor, and that they continued to drink. The defendant operated a store, and Mary Garland and her fourteen-year-old daughter, Aileen, came to get some aspirin. The deceased, who had never been in the home before, asked the fourteen-year-old girl to take a walk with him. The defendant then requested the three men to leave her home, and opened her front door. She then went in or was backed into her bedroom. The deceased suddenly started gritting his teeth and followed the defendant into her bedroom; that her pistol was on top of a dresser five or six steps from the door and the defendant was approaching her with his hand in his pocket and saying that he was going to kill her; that she begged him to stop but he would not stop and she shot him. The defendant weighs about 110 pounds. She testified that she was nervous and scared.

The jury returned a verdict of guilty of manslaughter and from the judgment imposed the defendant appeals, assigning error.

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

W. C. Berry, G. D. Bailey, and W. E. Anglin for the defendant.

DENNY, J. The appellant excepts to and assigns as error nine portions of the court's charge to the jury; all other exceptions have been abandoned.

We deem it necessary and appropriate in the disposition of this appeal to consider the following portions of the charge:

"To illustrate what I mean, if tonight when you put your car in the garage somebody jumps out in the dark and flashes his pistol on you and says he is going to kill you, you have the right to protect yourself and kill him. It might turn out later that the pistol is not loaded, has no cylinder, but you didn't know it, and you have the right to take the life of your assailant under these circumstances because you had a right to believe that you were about to be killed." Exception No. 5.

"On the other hand one cannot use the excessive force of taking human life." Exception No. 6.

"And if you shall have first found an unlawful killing with a deadly weapon, the burden would then be upon the defendant to satisfy you that in shooting the deceased she did not do so unjustified and with malice; and if she has so satisfied you and has not gone further, that would be an unlawful killing and would constitute manslaughter." Exception No. 9.

We concede that the illustration used, to which the defendant's fifth exception was taken, does illustrate what is meant by real or apparent danger, but on the other hand it was predicated upon a factual situation wholly unrelated to the facts in the instant case. The statute requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. G.S. 1-180. As a consequence of the use of the above illustration, we think the jury might have been misled, since the deceased did not jump out of the dark or flash a pistol or any other weapon on the defendant.

The sixth exception arises out of the language used by the court in connection with the defendant's right to expel or remove a person from her home. The court charged that a person in his own home has a right, for a reason or no reason, to order someone off his premises, and the person so ordered has the right to leave; and when one is ordered to leave the premises and refuses to go, then the one so ordering him has the right to use such force as is reasonably necessary to cause the intruder to leave. The court then said: "On the other hand one cannot use the excessive force of taking human life." This was followed with the statement that these are all abstract statements of the law which may be applicable to the facts in this case, depending upon the facts which the jury might find.

We think the instruction complained of was prejudicial since the justification or nonjustification of the killing of the deceased by the defendant grew out of circumstances connected with the defendant's request to the deceased and the two Petersons to leave her home. Whether the force used was actually necessary to repel the attack the defendant claims was being made on her, or whether some other or lesser force might have been adequate for her protection, was not the question for the jury to decide, but whether, when she did use the force which resulted in the death of the deceased, she had, under all the circumstances, reasonable cause to believe and did believe that such force was necessary to protect herself from impending danger or great bodily harm. *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620; *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142; *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161; 4 Am. Jur., Assault and Battery, section 50, page 152, *et seq.*

The challenge to that portion of the charge contained in the ninth exception must be upheld. We construe this instruction to mean that if the jury should first find an unlawful killing with a deadly weapon, the burden would then be upon the defendant to satisfy the jury that in shooting the deceased she was justified in doing so and did so without malice; and if she did so satisfy the jury, the killing would still be unlawful and the defendant would be guilty of manslaughter. Such is not the law.

The intentional killing of a human being with a deadly weapon raises two presumptions: first, that the killing was unlawful; and, second, that it was done with malice. *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733; *S. v. Childress,* 228 N.C. 208, 45 S.E. 2d 42; *S. v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562. The killing with a deadly weapon, however, must be intentional to raise these presumptions which are rebuttable. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

An unlawful killing of a human being with malice, and with premeditation and deliberation, is murder in the first degree; while an unlawful killing of a human being with malice, but without premeditation and deliberation, is murder in the second degree. And the unlawful killing of a human being without malice, and without premeditation and deliberation, is manslaughter. *S. v. Benson,* 183 N.C. 795, 111 S.E. 869; *S. v. Keaton,* 206 N.C. 682, 175 S.E. 296; *S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195.

If the defendant was justified in shooting the deceased, and did so without malice, the killing was not unlawful and she would be entitled to a verdict of not guilty.

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

New trial.

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

GEORGE EDWARDS AND WIFE, MARY J. EDWARDS, v. GEORGE O. EDWARDS, YVONNE EDWARDS, DOUGLAS EDWARDS, JAMES F. EDWARDS, EDITH R. EDWARDS, JO ANN EDWARDS, AND ROBERT S. EDWARDS, MINORS; AND UNBORN CHILDREN OF GEORGE EDWARDS AS MAY HEREAFTER BE BORN TO THE DEATH OF GEORGE EDWARDS, AND ANY CHILD OR CHILDREN OF GEORGE EDWARDS IN ESSE AT THE DEATH OF GEORGE EDWARDS, APPEARING BY THEIR GUARDIAN AD LITEM, K. A. PITTMAN.

(Filed 23 March, 1955.)

Wills § 33g—Will held to devise life estate to children and grandchild with fee in remainder as to share of those dying without issue.

The will in suit devised the land to testator's widow for life and at her death to be equally divided between testator's children and named grandchild (son of a deceased daughter) for life, and at the death of the children the share of each should go to their children, and if they left no children, then to the survivor or survivors of said children and their issue in fee simple. *Held:* It is apparent that the grandchild should stand upon an equal footing with the children and was included in the word "children" as used in the contingent limitation over, and while the children dying without issue prior to the death of the widow took nothing under the will, the other children and the grandson surviving the widow each took a life estate with remainder to their children, which, upon the death of the remaining children without issue, vested in the surviving grandchild in fee under the will, so that he owns a life estate in his share with remainder to his children, and the fee simple in the balance of the land as remainderman.

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

APPEAL by defendants from *Frizzelle, Resident Judge,* Fifth Judicial District, at Chambers, GREENE.

This is a civil action brought by the plaintiffs against the defendants—their children—for the purpose of having the court, by declaratory judgment, determine the rights of the parties under the last will and testament of Charles Best. The will follows:

"WILL OF CHARLES BEST

"In the name of God amen

"I, Charles Best, of the County of Greene and State of North Carolina being of Sound mind and memory do make and publish this my last will and testament in manner and form following to wit:

"Item first—I give and bequeathe to my beloved wife Peninnah Best and my two daughters Nettie Martha Best and Jennie Mirrenda Best all of my personal property of every description after the payment of my just debts and funeral expenses.

"Item second I give devise and bequeathe to my beloved wife Peninah Best for and during the term of her natural life all of my real estate and at her death I devise that my land shall be equally divided between all my children and my grandson George Edwards to have and to hold to them during their lives and if any one of them shall die without leaving any child or children then to the others who shall survive that said land shall not be sold by them or either of them nor be subject to their debts and at the death of my said children each ones share shall belong to their children if they leave any and if they leave no children then to the survivor or survivors of my children and their issue in fee simple.

"Item Lastly I make nominate and appoint my beloved wife Penninah Best Executrix to this my last will and testament to execute the same according to the true intent and meaning thereof in every part and clause thereof. In testimony whereof I hereunto set my hand and seal this the 7th day of February 1908.

CHARLES BEST (Seal)"

It is alleged in the complaint and admitted in the answer that the testator, a resident of Greene County, executed the will on 7 February 1908; that he died on ..... day of February, 1908; that his will was probated in common form before the Clerk Superior Court of Greene County on 20 February, 1908; that all the parties are residents of Greene County, and that the real estate devised in Item 2 of the will is located in that county. It is likewise alleged and admitted that at the time of his death the testator left surviving his widow, Penninah Best; two daughters, Nettie Martha Best and Jennie Mirrenda Best; one son, Ambrose Best; and a grandson, George Edwards, the present plaintiff, who is the only child of a deceased daughter of the testator.

Nettie Martha Best died in the year 1914 without child or children. The widow, Penninah Best, died in the year 1932. Ambrose Best died on the ..... day of July, 1939, without child or children. Jennie Mirrenda Best died on the ..... day of October, 1953, without child or children. George Edwards, one of the plaintiffs, is the sole surviving heir at law of Charles Best, of Nettie Martha Best, of Ambrose Best and Jennie Mirrenda Best.

The defendants are the children of the plaintiffs. All are minors without regular or testamentary guardian. Upon proper application and affidavit, K. A. Pittman was appointed by the Clerk Superior Court of Greene County as *guardian ad litem* for the named defendants and any other child or children of George Edwards *"in esse* at the time of his death." K. A. Pittman accepted the appointment as *guardian ad litem* and filed an answer to the complaint.

The plaintiffs allege in respect to Item 2 of the will of Charles Best, "It was the intention of the testator to create a life estate in each of his said children and upon their death to their issue, if any, and the plaintiffs are advised and believe and, upon such information and belief, allege that since all of the children of the testator died without issue that the said lands so devised reverted to the estate of the testator, Charles Best, and the said George Edwards being the sole heir of the said testator, as well as the sole heir at law of the said three children of the testator, is entitled to be declared the owner in fee of a three-fourths undivided interest in said lands." The plaintiffs further allege that as to the remaining one-fourth interest in the lands described in Item 2 of the will, that the plaintiff, George Edwards, is entitled to a life estate therein, with the remainder to his children in fee.

The *guardian ad litem* sets up in his answer, "It was the intent and purpose of the said testator that if either of his children die without issue that all of said lands were to go to and the title thereto vested in fee simple in the defendants as children of the devisee and his grandson, George Edwards, they being the only children of the only surviving devisee, George Edwards, life tenant under the terms of said last will and testament; and it was the purpose of the testator to vest the title to said lands in the defendants, in fee, after the falling in of the life estates created by the terms of the said last will and testament of the said Charles Best;" and that the defendants, who are the children of the last survivor, should be declared the owners in fee of all the lands, subject only to the life estate of their father, George Edwards.

After finding the facts in substance as heretofore set forth, the court entered judgment in material part as follows:

"11. That the Court is of the opinion and finds as a fact that it was the intent of the testator in Item Second of said will to devise all of his real estate to his wife, Peninah Best, for life, and upon the termination of that estate to his three children and grandson, George Edwards, to be divided equally between them, and that after the death of his said three children and grandson it was the intent of the said Charles Best that the properties divided unto each of his three children and his grandson should go to the respective children of each of the respective devisees. That said Charles Best intended that an equal division be made of said lands between said second life takers.

"12. That the Court is of the opinion and finds as a matter of law that the lands devised in said will to his three children for life and at their death to the survivor or survivors of said children and their issue in fee simple, upon the death of all three of said children without issue, reverted to the estate of Charles Best, *Ex Defectu Sanguinis,* and there-

fore descended by inheritance to the plaintiff George Edwards, as the sole surviving heir at law of the testator, Charles Best.

"13. That the Court is of the opinion and finds as a matter of law that the said George Edwards as the owner in fee simple of a three-fourths undivided interest in the lands devised in said will is entitled to have said lands divided into two parts, under appropriate proceedings, and one part equal to three-fourths of the total value thereof allotted to him and the other part equal to one-fourth of the total value thereof allotted to him for life with the remainder to his children in fee.

"IT IS NOW, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, DECLARED AND DECREED that the plaintiff George Edwards is the owner in fee simple of a three-fourths undivided interest in all the lands devised in the will of Charles Best, and is entitled to have said lands divided, and to have three-fourths in value of said lands allotted to him in fee simple, free and discharged of any interest therein of the defendants in this cause; and that he is entitled to have one-fourth in value of said lands allotted to him for life with remainder to his children."

From the foregoing judgment, the defendants appealed, assigning errors in the court's conclusions as to the intent of the testator and the effect of the disposition made in Item 2 of the will.

George W. Edwards for plaintiffs, appellees.
K. A. Pittman for defendants, appellants.

HIGGINS, J. The sole question involved in this appeal is the disposition of the real estate made in Item 2 of the will of Charles Best. That George Edwards is the owner of a life estate in an undivided one-fourth of the land, with remainder to his children, is not in dispute. The will plainly so provides and the trial judge was correct in so deciding. The controversy arises with respect to the remaining three-fourths interest. Careful consideration of the will convinces us the trial judge was also correct in holding that George Edwards is the owner in fee of the remaining three-fourths undivided interest. We think this is so for reasons different from those assigned in the judgment of the Superior Court. While George Edwards is the sole heir of the testator, he takes under the will as survivor and not by inheritance.

We gather from the will that it was the intention of the testator to make a complete and final disposition of all his real estate and that Item 2 of his will makes such disposition. The item in question contains one sentence. As related to the question involved, the two important and controlling clauses are: (1) "That my lands shall be equally divided between all my children and my grandson, George Edwards, to have and to hold to them during their lives and if any one of them shall die without

leaving any child or children, then to the others who shall survive;" and (2) "at the death of my said children each one's share shall belong to their children if they leave any and if they leave no children, then to the survivor or survivors of my children and their issue in fee simple."

The widow's life estate was outstanding until her death in 1932. Nettie Mirrenda Best died in 1914. Her life estate had not come into possession. She died without children. She was not a survivor. She took nothing under the will. At the death of the widow in 1932, Ambrose Best, Jennie Mirrenda Best and George Edwards came into possession of life estates as tenants in common. In 1939 Ambrose Best died without children. He could not qualify as a survivor. Under the will he took only a life estate which terminated with his death. Thereafter the life estates of Jennie Mirrenda Best and George Edwards continued until 1953 when Jennie Mirrenda Best died without children. She was not a survivor. Her interest terminated with her death. Of the devisees in the will, George Edwards is the lone survivor. When related clauses numbers 1 and 2 above quoted are read together, as they must be in construing the will, it is apparent the testator intended that the grandchild, George Edwards, should stand on an equal footing with the children and that the word "children" last used in clause number 2 was intended to and did include the grandchild, George Edwards. He took in fee three-fourths of the land for the reason that Nettie Martha, Ambrose, and Jennie Mirrenda each died without children, leaving him the sole survivor.

Our decision that George Edwards takes as survivor a three-fourths undivided interest in fee in all the lands embraced in Item 2 of the will is supported by prior decisions of this Court in unbroken line (so far as the writer can ascertain) beginning in 1840. *Gregory v. Beasley,* 36 N.C. 25; *Skinner v. Lamb,* 25 N.C. 155; *Threadgill v. Ingram,* 23 N.C. 577; *Hilliard v. Kearney,* 45 N.C. 221; *Ham v. Ham,* 168 N.C. 486, 84 S.E. 840; *Wooten v. Hobbs,* 170 N.C. 211, 86 S.E. 811; *Dicks v. Young,* 181 N.C. 448, 107 S.E. 220; *Mercer v. Downs,* 191 N.C. 203, 131 S.E. 575; *Hummell v. Hummell,* 241 N.C. 254, 85 S.E. 2d 144.

While the judgment of the Superior Court of Greene County is affirmed in so far as it relates to the interests of the parties in the land in controversy, it is modified by striking out that portion which directs a partition of the land. The question of partition does not arise on this record. That question may be determined if and when desirable by a proceeding before the Clerk Superior Court of Greene County.

Modified and affirmed.

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

P. M. REID v. W. A. BRISTOL AND MABEL L. BRISTOL.

(Filed 23 March, 1955.)

1. Judgments § 23—

Under the proviso in G.S. 1-306 no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof (G.S. 1-234), and the only procedure whereby the owner of the judgment may obtain a new judgment for the amount is by independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as in case of any other action to recover judgment on debt, which action must be commenced within 10 years from the date of the rendition of the judgment. G.S. 1-47.

2. Same—

The remedy of an action on a judgment and the remedy of a motion to revive a dormant judgment, by *scire facias*, are separate remedies, and a concept of a dormant judgment and *scire facias* for leave to issue execution thereon is now obsolete, and a judgment entered upon a motion to revive the judgment, in which no summons is issued and no complaint filed, is a nullity, the remedy of a judgment upon a judgment being obtainable only by an independent action prosecuted in conformity with an action for debt.

3. Judgments § 27b—

A void judgment is a nullity and may be disregarded, set aside, or collaterally attacked by the parties, or may be set aside by the court of its own motion.

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

APPEAL by plaintiff from *Rousseau, J.*, January Term, 1955, of WILKES.

At the October Term, 1936, of Wilkes, to wit, on 9 October, 1936, P. M. Reid obtained a judgment against Mabel L. Bristol for $4,389.20 plus interest and costs. No execution to enforce payment thereof was ever issued.

P. M. Reid, the judgment creditor, died. Thereafter, counsel for Mrs. P. M. Reid, Administratrix of P. M. Reid, deceased, prepared and issued a notice, addressed to Mabel L. Bristol, that on 20 September, 1946, he would move, in behalf of said administratrix, before the Clerk of the Superior Court, "to revive a judgment against you in favor of P. M. Reid, deceased."

Prior to 20 September, 1946, Mrs. Bristol filed with said clerk an answer to said notice. In such answer she alleged that said judgment could be revived only for the purpose of issuing execution thereon, and for such purpose not beyond 9 October, 1946, to wit, ten years from the date of rendition of said judgment. She did not appear in person before said clerk on 20 September, 1946.

No summons was issued and no complaint was filed in an action by said administratrix, predicated upon her ownership of the 1936 judgment, to recover judgment against Mrs. Bristol for an indebtedness alleged to be owing to said administratrix on account of the 1936 judgment. There was no new or independent action of any kind. The said administratrix proceeded by motion in or in relation to the cause in which the 1936 judgment was rendered.

On 24 September, 1946, the said clerk entered an order, which, after recitals of the facts stated above, provided: "After hearing the motion read and the argument of counsel for Mrs. P. M. Reid, Administratrix of P. M. Reid, deceased, it is ORDERED, DECREED AND ADJUDGED that said judgment be, and it is revived, as by law provided." Whereupon, this order was docketed as a judgment dated 20 September, 1946, in favor of Mrs. P. M. Reid, Administratrix of P. M. Reid, and against Mrs. Mabel L. Bristol, for the amount of the 1936 judgment. A transcript of this purported judgment was docketed in Iredell County. No execution to enforce payment of this purported judgment was ever issued.

Long afterwards, but promptly upon discovery of this docketed transcript, Mrs. Bristol filed a motion with the then clerk that the purported judgment of September, 1946, and the said transcript thereof, be declared void and canceled. Due notice was given to said administratrix and to her counsel. After hearing, the clerk entered a judgment allowing the said motion. The said administratrix excepted and appealed. In the Superior Court, Rousseau, J., after hearing, entered a judgment, substantially the same as that previously entered by the clerk, wherein the purported judgment of September, 1946, was declared void, and the said purported judgment and the transcript thereof were set aside and stricken from the records, and an order made that a copy of his judgment be transcripted to Iredell County. The said administratrix excepted and appealed.

J. F. Jordan for plaintiff, appellant.
Scott, Collier & Nash and Zeb V. Long for defendant, appellee.

BOBBITT, J. As indicated above, this appeal does not concern the status of the judgment of 9 October, 1936, in favor of the late P. M. Reid and against Mabel L. Bristol. However, upon the record before us, it would appear that the lien thereof on real property, if any, has ceased to exist, G.S. 1-234, *Lupton v. Edmundson,* 220 N.C. 188, 16 S.E. 2d 840; and, further, that the time for the issuance of execution thereon to enforce payment has expired. G.S. 1-306.

Under former statutory provisions, last codified as sections 667 and 668 of the Consolidated Statutes of 1919 (superseded by G.S. 1-306), the

life of a judgment, solely for the purpose of issuing execution thereon, might be prolonged beyond the expiration of ten years from the date of rendition; and, when the judgment became *dormant* by failure to issue execution within three years from rendition or from issuance of a prior execution thereon, the judgment creditor, by notice to show cause, *scire facias,* and upon satisfactory proof, might obtain leave *to revive the judgment* and issue execution thereon. McIntosh, N.C.P.&P. (1929), 834-835; *Barnes v. Fort,* 169 N.C. 431, 86 S.E. 340. Under this procedure, no judgment was contemplated or permitted, but only the revival of the original (dormant) judgment for one purpose, namely, the issuance of execution thereon.

Reference to the former practice discussed above is made solely because cases cited by appellant were decided in relation thereto. But that practice is now obsolete. Since the enactment of ch. 98, Public Laws of 1935, now codified as the proviso in G.S. 1-306, "no execution upon any judgment which requires the payment of money may be issued at any time after ten years from the date of the rendition thereof." The concept of a *dormant* judgment has no place under present statutory provisions. It is of interest only because a knowledge thereof is necessary to understand the earlier decisions and statute.

During a period when *sec. 14 of the C.C.P. (1868)* was in effect, it was necessary to obtain leave of court before commencing an independent action on a judgment. *Warren v. Warren,* 84 N.C. 614. An action on a judgment was recognized as entirely different from a motion to revive a dormant judgment for the purpose of issuing execution thereon, since both remedies could be pursued at the same time. *McDonald v. Dickson,* 85 N.C. 248. But this statute was not brought forward in the Code of 1883; and, since 1883, such action may be brought as of right. *Dunlap v. Hendley,* 92 N.C. 115.

As stated by *Pearson, C. J.,* in *Parker v. Shannonhouse,* 61 N.C. 209: "We find by reference to the books that, at common law, the remedy of the creditor was an action of debt on former judgment. The statute, 13 Edw. I, ch. 15, re-enacted in the Rev. Code, ch. 31, sec. 109, gives to the creditor an additional remedy by *scire facias.* The effect of the ordinance is to repeal the statute, 13 Edw. I, and leave the creditor to his common-law remedy." Sec. 109, ch. 31, Rev. Code of 1854, by its terms, treats of procedure, by *scire facias,* to obtain leave to issue execution on a dormant judgment; and sec. 5, ch. 1, Ordinance of 1866, provides "that dormant judgments shall only be revived by actions of debt, and every *scire facias* to revive a judgment shall be dismissed on motion." Be that as it may, if in *ante-bellum* days it was ever permissible, by *scire facias,* to obtain a judgment on a judgment, it was held in *Parker v. Shannonhouse, supra,* that such was not the law subsequent to the Convention of

1866. Since then, if not before, the only procedure whereby the owner of a judgment may obtain a new judgment for the amount owing thereon is by independent action.

Such independent action upon a judgment must be commenced by the issuance of summons, filing of complaint, service thereof, etc., as in case of any other action to recover judgment on debt. And, it is expressly provided that the period limited for the commencement of such action upon a judgment is ten years "from the date of its rendition." G.S. 1-47. *Rodman v. Stillman,* 220 N.C. 361, 17 S.E. 2d 336; *McDonald v. Dickson, supra.* As to limitation applicable to action on judgment rendered by justice of the peace, see G.S. 1-49.

"A void judgment is a nullity, and no rights can be based thereon; it can be disregarded, or set aside on motion, or the court may of its own motion set it aside, or it may be attacked collaterally." McIntosh, *supra,* 735; *Lewis v. Harris,* 238 N.C. 642, 78 S.E. 2d 715; *Hanson v. Yandle,* 235 N.C. 532, 70 S.E. 2d 565.

In the matter now under review, there was no summons, no complaint, in short, no independent action by said administratrix against Mrs. Bristol. It follows that the clerk's order of 24 September, 1946, purporting to revive the late P. M. Reid's judgment of 1936 in the sense of rendering a new judgment for the debt, if any, owing to said administratrix by Mrs. Bristol thereon is void for lack of jurisdiction. The judgment of the court below so declared. It is

Affirmed.

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

STATE v. J. WALL ELLIS.

(Filed 23 March, 1955.)

1. Homicide § 27f—

Where the evidence discloses that defendant was a wildlife protector and at the time was engaged in the performance of his duties in checking a fisherman for license to give him a citation if he had none, G.S. 113-91 (d), G.S. 113-141, G.S. 113-152, G.S. 113-157, inadvertence of the court in charging the jury that the incident under investigation did not involve defendant's discharge of official duties and the fact that defendant was an officer would not affect his right to shoot, *is held* to constitute prejudicial error.

2. Homicide § 11—

The doctrine of retreat as an element of self-defense has no application to a peace officer, or one clothed with the powers of such officer, while in

the performance of his duties, but to the contrary it is the duty of such officer when assaulted to stand his ground and carry through on the performance of his duties, and meet force with force so long as he acts in good faith and uses no more force than reasonably appears to him to be necessary to effectuate the due performance of his official duties and save himself from death or great bodily harm.

3. Same—

As bearing upon the question of excessive force, a peace officer acting in self-defense is presumed to have acted in good faith, and the court should so instruct the jury.

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

APPEAL by defendant from *Pless, J.*, and a jury, at December Term, 1954, of AVERY.

Criminal prosecution tried upon a bill of indictment charging the defendant with the murder of Charlie Young.

When the case was called for trial, the Solicitor announced he would not prosecute the defendant for murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter, as the evidence might disclose. (*S. v. Wall*, 205 N.C. 659, 172 S.E. 216.)

The defendant, under plea of not guilty, admitted the intentional killing and assumed the burden of justification.

The homicide occurred on 5 April, 1954. The trout season opened that day. The defendant was a wildlife protector for the State of North Carolina. He had served in that capacity for about nine years. The defendant, with three other wildlife enforcement officers, had worked that day in the performance of their duties, and about 5:00 o'clock in the afternoon they came upon three men fishing in a trout stream.

The further evidence on which the defendant relies, so far as it is pertinent to decision, may be summarized as follows: The defendant and deputy protector Bailey went down to the creek to check the fishermen for creek limits and licenses. The fishermen were across the stream from the officers. The check made on the first two fishermen disclosed that one of them did not have a license. The third fisherman walked off while the other two were being checked. Thereupon the officers, in an effort to head off the third fisherman, returned to the car and drove across a bridge spanning the creek and parked side of the road near a pasture belonging to Ralph Young, brother of the deceased. Deputy Bailey walked down near the creek and was seen talking to one or more of the fishermen about 100 feet from the road. Whereupon the defendant started in the direction of deputy Bailey. The defendant's forward progress carried him near the deceased Charlie Young. When the defendant was some 75 or 80 feet from Young, who had not been seen by the defendant, Young called to

his brother Ralph, who was standing nearby, and asked if he could not get the defendant—referring to him as a s.o.b.—off his land. The defendant stopped. An exchange of words ensued. The deceased started advancing toward the defendant and said: "I can get the g— d— blue-face s.o.b. off there." The deceased continued on, walking fast, nearly running. There was a fence between the defendant and the deceased about 25 feet from the defendant. Before the deceased reached the fence he picked up a large rock and with it crossed the fence. The defendant said to him, "Don't come down here," and then pulled his pistol out of the holster. The deceased said, "I am not afraid of you or your g. d. gun either." The deceased continued on toward the defendant and when he was about 20 feet away, the defendant fired a warning shot to the left of the deceased. He continued to advance, looking "like a wild man." And when about 15 feet away, the defendant shot again, aiming at his arm. The deceased "twisted around" but did not stop. When he was about 6 feet away, he started to draw back with the rock, whereupon the defendant, as he put it, being "in fear that he would kill me with the rock," shot the deceased in the face, inflicting the wound that caused death.

Prior to this time the defendant had given the deceased a citation for violating the game law and had caused a warrant to be issued for him. The deceased had threatened to kill the defendant. There was also evidence that the deceased had the general reputation of being a dangerous and violent man, to the knowledge of the defendant. The deceased was about 45 years of age and weighed more than 225 pounds. The defendant was 64 years of age.

The State's evidence, omitted herefrom as not being pertinent to decision, contradicts vital phases of the defendant's evidence of justification.

The jury returned a verdict of guilty of manslaughter, and from judgment pronounced, directing that the defendant be committed to the State's Prison for a term of not less than four nor more than seven years, he appeals, assigning errors.

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

Charles Hughes, Robert Lacey, G. D. Bailey, and W. E. Anglin for defendant, appellant.

JOHNSON, J. The trial court instructed the jury in part as follows:

"Going further with the law of this case, gentlemen of the jury, the Court instructs you that upon this occasion that Mr. Ellis, the defendant, was in the discharge of his duties as a State Wildlife Protector, and under the statute is permitted to enter upon privately owned land for the purpose of checking fishing licenses and things of that sort, and that he

was not, therefore, upon this occasion a trespasser upon the lands of Mr. Ralph Young, the owner of it, *and on the other hand, gentlemen of the jury, inasmuch as the incident we are investigating did not involve the discharge of his official duties, the fact that he is an officer would not enter into that part of it; that is, gentlemen of the jury, under the circumstances he had no more right to shoot, but did have the same right to shoot as a private citizen, but he is not cast in the role of trespasser, but he had a right to be where he is; so that, in so far as that phase of the case is concerned, gentlemen of the jury, it would be the same as if the incident had taken place out upon the highway where two men had met up with each other.*" (Italics added.)

The defendant under Exception No. 63 assigns as error the portion of the charge appearing in italics. The assignment appears to be well taken. The inadvertence of the court in telling the jury "the incident we are investigating did not involve the discharge of his (defendant's) official duties," was inexact, contradictory of the instruction just given, and calculated to prejudice the defendant in his right of self-defense, as was the further instruction that "the fact that he is an officer would not enter into that part of it." The evidence discloses the defendant was engaged in the performance of his official duties, *i.e.*, on his way to check a fisherman for license and, if he had none, to give him a citation. These acts he was empowered by law to perform. G.S. 113-91 (d); G.S. 113-141; G.S. 113-152; G.S. 113-157. And being in the performance of his official duties, the doctrine of retreat as an element of self-defense (*S. v. Bryant*, 213 N.C. 752, 197 S.E. 530) had no application to the defendant's situation. This is so for the reason that a peace officer, or one clothed with the powers of such officer, who is assaulted or obstructed or interfered with while in the lawful performance of his duties is not required, or ordinarily permitted, to retreat and thus leave the would-be lawbreaker to work his will and frustrate the orderly enforcement of the law. *S. v. Garrett*, 60 N.C. 144; *S. v. Dunning*, 177 N.C. 559, 98 S.E. 530; 26 Am. Jur., Homicide, section 154. On the contrary, it is his duty when assaulted to stand his ground, carry through on the performance of his duties, and meet force with force so long as he acts in good faith and uses no more force than reasonably appears to him to be necessary to effectuate the due performance of his official duties and save himself from death or great bodily harm. *S. v. Dunning, supra;* 40 C.J.S., Homicide, section 137. Also, as bearing on the question of excessive force, a peace officer acting in self-defense is presumed to have acted in good faith (*S. v. Pugh*, 101 N.C. 737, 7 S.E. 757), and the jury should be so instructed. *S. v. Dunning, supra; S. v. McNinch*, 90 N.C. 695. Accordingly, the defendant was in no sense, as the court inadvertently told the jury, in the same

situation "as if the incident had taken place out upon the highway where two men had met up with each other."

It would seem that the challenged instructions must have weighed too heavily against the defendant. We conclude he is entitled to another trial. It is so ordered. This being so, we refrain from reviewing the remaining assignments of error.

New trial.

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

STATE v. CHARLES WARD.

(Filed 23 March, 1955.)

1. Homicide § 25—

Evidence tending to show that defendant and deceased, with others, were engaged in a drinking party characterized by bad temper, fighting, and scuffling, that defendant had a shotgun loaded with two shells, that a neighbor saw defendant shoot one time in the direction of deceased and shortly thereafter found deceased at that place *in extremis*, and that thereafter the gun was found with both shells exploded, *is held* sufficient to overrule motion for nonsuit in a prosecution for homicide.

2. Homicide § 17: Criminal Law § 34a—Declarations held incompetent as hearsay, and admission of testimony thereof was prejudicial.

In a prosecution for homicide committed during a drinking party, testimony of a declaration by defendant's brother to a neighbor that defendant had a gun and declarant was afraid he would kill deceased, and testimony of a declaration by defendant's son that his father was drunk and the son wanted the neighbor to come over to see if he could do anything with him, and testimony of a deputy sheriff that one of the men from the party stated that they had come for him when defendant went into the house to get a gun, none of the declarants being witnesses at the trial, *held* incompetent as hearsay and the admission of the testimony was reversible error.

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

APPEAL by defendant from *Pless, J.*, September Term 1954 of MITCHELL.

Criminal prosecution, tried on bill of indictment charging defendant with the murder of Forest Ward, his brother.

The solicitor announced that the State would not ask for verdict of murder in the first degree but for a verdict of murder in second degree or manslaughter as the evidence might warrant.

The State offered evidence tending to show that on the night of 20 February, 1954, there was a drinking party at the home of Charles Ward, the

defendant, who lived on the highway near Bakersville. Present besides the defendant and his wife Lucille and a 13-year-old son were defendant's two brothers, Forest Ward and Harold Ward, and three other visitors, Burleson, Buchanan and Ledford. After exhausting the supply of liquor and replenishing it by an incursion to a neighboring county, the men continued their potations until late in the night. It was testified that the defendant was intoxicated and angry. There was fighting and scuffling, particularly between Forest and Harold Ward in which Charles Ward engaged. The defendant Charles Ward had a double-barreled shotgun loaded with two shells containing buckshot. He had borrowed this gun several days before from a neighbor, Malone Gouge. Whisky and bad temper finally made violence seem imminent, so much so that shortly after midnight, Burleson, Buchanan and Ledford left the house and drove to Bakersville to summon the sheriff. When they left the scene they testified Forest Ward and Harold Ward were out near Harold's parked automobile about 17 steps from defendant's house, and Charles Ward was going into the house. They knew he had a gun. When they returned with the sheriff's deputy, about 20 minutes later, they found the defendant and his brothers gone. In the meantime, shortly after these men had gone for the sheriff, Malone Gouge, who lived in a house across the road some 200 yards away, was awakened by Harold Ward and Charles Ward's young son who had come to him for help. Gouge arose and, looking out, saw Charles Ward, the defendant, come out of his house onto his lighted porch and fire a gun. The gun was pointed away from the house. "I saw Charlie shoot to where Forest Ward fell and where he was when I came over." Gouge was unable to see anyone else at that time. He then dressed, and as he came out a few minutes later he saw Charles Ward scuffling with Forest Ward near a parked automobile. No one else was present. Gouge went at once to the automobile and as he reached it Forest Ward sank down to the ground, apparently *in extremis*, and, as Gouge expressed it, "bloody as he could be." He did not see the gun at that time. Gouge said to the defendant, "You have killed your brother." He replied, "I didn't do it," but Gouge said, "I seen you shoot." Defendant said "Lucille was the cause of it."

Gouge then placed the wounded man in the automobile with the help of Harold, who had come up, and the defendant and drove to Dr. Berry's clinic in Bakersville. Forest Ward died a few hours later and the doctor ascribed his death to shock and loss of blood. It appeared that the discharge of the load of buckshot from the gun struck the deceased on the right side and extended through his leg, some of the shot striking the left knee. The diameter of the hole was only slightly larger than that of the gun barrel, and the clothing and skin showed signs of powder burns. Malone Gouge testified he did not remember hearing a second shot but

said "there could have been one." Gouge later found the gun in his home with both shells exploded. The defendant told the sheriff next day that he and Forest Ward were scuffling over the gun, and it went off, that it was an accident.

Over objection Gouge was permitted to testify that when Harold Ward and Charles Ward's son came to his house that night Harold said, "Charles has a gun and I am afraid he will kill Forest." Gouge also testified over defendant's objection that defendant's son said, "Daddy is drunk. I want you to come over there and see if you can do anything with him." Neither of these testified.

The defendant also objected to the testimony of the sheriff that one of the men who came for him that night told him that "Charlie went in the house to get a gun and they left."

The defendant did not go on the stand and offered no evidence.

The jury returned verdict of guilty of manslaughter. From judgment imposing sentence the defendant appealed.

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

Warren Pritchard, G. D. Bailey, and W. E. Anglin for defendant, appellant.

DEVIN, J. The defendant assigns as error the denial by the trial judge of his motion for judgment as of nonsuit. He contends the evidence was insufficient to warrant its submission to the jury.

The evidence offered by the State was in some respects circumstantial, and the sequence of events was not always clear, but we think this evidence considered in the light most favorable for the State was sufficient to withstand the demurrer, and that the ruling below should be upheld.

As was said by this Court in *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730, "if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456.

However, we think there was error in the admission, over defendant's objection, of the unsworn declarations of Harold Ward and defendant's son with respect to defendant's attitude toward the deceased, and that this was prejudicial. Likewise, the testimony of the sheriff that one of the men who came to him that night told him the defendant went in his house to get a gun, and they thereupon left, would seem to violate the rule against hearsay evidence. *S. v. Lassiter,* 191 N.C. 210, 131 S.E. 577;

Teague v. Wilson, 220 N.C. 241, 17 S.E. 2d 9; *S. v. Black,* 230 N.C. 448, 53 S.E. 2d 443; Stansbury, Evidence, Sec. 138.

As we think the defendant is entitled to another hearing, we refrain from further elaboration or analysis of the evidence.

New trial.

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

EDITH HARRELL OLLIS v. LAWRENCE LAMEN OLLIS.

(Filed 23 March, 1955.)

1. Divorce and Alimony § 5d—

In an action for alimony without divorce, allegations that the husband had been abusive and violent toward plaintiff and she had been made to fear for her safety, are insufficient, it being necessary that plaintiff allege specific acts of misconduct on the part of the husband so that the court may determine whether his conduct was in fact such as constituted cause for divorce from bed and board, and also specify what, if anything, she did or said at the time, in order that the court may determine whether she provoked the difficulty. G.S. 50-16.

2. Same—

Allegations that during the 12 months preceding the institution of the action defendant had repeatedly told plaintiff to leave the home in which they were living, are insufficient to allege a cause of action that defendant maliciously turned plaintiff out of doors as a basis for an action for alimony without divorce under G.S. 50-16.

3. Same—

Allegations that the defendant spent money lavishly on other women, without allegation as to who they were or what was their relationship to defendant, if any, and without allegation of misconduct on the part of defendant, is insufficient to state a cause of action for divorce as a basis for alimony without divorce under G.S. 50-16.

4. Same—

Allegations that defendant failed to provide adequate support for the plaintiff and the child of the marriage, without allegations of specific acts and conduct on his part sufficient to justify her leaving him as she admitted she had done, and without allegation of the amount of support defendant provided or what other means he had or what she deemed "adequate support," are insufficient to allege that he separated himself from her and the child without providing them adequate support according to his means and condition in life, as a basis for alimony without divorce.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

OLLIS *v.* OLLIS.

APPEAL by defendant from *Parker, J.*, at Chambers, 11 September, 1954, VANCE.

This is a civil action for alimony without divorce and for counsel fees brought by the plaintiff under G.S. 50-16. The plaintiff alleges in substance:

(1) The parties are residents of North Carolina.

(2) The parties were married on 7 September, 1935; one child, Dixie Ann Ollis, now 17, was born of the marriage.

(3) The plaintiff at all times since the marriage has been a faithful and dutiful wife.

(4) The defendant has become abusive and violent to the plaintiff to the extent her life has become intolerable and she is unable to live with him; that she has been made to fear for her bodily safety to the extent it has become necessary for her to live separate and apart from the defendant.

(5) The plaintiff has frequently remonstrated with the defendant about his violent and abusive attitude toward her, but without effect on him.

(6) The defendant, during the preceding 12 months has repeatedly told plaintiff to leave the home in which they were living, which he had no right to do; the defendant began spending a great deal of time away from home and on one occasion was gone for 11 days without informing the plaintiff and his child of his whereabouts, which caused them great anxiety.

(7) The plaintiff is advised and believes the defendant spends money lavishly on other women and is now supporting a woman other than this plaintiff.

(8) The defendant has failed to provide adequate support for plaintiff and Dixie Ann.

(9) The plaintiff on 13 March, 1954, because of abuse and other indignities, left the home and returned to her home in Florence, South Carolina, where she left Dixie Ann and returned to North Carolina in order to bring this action.

(10) The defendant is able-bodied and capable of earning money. He operates a store and filling station and he has sufficient income to support plaintiff and Dixie Ann.

(11) The plaintiff is without means of support and without money to employ counsel.

The defendant filed a demurrer upon the ground, (1) the complaint fails to state a cause of action; (2) the plaintiff fails to set forth in detail and minuteness the circumstances of the alleged acts of cruelty on the part of the defendant and that the acts charged are set forth in general terms and do not state facts specifically and with particularity; (3) the

plaintiff has failed to aver that the alleged acts of cruelty on the part of defendant were without adequate provocation on her part and to state what her conduct was at the time of the alleged acts; (4) that the plaintiff does not aver that her conduct did not contribute to the wrongs and abuses of which she complains.

From an order of the Superior Court Judge overruling the demurrer, the defendant appealed.

No counsel, contra.
John Kerr, Jr., for defendant, appellant.

HIGGINS, J. In *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214, *Justice Winborne* sets out the allegations necessary in an action under G.S. 50-16, as follows: "When a wife bases her action for alimony without divorce upon the ground that her husband has been guilty of cruel treatment of her and of offering indignities to her person within the meaning of the statute pertaining to divorce from bed and board, G.S. 50-7 (3) and (4), she 'must meet the requisite' of this statute, *Pollard v. Pollard,* 221 N.C. 46, 19 S.E. 2d 1, and not only set out with particularity the acts on the part of her husband and upon which she relies, but she is also required to allege, and consequently to prove, that such acts were without adequate provocation on her part."

In the case of *Howell v. Howell,* 223 N.C. 62, 65 S.E. 2d 169, *Justice Denny* states the following as the rule: "In an action for alimony without divorce (C.S. 1667, now G.S. 50-16), as in an action for divorce *a mensa et thoro* by the wife, she must not only set out with some particularity the acts of cruelty upon the part of the husband, but she must aver, and consequently offer proof, that such acts were without adequate provocation upon her part. . . . The omission of such allegation is fatal."

It is not enough for the wife to allege the husband has been abusive and violent toward her, that she has been made to fear for her safety. She must go further and allege specific acts and conduct on the part of the husband so that the court may see that his conduct was in fact such as constituted a cause for divorce from bed and board. Not only must the wife specify the acts and conduct of the husband, but also she must set forth what, if anything she did to start or feed the fire of discord so that the court may determine whether she provoked the difficulty.

The plaintiff alleges "that the said defendant during the preceding 12 months has repeatedly told the plaintiff to leave the home in which they were both living." There is no allegation the plaintiff left or that the husband's statement amounted to more than a request that she do so. The complaint is likewise silent as to what the plaintiff did or said at the times the husband told her to leave. To be ground for divorce *a mensa*

et thoro, and consequently basis for the plaintiff's action under G.S. 50-16, the plaintiff must show that the defendant "maliciously turned her out of doors."

The plaintiff, on information and belief, charges also the defendant spent money lavishly on other women. She does not allege who they were, what their relationship, if any, to the defendant was, nor does she suggest any misconduct on the part of the defendant.

The plaintiff alleges defendant failed to provide adequate support for her and Dixie Ann. If treated as a second cause of action (*Oldham v. Oldham*, 225 N.C. 476, 35 S.E. 2d 332), the complaint fails to state a cause of action. She admits in her complaint that she left the defendant. She does not allege specific acts and conduct on his part sufficient to justify her leaving. She does not allege the amount of support the defendant provided or what means he had, or what she deemed "adequate support." The statute provides: *"If any husband shall separate himself from his wife* and shall fail to provide her and the children of the marriage *with the necessary subsistence according to his means and condition in life,"* she may maintain an action for alimony without divorce. (Emphasis added.)

The complaint in this action is deficient in that it fails to allege any ground for divorce, either absolute or from bed and board. It also fails to allege the husband has separated himself from his wife and failed to provide her and the child of the marriage with the necessary subsistence according to his means and condition in life. *Brooks v. Brooks*, 226 N.C. 280, 37 S.E. 2d 909; *Carnes v. Carnes*, 204 N.C. 636, 169 S.E. 222; *Dowdy v. Dowdy*, 154 N.C. 556, 70 S.E. 917; *Jackson v. Jackson*, 105 N.C. 433, 11 S.E. 173; *White v. White*, 84 N.C. 340.

The demurrer should have been sustained. The order for alimony and counsel fees is vacated.

Reversed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

J. T. SPRINKLE AND WIFE, LULA SPRINKLE; MRS. MINNIE V. PETTIGREW (WIDOW); B. F. SPRINKLE (UNMARRIED); R. L. SPRINKLE AND WIFE, LILLIAN SPRINKLE, PHILIP E. SPRINKLE AND WIFE, MARGARET SPRINKLE; MRS. JUANITA KIMSEY (WIDOW); REGINALD F. SPRINKLE AND WIFE, ANNIE YOUNG SPRINKLE, v. H. L. SPRINKLE AND WIFE, OLIE SPRINKLE, AND H. C. SPRINKLE AND WIFE, SIBIL SPRINKLE; PHILIP E. SPRINKLE AND BENJAMIN F. SPRINKLE, EXECUTORS OF THE ESTATE OF IDA A. SPRINKLE, DECEASED.

(Filed 23 March, 1955.)

Judgments § 27a—

Upon a motion to vacate an order on the ground that it was entered without notice, G.S. 1-582, it is the duty of the court upon request to find the facts not only in respect to the grounds upon which the motion is made, but as to the meritorious defense, the rules as to the setting aside a judgment for surprise and excusable neglect under G.S. 1-220, being applicable.

BARNHILL, C. J., took no part in the consideration and decision of this case.

APPEAL by respondent H. L. Sprinkle from *Fountain, S. J.*, at September Civil Term 1954, of ROCKINGHAM.

Special proceeding for partition of certain lands in Rockingham County, North Carolina, of which petitioners and defendants were tenants in common, heard upon duly verified motion of defendant H. L. Sprinkle, dated 20 February, 1954, entered in the cause, to set aside judgment and order of *Gwyn, J.*, dated 16 December, 1953, rejecting claim of H. L. Sprinkle for reimbursement of expenses incurred in connection with the sale of the property, upon grounds of mistake, inadvertence, surprise or excusable neglect, and that he has a meritorious defense, and that the order was made out of court and without notice.

The motion came on for hearing before the Judge presiding at September Civil Term 1954, who "having heard affidavits by the movant and oral evidence of the plaintiffs, and being of the opinion that the evidence is insufficient to show any inadvertence on the part of the court in entering said judgment and order dated December 16, 1953, and . . . to show that any false representations were made by counsel for the plaintiffs and the commissioners to the court, and . . . therefore being of the opinion that said motion should be denied," entered order, dated 7 September, 1954, denying the motion.

Defendant, H. L. Sprinkle, requested the court to find the facts, including those specified in detail. The request was denied,—and H. L. Sprinkle excepted. His exception No. 1.

Defendant H. L. Sprinkle thereupon moved that the order of 7 September, 1954, be set aside for irregularities and errors committed during the hearing and for lack of facts as found, and for that the facts found

will not support the order. The motion was overruled and defendant H. L. Sprinkle excepted. His exception No. 2.

And to the order of 7 September, 1954, and to the signing of it, defendant H. L. Sprinkle excepts, his exception No. 3, and appeals to Supreme Court and assigns error.

P. T. Stiers for plaintiffs, appellees.
Rufus W. Reynolds for defendant, appellant.

WINBORNE, J. Decisions of this Court hold that when a Judge of Superior Court hears a motion to set aside a judgment for mistake, surprise or excusable neglect, G.S. 1-220, it is his duty, upon request so to do, to find the facts not only in respect to the grounds on which the motion is made, but as to meritorious defense. Failure to do so is error. *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287; *McLeod v. Gooch,* 162 N.C. 122, 78 S.E. 4. See also *Parnell v. Ivey,* 213 N.C. 644, 197 S.E. 128.

The same rule would apply to hearing on motion to vacate an order for reason that it was made without notice. G.S. 1-582.

Hence the court below erred in declining to find the facts in these respects,—having been requested so to do.

The cause will be remanded for further proceedings as to right and justice appertains, and as the law provides.

Error and remanded.

BARNHILL, C. J., took no part in the consideration and decision of this case.

ANNIE JONES HINSON, ADMINISTRATRIX OF LEONARD E. HINSON, DECEASED, v. CHARLES EDWARD DAWSON AND CHARLES A. DAWSON.

(Filed 30 March, 1955.)

1. Pleadings § 3a: Death § 6—

A cause of action for wrongful death, and a cause of action for personal injuries between the date of injury and the death and for property damage sustained in the collision, should be separately stated.

2. Appeal and Error § 48—Partial new trial will be awarded when error affects only some of issues and issues are separable.

In this action for wrongful death and for personal injuries between the date of injury and death, and for property damage sustained in the collision, error relating to contributory negligence was committed in the trial. The jury answered in the negative the issue of whether intestate was killed through the negligence of defendants, but it appeared from the

record that the answer to this issue was predicated upon a finding that intestate did not die as a result of the injuries sustained in the accident. *Held:* The error requires only a partial new trial and the verdict on the cause of action for wrongful death will stand, since it is entirely separable from the others and the error could not have affected the jury's verdict in that cause.

3. Automobiles § 29a—

The operation of an automobile in a business district in excess of 20 miles per hour is a criminal offense, punishable by fine or imprisonment, or both, G.S. 20-141, G.S. 20-38 (a), G.S. 20-176.

4. Same: Statutes § 11—

Statutes creating criminal offenses, including those relating to the operation of motor vehicles, must be strictly construed.

5. Automobiles § 7—

Where the violation of a criminal statute regulating the operation of motor vehicles is relied upon in a civil action as constituting negligence *per se*, the statute must be strictly construed as a criminal statute, and further, plaintiff must show that its violation was a proximate cause of the accident.

6. Automobiles § 12d—

Whether a motorist is traveling in a business district within the purview of G.S. 20-38 (a) is to be determined with reference to the frontage along the street or highway on which he is traveling, and conditions along intersecting streets or highways are to be excluded from consideration.

7. Same—

A building used for business purposes need not be in actual contact with the front property line, but fronts upon the street or highway within the purview of G.S. 20-38 (a) if the space intervening between the front of the building and the front property line and used as a means of access to the building is reasonable in extent.

8. Same—

A business district within the purview of G.S. 20-38 (a) is to be determined on the basis of frontage actually occupied by buildings when their side lines are projected or extended to the street or highway, without taking into consideration the open spaces between the buildings, notwithstanding such spaces may be used for business purposes or incident to the operation of a business establishment.

9. Same—

A district is a business district within the purview of G.S. 20-38 (a) if 75% or more of the frontage for a distance for 300 feet or more on either side of the street or highway is occupied by buildings in use for business purposes, and it is not required that the frontage on both sides of the street or highway should be so used.

10. Automobiles § 18g (4)—

Testimony of a witness that the automobile in question was traveling between 35 and 40 miles per hour, there being no testimony of a greater

speed, may not be considered as tending to show a speed in excess of 35 miles per hour.

11. Automobiles §§ 12d, 18i—

Where it is apparent from a plat introduced in evidence that the testimony of the witnesses in regard to the frontage along the highway used for business purposes included not only the buildings but the open spaces between the buildings and that the evidence, when so considered, discloses that the area was not a business district within the purview of G.S. 20-38 (a), an instruction to the effect that if defendant was driving in excess of 20 miles per hour in a business district such speed was unlawful, must be held for prejudicial error.

12. Automobiles § 12a—

Speed less than 20 miles per hour, either in a business district, residential district or elsewhere, if greater than is reasonable and prudent under the conditions then existing is unlawful and negligence *per se*. G.S. 20-141 (a), (c).

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

APPEAL by plaintiff from *Bone, J.*, August-September Term, 1954, of WAYNE.

Action by administratrix to recover damages, (1) for wrongful death of intestate, (2) for personal injuries between injury and death, (3) for damages to intestate's 1951 Ford automobile.

On 20 December, 1953, about 9:15 p.m., there was a collision between a 1951 Ford automobile, owned and operated by Leonard E. Hinson, plaintiff's intestate, hereafter called Hinson, and a 1952 Ford automobile operated by defendant Charles Edward Dawson, hereafter called Dawson, the minor son of defendant Charles A. Dawson, who owned the car and admittedly was responsible for the actionable negligence, if any, of his son when operating the car.

The collision occurred within the intersection of two paved highways in the settlement of Adamsville, about 1.2 miles east of the City of Goldsboro. U. S. Highway #70 extends in a general east-west direction between Goldsboro and Kinston. At Adamsville, it intersects, nearly at right angles, with another paved road, which, to the north of Highway #70, is U. S. Highway #102 to Snow Hill, and to the south of Highway #70 is a paved road to Johnson Air Field.

The two cars approached the intersection from opposite directions, Hinson driving west toward Goldsboro and Dawson driving east toward Kinston. The collision occurred on the north half of Highway #70, *i.e.*, on Hinson's right side as he traveled west.

Plaintiff's allegations and evidence, in brief, are to the effect that Dawson, upon reaching the intersection, made a left turn toward the north, *i.e.*, toward Snow Hill, directly across the path of the oncoming

Hinson car; and that Dawson failed to give the required signal of his intention to make such left turn, failed to keep a proper lookout, and in these and other respects was guilty of negligence proximately causing the collision.

Defendants denied the crucial allegations of the complaint; and, by way of further answer and defense, alleged, *inter alia,* that Dawson was in the intersection, in the process of making a left turn in a lawful and proper manner, but that Hinson "failed to keep a proper lookout in that he drove his automobile at a high, excessive, and unlawful rate of speed," and in these and other respects was guilty of contributory negligence proximately causing the collision. Hinson's alleged contributory negligence was pleaded in bar of plaintiff's right to recover herein.

The court submitted nine issues, to wit:

"1. Was the plaintiff's intestate injured through the negligence of the defendants, as alleged in the Complaint? Answer: YES.

"2. If so, did the plaintiff's intestate by his own negligence contribute to such injury, as alleged in the Answer? Answer: YES.

"3. What damages, if any, is the plaintiff entitled to recover on account of medical expenses and suffering on the part of her intestate. Answer: .....

"4. Was plaintiff's intestate killed through the negligence of the defendants, as alleged in the Complaint? Answer: NO.

"5. If so, did plaintiff's intestate contribute to his death by his own negligence, as alleged in the Answer? Answer: .....

"6. What damages, if any, is plaintiff entitled to recover on account of the wrongful death of her intestate? Answer: .....

"7. Was plaintiff's intestate's automobile injured and damaged through the negligence of defendants, as alleged in the Complaint? Answer: YES.

"8. If so, did the plaintiff's intestate contribute to such injury and damages by his own negligence, as alleged in the Answer? Answer: YES.

"9. What damages, if any, is plaintiff entitled to recover for injuries to said automobile? Answer: ....."

Having answered the first, second, fourth, seventh and eighth issues, as shown above, the jury did not answer the third, fifth, sixth and ninth issues. In this the jury observed closely the instructions given by the court.

Judgment on the verdict was entered in favor of defendants. Plaintiff excepted and appealed.

J. Faison Thomson & Son and N. W. Outlaw for plaintiff, appellant.

Paul B. Edmundson, John S. Peacock, and Smith, Leach, Anderson & Dorsett for defendants, appellees.

BOBBITT, J. Plaintiff did not separately state the alleged cause of action for wrongful death and the alleged cause of action for personal injuries between date of injury and death and property damage. While the basis for each is the same wrongful act, the causes of action are separate and distinct. Each should have been alleged as a separate cause of action. The recovery in one is distributable differently from the recovery in the other. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105.

However, the trial judge clarified this confusion in the pleading by submitting, without objection, issues of negligence, contributory negligence and damages as to (1) the personal injury feature, (2) the wrongful death feature, and (3) the property damage feature. The court instructed the jury that, if the collision and resulting personal injury and property damage were caused by defendants' negligence, they would answer the first and seventh issues, "Yes." The jury answered these issues, "Yes," in plaintiff's favor. The court instructed the jury that, to answer the fourth issue, "Yes," plaintiff had to show further that personal injuries received by Hinson in the collision proximately caused his death. The jury answered this issue, "No." Apart from this one element, the questions posed by the first, fourth and seventh issues were essentially the same.

The verdict on the fourth issue will stand. The jury did not reach the contributory negligence issue relating to alleged wrongful death. We do not perceive that an error, involving alleged contributory negligence of Hinson, should affect the jury's verdict as to the fourth issue. Hence, the verdict and judgment will stand as a bar to further prosecution of the alleged cause of action for wrongful death. The new trial, ordered for reasons stated below, will be limited to issues relating to Hinson's personal injuries between the date of injury and death and the damage to his automobile.

Ordinarily, an error affecting a single issue is so interrelated with other issues that a complete new trial is awarded therefor; but here the first and seventh issues having been answered, "Yes," the only reasonable interpretation of the jury's answer, "No," to the fourth issue, is that plaintiff failed to satisfy the jury by the greater weight of the evidence that Hinson died as the result of injuries received in the collision. In this connection, we note that Hinson died 27 January, 1954; and that Dr. Winfield Thompson, witness for plaintiff and Hinson's surgeon and physician, testified: "He did not die as a result of this injury here. He died from a blood clot originating, outside of that injury, from the leg or thigh."

As pointed out by *Walker, J.*, ordinarily this Court will grant a partial new trial "when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication. *Benton v. Collins*, 125 N.C. 83;

Rowe v. Lumber Co., 133 N.C. 433." *Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164; *Jackson v. Parks*, 220 N.C. 680, 18 S.E. 2d 138; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366; *Journigan v. Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183.

The operation of an automobile "in any business district" in excess of twenty miles per hour is a criminal offense, punishable by fine or imprisonment or both. G.S. 20-141; G.S. 20-38 (a); G.S. 20-176. Statutes creating criminal offenses are subject to strict construction. *S. v. Campbell*, 223 N.C. 828, 28 S.E. 2d 499, and cases cited. This applies to all such statutes, including those relating to the operation of motor vehicles. *S. v. Hatcher*, 210 N.C. 55, 185 S.E. 435; *Powers v. Reynolds Bros.*, 298 Mass. 7, 9 N.E. 2d 535. True, the violation of such criminal statute, unless otherwise provided, is held to be negligence *per se* in the trial of a civil action. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331. But the statute must be construed as a criminal statute. When so construed, it is applicable alike to criminal prosecutions and civil actions.

The portion of G.S. 20-38, here concerned, provides:

"Definitions of words and phrases.—The following words and phrases when used in this article shall, for the purpose of this article, have the meanings respectively prescribed to them in this section, except in those instances where the context clearly indicates a different meaning:

"(a) Business District.—The territory contiguous to a highway where *seventy-five per cent* or *more of the frontage thereon* for a distance of three hundred (300) feet or more *is occupied by buildings* in use for business purposes." (Italics added.)

It is obvious that a motorist may violate the speed statute without being involved in a collision. He does so if he operates in excess of twenty (20) miles per hour "in a business district." G.S. 20-141. A "business district" is determinable with reference to the status of the frontage on the street or highway on which he is traveling. Conditions along intersecting streets or highways are excluded from consideration. *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406. The statute so construed does not apply to a motorist, traveling on an intersecting street or highway, along which there are no buildings, as he approaches and crosses a street or highway solidly built up with business establishments. That situation is controlled by "Stop" signs, electric signals, or other statutory provisions.

What is meant by "frontage" contiguous to a highway for a distance of three hundred (300) feet? "In figuring business frontage only that part of the land contiguous to the highway which is available for buildings should be included." *Wallace v. Kramer*, 296 Mich. 680, 296 N.W. 838. Hence, it does not include an intersecting street or highway. *Mitchell v. Melts, supra.*

Do "buildings in use for business purposes" include only those in actual contact with the property line? We apprehend that this construction would be too strict. A space, reasonable in extent, intervening between the front of the building and the front property line along the street or highway and used as a means of access thereto, would not destroy the character of the building as being in "territory contiguous to a highway." (Definitions of the word "contiguous" are quoted in *Mitchell v. Melts, supra.*) But this would apply only to space encompassed by a projection or extension of the frontage of the building itself and not to open spaces, if any, out from side walls of such buildings.

This brings us to the vital question, under the facts disclosed by the present record, namely: Is the space between buildings to be included or excluded in determining whether seventy-five (75) per cent or more is occupied by buildings in use for business purposes?

Manifestly, the space occupied by a dwelling and the grounds in connection therewith must be excluded. Moreover, the statutory definition relates to frontage actually *occupied by buildings* in use for business purposes. *McGill v. Baumgart,* 233 Wis. 86, 288 N.W. 799. Hence, the inquiry to determine whether a business district exists is concerned with *buildings* along the frontage, not to premises (unoccupied by buildings) simply because used for business purposes or incident to the operations of a business establishment.

We think G.S. 20-141 and G.S. 20-38 (a), fixing the speed limit at twenty (20) miles per hour in a business district, must be construed as intended to apply primarily to sections such as solidly built up business districts. Note the definition of "business district" as given in ch. 148, Art. I, sec. (s), Public Laws of 1927; ch. 407, Art. X, sec. 103, Public Laws of 1937; and ch. 275, Public Laws of 1939, where in 1939 the proportion of the frontage on a highway for a distance of three hundred (300) feet occupied by buildings in use for business purposes was increased from fifty (50) per cent to seventy-five (75) per cent.

It is immaterial, of course, whether the section is within the corporate limits of a municipality. However, the speed limit itself, twenty (20) miles per hour, is indicative of the fact that the statutes relate only to sections where seventy-five (75) per cent or more of the relevant frontage of three hundred (300) feet is actually occupied *by buildings* in use for business purposes. A sharp distinction is drawn between "a business district" and "a residential district." In the latter, (1) the speed limit is thirty-five (35) miles per hour; and (2) it consists of the territory contiguous to a highway, not a business district, where seventy-five (75) per cent or more of the frontage thereon for a distance of three hundred (300) feet or more "is *mainly* occupied by dwellings or by dwellings and buildings in use for business purposes." G.S. 20-38 (w) 1. (Italics

added.) Compare *Baker v. Court of Special Sessions,* 125 N.J.L. 127, 15 A. 2d 102, and *McGill v. Baumgart, supra,* as to the significance of the word "mainly."

The trial judge, in his charge, gave the definition of "business district" in the exact words of G.S. 20-38 (a). He then charged: "If the road frontage on both sides of the highway No. 70 extending eastwardly from the junction for a distance of 300 feet or more than 75% of the said road frontage occupied by buildings in use for business purposes then it would be a business district; otherwise it would not be."

In *Mitchell v. Melts, supra,* this Court, in opinion by *Winborne, J.,* stated, in effect, that a business district exists when seventy-five (75) per cent or more of the frontage for a distance of three hundred (300) feet or more on one side of the street or highway, either side, is occupied by buildings in use for business purposes. We adhere to that view. *A fortiorari,* it is a business district when seventy-five (75) per cent or more of the total frontage on both sides for a distance of three hundred (300) feet is occupied by buildings in use for business purposes. Of course, this cannot be unless seventy-five (75) per cent or more of the frontage on at least one side is so occupied. The quoted excerpt from the charge required that the seventy-five (75) per cent be applied to the frontage on both sides, that is, a total of six hundred (600) feet, *i.e.,* three hundred (300) feet on each side. However, the error in this respect was not prejudicial to plaintiff.

The trial judge gave further instructions to the effect that, if Hinson was driving in excess of twenty (20) miles per hour in a business district as defined, such conduct was unlawful. He properly placed the burden of proof on the defendants; also, properly instructed the jury, in accordance with G.S. 20-141 (e), that defendants had the further burden of establishing such unlawful speed as the proximate cause of the collision. But analysis of the evidence leaves the definite impression that defendants' evidence was insufficient to show that Hinson, as he approached the intersection, was driving in a business district within the meaning of G.S. 20-38 (a) as construed above.

In support of their plea of contributory negligence, defendants relied heavily upon the alleged "high, excessive, and unlawful rate of speed" of Hinson. The witness Reid testified that, when Hinson passed the filling station premises known as the Gasoteria and before he heard the brakes applied, Hinson was traveling between thirty-five (35) and forty (40) miles per hour. No witness testified to a greater speed. This testimony may not be considered as tending to show a speed in excess of thirty-five (35) miles per hour. *Mitchell v. Melts, supra.* The witness Moye testified that Hinson's speed was twenty (20) to thirty (30) miles per hour when he first saw him; and that, a short distance therefrom where the

impact occurred, his speed was between fifteen (15) and twenty (20) miles per hour. Hence, as stated in appellee's brief: "The case was tried on the theory and contentions that the collision occurred *either in a Business District* in which the speed limit was 20 miles per hour or in a *Residential District* in which the limit was 35 miles per hour."

The quoted instruction relates only to the frontage on that portion of Highway #70 extending eastwardly from the intersection. Bearing on the question under consideration, defendants offered the following evidence.

C. Beems, a licensed Surveyor, who measured the distances, "made an examination of the vicinity with the purpose of determining the number of feet along the highways, which are used for business or other purposes." Based thereon, he made a plat, defendants' Exhibit F, which was offered in evidence by defendants without limitation. The plat bears the legend "scale 1″ = 20′." It shows the highway frontage for a greater distance than three hundred (300) feet eastwardly from the intersection. It shows also the location of the buildings along this frontage.

Mr. Beems gave testimony, with reference to the plat, that, on the south side of Highway #70, east of the intersection, there was, first, Smith's Grocery Store, and "the property used for the grocery store extends . . . about 160 feet"; the next buildings, east of Smith's store, were two buildings of Whitley Milling Company, occupying about 204 feet along the highway; the next building was a cement log building, unoccupied, in process of construction; next, there was a vacant lot; and next there was a dwelling. On the north side, east of the intersection: first, there was a filling station, known as the Gasoteria, "the property of the filling station covers about 200 feet"; next, a residence covering about 60 feet; next, "about 85 feet along the front of Route 70 was used for a grocery store"; and next, there was a dwelling.

W. C. Whitley, also testifying with reference to the plat, gave testimony substantially in accord with that of Mr. Beems as stated above. Summing up his testimony, he said: "From the intersection, going eastward toward Kinston, on the south side of the road, on December 20, 1953, approximately 364 feet were occupied by business . . . On the north side of the road, from the intersection, I have an opinion that 215 feet were occupied."

Norman Stewart, plaintiff's witness, on cross-examination, testified: "The distance from the pavement where the two roads come together, back where the filling station property ends, is a little over 200 feet. I imagine it would be every bit of 300 feet. The filling station and the drive in front of the filling station covers that. On the opposite side of the filling station there was a store, and next to the store there was a building used as a mill. It was on the south side of the highway. I

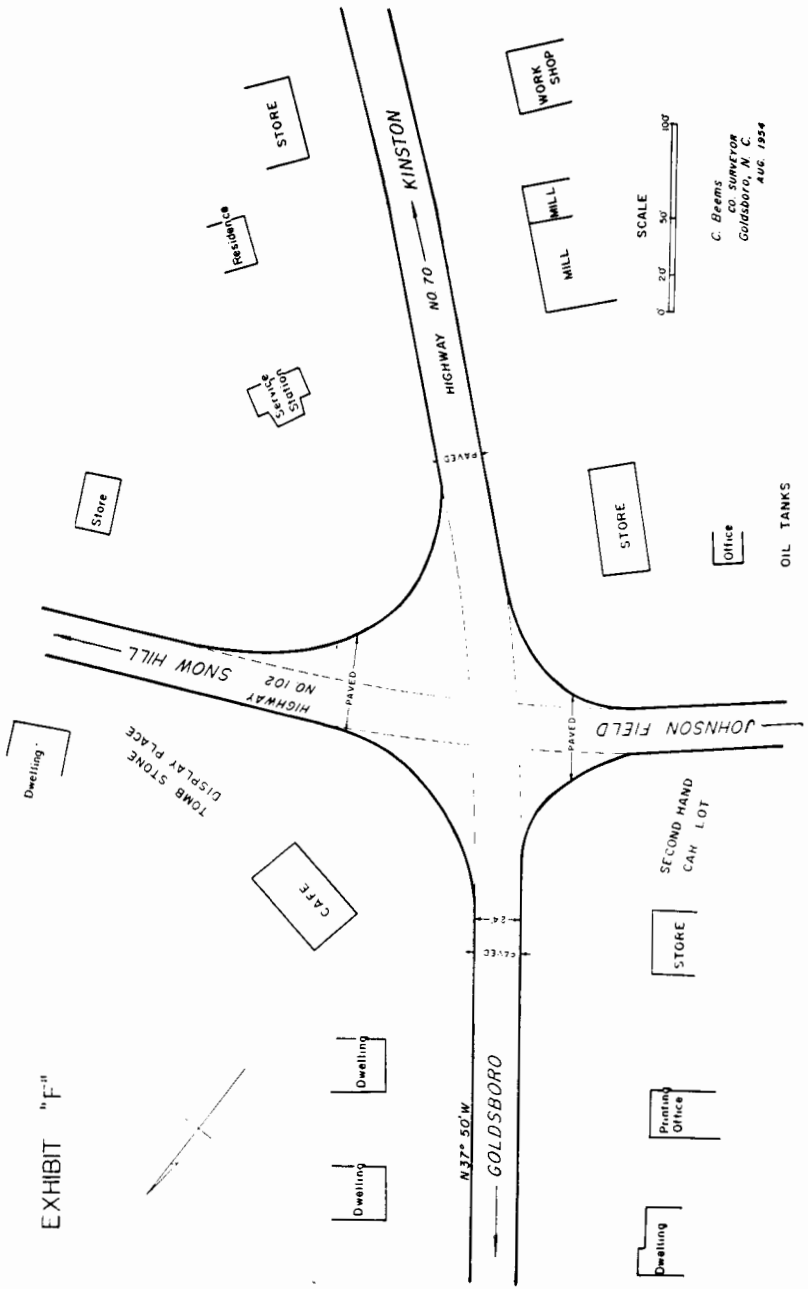


EXHIBIT "F"
HIGHWAY NO 70 — KINSTON
GOLDSBORO
N 37° 50' W
HIGHWAY NO 102 SNOW HILL
JOHNSON FIELD
PAVED
STORE
WORK SHOP
MILL
MILL
Residence
Store
Dwelling
CAFE
TOMB STONE DISPLAY PLACE
Dwelling
Dwelling
Dwelling
STORE
Office
OIL TANKS
SECOND HAND CAR LOT
STORE
Printing Office
Dwelling
SCALE
0 25' 50' 100'
C. Beems
CO. SURVEYOR
Goldsboro, N. C.
AUG. 1954

would not say that property occupied by the store and the mill extends along the highway further than the filling station."

Considered separately from defendants' Exhibit F, the testimony, giving every reasonable intendment to defendants, might support a finding that the section east of the intersection was a business district. But when considered in relation to defendants' Exhibit F, the portion showing the intersection and Highway #70 east thereof being reproduced herewith, it is plain that the testimony is directed to the frontage used for business purposes, or in connection with business establishments, not to the dimensions (frontage) of *buildings* in use for business purposes. No witness gives the dimensions, measured or estimated, of the *buildings*. If the scale of the plat is applied to the *buildings* shown thereon it is apparent that seventy-five (75) per cent of the frontage for 300 feet or more east of the intersection is not occupied by *buildings* in use for business purposes. It appears clearly that the witnesses included in their testimony, without distinction or defining their limits, the unoccupied spaces between the intersecting highway and the first buildings on the north and south sides of Highway #70 and the unoccupied spaces between the buildings, whether in use for business purposes or as dwellings.

For the reasons stated, defendants' evidence was insufficient to support a finding that Hinson, in approaching the point of collision, was driving "in a business district" within the meaning of G.S. 20-38 (a). On account thereof, there must be a new trial on the cause of action relating to Hinson's injuries and the damages to his automobile.

What we have said relates solely to what constitutes a violation of the statutory provision as to speed in a business district. Speed in violation of such statute is unlawful, and also negligence *per se*. Whether the statutory violation was a proximate cause of collision is another matter. Proximate cause will be for the court or jury, depending upon the facts and circumstances of the particular case. Too, it is to be borne in mind that a speed less than twenty (20) miles per hour, either in a business district, residential district or elsewhere, if "greater than is reasonable and prudent under the conditions then existing," is unlawful and negligence *per se*. G.S. 20-141 (a), (c).

We are advertent to the fact that G.S. 20-38 (a) has not been construed previously by this Court in relation to the point on which our decision rests; and that the trial judge, whose conduct of the trial deserves high commendation, was without chart or guidance as to the construction we would place thereon. Our trial courts are called upon so frequently to apply G.S. 20-38 (a) that we have undertaken herein to clarify to some extent its meaning as applied to factual situations similar to that presented in this case.

Questions posed by other assignments of error may not arise when the cause is tried again.

Partial new trial.

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

WOODROW P. PRUITT v. GREAT AMERICAN INSURANCE COMPANY, NEW YORK, AND THE WACHOVIA BANK AND TRUST COMPANY.

(Filed 30 March, 1955.)

1. Insurance § 13—

In the absence of fraud or mistake, a contract of insurance is conclusively presumed to express the agreement between the parties, and their rights must be determined in accordance with what is written.

2. Insurance § 43e—

The certificate of insurance in suit, issued under a master policy, stipulated an 18 month policy period between specified dates. The certificate provided that it should not be valid unless countersigned by a duly authorized agent of the company. *Held:* The certificate does not cover damage sustained in an accident occurring after the expiration of the policy period stipulated, notwithstanding that it occurred within 18 months of the time the policy was countersigned. The certificate did not provide that it should not be valid "until" countersigned, but "unless" countersigned, and therefore, did not create an ambiguity as to the period of coverage, since the word "unless" does not refer to time but to the authenticity of the policy.

3. Same: Insurance § 12—

An insurer, in the absence of fraud or concealment, may be held liable for losses antedating the policy if the policy so stipulates and the contract is founded on a consideration, and where a policy or certificate provides that it should not be valid unless countersigned, the inception of the risk need not be delayed until it is so countersigned.

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

APPEAL by defendant Great American Insurance Company, New York, from *Pless, J.*, November Term 1954 of WILKES.

Civil action on a policy of automobile collision insurance.

Pursuant to G.S. 1-184 a trial by jury was waived. The parties stipulated the facts, summarized below:

One. On 10 February 1948 the defendant Great American Insurance Company, New York,—hereafter called the Insurance Company—issued to the defendant Wachovia Bank and Trust Company—hereafter called

the Bank—a Master Policy of Insurance No. A 101, which was in full force in 1952, 1953 and 1954.

Two. The Bank, in the course of its business, arranges for the financing of automobiles purchased on the monthly installment plan. Certificates of insurance issued under this Master Policy are written and issued to purchasers of automobiles desiring to borrow money and using the automobile as security for the loan. Such certificates, including Certificate of Insurance No. 47232, the one issued to plaintiff, provide double interest coverage; coverage for the protection of the Bank and the purchaser.

Three. On 16 August 1952 plaintiff purchased from Hickory Motor Sales, Inc., of Hickory, a new 1952 Dodge four-door sedan, Motor No. D42-291-254, Serial No. 31882488, and at the time executed and delivered to the Hickory Motor Sales, Inc. a note and conditional sales contract in the sum of $1,423.62. On the same date the Hickory Motor Sales, Inc. assigned the note and conditional sales contract to the Bank.

Four. At the time of purchase of the automobile plaintiff paid a premium of $147.50 to the Hickory Motor Sales, Inc. for a collision insurance policy, which premium it forwarded to the Bank. Whereupon the Bank issued and delivered to plaintiff within thirty days of 16 August 1952 Certificate of Insurance No. 47232, which is attached to the stipulations and made a part thereof. We set forth only those parts of the Certificate of Insurance necessary for a decision of this case. "Item 2. Policy Period: From August 16, 1952 to February 16, 1954. 12:01 A. M., standard time at the address of the insured as stated herein." "Premium 1 yr. 6 mos." This part of Item 1: "Subject to all the provisions, exclusions, conditions and declarations contained in the master policy of which this certificate is a part . . ." This part of Item 3: "In consideration of the payment of the premium and in reliance upon the statements in the declarations and *subject to the limits of liability, exclusions, conditions and other terms of the master policy* and this certificate, the company agrees to pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, *sustained during the policy period,* with respect to such and so many of the following coverages as are indicated by specific premium charge or charges." (Italics ours.) This appears in Item 4 in respect to installment payments on the automobile: "Installment payments, Number 18. Amount of each, $79.09. Due Date and Amount of Final Installment, 3-1-54. $(Blank.)" This appears at the bottom of the first page of this certificate: "THIS CERTIFICATE SHALL NOT BE VALID UNLESS COUNTERSIGNED BY A DULY AUTHORIZED AGENT OF THE COMPANY. COUNTERSIGNED: AUGUST 29, 1952 AT WINSTON-SALEM, NORTH CAROLINA. WACHOVIA BANK AND TRUST COMPANY—INSURANCE DEPARTMENT BY /S/ ROMAINE S. ANGEL. AGENT."

Five. This Certificate of Insurance No. 47232 was issued in connection with Master Policy No. A 101, which Master Policy and endorsements thereto are attached to the stipulations, and made a part thereof. Under the Heading, "AUTOMOBILE FINANCE MASTER POLICY FORM DOUBLE INTEREST COVERAGE" this appears: "2. ATTACHMENT AND EVIDENCE OF INSURANCE. The insurance hereunder upon each automobile attaches as of the time of execution of the conditional sale, mortgage or lien agreement, but only if reported to this Company within thirty (30) days thereafter. The acceptance of each risk and the particulars of insurance thereon, including the perils insured against, shall be evidenced by an individual policy or certificate of insurance issued hereunder by this Company."

Six. The sole question of law involved is whether or not Certificate of Insurance No. 47232 was in effect at the time plaintiff's motor vehicle was damaged on 20 February 1954, and if it was, plaintiff would be entitled to recover under said Certificate of Insurance $1,256.50.

Seven. The presiding judge could decide the case upon the admissions in the pleadings, the stipulations, the conditional sales contract and note, the Certificate of Insurance, the Master Policy with endorsements and other competent evidence.

The court found the facts as stipulated, and concluded: "As a matter of law that the certificate contained ambiguous provisions, in that Item 2 designates the policy period as being from August 16, 1952, to February 16, 1954, showing on its face that the premium was paid for one year six months, with the later provision 'this certificate shall not be valid unless countersigned by a duly authorized agent of the company.'" Whereupon it entered judgment that the plaintiff recover $1,256.50 from the Insurance Company, and recover nothing from the Bank.

From judgment for plaintiff, the defendant, Great American Insurance Company, New York, appeals.

W. H. McElwee, Jr., for Plaintiff, Appellee.

Trivette, Holshouser & Mitchell and Joyner & Howison for Defendant, Appellant, Great American Insurance Company, New York.

PARKER, J. There are no allegations of fraud or of mutual mistake. Therefore, "the written policy is conclusively presumed to express the contract it purports to contain." *Floars v. Insurance Co.*, 144 N.C. 232, 56 S.E. 915: See also *Distributing Corp. v. Indemnity Co.*, 224 N.C. 370, p. 374, 30 S.E. 2d 377. Lacking such allegations this suit is upon the Certificate of Insurance as written. *Burton v. Ins. Co.*, 198 N.C. 498, 152 S.E. 396.

Under an almost identical fact situation the Supreme Court of Alabama in *Union Marine & General Ins. Co. v. Holmes,* 249 Ala. 294, 31 So. 2d 303, held that such provision as to countersigning did not make the contract ambiguous as to the period of coverage. In the Alabama Case the insurance policy contained the following provisions: "Item 2. Policy Period. From February 7, 1943 to February 7, 1944, at 12:01 a. m., Standard Time, at the address of the insured, as stated herein. . . . In Witness Whereof, the company has caused this policy to be executed and attested but this policy shall not be valid unless countersigned on the declaration page by a duly authorized agent of the company . . . Countersigned February 8, 1943 at Birmingham, Alabama . . ." The automobile insured under said policy of insurance was destroyed by collision or upset on 7 February 1944 at 4:45 p. m. The Supreme Court of Alabama said: "Defendant's primary liability, if liable at all, for the damages claimed must rest upon the commitments expressed in the contract, as limited therein. *Great American Ins. Co. v. Dover,* 219 Ala. 530, 122 So. 658. Therefore, conceding that the countersigning of the policy was essential to the completed execution thereof, it is clear that the delayed countersigning did not extend the period of liability, the limitation of which was stated in the face of the contract. Nor did it inject into the contract an ambiguity as to the period of the coverage. The counter signature in fact and law merely confirmed said stated limitation and gave retroactive force to the policy as of the time it was executed by the defendant company. 'To "countersign" is to sign in addition to the signature of another in order to attest the authenticity of the other.' *Royal Exchange Assurance of London v. Almon,* 202 Ala. 374, 80 So. 456, 458; *Hartford Fire Ins. Co. v. King,* 106 Ala. 519, 17 So. 707; *New York Life Ins. Co. v. Tolbert,* 10 Cir., 55 F. 2d 10; *Mead v. Davidson,* 3 Ad. & El. 303, 111 Eng. Reprint 428, 4 L. J. K. B. (N. S.) 193."

In *Dillon v. General Exchange Ins. Corporation,* Tex. Civ. App. 1933, 60 S.W. 2d 331, the facts were these: On 19 March 1931, plaintiff purchased an automobile, and at the same time paid to the seller, Chevrolet Co., for the use and benefit of the defendant Insurance Co. the required premium for one year's protection against loss by fire, theft, etc. In consideration of this premium the Insurance Co. issued the policy sued on. The policy recites on its face that the effective date of same is 19 March 1931 and the expiration date 19 March 1932. The policy also showed on its face, "this policy shall not be valid unless countersigned by the duly authorized agent of the Company at San Antonio, Texas." It was countersigned on 31 March 1931. On the night of 20 March 1932 plaintiff's automobile was destroyed by fire. The Court said: "Appellant's attention is that regardless of the fact that the policy contained the expressed stipulation that it expired at noon March 19, 1932, it was never-

theless in effect on the night of March 20, 1932, because the policy also contained the stipulation that it was not valid unless countersigned by the duly authorized agent of the company at San Antonio, Tex., and that the policy was actually countersigned on March 31, 1931, that appellant had paid for one year's insurance, that he was therefore entitled to one full year's insurance, and that the policy not having been countersigned until March 31, 1931, should not have expired until March 31, 1932. We do not agree with this contention. The insurance company had a lawful right to make this policy effective from a prior date, regardless of the provision that same was not valid unless countersigned by the agent designated. This stipulation had to do with the authenticity of the policy rather than the time from which it should become effective. The policy did not provide that it was not valid *until* countersigned, but *unless* countersigned. Until might be construed as referring to time, but unless does not refer to time. *Bankers Lloyds v. Montgomery* (Tex. Civ. App.) 42 S. W. (2d) 285; *Schwartz v. Northern Life Ins. Co.* (C. C. A.) 25 F. (2d) 555; *Anderson v. Mutual Life Ins. Co.*, 164 Cal. 712, 130 P. 726, Ann. Cas. 1914B, 903."

Under almost identical facts with the present case the Supreme Court of Tennessee held in *McKee v. Continental Ins. Co.*, 191 Tenn. 413, 234 S.W. 830, 22 A.L.R. 2d 980, that a provision in the Certificate of Insurance that "this certificate shall not be valid unless countersigned by a duly authorized agent of the company" merely confirmed the contract as stated, so that the period of coverage ran from the date stated in the policy as that of the inception of risk, rather than from the date of countersignature six days later, and insured could not recover for a loss to his automobile which occurred three days after the expiration of the period of coverage as stated in the policy.

The fact that an insurance policy provides: "This certificate shall not be valid unless countersigned by a duly authorized agent of the company" was held not to alter the inception and expiration dates as set forth on the policy in the following cases: *Simons v. American Fire Underwriters of American Indem. Co.*, 203 S.C. 471, 27 S.E. 2d 809; *Oklahoma Farm Bureau Mut. Ins. Co. v. Brown*, 208 Okla. 317, 255 P. 2d 919. See also Anno. 22 A.L.R. 2d 984.

Plaintiff contends in his brief that *Davis v. Home Ins. Co.*, 125 S.C. 381, 118 S.E. 536, has identical facts with the case here. Counsel for the Indemnity Company contended in the Case of *Simons v. American Fire Underwriters of American Indem. Co., supra,* which was before the Supreme Court of South Carolina in 1943, twenty years after the *Davis Case,* that the *Davis Case* controlled the *Simons Case.* The South Carolina Supreme Court said: ". . . but in this we think the appellant is mistaken. In the *Davis Case* the controversy arose over the fact that the

loss occurred within the twelve months period for which the premium had been paid by the insured, but after twelve months from the effective date of the policy as expressed therein. In other words, the effective date stated in the policy was an earlier date than the actual date of the countersigning of the policy. And the policy contained an express provision that it should be valid only when countersigned by the duly authorized agent of the Company. Because of this provision the policy was held effective to cover the loss. In the policy now before the Court, the provision is: '. . . but this policy shall not be valid *unless* countersigned by a duly authorized representative of this Company.' (Emphasis added.) It was in fact so countersigned, and there is nothing in the instrument as introduced in evidence to deprive the insured of the right to rely upon the terms of the policy as far as the question of its taking effect is concerned." In this case the facts were these: On 6 March 1941, at about 7:00 o'clock p. m., Simons requested the local agent of the Indemnity Co. to cover his automobile with collision and other insurance, and deliver the policy to the Commercial Credit Corporation. The agent said he would cover plaintiff. About 10:00 a.m. on 7 March 1941 the agent issued and countersigned a collision policy covering plaintiff's automobile for a "Policy Period: From March 7, 1941 to March 7, 1942, 12:01 a.m. Standard Time . . ." At the time the agent issued and countersigned the policy, the agent did not know plaintiff had had a collision with his automobile about 1:30 a.m. on 7 March 1941. The court held that the Indemnity Co. was liable as plaintiff's damage occurred within the period covered by the policy.

Where a provision in a policy of insurance provides that it shall not be valid *until* countersigned by the company's agent, there is authority to the effect that this is a condition precedent to the validity of the policy. *Burner v. American Ins. Co.*, 221 Mo. App. 1193, 300 S.W. 556; *National Union Fire Ins. Co. v. California Cotton Credit Corp.*, (1935 C A 9th Cal.) 76 F. 2d 279. Webster's New Collegiate Dictionary, the latest edition of the Merriam-Webster series of dictionaries, defines UNTIL as "up to the time that or when." The same authority defines UNLESS thus, "if not; supposing that not; except that." According to Webster's definitions, UNTIL refers to time: UNLESS does not. American Jurisprudence discusses the meaning of the word UNTIL in Vol. 52, Article Time, Sec. 25. See also: Anno. 16 A.L.R. 1090.

This action is upon the Certificate of Insurance as written. The Certificate of Insurance plainly states that it is "subject to the limits of liability, exclusions, conditions and other terms of the Master Policy." The Master Policy explicitly states that the insurance issued upon plaintiff's automobile attached "as of the time of execution of the conditional sale, mortgage or lien agreement, but only if reported to this Company

within thirty (30) days thereafter." The conditional sale agreement was executed on 16 August 1952, and the Certificate of Insurance was countersigned, issued and delivered to plaintiff within 30 days after 16 August 1952. There is nothing in the language of the Certificate of Insurance here that the period of coverage will be extended by a delayed countersigning. It seems clear and plain from these provisions that it was the intention of the Insurance Co. to assume liability before the Certificate of Insurance was countersigned. Appleman, Insurance Law and Practice, Vol. 7, Sec. 4266, states: "An insurer has the right to assume obligations antedating the policy date, if it so elects and the contract is founded on a consideration. Under such circumstances, the insurer is liable for losses antedating the policy, provided there is no fraud or concealment by the insured." The countersigning had to do with the authenticity of the Certificate of Insurance rather than with the inception of the risk: it did not create an ambiguity as to the period of coverage. As was said by the South Dakota Supreme Court in *Stratton v. United States Fire Ins. Co. of New York,* 25 N.W. 2d 239: "We cannot disregard the plain and unequivocal terms of the policy, and make a new contract for the parties."

In the case here the Certificate of Insurance in the plaintiff's possession explicitly and plainly states that the expiration date was at 12:01 a.m., 16 February 1954. It expired on that date according to its terms. *Union Marine & General Ins. Co. v. Holmes, supra; Dillon v. General Exchange Ins. Corporation, supra; McKee v. Continental Ins. Co., supra; Simons v. American Fire Underwriters of American Indemnity Co., supra; Oklahoma Farm Bureau Mut. Ins. Co. v. Brown, supra; Dohlin v. Dwelling House Mut. Ins. Co.,* 122 Neb. 47, 238 N.W. 921; Appleman, Insurance Law and Practice, Sec. 4268; Blashfield, Cyclopedia of Automobile Law and Practice, Sec. 3541; Anno. 22 A.L.R. 2d 984. See also: *Boone v. Standard Acc. Ins. Co. of Detroit,* 192 Va. 672, 66 S.E. 2d 530; *Gulledge v. World Ins. Co. of Omaha,* 199 F. 2d 158.

It may not be amiss to refer to the Form of the Standard Fire Insurance Policy in this State. G.S. 58-176 sets forth a standard form for a fire insurance policy. At the end of the form there is this language: "IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized agent of this Company at the agency hereinbefore mentioned." G.S. 58-177 (d) provides: "Binders or other contracts for temporary insurance may be made, orally or in writing, for a period which shall not exceed 60 days . . ." It would seem that the North Carolina Standard Fire Policy means that the inception of the risk is not delayed until the policy is countersigned. See *Lea v. Atlantic Ins. Co.,* 168 N.C. 478, 84 S.E. 813.

The plaintiff cites in his brief in support of his argument *Cheek v. Insurance Co.*, 215 N.C. 36, 1 S.E. 2d 115; *Turlington v. Insurance Co.*, 193 N.C. 481, 137 S.E. 422; *Ross v. Insurance Co.*, 124 N.C. 395, 32 S.E. 733; *Ormond v. Insurance Co.*, 96 N.C. 158; 1 S.E. 796. Those cases dealt with provisions in insurance policies fundamentally different from the one here. For instance, in the *Cheek Case* the consummation of the contract of insurance depended upon the approval of the home office.

The plaintiff contends that there was no meeting of the minds and the contract did not come into existence until the Certificate was countersigned. To agree with that argument would require us to ignore the provision that the insurance attached "as of the time of execution of the conditional sale . . . agreement, but only if reported to this company within thirty (30) days thereafter."

For the reasons stated above, the judgment of the Trial Court is

Reversed.

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

MRS. ANNIE P. NORMAN, WIDOW, GLENN NORMAN, A MINOR UNDER THE AGE OF 21 YEARS WITHOUT GENERAL GUARDIAN, HEREIN APPEARING BY S. S. NORMAN, HER DULY APPOINTED NEXT FRIEND, AND L. G. TRAVIS AND HIS WIFE, DORIS TRAVIS, v. JOHN J. WILLIAMS.

(Filed 30 March, 1955.)

1. Trespass to Try Title § 3—

In an action for the recovery of land and for trespass by the cutting of timber therefrom, defendant's denials of plaintiff's title and defendant's trespass, nothing else appearing, raise issues of fact as to the title of plaintiff and trespass by defendant, with the burden of proof on plaintiff as to each issue.

2. Same—

In an action for the recovery of land and for trespass by defendant, plaintiff must rely upon the strength of his own title, which he may establish by various methods specifically set forth in *Mobley v. Griffin*, 104 N.C. 112.

3. Same—

In all actions involving title to real property, title is presumed to be out of the State unless it be a party to the action, G.S. 1-36, but such presumption does not relieve plaintiff of the burden of showing title in himself and is not a presumption in favor of either party.

4. Same—

Where plaintiffs, in an action for recovery of land and for trespass thereon, seek to establish title by showing a common source of title and better title in themselves from that source, failure of evidence connecting defendant with any source of title common to both parties is fatal.

5. Adverse Possession § 9c—

A deed offered in evidence is color of title only as to the land designated and described in it.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Morris, J.*, at November Term 1954, of HALIFAX.

Civil action to recover damage for trespass in cutting and removing timber from certain lands in Halifax County, North Carolina, and to restrain further trespass thereon. G.S. 1-486.

Plaintiffs allege in summary (1) that they are the owners in fee as tenants in common (Annie P. Norman of a life estate in one-half undivided interest, and Glenn Norman of the remainder of one-half undivided interest, and L. G. Travis one-half undivided interest) of, in and to the following described tract of land in Brinkleyville Township, Halifax County, North Carolina, to wit: That certain 184.50 acres, more or less, described according to a map prepared by C. E. Foster, C.E., on 8 April, 1949, as follows: (Specific description follows), and (2) that defendant has wrongfully, unlawfully and tortiously entered upon the lands of plaintiffs above described, and is cutting down and removing timber trees therefrom, to the damage in a large amount, and to the irreparable injury of plaintiffs, and threatens to continue so to do.

Defendant, answering, avers that the allegations of plaintiffs as above set forth are untrue, and are therefore denied.

And for further answer and defense, defendant says, in so far as pertinent to this appeal: "That the defendant is the owner in fee of all merchantable timber trees of every sort, kind and description standing or lying upon the measure when cut eight inches or more in diameter, measured across the stump eight inches from the ground, with full right of ingress, egress and regress upon the said tract of land until January 1, 1953, for the purpose of cutting and removing the said timber trees therefrom,—the said timber trees and rights having been conveyed to the said defendant by Junie Wright and wife, Fannie Wright, by deed dated October 12, 1950, and duly recorded in the office of the Register of Deeds of Halifax County, North Carolina, in Book 582, page 419, *et seq.*"

Plaintiffs replying deny the averments of the defendant's further answer and defense, and allege that on 12 October, 1950, defendant, with his

wife, "conveyed by deed recorded in Book 582 at page 419 certain timber on the lands therein described, and gave the southern boundary of the tract upon which the timber was sold as the lands of the plaintiffs, which are set out and described in paragraph 3 of the complaint. The plaintiffs aver, therefore, that the line set out in the complaint is the true dividing line between the plaintiffs' lands and the lands of the defendant, and that the defendant is estopped from denying the same."

Upon the trial in Superior Court plaintiff offered the following as evidence:

1. Plaintiffs' Exhibit No. 1, Book 32, page 561, showing division of lots Nos. 1, 2 and 3 of Kimball lands (each specifically described).

2. Plaintiffs' Exhibit No. 2, map made by J. C. Shearin of tracts Nos. 2 and 3 of Kimball Division. (Admitted for purposes of illustrating testimony of the witness Shearin.)

3. Evidence tending to show that the land described in the complaint is lot No. 3 of the Kimball Division.

4. From public registry of Halifax County record of the following:

(a) Deed from Lucy A. Biggs, Executrix of Kader Biggs and C. W. Kellinger, Executor of Asa Biggs, to Edward L. Travis, (Plaintiffs' Exhibit No. 7), dated 28 May, 1905, recorded in Book 175, page 58, purporting to convey lot No. 3 of the Kimball Division. The record shows that this deed was "admitted for the purpose of showing color of title."

(b) Deed from G. H. Johnson, Sheriff of Halifax County, as party of the first part, to N. L. Stedman, F. H. Gregory and Quentin Gregory (Plaintiffs' Exhibit No. 6), dated 4 May, 1931, recorded in Book 406, page 545, the material parts of which are as follows: "WITNESSETH: That whereas a certain writ of execution issued out of the Superior Court of Wake County in favor of Merchants National Bank, plaintiff, and against E. L. Travis, Sr., defendant, and a certain writ of execution issued out of the Superior Court of Halifax County in favor of the First National Bank of Roanoke Rapids, plaintiff, and against E. L. Travis, Sr., defendant, were to the said Sheriff directed and delivered, commanding him out of the personal property of the said E. L. Travis, Sr., within said county found, to satisfy the same, or in default thereof, out of the real property of said judgment debtor in said county situate, to cause the same to be made, as by reference to said executions will more fully appear; and whereas, because sufficient personal property of said judgment debtor to satisfy said executions in said county could not be found, he, the said sheriff, did levy on, take and seize all the estate, right, title and interest of said judgment debtor of, in and to the real estate hereinafter particularly described, with the appurtenances, and did, on the 4th day of May 1931, sell the said premises at public auction, at the courthouse door in Halifax, in said county, after having first given the notice of the time and

place of such sale and advertised the same according to law at which sale the said N. L. Stedman, F. H. Gregory and Quinton Gregory became the last and highest bidders thereof at and for the price of $6,000.00.

"Now therefore, know all men by these presents: That the said party of the first part, sheriff, as aforesaid, by virtue of said execution and for and in consideration of the sum of money above mentioned, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, sold, conveyed, and confirmed and by these presents does grant, sell, convey and confirm unto the said parties of the second part, their heirs or assigns, all the estate, right, title and interest of the said E. L. Travis, Sr., judgment debtor aforesaid, whereof E. L. Travis, Sr. seized or possessed on the day of docketing of said judgment in said county, or at any time afterward, of, in and to the following described real estate, to wit: . . .

"2. A tract of land in Brinkleyville Township, Halifax County, lying on Little Fishing Creek, immediately below Avents Bridge, fully described in the deed of C. W. Kellinger, Executor, and others, to E. L. Travis, of record in Book 175, page 58 of the Register of Deeds office of Halifax County, and containing in all 505 acres, more or less, together with all and singular the tenements and appurtenances thereunto belonging or in anywise appertaining.

"TO HAVE AND TO HOLD THE said described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns forever, as fully and absolutely as he, the said sheriff, party of the first part aforesaid, can and may or ought to, by virtue of the said execution, and of his said office of sheriff, grant, sell, convey and confirm the same."

(Note: Oral testimony tends to show that the land described in the foregoing deed comprises among others lot No. 3 of Kimball Division.)

(c) Deed from N. L. Stedman and wife, Fletcher H. Gregory and wife, and Quentin Gregory and wife, to Louis G. Travis (Plaintiffs' Exhibit No. 5), dated 28 September, 1934, recorded in Book 434, page 259, purporting to convey . . . all that tract of land in Brinkleyville Township, Halifax County, which were conveyed to (by) G. H. Johnson, Sheriff of Halifax County, to N. L. Stedman, F. H. Gregory and Quentin Gregory, by a deed dated the 4th day of May, 1931 and recorded in Book 406 at page 545 of the Register of Deeds office of Halifax County," reference thereto being "made for a full description of the said lands." (Oral testimony tends to show that the description comprises, among others, lot No. 3 of the Kimball Division.)

(d) Deed from Louis G. Travis to Mrs. Annie P. Norman (Plaintiffs' Exhibit No. 4), dated 2 September, 1938, and recorded in Book 477, page 286, purporting to convey "A one-half undivided interest in and to the several tracts of land which are fully described in deed from C. W. Kel-

linger, Executor of Asa Biggs, and Mrs. Lucy Anne Biggs, Executrix of Kader Biggs, to Edward L. Travis, of date May 28, 1905, and of record in Book 175, page 58, of the Register of Deeds office of Halifax County to which deed reference is hereby made for full and complete description of said tracts of land." (Oral testimony tends to show that "that is a description of tract No. 3 in the Kimball Division," shown on Shearin map embracing "area between the red lines marked 'ABCD clockwise EFGH, back to IJK back to A.'") That is the same tract described in the complaint.

(e) Deed from Annie P. Norman to Glenn A. Norman (Plaintiffs' Exhibit No. 3), dated 3 July, 1940 and recorded in Book 498, page 587, purporting to convey "To said Glenn Norman, at my death, and her heirs and assigns, a certain tract or parcel of land in Halifax County, State of North Carolina, adjoining the lands of B. M. Nicholson, Hugh Bloomer, lying on Little Fishing Creek and others, and bounded as follows, viz.: My one-half (½) undivided interest in and to the tract of land known as the 'Kimball Tract' containing about five hundred (500) acres of land. The other ½ interest to the tract belonging . . . Travis . . . and being the same tract on which the tenant Joe Wright now presides."

Plaintiffs also offered in evidence records of certain timber deeds and of a deed from Maggie Journigan to June Wright purporting to convey lot No. 2 of Kimball Division. But since neither seems to be necessary to a decision on the point decisive of this appeal, recitations in respect thereto would serve no useful purpose.

Plaintiffs also offered oral testimony in respect to the line and boundaries of the lands here involved.

When plaintiffs rested their case, defendant moved for judgment as of nonsuit, and the court, being of opinion that same should be allowed, entered judgment that the case be dismissed as of nonsuit. The parties stipulated in case on appeal "that defendant, John J. Williams, cut some timber trees from the disputed area."

To the entry of the judgment of nonsuit plaintiffs excepted, and appeal to the Supreme Court and assign error.

George C. Green and Dickens & Dickens for plaintiffs, appellants.
Johnson & Branch and Banzet & Banzet for defendant, appellee.

WINBORNE, J. Appellants state in their brief that the questions involved on this appeal are: "1. Did the court err in sustaining the defendant's motion for judgment of nonsuit? 2. Did the court err in entering the judgment which appears of record?" In the light of the record and the evidence appearing in the case on appeal, the answer to each of

these questions must be "No." The evidence fails to make out a *prima facie* showing of title in plaintiffs.

To sustain an action for trespass by cutting timber, plaintiff must allege and show that he is the owner of the land from which the timber was cut. *Johnson v. Lumber Co.*, 147 N.C. 249, 60 S.E. 1129.

And where in an action for the recovery of land and for trespass thereon defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to the title of plaintiff and as to trespass by defendant,—the burden of proof as to each issue being on plaintiff. *Mortgage Corp. v. Barco*, 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson*, 227 N.C. 56, 40 S.E. 2d 451; *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E. 2d 673; *Williams v. Robertson*, 235 N.C. 478, 70 S.E. 2d 692; *McDonald v. McCrummen*, 235 N.C. 550, 70 S.E. 2d 703; *Meeker v. Wheeler*, 236 N.C. 172, 72 S.E. 2d 214; *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759.

In such action plaintiff must rely upon the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142, and applied in *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800; *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627, and many other decisions, some of the late ones being *Smith v. Benson, supra; Locklear v. Oxendine, supra; Williams v. Robertson, supra; McDonald v. McCrummen, supra; Meeker v. Wheeler, supra; Powell v. Mills, supra.*

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." See *Williams v. Robertson, supra,* and cases cited. See also *Powell v. Mills, supra.*

However, testing the evidence in the case by these rules, it does not appear that plaintiffs have brought their case within any of them. If they intend to invoke the sixth rule, that is, to show a common source of title, and in themselves a better title from that source, *Stewart v. Cary*, 220 N.C. 214, 17 S.E. 2d 29, the evidence does not connect defendant with any source of title common to both, and is, therefore, insufficient. Hence the question as to the effect of the recitals in the Sheriff's deed is not reached. But compare the cases of *McDonald v. McCrummen, supra,* and *Meeker v. Wheeler, supra,* and cases cited.

On the other hand, if plaintiffs would rely upon adverse possession under known and visible lines and boundaries, under color of title, the evidence is vague and insufficient in either situation. In pursuing this method of proving title, a deed offered as color of title is such for only

the land designated and described in it. See *Locklear v. Oxendine, supra; Powell v. Mills, supra,* and cases cited.

Apparently this action has been prosecuted under misapprehension of applicable principles of law.

In the light of this opinion, if proof be available, plaintiffs may yet make out a *prima facie* title in a new action. See last paragraph in *McDonald v. McCrummen, supra; Meeker v. Wheeler, supra.*

But on this record, motion for judgment of nonsuit was properly allowed. Hence the judgment below is

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

JOHNNIE L. SCOTT v. REUBEN C. SHACKELFORD AND WIFE, HELEN SHACKELFORD.

(Filed 30 March, 1955.)

1. Appeal and Error § 40d—

In a trial by the court under agreement of the parties, motions for nonsuit and to set aside the findings of fact on the ground that the findings are not supported by evidence require a determination only of whether there is competent evidence in the record sufficient to support those findings which are necessary to sustain the court's conclusions of law.

2. Dedication § 4—Evidence held sufficient to sustain finding of acceptance by public of dedication of street.

A municipality was established by Act of Assembly which recited that fifty acres of land had been laid out in the town in half-acre lots with convenient streets. Plaintiffs introduced in evidence a map recorded some sixty years thereafter showing the alleyway or street in suit. Plaintiffs' testimony tended to show circumstances from which it could be inferred that no streets were laid out in the interval between the enactment of the statute and the recording of the map and that the map showed the streets and alleys in accordance with the plan in existence at the time of the enactment of the statute, and further that the street or alley in suit had been used as a public way for some sixty-one years prior to the institution of the action. *Held:* There is some evidence to support the finding that the alley or street in question was a part of the original plan of the town and constituted a public alleyway, and judgment that defendant had no right to obstruct same by virtue of a deed embracing the alley which was executed less than four years prior to the institution of the action, is affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

SCOTT *v.* SHACKELFORD.

APPEAL by defendants from *Grady, E. J.*, October 1954 Term Superior Court, PASQUOTANK.

Civil action for an injunction requiring defendants (1) to remove obstructions placed by them in such a way as to obstruct and close a public street or alleyway in the Town of Nixonton, Pasquotank County; and (2) to refrain hereafter from further interfering with the use by the plaintiff and the public of the street or alleyway.

Plaintiff's complaint contains allegations sufficient, if proved to warrant the court in finding the street or alleyway is a public street and to entitle him to the relief demanded.

The defendants, by answer, entered a general denial of all the material allegations of the complaint. A jury trial was waived, whereupon Judge Grady heard the case as judge and jury.

The plaintiff introduced Deed Book M. M., Page 39, the record of an agreement entered into 28 October, 1856, between John H. Kenyon and Timothy Morgan, fixing the boundary lines to their adjoining properties. A map of the land was made at the time of the agreement. It is recorded in Division B, page 153, Pasquotank Registry. This map shows the lane, street or alley all the way from Main, or Elm Street to Little River. The alley is the eastern boundary of the Morgan property. The Kenyon land is the western boundary of the Morgan lot. The plaintiff claims through Timothy Morgan and introduced *mesne* conveyances from Morgan to himself. The *mesne* conveyances refer to the lane or alley as the eastern boundary of the lot.

The plaintiff offered a number of witnesses who had lived in and near Nixonton and were familiar with the town for a period from 54 to 61 years. They testified the street or alley in question was considered and used as a public street for the entire period. One witness testified the lane bore the general reputation of being a public road for 60 years. Another witness testified that the lane was open and used by the public the entire distance from Main, or Elm Street, all the way to Little River, and "everybody took it for granted that the lane was a public street." There was evidence at one time the post office was located on this street or alley. There was no evidence of public maintenance and no evidence as to how, if at all, it was maintained. There was evidence the defendants' deed, executed in 1951, included the alley. This deed contained the following as a part of the description of the lot conveyed. "The foregoing description includes the driveway on the west side of said lot leading from the said Elm Street to the residence of said property and to Little River." The defendants introduced deeds from their predecessors in title to their lot going back to 1917. The defendants also introduced evidence that the alley or lane had not been maintained as a public way since 1921. One of defendants' witnesses testified: "I know the Shackelford property

(now defendants' lot); that was 61 years ago. There was a post office in the building on the property. My father drove the mail, it was a star route, every other day. It was my job to go up to Mr. White's and get the mail back every other morning. I did that for three or four years. I went to the driveway that is there now. It is approximately the same location as it was 61 years ago. To enter the property I went in off of Main Street, or Elm Street and came out the same way. I used to walk up there after the mail. It was fenced on both sides of this street or alley, whichever you call it, right on down to the river."

At the close of the evidence the defendants made timely motions for judgment of nonsuit, which were overruled. The court made extensive findings of fact. However, we shall quote only the substance of the determinative findings:

1. "The only inference that can be drawn from the facts as they clearly appear is that the alleyway or street was a part of the original plan of the Town of Nixonton." . . . "That it was a public alley, that it has had the reputation of such from time immemorial . . . the measurements show it was 16 feet wide."

2. "That there is a 16-foot alleyway lying between the lands of the plaintiff and the lands of the defendants and runs from Main or Elm Street to Little River, which alley is designated on the map hereto attached by the letters A-B-C-D-A." The court concluded as a matter of law "that the defendants have no right, title or interest in said alley or street, except to use the same as a public convenience."

Upon the findings of fact and conclusions of law based thereon, the court ordered the removal of all obstructions interfering with the public use of the alley, and forever restraining the defendants from interfering in any way with the plaintiff's rights respecting the lane, including their right to use the same at all times as a public alley or street.

The defendants moved to strike out each finding of fact in each paragraph. Exceptions were also taken to each of the stated conclusions of law. All motions were denied, to which the defendants excepted. Judgment was signed as indicated, from which the defendants appealed.

Jennette & Pearson, by J. W. Jennette, for plaintiff, appellee.

LeRoy & Goodwin, by J. C. Goodwin, Partner, for defendants, appellants.

HIGGINS, J. The defendants' evidence has not been summarized and need not be considered in the determination of the questions presented by this appeal. The motions for nonsuit and to set aside the findings of fact and reverse the conclusions of law on the ground the findings are not supported by the evidence, lead us to inquire whether there is competent

evidence in the record to support, not necessarily all the findings, but sufficient of them to warrant the conclusion that the street or alley is a public way. If such evidence appears in the record, we are bound by the findings and the judgment must be affirmed.

Under the early decisions of this Court the problem here presented would be easy to solve. In early times, when the country was thinly populated, when lands were of relatively little value, when public funds for road and street construction and maintenance were simply not available, when proceedings, records, and plats showing the authorization and location of streets and highways were ineptly drawn,—sometimes recorded and sometimes not—when the method of keeping and preserving records consisted in placing longhand papers in pigeonholes in some wooden cabinet, stored away in a wooden courthouse or town meeting-house, it was both practical and sensible for the Court to hold as it did in *S. v. Marble*, 26 N.C. 318, "When a road has been used by the public as a public road for 20 years and there is no evidence as to how this user commenced, a presumption in law arises that the road has been, by due course of law, and by the proper tribunal laid off and established as a public road or highway." Likewise, in *S. v. Cardwell*, 44 N.C. 245, this Court said: "Furthermore, the use of a road as a public highway for twenty years will authorize a jury to presume its dedication to that purpose." *Woolard v. McCullough*, 23 N.C. 432; *Tarkington v. McRea*, 47 N.C. 48; *Askew v. Wynne*, 52 N.C. 22; *Tise v. Whitaker*, 146 N.C. 374."

By admission of counsel for the defendants as recited in Judge Grady's finding of fact, the lane or alley in question is a part of a fifty-acre tract of land described in the Act of Assembly of North Carolina, Chapter XVI, Volume 25, Public Laws 1789-1790, and reported in Volume XXV, State Records of North Carolina, the pertinent parts of which are as follows:

"An Act For Establishing A Town On The Lands Formerly Belonging To Zachariah Nixon, Lying On The North East Side Of Little River, In Pasquotank County.

"I. Whereas, it hath been represented to the Assembly, that in the year of our Lord one thousand seven hundred and forty-six, one hundred and sixty-one and a half acres of land were purchased for a town and commons, fifty acres of which hath been laid out in half acre lots, with convenient streets; that there are now upwards of twenty habitable houses erected thereon, and upwards of seventy inhabitants; and the same might soon be improved, if it was erected into a town by lawful authority.

"II. Be it therefore enacted, by the Governor, Council, and Assembly, and by the authority of the same, That the said one hundred and sixty-one and a half acres of land, be, and the same is hereby constituted, erected

and established a town, and a town commons, and shall be called by the name of Nixon's town."

It is of significance the Act recites fifty acres "hath been laid out in one-half-acre lots with convenient streets." According to history, Nixonton, or Nixontown, was the county seat of Pasquotank County from 1785-1800. At the time of the Act of Assembly above referred to, the town was the county seat and the fifty acres seems to have been the settled or built up part of the town. The title to the Act states the lands lie on the North East side of Little River. The record indicates Little River is a navigable stream, so that in 1789-1790, it is not difficult to understand why streets leading to the river would be of importance, for the navigable rivers of that section in that day were the highways of the time. It is of significance also, the plaintiff's lot comprises one-half acre, and in the record of all conveyances connecting his title with Timothy Morgan in 1856, the description is always the same—one-half acre. The plaintiff does not attempt to carry his title beyond 1856. In every conveyance from that date the eastern boundary of his one-half acre lot is given as the lane or alley from Main Street to Little River.

Soon after the Act of Assembly in 1789-1790, the county seat was moved from Nixonton to Elizabeth City. After Nixonton ceased to be the county seat in 1800, it is not unreasonable to conclude the growth of the town was over and there no longer existed reasons for laying out streets. Likewise, it is not unreasonable to conclude such streets as were laid out in that remote and hazy past are traceable to that time of promise and growth—while it was the county seat. No reason appears why a new street or alleyway should be laid out between 1800 and 1856, in which year the map shows the street in question.

The map recorded in Division Record Book B, page 153, shows Main, or Elm Street, and the alley or lane connecting that street with Little River. Further west, another street is shown to intersect Main or Elm Street at exactly the same angle as the alley in question and this street also runs exactly parallel to the alley or street here in question from Main Street to Little River. The map is attached to the judgment and is a part of the record on appeal.

The plaintiff offered evidence of witnesses who had known the property for a period going back as far as 61 years. The substance of the testimony is that during all the time the witnesses had known the property, the lane was used as a public street and it had the general reputation of being a public road. At one time the post office was located on this alley and, further towards the river, there was a blacksmith shop; that the alley was used by the public as a means of access to the river. One of defendants' witnesses testified that part of the street or alley was used as a star

mail route; that it was fenced on both sides. He had been familiar with it for more than 60 years.

There can be no doubt but that under the old decisions of this Court the evidence of the use of the alley by the public for the time shown by the plaintiff's evidence would be amply sufficient to sustain the findings and judgment in this case. Under the later decisions, we think the facts offered, though somewhat inconclusive as proof of acceptance, constitute *some* evidence and as such will support Judge Grady's findings.

However, as the State and the towns developed, and larger and larger sums of money became available for highways and streets, they were surveyed with mathematical exactness. They were authorized by carefully prepared proceedings. Records of surveys and plans showing the exact location were made and were available at every courthouse and town hall. The authority for the location and construction can be ascertained without difficulty. As a consequence, the recent decisions of this Court are in harmony with and recognize the change in conditions. In an opinion by *Barnhill, J.*, now *C. J.*, in the case of *Chesson v. Jordan*, 224 N.C. 289, 29 S.E. 2d 906, the Court clearly states the modern view: "According to the current of decisions in this Court, there can be in this State no public road or highway unless it be one either established by public authorities in a proper proceeding regularly instituted before the proper tribunal; or generally used by the public and *over which the public authorities have assumed control* for a period of twenty years or more; or dedicated to the public by the owner of the soil with the sanction of the authorities and *for the maintenance and operation of which they are responsible.*" (Emphasis added.)

Long after the time the alley in question here had been in use according to the plaintiff's evidence, maintenance of streets and highways generally consisted of the draining or filling up of mudholes, often by the owner of the adjacent property. Then, the use alone was sufficient to establish the right. Then, no provision or facilities were provided for maintenance. Now, it is not enough for the public to use the streets, highways or alleys for twenty years. The public authorities must assert control over them.

If the street or alley in question here was accepted by the Assembly in 1789-1790, as seems probable, it became a public way and its use as such is shown by the map recorded 99 years ago. It has been recognized in all the deeds constituting plaintiff's chain of title. It has been used by the public and has borne the general reputation of being a public way for 61 years.

When once accepted, the acceptance cannot be withdrawn or the character of a public street destroyed, except by abandonment or by adverse user for a period of 20 years. The doctrine of abandonment and adverse

user is fully discussed in an opinion by *Denny, J.*, in the case of *Lee v. Walker*, 234 N.C. 687, 68 S.E. 2d 664.

The defendants have a deed for the Shackelford lot which includes in the description of the property conveyed, the alley in question. This deed was executed to them in 1951. From a review of the record, we conclude there was sufficient evidence to warrant Judge Grady in finding the street or alley as shown by the map is a public street which the defendants have shown no right to obstruct.

The judgment of the Superior Court of Pasquotank County is Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

BYNUM COFFEY, CARRIE E. COFFEY AND VIRGINIA C. BURGESS v. TOM GREER, MARY ANN GREER, AND R. T. GREER, GUARDIAN AD LITEM OF TOM GREER AND MARY ANN GREER.

(Filed 30 March, 1955.)

1. Boundaries § 6—

Where plaintiffs and defendants are adjoining landowners, and there is no dispute as to the validity of the title of the parties to their respective tracts, but the only dispute is as to the location of the dividing line between the two properties, the action is in effect a processioning proceeding.

2. Boundaries § 3e—

Where a junior deed calls for a corner of an adjacent tract as the beginning corner, such corner or line must be established from the description in the senior deed to which reference is made, if possible, before the description or calls in the junior deed may be considered in establishing such line.

3. Same—

Where a deed calls for the corner of an adjacent tract as the beginning point, such deed is the junior deed notwithstanding the fact that the deeds to both tracts, from the common source, bear the same date.

4. Boundaries § 3c—

Where a deed calls for a corner of the contiguous tract as a point of beginning and such corner of the contiguous tract cannot be definitely located, but another corner can be ascertained, the line may be reversed from the ascertainable corner in order that the corner in question may be located.

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

COFFEY *v.* GREER.

APPEAL by defendants from *Sharp, Special Judge,* November Term, 1954, of WATAUGA.

This proceeding was instituted as an action in ejectment. A jury trial was waived and it was agreed that the trial judge might hear the evidence, find the facts, make her conclusions of law and enter judgment thereon. The parties stipulated that certain monuments referred to in plaintiffs' deed are known, visible, and undisputed corners which are readily ascertainable.

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

1. The parties claim from a common source, to wit: T. F. Greer, who died intestate on 25 March, 1946, seized of a tract of land of which the properties described in the complaint and answer are a part.

2. That the lands of T. F. Greer were partitioned among his heirs by the execution of partition deeds; that on 30 May, 1952, the heirs of T. F. Greer conveyed the property described in the complaint to Horace Greer by deed recorded 23 June, 1952, in the office of the Register of Deeds of Watauga County, in Deed Book 71, at page 63; that on 16 July, 1952, Horace Greer and wife conveyed the said property, consisting of twelve acres, more or less, to Virginia C. Burgess and Carrie E. Coffey, plaintiffs in this action, which deed was recorded on 19 July, 1952, in Deed Book 71, at page 107, of the Watauga County Registry.

3. That on 30 May, 1952, Horace Greer and the other heirs of T. F. Greer, conveyed the lands described in the answer, consisting of sixteen acres, more or less, to R. T. Greer, by deed recorded on 21 July, 1952, in Deed Book 69, at page 480, in the aforesaid Registry; that thereafter, on 16 January, 1953, R. T. Greer and wife conveyed said property to the defendants in this action.

4. That the property of the plaintiffs and the defendants adjoin; and the crucial question in this case is: Where is the corner of the defendants' land, which is the point where the description in plaintiffs' deed begins?

In view of the stipulations and the other evidence, including the calls in plaintiffs' deed, the court found as a fact that the beginning point of plaintiffs' tract of land is a point ascertained in the following manner: By taking the last known visible and undisputed corner called for in the description in plaintiffs' deed, to wit: a bridge, and then following the bearings and distances set out in plaintiffs' deed to the beginning. From the bridge these calls are "thence North 44 West 6 poles to a stake in center of new Highway 321; thence down said new Highway North 14 East 9¼ poles to a stake, the beginning, containing 12 acres, more or less."

Judgment was accordingly rendered in favor of the plaintiffs, and the defendants appeal, assigning error.

Louis H. Smith for plaintiffs, appellees.
Bowie & Bowie and Wade E. Brown, Jr., for defendants, appellants.

DENNY, J. It is stated in the description in the plaintiffs' deed to the 12-acre tract of land that it begins "on a stake in new Highway No. 321, just below old house and corner to the R. T. Greer tract (being the 16-acre tract now owned by the defendants) and runs with line of said R. T. Greer tract North 75 West 18 poles to a stake in old Highway 321 just below rock house"; etc.

It appears from undisputed evidence in the trial below that the field notes made by the surveyor when the lands of T. F. Greer were divided among his heirs by the execution of partition deeds, and from which notes the deeds were drawn, that such notes with respect to the last call in the described 12-acre tract now owned by the plaintiffs, called for only 6¼ poles North 14 East to a stake, the beginning, instead of 9¼ poles as stated in plaintiffs' deed. This difference of three poles constitutes the gravamen of the present controversy.

Since the plaintiffs and the defendants are adjoining landowners, and the court below so found, and there is no dispute as to the validity of the plaintiffs' title to the 12-acre tract, or as to the validity of the title of the defendants to the 16-acre tract, this action, in so far as it relates to the location of the beginning corner of the plaintiffs' tract of land, or to the division line between the two tracts, is in effect a processioning proceeding. *Goodwin v. Greene,* 237 N.C. 244, 74 S.E. 2d 630; *Clegg v. Canady,* 217 N.C. 433, 8 S.E. 2d 246; *Cody v. England,* 216 N.C. 604, 5 S.E. 2d 833.

The law is well settled in this jurisdiction that when a line of another tract of land is called for, such line "controls course and distance, being considered the more certain description, and it makes no difference whether it is a marked or unmarked, or mathematical line, . . . *provided it be the line which is called for.*" *Corn v. McCrary,* 48 N.C. 496; *Bowen v. Gaylord,* 122 N.C. 816, 29 S.E. 340; *Whitaker v. Cover,* 140 N.C. 280, 52 S.E. 581; *Clegg v. Canady, supra; Goodwin v. Greene, supra.* This same principle applies when a junior deed calls for a corner of another tract. Consequently, when a corner or line of another tract is called for in a deed, such corner or line must be established from the description in the deed to which reference is made, if possible, before the description or calls in the junior deed may be considered in establishing such corner or line. *Goodwin v. Greene, supra; Bostic v. Blanton,* 232 N.C. 441, 61 S.E. 2d 443; *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326; *Thomas v. Hipp,* 223 N.C. 515, 27 S.E. 2d 528; *Euliss v. McAdams,* 108 N.C. 507, 13 S.E. 162; *Corn v. McCrary, supra; Dula v. McGhee,* 34 N.C. 332; *Sasser v. Herring,* 14 N.C. 340. And the fact that the description in the

plaintiffs' deed calls for a corner in defendants' land, as its beginning corner, and runs thence with a line of defendants' land, gives the plaintiffs' deed the status of a junior deed notwithstanding the fact that the respective deeds, from the common source, bear the same date.

Applying the above principle of law to the present case, the beginning corner of the plaintiffs' tract of land must be located, if possible, from the description of the defendants' tract of land before it will be permissible to resort to any call in plaintiffs' deed for the purpose of establishing the corner of the defendants' tract of land, which is the beginning corner of plaintiffs' tract of land. And if any corner of the defendants' tract of land can be definitely located, the line may be reversed from that point if necessary, in order to locate the lines and corners called for in that tract. *Goodwin v. Greene, supra; Linder v. Horne,* 237 N.C. 129, 74 S.E. 2d 227; *Belhaven v. Hodges, supra; Thomas v. Hipp, supra; Jarvis v. Swain,* 173 N.C. 9, 91 S.E. 358.

The facts found by the court below are not sufficient to support the legal conclusions reached by the trial court. Hence, the defendants' exception to the judgment entered must be sustained.

The judgment of the court below is reversed and this cause remanded for further proceedings in accord with this opinion.

Reversed and remanded.

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

MRS. FLORENCE E. ELLIS, ADMINISTRATRIX OF THE ESTATE OF VERNON ELLIS, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 March, 1955.)

1. Appeal and Error § 23—

Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. Rule 19-3 of the Rules of Practice of the Supreme Court, G.S. 1-282.

2. Railroads § 5—

Where plaintiff's evidence discloses that her intestate was last seen alive about 10:30 p.m. and that his mutilated body was found about 7:30 the next morning lying near the crossties of defendant's track, the evidence may be sufficient to establish that intestate was killed by one of defendant's trains during the night, but it does not establish that he was killed by a particular train, and therefore evidence as to the manner in which a particular train was operated that night does not prove that its manner of operation was the proximate cause of intestate's death.

3. Same—

If a person enters upon a railroad track at a place other than a crossing or public pathway, he is a trespasser and his act of placing himself on or near the track constitutes contributory negligence, barring recovery for his death unless the doctrine of last clear chance is applicable.

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

APPEAL by plaintiff from *Martin, Special Judge,* January Term, 1955, of JOHNSTON.

This is an action for the alleged wrongful death of plaintiff's intestate.

The plaintiff alleges that her intestate was killed about 11:50 p.m. on 29 May, 1952, while walking along and crossing the railroad of defendant in the immediate vicinity of the Mitchner Island crossing between Smithfield and Four Oaks, North Carolina. That defendant's 11:50 p.m. train on that date was being operated at an excessive rate of speed, without sounding any warning of its approach to said crossing and without being equipped with proper headlights, and that the engineer of said 11:50 train which killed the said plaintiff's intestate, failed to stop said train after killing plaintiff's intestate.

According to the evidence, the intestate left his home about 8:30 p.m. on 29 May, 1952, for the purpose of going to Haggard's store for cigarettes. He was at Haggard's store around 10:00 p.m. and left there and went to Big Planters Warehouse where he was last seen alive, about 10:30 p.m. His body was found about 7:30 a.m. on 30 May, 1952, lying about three feet from the end of the crossties, on the west side of defendant's southbound track.

One witness testified that he identified the tracks of the intestate in a path back of Big Planters Warehouse which led to the railroad; that he observed the tracks a distance of about 75 yards before they reached the railroad; that he saw the tracks on the edge of the crossties and that the tracks began to fade out. It was 1,100 yards from where the tracks entered the railroad to where the body was found. The body was found about 300 yards from the nearest public crossing and about 100 yards from where a footpath crossed the tracks. The intestate's right hand was bruised and little particles of human skull were found lying on the end of the cross-ties, and he had a hole knocked in the top of his head about the size of a fifty-cent piece.

The plaintiff offered another witness who testified that he lives some 700 yards from where plaintiff's intestate got killed; that he lives about 550 yards from the railroad; that on the night in question he saw defendant's train going south at about 70 miles per hour, and that there were no lights on the front of the train. No one saw plaintiff's intestate on or near the defendant's railroad tracks immediately prior to his death.

At the close of plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was sustained and judgment entered accordingly. Plaintiff appeals, assigning error.

E. Reamuel Temple, Jr., and J. R. Barefoot for plaintiff, appellant.
Larry F. Wood for defendant, appellee.

DENNY, J. The appellant's exceptions are not grouped as required by the Rules of Practice in the Supreme Court, Rule 19 (3), 221 N.C. at page 553, *et seq.* However, the appeal itself will be treated as an exception to the judgment, *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797, but the other purported assignments of error which do not comply with our rules, may not be considered. G.S. 1-282; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299.

If it be conceded that the plaintiff's intestate was killed by one of the defendant's trains, the evidence is not sufficient to establish the fact that he was killed by its 11:50 p.m. southbound train on 29 May, 1952, as alleged in the complaint. Therefore, any conclusion as to which one of the defendant's trains killed the plaintiff's intestate would have to be based on mere speculation. Consequently, the evidence offered by the plaintiff in the trial below fails to show that the manner in which the defendant operated its 11:50 p.m. train on 29 May, 1952, was the proximate cause of the death of plaintiff's intestate.

Moreover, if the plaintiff's intestate entered upon or near the defendant's railroad tracks under the circumstances which the evidence tends to show, his status at such time was that of a trespasser. The accident, according to the evidence, occurred at least 300 yards from the nearest crossing. His act in placing himself in a dangerous position, on or near the defendant's railroad tracks, constituted such negligence on his part as would preclude a recovery of damages from the defendant for his death, unless the defendant had the last clear chance to avoid the injury. *Lee v. R. R.,* 237 N.C. 357, 75 S.E. 2d 143; *Osborne v. R. R.,* 233 N.C. 215, 63 S.E. 2d 147; *Long v. R. R.,* 222 N.C. 523, 23 S.E. 2d 849; *Justice v. R. R.,* 219 N.C. 273, 13 S.E. 2d 553; *Mercer v. Powell,* 218 N.C. 642, 12 S.E. 2d 227; *Cummings v. R. R.,* 217 N.C. 127, 6 S.E. 2d 837. And the appellant admits in her brief that the doctrine of last clear chance does not apply in this case, and points out that it is not pleaded. *Bailey v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833.

The ruling of the court below is

Affirmed.

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

APPENDIX.

To the Supreme Court of the State of North Carolina:

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at the regular quarterly meeting of the Council of The North Carolina State Bar, April 16, 1954.

Amend Article X, appearing 221 N.C. 606, by adding a new canon following Article X-F, appearing 221 N.C. 606, to be designated as G as follows:

> "G. When any member of The North Carolina State Bar shall investigate or adjust any claim for any insurance company or agency, either directly or indirectly, through the service of any other person, neither shall said member, nor any partnership of attorneys by whom he is employed, be permitted to represent for compensation as attorney, for any personal injuries sustained, any person, firm or corporation in anywise identified with said claim as a result of the facts or circumstances through which said claim originated, except the insurance company or agency for which or for whom the said investigation or adjustment was made. Provided that this canon shall not apply to the representation of any person charged with a criminal offense in any court of the State."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar were duly adopted by The North Carolina State Bar in that the said Council did by resolution at a regular quarterly meeting adopt said amendment to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 22 day of May, 1954.

(SEAL) EDWARD L. CANNON, *Secretary,*
The North Carolina State Bar.

The Court is of the opinion that its approval is not required as a condition precedent to the promulgation of canons of ethics by the Council of The North Carolina State Bar. Let the foregoing amendment to the canons of ethics of The North Carolina State Bar, together with the certificate of Edward L. Cannon, Secretary, be published in the forthcoming volume of the Reports.

This fourth day of November, 1954.

HIGGINS, J., *for the Court.*

APPENDIX

ETHICS OPINIONS

of the

Council of the North Carolina State Bar

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(The cost of printing these opinions is borne by the North Carolina State Bar.)

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ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 1 (October 22, 1942)

Attorney—Responsibility for costs.

Inquiry. Dated September 24, 1942. Facts stated in opinion.

Opinion. It is not incumbent upon an attorney to pursue an appeal to the Supreme Court when his client has failed to pay the costs involved therein, assuming that the client is advertent to his obligation to pay said costs.

OPINION No. 2 (October 22, 1942)

Conflicting Interests—Councilor representing attorney charged with moral turpitude.

Inquiry. Dated August 4, 1942. Facts stated in opinion.

Opinion. Since the Council of the North Carolina State Bar is vested with authority to discipline practicing attorneys, it is improper for any member of the Council to appear as counsel for any attorney who has been charged with any act involving moral turpitude, for should he so appear he would not thereafter be free to pass upon the innocence or guilt of such attorney when his conduct becomes the subject of investigation by the Council.

OPINION No. 3 (January 22, 1943)

Advertising—By Bar Association.

Inquiry. Dated November 13, 1942. Facts stated in opinion.

Opinion. It is not unethical for a city bar association to advertise in local newspapers a resolution adopted by it changing the office hours of all its members in order to accommodate those persons who might wish to employ any of its members in connection with income tax work.

OPINION No. 4 (January 22, 1943)

Inferior Courts—Restrictions on practice of solicitor.

Inquiry. Dated January 1, 1943. Facts stated in opinion.

Opinion. 1. It is not unethical, although it might become embarrassing, for the solicitor of a county recorder's court to appear in civil actions for alimony where his client is alleging abandonment or nonsupport provided that said solicitor has not previously prosecuted criminally the husband charged with said abandonment or nonsupport.

2. It is not unethical, although it might become embarrassing, for the solicitor of a county recorder's court to appear in civil actions for damages wherein his client is charging the adversary party with reckless driving or drunken driving, provided said solicitor has not previously prosecuted said adverse party criminally on such charges.

3. It is unethical for the solicitor of a recorder's court to represent the defendants in a civil action against them to abate a nuisance against public morals, since such charges are, if sustained, directly violative of the criminal

law and might thereafter be the subject of criminal prosecution upon the same facts involved in said civil action.

OPINION No. 5 (January 22, 1943)

Solicitor—Appearance in civil action following criminal prosecution.

Inquiry. Dated November 10, 1942. Facts stated in opinion.

Opinion. It is unethical for a solicitor who has prosecuted a defendant in the Superior Court wherein said defendant was found not guilty subsequently to appear in a civil suit for damages brought by said criminal defendant against the prosecuting witnesses. Canon 46C.

OPINION No. 6 (April 16, 1943)

Advertising—Attorney advertising tax services.

Inquiry. Dated March 1, 1943. Facts stated in opinion.

Opinion. It is unethical for an attorney to advertise in a newspaper that he, as an attorney, solicits tax work.

OPINION No. 7 (April 16, 1943)

Attorney—Dealings with client upon discharge.

Inquiry. Dated January 21, 1943. Facts stated in opinion.

Opinion. When client discharges attorney in the middle of litigation and requests that attorney return to client his papers, attorney cannot decline to return them until his fee is paid in full.

OPINION No. 8 (July 23, 1943)

Advertising—City directories.

Inquiry. Dated June 1, 1943. Facts stated in opinion.

Opinion. It is unethical for an attorney to have his name printed in any city directory in bold face type, there being an additional charge for such listing and such listing being more prominently set up than the listing of attorneys who do not pay said additional charge.

OPINION No. 9 (July 23, 1943)

Attorneys—Political activity.

Inquiry. Dated May 4, 1943. Facts stated in opinion.

Opinion. It is entirely proper for a lawyer to represent a special group of citizens in an effort to elect four out of seven members of a city council.

OPINION No. 10 (July 23, 1943)

Inferior Courts—Solicitor appearing in parole matter.

Inquiry. Dated July 17, 1943. Facts stated in opinion.

Opinion. It is unethical for the solicitor of a county court to accept employment in a parole matter from a defendant who is convicted of a criminal offense in the Superior Court of the same county, even though said defendant never appeared in said county court. Canon 46D.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 11 (October 21, 1943)

Solicitor—Appearance in inferior courts.

Inquiry. Dated September 27, 1943. Facts stated in opinion.

Opinion. It is unethical for a district solicitor to accept employment on behalf of a defendant indicted in a domestic relations court. Canon 46D.

OPINION No. 12 (January 14, 1944)

Advertising—Letterheads carrying specialization information.

Inquiry. Dated October 26, 1943. Facts stated in opinion.

Opinion. It is not improper for attorney to carry on his letterhead and other stationery material information that he specializes in tax work, naming the various taxes involved.

OPINION No. 13 (January 14, 1944)

Advertising—Tax specialization.

Inquiry. Dated January 7, 1944. Facts stated in opinion.

Opinion. It is not a violation of legal ethics for an attorney to advertise himself through various media as a tax consultant, provided he does not hold himself out as a licensed attorney or endeavor to secure tax work by reason of the fact that he holds a law license.

OPINION No. 14 (January 14, 1944)

Conflicting Interests—Commissioner to hear evidence later accepting employment as attorney.

Inquiry. Dated November 1, 1943. Attorney acted as commissioner to hear evidence in personal injury suit. In such capacity he exercised no judicial function and merely subscribed his name to the evidence taken before him. Subsequently plaintiff recovered verdict against defendant. Defendant's insurance carrier did not pay, and it was necessary for plaintiff then to sue said insurance carrier. May the attorney who was the previous commissioner represent the insurance company in this action?

Opinion. From the facts stated it does not appear that there would be any violation of ethics for the attorney to appear for the insurance company.

OPINION No. 15 (April 14, 1944)

Advertising—Card soliciting tax work.

Inquiry. Dated February 4, 1944. Facts stated in opinion.

Opinion. It is improper for an attorney to solicit tax work by means of advertisements placed in newspapers, where he designates himself as an attorney.

OPINION No. 16 (April 14, 1944)

Advertising—Professional card.

Inquiry. Dated January 17, 1944. Facts stated in opinion.

Opinion. It is proper for an attorney to insert a notice in local newspapers of the re-opening of his offices for the resumption of the practice of law.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 17 (April 14, 1944)

Conflicting Interests—Solicitor representing defendant in padlock proceedings.

Inquiry. Dated February 10, 1944. Facts stated in opinion.

Opinion. It is unethical for a solicitor to accept employment in behalf of a defendant involved in padlock proceedings, the same being a semi-criminal matter, and the solicitor accepting such employment might thereafter find himself embarrassed by having to prosecute said defendant criminally on account of matters growing out of said padlock proceedings.

OPINION No. 18 (July 14, 1944)

Advertising—Solicitation of mortgage loans.

Inquiry. Dated July 8, 1944. Facts stated in opinion.

Opinion. Attorney who is to receive commissions from insurance company on mortgage loans made by insurance company may not allow representative of insurance company to advertise that he will be in said attorney's office at certain times to receive applications for said loans. Canon 27.

OPINION No. 19 (April 13, 1945)

Conflicting Interests—Representing wife in divorce action at instance of husband.

Inquiry. Dated November 1, 1944. Facts stated in opinion.

Opinion. It would be improper for attorney, at instance of husband who expects to pay said attorney's fee, to seek out wife for purpose of having her allow attorney to bring divorce action in her name.

OPINION No. 20 (April 13, 1945)

Solicitor—Representing criminal defendant outside district.

Inquiry. Dated November 13, 1944. Facts stated in opinion.

Opinion. It is not unethical, but it may be unwise, for a solicitor of a criminal court to represent a criminal defendant in an action outside the solicitor's district.

OPINION No. 21 (July 13, 1945)

Unauthorized Practice—Attorney aiding practice by corporation.

Inquiry. Dated July 11, 1945. Facts stated in opinion.

Opinion. It is unethical for an attorney to accept retainer from corporate client for which retainer attorney would represent client's employees in personal legal matters. Canon 46.

OPINION No. 22 (January 18, 1946)

Advertising—Professional card.

Inquiry. Dated December 14, 1945. Facts stated in opinion.

Opinion. It is not improper for an attorney to insert a professional card in a local school annual.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 23 (January 18, 1946)

Certified Public Accountants—Partnership with attorney.

Inquiry. Dated November 29, 1945. Facts stated in opinion.

Opinion. It is unethical for an accountant who is also an attorney to form a partnership with an accountant who is not an attorney for any purposes that involve the practice of law, whether said practice is done by the firm or purportedly by the attorney alone.

OPINION No. 24 (July 12, 1946)

Attorneys—Service on grand jury.

Inquiry. Dated July 12, 1946. Facts stated in opinion.

Opinion. It is improper for an attorney who is serving upon a grand jury to advise clients in criminal matters which might come before him as a member of the grand jury during his period of service thereon.

OPINION No. 25 (July 12, 1946)

Conflicting Interests—Representing different sides in civil and criminal actions.

Inquiry. Dated June 18, 1946. Facts stated in opinion.

Opinion. An attorney who represented D, defendant in a criminal action in which P was the prosecuting witness, cannot later represent P when D sues him in a civil action for injuries arising out of the same incident.

OPINION No. 26 (October 24, 1946)

Advertising—Professional card.

Inquiry. Dated October 10, 1946. Facts stated in opinion.

Opinion. It is unprofessional for an attorney to insert in a newspaper a professional card advertising himself as an "income tax consultant."

OPINION No. 27 (October 24, 1946)

Advertising—Telephone directory service.

Inquiry. Dated August 2, 1946. Facts stated in opinion.

Opinion. It is unethical for an attorney to allow his name to be listed in a classified telephone directory under the listing "Tax Consultants" or "Tax Service" or any other listing other than that of "Attorneys at Law." Canon 47.

OPINION No. 28 (October 24, 1946)

Candor and Fairness—Transactions with opposite side.

Inquiry. Dated September 11, 1946. Facts stated in opinion.

Opinion. It is unethical for the attorney for a defendant to draft an assignment of the plaintiff's interest in a pending suit without consulting the plaintiff's attorney.

OPINION No. 29 (October 24, 1946)

Inferior Courts—Prosecuting attorney practicing criminal law.

Inquiry. Dated August 21, 1946. Facts stated in opinion.

Opinion. It is not unethical for the prosecuting attorney of a county court to represent defendants in criminal action in the Federal court.

ETHICS OPINIONS OF THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

OPINION No. 30 (January 17, 1947)

Attorney—Sharing office with businessman.

Inquiry. Dated November 26, 1946. Facts stated in opinion.

Opinion. There is no objection to a businessman sharing an office with an attorney provided that no advertisement is made which indicates that he is in an attorney's office.

OPINION No. 31 (January 17, 1947)

Inferior Courts—Assistant judge practicing criminal law.

Inquiry. Dated January 7, 1947. Facts stated in opinion.

Opinion. It is improper for an attorney who is the assistant recorder of a recorder's court to practice criminal law in any court in the county in which said recorder's court is located, even though the position of assistant recorder carries no compensation with it. Canon 46D.

Opinion No. 32 (January 17, 1947)

Inferior Courts—Judge pro tem of domestic relations court practicing criminal law.

Inquiry. Dated December 28, 1946. Facts stated in opinion.

Opinion. It is improper for the judge *pro tem* of a domestic relations and juvenile court to practice criminal law in any court in the county. Canon 46D.

OPINION No. 33 (January 17, 1947)

Inferior Courts—Practice by solicitor's brother.

Inquiry. Dated December 15, 1946. Facts stated in opinion.

Opinion. After the partnership between them is dissolved, it is not improper for an attorney to appear for defendants in a recorder's court of which his brother is the solicitor.

OPINION No. 34 (April 18, 1947)

Advertising—Tax law practice.

Inquiry. Dated February 14, 1947. Facts stated in opinion.

Opinion. Advertisements as to the practice of tax law should be in the name of a bar association and not in the name of any individual attorney.

OPINION No. 35 (April 18, 1947)

Inferior Courts—Solicitor appearing in criminal matters.

Inquiry. Dated January 28, 1947. Facts stated in opinion.

Opinion. Attorney in pending criminal cases cannot continue his representation after he becomes solicitor of recorder's court in same county. Canon 46D.

OPINION No. 36 (July 25, 1947)

Advertising—Attorney connected with business school.

Inquiry. Dated July 23, 1947. Facts stated in opinion

Opinion. A lawyer who is a part-time teacher in a business school may permit his name and profession to be used in the school's catalogue, but not in

connection with advertising by the school to obtain additional students, although there is no objection to the school advertising the fact that an attorney is teaching a particular course, without naming said attorney.

OPINION No. 37 (July 25, 1947)

Advertising—Use of form letters.

Inquiry. Dated April 29, 1947. Facts stated in opinion.

Opinion. It is improper for attorney to use form letters sent to a mailing list with the hope of increasing his collection business.

OPINION No. 38 (July 25, 1947)

Conflicting Interest—Representing both sides in adoption proceeding.

Inquiry. Dated June 30, 1947. Facts stated in opinion.

Opinion. The employed attorney of a children's home may not ethically represent in adoption proceedings both the home and persons adopting children therefrom, with or without compensation from the adopting parent.

OPINION No. 39 (July 25, 1947)

Expenses—Attorney advancing expenses to client.

Inquiry. Dated June 6, 1947. Facts stated in opinion.

Opinion. While Canon 41 permits a lawyer in good faith to advance expenses in connection with litigation as a matter of convenience, said advances being subject to reimbursement, the Canon does not permit a lawyer to advance living expenses to his client pending expected recovery in said litigation.

OPINION No. 40 (July 25, 1947)

Inferior Courts—Judge appearing in parole matters.

Inquiry. Dated July 5, 1947. Facts stated in opinion.

Opinion. It is improper for the judge of a municipal court to appear in parole matters for any prisoner, even one who was convicted and sentenced in a county outside the one in which the municipal court is located.

OPINION No. 41 (July 25, 1947)

Inferior Courts—Mayor practicing criminal law.

Inquiry. Dated May 12, 1947. Facts stated in opinion.

Opinion. Canon 46D permits a mayor who by virtue of his office presides over an inferior court to practice criminal law in courts of the county other than his own, provided that said mayor's court does not have jurisdiction in excess of that of a justice of the peace.

OPINION No. 42 (October 23, 1947)

Attorneys—Banks employing in title matters.

Inquiry. Dated October 23, 1947. Facts stated in opinion.

Opinion. There is nothing improper in banks employing counsel in title matters connected with loans made by it; his fee being paid by the borrower.

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OPINION No. 43 (October 23, 1947)

Fees—Reduction in title fees granted lending institutions.

Inquiry. Dated July 18, 1947. Facts stated in opinion.

Opinion. Where a local bar association adopts a schedule of minimum title fees, it is a violation of the canons of ethics for said association then to grant a reduction of said fees to certain lending institutions that attend to some of the details of "closing" the loan for which the title examination was made.

OPINION No. 44 (January 16, 1948)

Witnesses—Examining adverse witness.

Inquiry. Dated December 20, 1947. Facts stated in opinion.

Opinion. It is not improper for counsel for the adverse party to examine a witness who has been subpoenaed by his adversary.

OPINION No. 45 (July 16, 1948)

Advertising—Postal cards.

Inquiry. Dated January 19, 1948. Facts stated in opinion.

Opinion. It is improper solicitation of business for attorney to mail out postal cards advertising himself as experienced in income tax service.

OPINION No. 46 (October 21, 1948)

Advertising—Insurance agent who is attorney listing bar membership on letterhead.

Inquiry. Dated July 29, 1948. Facts stated in opinion.

Opinion. It is improper for a member of the bar who has left the practice of law for the insurance business to carry upon the letterhead used in said insurance business notation that he is a member of the bar.

OPINION No. 47 (October 21, 1948)

Attorneys—Signing bond in civil action.

Inquiry. Dated August 24, 1948. Facts stated in opinion.

Opinion. It is improper for an attorney or a member of his family to sign a cost bond in a civil action for said attorney's client.

OPINION No. 48 (October 21, 1948)

Inferior Courts—Judge Pro Tem of recorder's court practicing therein.

Inquiry. Dated August 26, 1948. Facts stated in opinion.

Opinion. It is improper for attorney who is judge *pro tem* of a recorder's court to appear in said recorder's court. Canon 46D.

OPINION No. 49 (October 21, 1948)

Inferior Courts—Solicitor appearing in criminal cases.

Inquiry. Dated October 20, 1948. Facts stated in opinion.

Opinion. It is improper for solicitor of a recorder's court to appear for a defendant in a criminal action in the Superior Court of the county in which said recorder's court is located. Canon 46D.

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OPINION No. 50 (October 21, 1948)

Solicitation of Business—Attorney seeking office of county or city attorney.

Inquiry. Dated August 12, 1948. Facts stated in opinion.

Opinion. It is improper for an attorney to solicit support for the office of county attorney or city attorney.

(Overruled July 16, 1954. See Opinion No. 139.)

OPINION No. 51 (October 21, 1948)

Solicitor—Solicitor appearing in parole matter.

Inquiry. Dated October 6, 1948. Facts stated in opinion.

Opinion. It would be improper for a solicitor to appear before the Parole Commission on behalf of a client for whom he had accepted a retainer fee prior to taking office as Solicitor, and said retainer should be returned.

OPINION No. 52 (January 14, 1949)

Inferior Courts—Judge Pro Tem of a Domestic Relations Court practicing law.

Inquiry. Dated January 12, 1949. Facts stated in opinion.

Opinion. It is improper for the judge *pro tem* of a domestic relations court to practice in any criminal court in the county in which said domestic relations court is located.

OPINION No. 53 (April 15, 1949)

Inferior Courts—Solicitor representing defendant in a habeas corpus proceeding.

Inquiry. Dated February 14, 1949. Facts stated in opinion.

Opinion. It is improper for an attorney who is the solicitor of a recorder's court to represent a client in a *habeas corpus* proceeding.

OPINION No. 54 (April 15, 1949)

Certified Public Accountant—Attorney employed by C.P.A.

Inquiry. Dated January 28, 1949. Attorney contemplates agreement with accounting firm upon the following basis:

1. I will be employed by the firm as a member of their accounting staff, to handle all non-legal tax work which is referred to them by their clients. I will be compensated by a fixed salary plus a percentage of the revenue from the performance of this work.

2. Any legal questions involved in or arising from this tax work shall be referred, in accordance with the wishes of the client involved, either to me to handle in my separate capacity as a lawyer or to some other attorney. If such legal questions are referred to me, I will deal directly with the client, will render a bill directly to him for my services, and will retain for myself the entire fee charged, not sharing or paying it over to anyone else.

3. It will be agreed that my name shall not appear, as an attorney-at-law, on any letterhead or other stationery of the accounting firm, or on any door plate or door lettering of the firm.

Is such agreement objectionable?

Opinion. Upon the facts stated it appears that such an agreement would be both a breach of ethics and of unauthorized practice of law.

OPINION No. 55 (April 15, 1949)

Candor and Fairness—Communication with judge.

Inquiry. Dated March 14, 1949. Is it improper for attorney who has been employed in the event his client may be sued to address a letter to a judge or judges asking that he or they refuse to grant any application that might be made for appointment of a receiver until said attorney might be heard on behalf of his client?

Opinion. Such a letter is not improper since it is merely a request to be heard and not a violation of Canon 3.

OPINION No. 56 (April 15, 1949)

Candor and Fairness—Attempted settlement without knowledge of retained counsel.

Inquiry. Dated January 26, 1949. Facts stated in opinion.

Opinion. It is not improper for an attorney, as a matter of friendship, to discuss with a close relative the possibility of the settlement of the relative's suit against her husband for alimony, said discussion having taken place without the knowledge of said relative's retained counsel.

OPINION No. 57 (April 15, 1949)

Advertising—Professional card.

Inquiry. Dated February 14, and February 28, 1949. Facts stated in opinion.

Opinion. Professional card which contains information other than the simple card notice, to wit, "Tax Consultant enrolled to practice before the United States Treasury Department," is improper.

OPINION No. 58 (July 15, 1949)

Advertising—Attorney's name in "Who's Who."

Inquiry. Dated April 7, 1949. Facts stated in opinion.

Opinion. It is not improper for an attorney to allow his name to be listed in "Who's Who."

OPINION No. 59 (July 15, 1949)

Inferior Courts—Assistant judge of mayor's court practicing criminal law in county.

Inquiry. Dated June 7, 1949. Facts stated in opinion.

Opinion. The assistant judge of a mayor's court may practice in criminal cases in other courts of the county other than in the jurisdiction of said mayor's court provided that said mayor's court does not have jurisdiction greater than that of a justice of the peace. Canon 46D.

OPINION No. 60 (July 15, 1949)

Solicitation of Business—Application for appointment to office of city or county attorney.

Inquiry. Dated June 16, 1949. Facts stated in opinion.

Opinion. It is improper for a member of the Bar to seek the office of city or county attorney but it is not improper to apply for any public office.

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OPINION No. 61 (October 27, 1949)

Advertising—Attorney's professional card.

Inquiry. Dated August 24, 1949. Facts stated in opinion.

Opinion. There is no impropriety in the publication of an attorney's professional card in an organization publication to which he belongs.

OPINION No. 62 (April 14, 1950)

Advertising—Letterhead carrying designation attorney and C.P.A.

Certified Public Accountant—Attorney's letterhead carrying designation C.P.A.

Inquiry. Dated April 28, 1950. Facts stated in opinion.

Opinion. It is improper for an attorney to carry on his letterhead both the designation attorney at law and certified public accountant.

OPINION No. 63 (April 14, 1950)

Advertising—Use of deceased partner's name on letterhead.

Inquiry. Dated April 1, 1950. Facts stated in opinion.

Opinion. Unless forbidden by local custom, it is not improper for the letterhead of a law firm to carry the names and dates of former members of the firm now deceased.

OPINION No. 64 (April 14, 1950)

Fees—Fee for furnishing certificate upon petition for review.

Inquiry. Dated February 21, 1950. Is it ethically proper for a firm requesting and receiving a certificate from another attorney for consideration of a petition to rehear as prescribed in Rule 44 of the Supreme Court to pay such attorney giving such certificate, irrespective of whether the certificate is favorable or unfavorable?

Opinion. It would be improper to pay a fee under these circumstances in view of the provision in Rule 44 that the certificate shall be furnished by attorneys who have no interest in the subject matter and have not been of counsel for either party to the suit.

OPINION No. 65 (October 26, 1950)

Inferior Courts—Vice recorder practicing criminal law.

Inquiry. Dated September 27, 1950. Facts stated in opinion.

Opinion. It is improper for the vice recorder of the county court having criminal jurisdiction to practice criminal law in any court in the county in which said recorder's court is located. Canon 46D.

OPINION No. 66 (October 26, 1950)

Law Clerk—Firm's employment of attorney licensed in another state.

Inquiry. Dated August 17, 1950. Facts stated in opinion.

Opinion. There is no objection to a law firm employing an attorney who is licensed in another state but not in North Carolina to do tax research work, the abstracting of deeds and other court records, and similar services for members of the firm where he is not held out to the public as a practicing attorney or as a member of the firm, and where he does not in fact appear in any court or handle any legal matters for clients of the firm.

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OPINION No. 67 (January 12, 1951)

Conflicting Interests—Law partner of administrator representing administrator.

Inquiry. Dated October 25, 1950. Facts stated in opinion.

Opinion. It is improper for an administrator who is also a lawyer to employ his law partner to represent him as such administrator in bringing legal proceedings necessary in connection with the settlement of the estate.

OPINION No. 68 (January 12, 1951)

Contingent Fees—Parole cases.

Inquiry. Dated December 21, 1950. Facts stated in opinion.

Opinion. It is not improper for an attorney to accept employment in a criminal action upon a contingent basis, and therefore there is no ethical prohibition against said attorney taking a parole case on the same basis.

OPINION No. 69 (April 13, 1951)

Conflicting Interests—Representation of prisoner in clemency matter after previous representation of others implicated by prisoner.

Inquiry. Dated January 31, 1951. Prisoner was sentenced to death and his sentence was later commuted to life imprisonment. Attorney did not represent either prisoner or the State in prisoner's trial, but later represented two other people who were implicated in the same crime by the prisoner and who were tried after prisoner's trial had been completed. Prisoner now desires attorney to represent him in seeking clemency. Would such representation be unethical?

Opinion. It would neither be unethical nor unprofessional for attorney to appear on behalf of prisoner seeking clemency.

OPINION No. 70 (April 13, 1951)

Inferior Courts—Vice recorder practicing criminal law.

Inquiry. Dated January 31, 1951. Facts stated in opinion.

Opinion. Attorney serving temporarily as vice recorder of county court during the illness of the incumbent recorder is prohibited from practicing in any other criminal court in the county where said recorder's court is located during the time he served as such vice recorder. Canon 46D.

OPINION No. 71 (July 13, 1951)

Certified Public Accountants—Partnership with attorney.

Inquiry. Dated May 24, 1951. Attorney contemplates formation of partnership with a licensed attorney who is also a certified public accountant and who primarily engages in the practice of accountancy. Would the formation of such a partnership be ethical, and if so, would the attorney who is also a certified public accountant be allowed to continue his practice of general accounting?

Opinion. It would not be unethical for attorney to form partnership with an attorney who is also a certified public accountant, but said firm cannot represent the accountant as such on the firm's letterhead or engage in any form of advertising in this connection. It would also be unethical for the partner who is also a certified public accountant to continue his practice of general accounting.

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OPINION No. 72 (July 13, 1951)

Solicitation of Business—Attorney seeking appointive office.

Inquiry. Dated July 7, 1951. Facts stated in opinion.

Opinion. It is not improper for an attorney to make written application for appointive offices to the board of commissioners and other agencies exercising powers of appointment.

OPINION No. 73 (October 25, 1951)

Advertising—Directory listing.

Inquiry. Dated September 15, 1951. Facts stated in opinion.

Opinion. It is proper for attorneys to allow their names to be published in a directory when all listings are in the same type showing only name and address and telephone number.

OPINION No. 74 (October 25, 1951)

Certified Public Accountants—Attorneys who are also C.P.A.'s.

Inquiry. Dated in 1951. Facts stated in opinion.

Opinion. Without attempting to cover the entire field, the council lays down the following rules as to matters which will face attorneys who are also certified public accountants:

(a) It would not be improper for attorney to practice law and also do such accounting work as necessary for preparation of tax returns and tax cases so long as attorney does not solicit or advertise for clients of any kind.

(b) It would not be improper to include in accounting services bookkeeping, designing and installing of accounting systems so long as the same was for facilitation and preparation of tax cases.

(c) It would not be improper for attorney to prepare financial statements for client for use other than tax purposes so long as same did not bear attorney's name or letterhead.

(d) It would not be improper for attorney to prepare such statements and certify to them so long as said statement did not indicate that inquirer was an attorney.

(e) It is proper for attorney to practice law and accounting at one and the same time provided he does not advertise himself as an accountant and thereby draw clientele and engage in legal work arising out of accountancy. The line of demarcation is closely drawn and it is always difficult to determine where accountancy ends and legal service begins.

(f) There is no objection to an accountant submitting a bid for particular accounting work but if such advertising and bidding results in legal services, an embarrassing and unethical situation is likely to arise.

(g) It would be improper for attorney to practice law and do accounting work such as preparation of tax returns and handling of tax cases in the courts if such legal work is the result of advertising upon the part of inquirer as an accountant.

(h) It would not be improper for attorney who is also an accountant to employ persons who are not attorneys to assist him in accounting work so long as such employees do not perform any acts which would constitute the practice of law.

(i) It would be improper for attorney who is also an accountant to display on his office door both the words "Attorney at Law" and "Certified Public Accountant."

(j) It would be proper for attorney to display in his office such certificates, diplomas, etc., as he might have received by virtue of his licenses or membership in various organizations.

(k) It would be proper to have listed in telephone directories the name of inquirer under the section classified as attorneys where such listing is carried in the same type as all other attorneys but such listing should not refer to any listing under accountants or like designation and likewise, if any listing is made under accountants, it should not refer to inquirer as also appearing under attorneys listed.

OPINION No. 75 (October 25, 1951)

Candor and Fairness—Settlement of case without consulting attorney for adverse party.

Inquiry. Dated August 17, 1951. Facts stated in opinion.

Opinion. Attorney representing defendant is guilty of unprofessional conduct where he undertakes to negotiate a settlement between his client and the plaintiff in an action where both parties are represented by counsel without notice of any kind to plaintiff's attorney.

OPINION No. 76 (October 25, 1951)

Inferior Courts—Solicitor practicing before Justice of Peace.

Inquiry. Dated August 14, 1951. Facts stated in opinion.

Opinion. It is improper for the solicitor of an inferior court to appear for a defendant in a criminal proceeding in a justice of the peace court even though if convicted the defendant's appeal would go directly to the Superior Court. Canon 46D.

OPINION No. 77 (January 18, 1952)

Advertising—Newspaper advertisement of the availability of farm loans from attorney representing insurance company lender.

Inquiry. Dated November 6, 1951. Attorney represents insurance company in making farm loans in his area, and said company has requested that he run occasional advertisement in a newspaper stating that farm loans are available through him. May he ethically do so?

Opinion. Canon 27 precludes such advertising.

OPINION No. 78 (January 18, 1952)

Advertising—Newspaper notice of removal of attorney's office.

Inquiry. Dated October 27, 1951. Facts stated in opinion.

Opinion. It is not improper for an attorney who is moving his law offices to a new address to run an announcement thereof in local newspapers.

OPINION No. 79 (January 18, 1952)

Conflicting Interests—Attorney practicing in Recorder's Court of which his son is Solicitor.

Inquiry. Dated January 7, 1952. Attorney intends to seek election as Solicitor of a recorder's court. At the present time attorney and his father are

law partners. If elected, attorney and father will dissolve their partnership and carry on their law practices entirely separately. Would it then be improper for the father to practice in said recorder's court?

Opinion. It would not be improper for father to practice in the recorder's court, although embarrassing situations might arise which would be a matter of personal taste rather than of ethics.

OPINION No. 80 (January 18, 1952)

Inferior Courts—Judge Pro Tem of Municipal Court practicing therein.

Inquiry. Dated October 24, 1951. Facts stated in opinion.

Opinion. It is improper for the Judge Pro Tem of a Municipal Court having both criminal and civil jurisdiction to appear in said court in either criminal or civil matters. Neither could said person practice criminal law in any court in his county. See Canon 46D.

OPINION No. 81 (January 18, 1952)

Inferior Courts—Vice Recorder practicing criminal law.

Inquiry. Dated January 4, 1952. Facts stated in opinion.

Opinion. It is improper for a Vice Recorder of a City Recorder's Court to appear in criminal cases in said court or in any other court of the county in which he resides.

OPINION No. 82 (April 18, 1952)

Advertising—Patent attorneys.

Patent Attorneys—Advertising.

Inquiry. Dated March 17, 1952. Facts stated in opinion.

Opinion. There is no objection to a patent attorney inserting a professional card in daily papers. It is improper, however, for any attorney to list on his stationery or on other materials the names of persons other than members of the Bar.

OPINION No. 83 (April 18, 1952)

Conflicting Interests—Attorney's wife as agent of bonding company.

Inquiry. Dated January 10, 1952. Facts stated in opinion.

Opinion. It would not be improper for an attorney's wife who has been an agent for a bonding company to continue such agency if and when her husband enters the practice of law.

OPINION No. 84 (April 18, 1952)

Conflicting Interests—Solicitor representing defendant in civil action arising out of wreck, the criminal aspects of which he investigated.

Inquiry. Dated March 7, 1952. State Solicitor, together with Police Officers, investigated automobile wreck and determined that there was no criminal implications therein. A warrant has been issued for the driver of one of the cars but no bill of indictment has been presented to the Grand Jury. May the Solicitor represent said driver in a civil action against him for damages arising out of said accident?

Opinion. No. It is unethical for a prosecutor to accept professional employment in any matter growing out of anything which is in any way connected with the office of such prosecuting officer during his incumbency. See Canon 46C.

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OPINION No. 85 (April 18, 1952)

Inferior Courts—Judge practicing criminal law.

Inquiry. Dated April 4, 1952. Facts stated in opinion.

Opinion. It is improper for the Judge of a county Recorder's Court to accept employment as counsel in felony cases in the Superior Court even when the preliminary hearings have been held before a Justice of the Peace and the Recorder's Court has nothing to do with the case. See Canon 46-D.

OPINION No. 86 (April 18, 1952)

Inferior Courts—Solicitor appearing in parole matter.

Inquiry. Dated February 6, 1952. Facts stated in opinion.

Opinion. It is improper for the Solicitor of a Recorder's Court to represent a prisoner in his application for parole, even though said Recorder's Court never had any connection with the prisoner's case.

OPINION No. 87 (July 18, 1952)

Advertising—Attorney using designation "Certified Public Accountant."

Advertising—Office party of attorney.

Certified Public Accountant—Attorney who is also a certified public accountant.

Inquiry. Dated in 1952. May an attorney who is a certified public accountant use the designation "Certified Public Accountant" in his announcement of the opening of his law office, and may he have an "office party" in connection therewith.

Opinion. Announcement as to the opening of law offices is not improper, but the use of the designation "Certified Public Accountant" may not be made therein. The practice of accounting should be entirely disassociated from the practice of law, including tax law. A certified public accountant should not advertise this business in connection with law practice, and law practice should not be used in such a manner as to obtain accounting business that might lead to the practice of law.

An "office party" by an attorney would be improper if it is for the purpose of advertising the opening of a law office.

OPINION No. 88 (July 18, 1952)

Inferior Courts—Judge or Judge Pro Tem practicing law.

Inquiry. Dated April 23, 1952. Facts stated in opinion.

Opinion. It is unethical for either the Judge or the Judge Pro Tem of a Recorder's Court to practice in the courts over which he presides. See Canon 46D.

OPINION No. 89 (July 18, 1952)

Inferior Courts—Judge practicing law.

Inquiry. Dated May 30, 1952. Facts stated in opinion.

Opinion. It is unethical for a judge of a Recorder's Court to practice criminal law in any of the courts of the county in which the Recorder's Court is located.

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OPINION No. 90 (October 23, 1952)

Advertising—Civic organizations and clubs.

Inquiry. Dated September 15, 1952. Facts stated in opinion.

Opinion. The propriety of deducting country club dues, civic club dues and meals furnished clients and similar items from income taxes is a matter of law rather than of ethics. It is not improper for an attorney to join various civic organizations and clubs provided that the joining of the same is not for the sole purpose of acquiring clients.

OPINION No. 91 (October 23, 1952)

Advertising—Stationery denoting limitation of practice.

Inquiry. Dated September 15, 1952. Facts stated in opinion.

Opinion. Attorney's stationery listing the words "Taxation and Civil Practice" is not unethical but may not be in good taste.

OPINION No. 92 (October 23, 1952)

Advertising—Stationery designating attorney and certified public accountant.

Certified Public Accountant—Stationery designating attorney and certified public accountant.

Inquiry. Dated September 9, 1952. Facts stated in opinion.

Opinion. Attorney's stationery listing himself as attorney at law and certified public accountant is highly improper.

OPINION No. 93 (October 23, 1952)

Advertising—Unsolicited newspaper articles about attorneys.

Inquiry. Dated October 6, 1952. Facts stated in opinion.

Opinion. It is not unethical for attorney just returned to home town to open law office to allow unsolicited newspaper stories concerning him. Canon 27.

OPINION No. 94 (October 23, 1952)

Inferior Courts—Judge or Solicitor of Recorder's Court representing criminal defendants in Superior Court.

Inquiry. Dated October 16, 1952. Facts stated in opinion.

Opinion. It is improper for the Judge or Solicitor of a Recorder's Court to appear for defendants in criminal cases in the Superior Court of their county even where said cases are not heard in said Recorder's Court. Canon 46D.

OPINION No. 95 (October 23, 1952)

Inferior Courts—Judge Pro Tem of County Court practicing criminal law in said court.

Inquiry. Dated August 19, 1952. Facts stated in opinion.

Opinion. Attorney approved by Board of County Commissioners as Judge Pro Tem of County Court but not yet qualified or sworn in is precluded from practicing in the criminal courts of his county while occupying office of Judge Pro Tem. Canon 46D.

OPINION No. 96 (October 23, 1952)

Inferior Courts—Prosecuting attorney of Recorder's Court practicing criminal law in other courts.

Inquiry. Dated July 29, 1952. Facts stated in opinion.

Opinion. Prosecuting attorney of Recorder's Court may not practice criminal law in other courts in the same county, but may do so in other counties. Canon 46D.

OPINION No. 97 (October 23, 1952)

Witnesses—Interviewing driver of adverse party's vehicle.

Inquiry. Dated October 3, 1952. Facts stated in opinion.

Opinion. Where a corporation sues or is sued, for damages growing out of an automobile accident and the driver of the vehicle is not a party to the action, it is not unethical for counsellor appearing against the corporation to interview the driver as any other witness might be interviewed.

OPINION No. 98 (January 16, 1953)

Advertising—Data on letterheads and envelopes.

Inquiry. Dated October 24, 1952. Facts stated in opinion.

Opinion. It is improper for an attorney to carry on his letterheads and envelopes his name followed by the following: "Attorney and Counsellor at Law, B.A., B.S., LL.B., Municipal Bonds and Title Laws Especially."

OPINION No. 99 (January 16, 1953)

Advertising—Data on stationery indicating restricted practice.

Inquiry. Dated January 14, 1953. Facts stated in opinion.

Opinion. There is no objection to an attorney listing on his letterhead "Specializing in tax matters" or "Practice restricted to taxation."

OPINION No. 100 (January 16, 1953)

Inferior Courts—Solicitor of Recorder's Court continuing criminal cases in which he was employed prior to taking office.

Inquiry. Dated December 5, 1952. Inquirer accepted employment in several criminal cases in Superior Court, and prior to their conclusion he accepted position as Solicitor of local Recorder's Court. Can he complete said employment?

Opinion. It would be improper for attorney to continue or complete said employment and he should turn such cases over to other members of the Bar. Further, it would be improper for attorney to prosecute in said Recorder's Court any defendant for whom he was appearing at the time he became Solicitor. See Canon 46D.

OPINION No. 101 (April 17, 1953)

Advertising—Stationery of attorney who is a Certified Public Accountant.

Certified Public Accountant—Stationery of accountant who is an attorney.

Inquiry. Dated February 11, 1953. Facts stated in opinion.

Opinion. The stationery and other documents of a person who is both an attorney and a Certified Public Accountant should not indicate that he is a

Certified Public Accountant in matters where he is acting as an attorney, or *vice versa*.

OPINION No. 102 (April 17, 1953)

Conflicting Interests—Member of School Board acting as its attorney.

Inquiry. Dated April 11, 1953. Facts stated in opinion.

Opinion. It is improper for an attorney who is a member of a school board to act as attorney for the board.

OPINION No. 103 (April 17, 1953)

Conflicting Interests—Private prosecutor subsequently representing defendant in parole matter.

Inquiry. Dated February 10, 1953. Facts stated in opinion.

Opinion. It would be highly improper for an attorney who acted as private prosecutor against a defendant who was convicted of a criminal offense subsequently to represent said defendant in his efforts to obtain a parole.

OPINION No. 104 (April 17, 1953)

Conflicting Interests—School Board attorney representing claimant against school bus driver.

Inquiry. Dated January 30, 1953. Facts stated in opinion.

Opinion. It would be improper for the attorney for a county board of education to represent a plaintiff whose car was damaged in a collision with a school bus in the same county, in a claim against the State for damages to plaintiff's car due to the alleged negligence of the student driver of the bus, even though the driver is an employee of the State Board of Education.

OPINION No. 105 (April 17, 1953)

Inferior Courts—Assistant Judge of Recorder's Court practicing in said court.

Inquiry. Dated January 20, 1953. Facts stated in opinion.

Opinion. It is improper for the Assistant Judge of a Recorder's Court to practice in his own court when not acting as Judge or to practice in any of the criminal courts of his county.

OPINION No. 106 (April 17, 1953)

Inferior Courts—Judge of Recorder's Court practicing before Motor Vehicles Department re suspension of driver's license.

Inquiry. Dated April 2, 1953. May the Judge of a Recorder's Court in X County represent a defendant before a representative of the Motor Vehicles Department in a hearing in X County concerning the suspension of defendant's driver's license for previous traffic convictions in counties Y and Z?

Opinion. Such representation would not be unethical, but as a matter of propriety it might not be in the best of taste since such appearance in effect is in a criminal action. See Canon 46D.

OPINION No. 107 (July 17, 1953)

Advertising—Attorney newspaper card.

Inquiry. Dated June 4, 1953. Facts stated in opinion.

Opinion. Attorney's card in newspaper which contains the words "Real Estate Loans" is improper.

OPINION No. 108 (July 17, 1953)

Advertising—Information on letterhead.

Inquiry. Dated July 8, 1953. Facts stated in opinion.

Opinion. There would be nothing improper in attorney using on his letterhead statement that his practice is limited to "Biblical Law and Equity."

OPINION No. 109 (July 17, 1953)

Conflicting Interests—Attorney defending deed drawn by him in suit to set it aside.

Inquiry. Dated April 20, 1953. Facts stated in opinion.

Opinion. It is not unethical for a firm to represent title insurance company in action brought against company's insured to set aside deed on grounds of grantor's mental incapacity, where firm prepared deed and one of its members supervised its execution.

OPINION No. 110 (July 17, 1953)

Inferior Courts—Limitations on civil practice of solicitor.

Inquiry. Dated June 13, 1953. Facts stated in opinion.

Opinion. Canon 46C prohibits solicitor of recorder's court from appearing in a civil action for a party involved in a criminal proceeding in his court, the civil action arising out of the same transaction as the criminal proceeding.

OPINION No. 111 (July 17, 1953)

Inferior Courts—Limitation on civil practice of solicitor.

Inquiry. Dated June 23, 1953. Facts stated in opinion.

Opinion. Canon 46C prohibits prosecuting attorney of recorder's court from accepting employment in a civil action growing out of a matter that was before the said prosecuting attorney's criminal court.

OPINION No. 112 (July 17, 1953)

Inferior Courts—Solicitor practicing criminal law.

Inquiry. Dated June 29, 1953. Facts stated in opinion.

Opinion. It is improper for the solicitor of a recorder's court to practice law in any criminal court in the county in which said recorder's court is located. Canon 46D.

OPINION No. 113 (July 17, 1953)

Solicitation of Business—Real estate transaction.

Inquiry. Dated February 4, 1953. F is a real estate broker. F sells a residence and helps the purchaser to obtain a loan from A's insurance company through the loan correspondent. F then stipulates that his friend, a young

attorney recently licensed, shall do the legal work incidental to the loan, or he will get his loan elsewhere. The young attorney admits that he is ignorant of the procedure for closing such loan and asks A to guide him and to certify the title for title insurance.

Opinion. It would be improper for the newly licensed attorney, or any other attorney, to accept the work secured through the stipulations of F if such attorney was apprised that the work had come to him by reason of such stipulations, and if the attorney was using his friend as a "runner" it would constitute solicitation of business in its most aggravated form. However, if the attorney was not advised as to the manner in which his legal services were obtained, then he could not be charged with solicitation of the business and in such event it would not be improper for him to ask the guidance of A.

OPINION No. 114 (July 17, 1953)

Solicitation of Business—Real estate transaction.

Inquiry. Dated February 4, 1953. D is a firm of attorneys. E is a real estate developer, brother of a member of the firm. E shops around for the best insurance company loans for his purchasers, selects A's insurance company loans, and so notifies the loan correspondent, but stipulates that his attorney brother do all the legal work incidental to the loans.

Opinion. If E's brother is familiar with the activities of E, it would be improper for him to accept the work under the circumstances for he would be in a position of soliciting business through a "runner."

OPINION No. 115 (July 17, 1953)

Solicitation of Business—Real estate transaction.

Inquiry. Dated February 4, 1953. A is the regular attorney for a large insurance company lender and its local loan correspondent. B's client obtains a loan from the insurance company through its loan correspondent. B notifies the loan correspondent that he, B, will do the necessary title and other legal work necessary for the loan, and if he doesn't get the work he will see that his client gets his loan elsewhere.

Opinion. B is guilty of unprofessional conduct for engaging in the solicitation of business.

OPINION No. 116 (July 17, 1953)

Solicitation of Business—Real estate transaction.

Inquiry. Dated February 4, 1953. A and B are attorneys. A and B own adjoining tracts of land. A contracts to sell his land to C, a real estate developer. C wishes to buy a small parcel or fringe of land from B in order to lay out his proposed development to the best advantage. B and C agree on a price, and then B stipulates that he, B, shall do all of C's legal work involved in the purchase, development, and sale of both parcels of land, including loans to individual purchasers by C's insurance company lender. C prefers A as his attorney but has to yield to B or sacrifice a substantial advantage in the development and sale of the lands.

Opinion. The conduct of attorney B is improper and constitutes soliciting professional business in aggravated form.

OPINION No. 117 (October 22, 1953)

Advertising—Attorney subscribing to "Welcome Service."

Inquiry. Dated October 21, 1953. Facts stated in opinion.

Opinion. It would be highly unethical for an attorney to subscribe to a "Welcome Service" which would, in connection with its calls upon newcomers to town, present them with said attorney's professional card.

OPINION No. 118 (October 22, 1953)

Advertising—Professional card in newspaper.

Inquiry. Dated October 19, 1953. Facts stated in opinion.

Opinion. Professional card inserted in newspaper which states attorney's name and address and refers to the fact that the attorney engages in general practice is not improper.

OPINION No. 119 (October 22, 1953)

Inferior Courts—Solicitor appearing in other courts in same county.

Inquiry. Dated August 18, 1953. Facts stated in opinion.

Opinion. It is unethical for the solicitor of a recorder's court to represent a defendant in a criminal action in another recorder's court originating in the same county but outside the township in which said solicitor's court has jurisdiction, and therefore it would also be unethical for said solicitor to appear in the same case upon its hearing in the Superior Court. Canon 46D.

OPINION No. 120 (October 22, 1953)

Inferior Courts—Solicitor practicing criminal law in other courts in county.

Inquiry. Dated August 28, 1953. Facts stated in opinion.

Opinion. It is improper for the solicitor of a recorder's court to represent a defendant in the criminal Superior Court of the same county even though the recorder's court has had no connection with the case. Canon 46D.

OPINION No. 121 (October 22, 1953)

Inferior Courts—Vice recorder practicing criminal law.

Inquiry. Dated September 28, 1953. Facts stated in opinion.

Opinion. It is improper for the vice recorder of a municipal recorder's court to practice criminal law in any court in his county. Canon 46D.

OPINION No. 122 (October 22, 1953)

Partnership—Including in name the name of member who is insurance commissioner.

Inquiry. Dated October 17, 1953. Is it improper for a partnership to retain in the firm's name the name of a member who is the State Commissioner of Insurance when said partner will not share financially or otherwise in partnership business during his term, and where announcement is made of his leave of absence?

Opinion. Use of the partner's name in the manner set forth is probably not a violation of Canons of Ethics, but would be improper.

OPINION No. 123 (October 22, 1953)

Solicitation of Business—Communications with former clients.

Inquiry. Dated September 28, and October 22, 1953. Facts stated in opinion.

Opinion. Letter communications to former clients enclosing forms for use in getting up income tax information with offer of additional assistance therein. and advising of change of office address both constitute improper solicitation of business.

OPINION No. 124 (October 22, 1953)

Solicitor—Partner practicing in his criminal court.

Inquiry. Dated July 17, 1953. Is it unethical for a member of a law partnership to practice in the criminal court wherein one member of the partnership is solicitor, said solicitor having taken a leave of absence from the partnership?

Opinion. The leave of absence granted the solicitor from the partnership does not cure the prohibition contained in Canon 46B and therefore such practice would be unethical.

OPINION No. 125 (October 22, 1953)

Solicitors—Appearing for plaintiff in civil action where there is possibility of criminal action.

Inquiry. Dated September 22, 1953. Facts stated in opinion.

Opinion. Canon 46C prohibits a solicitor from appearing for a plaintiff in a civil action for personal injuries where there is or may be a criminal action involving the same accident.

OPINION No. 126 (October 22, 1953)

Witnesses—Contact with opposing witnesses.

Inquiry. Dated October 16, 1953. Facts stated in opinion.

Opinion. It is unethical for an attorney to contact opponent's witnesses in an attempt to persuade them to refuse to go to designated place for the taking of depositions.

OPINION No. 127 (January 15, 1954)

Solicitor—Releasing information to press about pending criminal case.

Newspapers—Right to information about pending criminal case.

Inquiry. Dated November 19, 1953. Facts stated in opinion.

Opinion. It is unethical for an attorney who is prosecuting a criminal case, either privately or as solicitor, to divulge for publication any facts having to do with the case for the purpose of influencing or prejudicing the minds of the public. An attorney should never divulge any facts in respect to a case except such facts as may be disclosed by the record proper, and it would be unethical for him to communicate facts of record if such communication is for the purpose of influencing public opinion and prejudicing the public's mind in regard to such case.

OPINION No. 128 (January 15, 1954)

Inferior Courts—Solicitor representing prosecuting witness in subsequent civil action.

Inquiry. Dated January 1954. Facts stated in opinion.

Opinion. It is not unethical for the solicitor of a recorder's court to represent in a civil divorce action the victim of an assault whose assailant was

arrested by process from said recorder's court and waived therein the preliminary hearing on said criminal charge.

OPINION No. 129 (January 15, 1954)

Advertising—County court.

Inquiry. Dated January 1954. Facts stated in opinion.

Opinion. It is not improper for officials of a county court to join with other county officials in anniversary or other greetings to the public printed in newspapers.

OPINION No. 130 (April 16, 1954)

Advertising—Data on letterhead.

Inquiry. Dated April 1954. Facts stated in opinion.

Opinion. It is improper for an attorney to carry on his letterhead or other printed material the following designation: "John Doe, Attorney at Law, insurance adjustments, Raleigh, North Carolina."

OPINION No. 131 (April 16, 1954)

Conflicting Interests—Attorney filing caveat to will he drew.

Inquiry. Dated February 20, 1954. An aged father, brought to attorney's office by his son, requested attorney to draft a will. The father seemed quite nervous and attorney had some difficulty in ascertaining his wishes, and several statements made by the father appeared quite peculiar to the attorney. The attorney drafted the will, although there was some question in his mind as to the mental condition of the client. It appeared to the attorney, and still appears, that the provisions of the will were most favorable to his son who brought the client to the attorney's office and unfavorable to other children. However, the will was drafted in exact accordance with the expressed wishes of the father. The father has just died. His two daughters now seek to employ the said attorney to file a caveat to the will alleging lack of mental capacity and undue influence by the son. Can attorney accept such employment?

Opinion. It would be highly improper for attorney to accept employment under the facts outlined above.

OPINION No. 132 (April 16, 1954)

Advertising—Pencils carrying attorney's name.

Inquiry. Dated February 2, 1954. Facts stated in opinion.

Opinion. There is no objection to an attorney using pencils which carry his name and address if they are solely for his own personal use. It would be unethical for the attorney to use such pencils for advertising purposes.

OPINION No. 133 (April 16, 1954)

Solicitor—Restrictions on his law partner.

Inquiry. Dated February 12, 1954. Facts stated in opinion.

Opinion. a. Canon 46D precludes the law partner of the solicitor of the Superior Court from appearing in any criminal matter in the Superior Court of the solicitor's district, whether for a defendant or for the prosecution.

b. The law partner of the solicitor of the Superior Court may appear in criminal matters in inferior courts of the solicitor's district, but he cannot appear in such matters upon their appeal to the Superior Court.

c. The law partner of the solicitor of the Superior Court may serve as solicitor of an inferior court in the Solicitor's district.

OPINION No. 134 (April 16, 1954)

Candor and Fairness—Communicating directly with adversary who is represented by counsel.

Inquiry. Dated January 5, 1954. Facts stated in opinion.

Opinion. It is unethical for plaintiff's attorney to make an offer of settlement directly to defendant who is represented by counsel, even though a copy of the letter containing the offer went directly to defendant's counsel.

OPINION No. 135. (April 16, 1954)

Conflicting Interests—Representation of several parties to automobile accident.

Inquiry. Dated April 3, 1954. X, driving car containing A, B, C, D, E & F, has a wreck with a train. Attorney successfully defends X on the criminal charge of reckless driving, and is employed by X to sue the railroad for personal injuries and property damage. May the attorney likewise represent A, B, and C in an action against the railroad for damages arising out of said wreck?

Opinion. No. There is a conflict of interest between X, and A, B, and C. It is quite possible that A, B and C should sue both the railroad and X, and it would be difficult for attorney, representing all of them, to decide this question. Even if it is determined that they should sue only the railroad and not X, the railroad could still bring X in as a party defendant. Under all these circumstances, the conflicting interests that do or may arise are such as preclude attorney from representing A, B, and C after he has accepted employment from X.

OPINION No. 136 (April 16, 1954)

Attorney—Representing absent defendant in traffic matter.

Inferior Courts—Attorney representing absent defendant in traffic matter.

Solicitation of Business—Attorney representing absent defendant in traffic matter.

Inquiry. Dated January 1954. An out-of-state motorist who is arrested for a traffic violation over which the county recorder's court has jurisdiction may, if he wishes, pay to a justice of the peace who does not have jurisdiction over the case a sum of money which is sufficient to pay the usual fine and costs of the offense charged, plus a $5.00 attorney's fee, and give the justice of the peace written instructions to employ an attorney for him to waive his appearance and plead him guilty at the next term of said recorder's court. The attorney is to use the money to pay the fine and costs to the recorder's court, and the $5.00 to himself for a fee. May attorneys of the county ethically participate in such a practice?

Opinion. No. Participation of attorneys in such a scheme not only lends itself to an abuse of process, but indirectly is a solicitation of business by said attorneys.

OPINION No. 137 (July 16, 1954)

Inferior Courts—Partner of judge practicing criminal law.

Inquiry. Dated May 1, 1954. Facts stated in opinion.

Opinion. While it is unethical for the judge of a recorder's court to appear in any criminal proceeding in any other court of the county in which said

recorder's court is located, his law partners may practice criminal law in any court of said county other than said recorder's court of which he is judge.

OPINION No. 138 (July 16, 1954)

Inferior Courts—Solicitor representing defendant therein.

Inquiry. Dated April 30, 1954. Facts stated in opinion.

Opinion. The solicitor of a recorder's court can never represent a defendant in the court in which he is solicitor nor may he practice in any other criminal court of his county.

OPINION No. 139 (July 16, 1954)

Solicitation of Business—Attorney seeking appointive office.

Inquiry. Dated July 16, 1954. Facts stated in opinion.

Opinion. It appearing that there is a conflict between Opinion No. 50 dated October 21, 1948, and Opinion No. 72 dated July 13, 1951, Opinion No. 50 is hereby rescinded and overruled, and Opinion No. 72 is hereby adopted by the Council.

OPINION No. 140 (October 21, 1954)

Attorney—Announcements—Professional Cards.

Inquiry. Dated July 30, 1954.

1. Is it unethical for public official upon resignation from Commission to mail announcements of resignation and opening of offices for general practice at given address? *Opinion.* It is not unethical.

2. Is it unethical to enclose with such announcement engraved business card giving address of office. *Opinion.* It is not unethical.

3. Is it unethical to send such announcement to physicians with whom attorney has had personal and official contacts while holding office? *Opinion.* It is not unethical.

4. (a) Is it unethical to send such announcement to other attorneys with whom attorney has had personal and official contact during the time that he has held public office? *Opinion.* It is not unethical.

(b) Is it unethical to send such announcement to insurance adjusters? *Opinion.* It would be unethical to send such announcement to insurance adjusters.

5. Is it unethical to send such announcement to officials of companies with whom attorney has had dealings in an official capacity? *Opinion.* It would be unethical to send such announcement to such officials or companies.

OPINION No. 141 (October 21, 1954)

Attorney—Acting as trustee of fund raised by client for expense of litigation.

Inquiry. Dated October 2, 1954. Facts stated in opinion.

Opinion. "A" Company was sued by "B" Company for infringement of plaintiff's patent and their failure to pay royalties to plaintiff. "A" Company employed attorneys. Pending suit "A" Company found itself financially unable to defend without assistance from other companies similarly situated. Thereupon "A" Company requested companies similarly situated to contribute to defense of the action and funds raised were, in the first instance, sent to attorneys as

trustees. Thereafter layman successor trustee was named and funds are to be used to defray cost of litigation. If the suggestion for assistance in the first instance came from "A" Company, there would be no impropriety in attorneys accepting compensation from the fund. If, however, suggestion for assistance in the first instance came from attorneys for "A" Company, then such suggestion was unethical and improper and attorneys should not have accepted funds raised by solicitation at their suggestion. It is highly improper for attorneys to stir up litigation or to engage in solicitation of business in any form.

OPINION No. 142 (October 21, 1954)

Attorney—County Attorney prosecuting deputy sheriff.

Inquiry. Dated July 24, 1954. Facts stated in opinion.

Opinion. Ordinarily a county attorney is employed by the county commissioners to advise the commissioners in their administration in the affairs of the county and is not employed to represent the several county units. The terms of the attorney's employment would govern the situation in which county attorney appears against deputy sheriff who killed a party while another officer was serving warrant. Unless the terms of the attorney's employment embraces representation by him of the several county units, there would be no impropriety in such attorney prosecuting a deputy sheriff.

OPINION No. 143 (October 21, 1954)

Attorney—Signing bond in civil action for other than client.

Inquiry. Dated July 23, 1954. Facts stated in opinion.

Opinion. What is the legality and ethical propriety of an attorney, not an attorney of record in the cause, signing an occasional prosecution bond in civil cases as surety? There is no rule which prevents an attorney not of record from executing a bond as surety, but the execution of such bond by the attorney precludes him from appearing in the case. (The Supreme Court has recently amended the rules in respect to bail bonds, *et cetera.* 238 N.C. 747.) (See also Opinion 47, October 21, 1948.)

OPINION No. 144 (October 21, 1954)

Advertising—Professional cards.

Inquiry. Dated September 20, 1954. Facts stated in opinion.

Opinion. It is not improper for attorney in announcing opening of law offices to indicate that his practice is limited to "General Taxation."

Abandonment—Of child by father, *S. v. Smith*, 301.

Abatement—Of gambling nuisance, *Taylor v. Racing Asso.*, 80.

Abatement and Revival—Pendency of prior action, *Morgan v. Brooks*, 527; survival of action, judgment of dismissal, *Sawyer v. Cowell*, 681.

Acceleration—Of Vested Remainders, *Trust Co. v. McEwen*, 166.

Acceptance—Must be identical with offer and unconditional, *Carver v. Britt*, 538.

Accident Insurance—Murder of insured as excluding liability under insurance policy, *Patrick v. Insurance Co.*, 614.

Actions—Particular actions and prosecutions, see particular titles of actions and crimes; pleadings, see Pleadings; trial, see Trial; action held to restrain nuisance and not in trespass, *Owen v. DeBruhl*, 597; death of party and survival of action, see Abatement and Revival.

Administration — See Executors and Administrators.

Administrative Law—Review and subsequent proceedings, *Johnson v. Board of Education*, 56.

Adultery—See Fornication and Adultery.

Advancements — Whether Deed of Trust was security for future advancements, *Boswell v. Boswell*, 515.

Adverse Possession — Acquisition of riparian rights by user, *Young v. Asheville*, 618; color of title, *Norman v. Williams*, 732.

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Aggrieved Party—Who may appeal, *Boswell v. Boswell*, 515.

Agriculture—Counterclaim for delay in delivery of farm machinery, *Hall v. Christiansen*, 393.

Alibi—Charge on defense of alibi, *S. v. Stone*, 294.

Alimony—See Divorce and Alimony.

Allegations—Must conform to proof, *Young v. Asheville*, 618; *Osborne v. Gilreath*, 685.

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Ancient Document Rule — Map held competent under, *Spears v. Randolph*, 659.

"And-or" — Disapproved, *Johnson v. Board of Education*, 56; *Thomas & Howard Co. v. Ins. Co.*, 109.

Anticipation of Injury — *Billings v. Renegar*, 17; *Reynolds v. Murph*, 60; *Loving v. Whitton*, 273; foreseeability of injury is essential element of proximate cause, *Garland v. Gatewood*, 606.

Appeal and Error—Appeals from Industrial Commission to Superior Court, see Master and Servant; appeals in criminal cases, see Criminal Law; nature and grounds of appellate jurisdiction, *Boswell v. Boswell*, 515; *Cutler v. Winfield*, 555; *Greensboro v. Smith*, 363; judgments appealable, *Langley v. Taylor*, 573; *Reid v. Comrs. of Pilot Mountain*, 551; *DeBruhl v. Highway Comm.*, 616; parties who may appeal, *Boswell v. Boswell*, 515; exception particularizing objection will be considered only on that ground, *Terrace v. Indemnity Co.*, 473; exception to judgment or to signing of judgment, *Crowley v. McDougald*, 404; *Suits v. Ins. Co.*, 483; exceptions to findings of fact, *Browning v. Humphrey*, 285; *Suits v. Ins. Co.*, 483; misstatement of contentions must be brought to court's attention, *Moore v. Bezalla*, 190; necessity of motion to nonsuit, *Elizabeth City v. Hoover*, 569; term to which appeal must be taken, *S. v. Freeman*, 78; record conclusive,

Redd v. Mecklenburg Nurseries, 385; assignments of error, *Suits v. Ins. Co.*, 483; *Spears v. Randolph*, 659; *Ellis v. R. R.*, 747; abandonment of exceptions by failure to discuss in the brief, *Reynolds v. Earley*, 521; *Keith v. Wilder*, 672; *S. v. Gordon*, 356; *S. v. Cole*, 576; *S. v. Faulkner*, 609; *S. v. Williams*, 259; stipulations of parties, *Owens v. DeBruhl*, 597; burden of showing error, *Billings v. Renegar*, 17; *S. v. Poolos*, 382; *Spears v. Randolph*, 659; harmless and prejudicial error, *Redd v. Mecklenburg Nurseries*, 385; *Perkins v. Clarke*, 24; *Moore v. Bezalla*, 190; *Hedge v. Sellers*, 240; *Spears v. Randolph*, 659; *S. v. Poolos*, 382; review of injunctive proceedings, *Owen v. DeBruhl*, 598; review of findings of fact, *Reid v. Johnson*, 201; *Browning v. Humphrey*, 285; *Morris v. Wilkins*, 507; *Scott v. Shackleford*, 738; review of orders on motions to strike, *Gallimore v. Highway Com.*, 350; partial new trial, *Hinson v. Dawson*, 714; remand, *Boswell v. Boswell*, 515; law of the case, *Hobbs v. Goodman*, 297; interpretation of decision, *Morgan v. Brooks*, 527.

Argument—Of solicitor held not prejudicial, *S. v. Willard*, 259; of solicitor held not to transgress bounds of propriety, *State v. Barefoot*, 650.

Armed Forces — Member of armed forces here solely as result of military order is not resident, *Hart v. Coach Co.*, 389.

Arrest and Bail—Resisting arrest, *S. v. Scott*, 178; *S. v. Faulkner*, 609; bail bonds, *S. v. Harrell*, 304; injury to prisoner during escape after arrest, *Garland v. Gatewood*, 606.

Arrest of Judgment—Motions in, *S. v. Hammonds*, 226; *S. v. Scott*, 178; *S. v. Smith*, 301; *S. v. Faulkner*, 609; *S. v. Chestnutt*, 401.

Arson—*S. v. Thomas*, 337.

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Assignments of Error—Not discussed in brief deemed abandoned, *S. v. Gordon*, 356; *S. v. Cole*, 576; *S. v. Faulkner*, 609; *Keith v. Wilder*, 672; must be predicated upon exceptions, *S. v. Gordon*, 356; functions of, *Suits v. Ins. Co.*, 483; should present single question of law for review, *Spears v. Randolph*, 659; exceptions must be grouped, *Ellis v. R. R.*, 747.

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negligence, *Loving v. Whitton*, 273; *Holbrook v. Page*, 487; opinion evidence as to speed, *S. v. Becker*, 321; *Hinson v. Dawson*, 714; physical facts at scene, *S. v. Becker*, 321; sufficiency of evidence on issue of negligence, *Harrison v. Kapp*, 408; *Coach Co. v. Burrell*, 432; *Keaton v. Taxi Co.*, 589; *Ins. Co. v. Motors*, 67; nonsuit for contributory negligence, *Moore v. Bezalla*, 190; *Garmon v. Thomas*, 412; *Coach Co. v. Burrell*, 432; nonsuit for intervening negligence, *Holbrook v. Page*, 487; instructions in auto accident cases, *Billings v. Renegar*, 18; *Hinson v. Dawson*, 714; actions by guest, *Osborne v. Gilreath*, 685; respondeat superior, *Osborne v. Gilreath*, 685; manslaughter, *S. v. Gatlin*, 175; *S. v. Becker*, 321; speeding, *Hinson v. Dawson*, 714; drunken driving, *S. v. Willard*, 259; *S. v. Cole*, 576; revocation and suspension of license, *Fox v. Scheidt*, 31; *S. v. Cole*, 576; *Mintz v. Scheidt*, 268; parking regulations, *S. v. Rumfelt*, 375.

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Bailment—*Herring v. Creech*, 233.

Baptist Church — Controversy over control and management of property, *Reid v. Johnston*, 197.

Bastards—Wilfull failure to support, *S. v. Perry*, 119; right to custody, *Browning v. Humphrey*, 285.

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Brokers—Fraud on part of broker in sale of timber, *Keith v. Wilder*, 672; right to commissions, *Carver v. Britt*, 538.

Builder's Performance Bond—*Terrace, Inc., v. Indemnity Co.*, 473.

Burden of Proof—Where plaintiff has burden of clear, strong, and convincing proof whether the plaintiff has met required intensity of proof is for jury, *Bowen v. Darden*, 11; burden of establishing resulting trust, *Bowen v. Darden*, 11; in actions for negligent injuries, *Garland v. Gatewood*, 606; to reform deeds, *Hege v. Sellers*, 240; in homicide prosecutions, see Homicide; in action in trespass to try title, *Norman v. Williams*, 732; charge on burden of proof, *Billings v. Renegar*, 17; *S. v. Stone*, 294; *Redd v. Mecklenburg Nurseries*, 385; *S. v. Ramsey*, 181; *Moore v. Bezalla*, 190; charge on reasonable doubt held erroneous, *S. v. Faulkner*, 609; charge that if jury found defendant guilty on one count to find him guilty on another count, *Held* error, *S. v. Cephus*, 562; verdict may not be directed in favor of

party having burden of proof, *Reynolds v. Earley*, 521.

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"Until"—Provision of policy that it not be valid unless countersigned does not refer to time but authenticity, *Pruitt v. Ins. Co.*, 725.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 9. Pendency of Action—Identity of Actions.

The owner of an automobile instituted action against the owner-operator of the other car involved in the collision. The original defendant had the driver of plaintiff's car and an occupant thereof joined as additional defendants. The occupant of plaintiff's car filed no cross-action against the original defendant, but thereafter instituted an independent action against him. *Held:* The second action is not subject to abatement on the ground of the pendency of the first, since the issues in the second action were not essentially a part of the first action and did not have to be adjudicated therein. *Morgan v. Brooks*, 527.

§ 16½. Death of Party and Survival of Action—Order of Dismissal or Continuance and Joinder of Parties.

An action which survives disability or death does not abate until a judgment of the court is entered to that effect. *Sawyer v. Cowell*, 681.

The power of the court to allow an action which survives the death of defendant to be continued against defendant's personal representative or successor in interest may not be invoked by a plaintiff who has kept his action in a semi-dormant condition for a number of years and then called defendant's heir into court after the heir, by lapse of time, is unable to make good his defense or that defense which the ancestor might have made. *Ibid.*

Granting of motion to abate after action had been dormant for almost seven years *held* within discretionary power of trial court. *Ibid.*

ADMINISTRATIVE LAW.

§ 6. Review and Subsequent Proceedings.

Where the Superior Court, on appeal from an administrative board, holds that certain findings are not supported by evidence and remands the cause, the board is bound thereby and may not merely rephrase the original findings and adopt them as so rephrased. *Johnson v. Board of Education*, 56.

ADVERSE POSSESSION.

§ 9c. Color of Title—Fitting Description to Land Claimed.

A deed offered in evidence is color of title only as to the land designated and described in it. *Norman v. Williams*, 732.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

Since dissimilarity as to a material fact may call for application of different principles of law, where the specific determinative facts are not established in the lower court, the Supreme Court will not decide the question sought to be presented, since such decision would amount to an advisory opinion on abstract questions. *Boswell v. Boswell*, 515.

The Supreme Court, in the exercise of its supervisory power over lower courts, will take cognizance *ex mero motu* of the lack of authority of a named guardian *ad litem* for a nonexistent party. *Cutler v. Winfield*, 555.

Adjudication of whether a municipality has power to supplement funds for a war memorial with moneys derived from sources other than taxation should

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not be made in the absence of the factual data as to the source and character of such funds. *Greensboro v. Smith*, 363.

§ 2. Judgments Appealable.

An order overruling a demurrer *ore tenus* is not appealable. *Langley v. Taylor*, 573.

Ordinarily, an order of the lower court overruling a demurrer *ore tenus* is not appealable, but when the case involves a matter of public interest and a continuance of restraining order, the Supreme Court may nevertheless entertain the appeal. *Reid v. Comrs. of Pilot Mountain*, 551.

An appeal from an order entered on pre-trial hearing specifying the issue to be submitted to the jury, is premature and will be dismissed without prejudice. *DeBruhl v. Highway Com.*, 616.

§ 3. Parties Who May Appeal.

Appellee may not maintain that appellant's claim is void and that, therefore, appellant is not the party aggrieved by judgment in his favor for a part of his claim, when it is admitted in the pleadings that the appellant's mortgage constituted a valid lien and only the amount of the indebtedness secured is controverted, *a fortiori* when the facts upon the invalidity of the mortgage is asserted do not appear of record but only in the brief. *Boswell v. Boswell*, 515.

§ 6c (1). Form and Sufficiency of Objections and Exceptions in General.

Where the court enters an order striking certain paragraphs from the pleadings and likewise denying motion to make an additional party defendant, an exception particularizing objection solely to so much of the order as strikes the paragraphs, does not support an assignment of error to the refusal to make the additional party defendant. *Terrace, Inc., v. Indemnity Co.*, 473.

§ 6c (2). Exception to Judgment or to Signing of Judgment.

A sole exception to the signing of the judgment is sufficient to present for review the question whether error of law appears on the face of the record. *Crowley v. McDougald*, 404.

A sole exception to the judgment presents for review the single question whether the facts found support the judgment, and does not present the findings of fact or the evidence upon which they are based. *Suits v. Ins. Co.*, 483.

§ 6c (3). Exceptions to Findings of Fact.

An exception to the finding of facts which does not point out any particular finding to which the exception is taken, is a broadside exception and does not raise the question of the sufficiency of the evidence to support the findings or any one or more of them. *Browning v. Humphrey*, 285; *Suits v. Ins. Co.*, 483.

§ 6c (6). Requirement That Matter Be Brought to Trial Court's Attention to Support Exception to Charge.

Exceptions to the statement of the contentions of a party, not objected to and brought to the court's attention in apt time, are unavailing on appeal. *Moore v. Bezalla*, 190.

§ 7. Preservation of Grounds of Review—Motions in Superior Court.

The question of the sufficiency of the evidence to justify the submission of an issue to the jury must be properly raised in the trial court and may not be presented for the first time on appeal, and where there is no exception to the sub-

mission of the issue of contributory negligence and no request for instructions thereon, appellant may not challenge the sufficiency of the evidence to support the verdict of the jury on that issue, notwithstanding formal motion to set aside the verdict on that issue as being contrary to the law and the evidence. *Elizabeth City v. Hoover*, 569.

§ 16. Term of Supreme Court to Which Appeal Must Be Taken.

Where judgment is entered in an action tried at a term prior to the convening of the Supreme Court, the appeal must be taken to that term of the Supreme Court. *S. v. Freeman*, 78.

§ 22. Conclusiveness and Effect of Record.

The Supreme Court is bound by the record. *Redd v. Mecklenburg Nurseries*, 385.

§ 23. Form and Requisites of Assignments of Error.

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 appellant desires to preserve and present for review. *Suits v. Ins. Co.*, 483.

An assignment of error should present a single question of law for consideration by an appellate court. *Spears v. Randolph*, 659.

Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. *Ellis v. R. R.*, 747.

§ 24. Necessity of Exception to Support Assignment of Error.

An assignment of error not supported by an exception will be disregarded. This rule is mandatory and will be enforced *ex mero motu*. *Suits v. Ins. Co.*, 483.

§ 29. Abandonment of Exceptions by Failure to Discuss in the Brief.

A ground of objection not discussed by appellants in their brief is deemed abandoned. *Reynolds v. Early*, 521.

Exceptions not brought forward as separate assignments of error and not discussed in the brief are deemed abandoned. *Keith v. Wilder*, 672; *S. v. Gordon*, 356; *S. v. Cole*, 576; *S. v. Faulkner*, 609; *S. v. Williams*, 259.

§ 37½. Stipulations of Parties.

Where the complaint and affidavits are sufficient to support the conclusion that defendants had entered upon plaintiffs' land and were maintaining thereon a continuous nuisance, defendants may not contend that plaintiffs had waived the allegations as to nuisance by agreeing to defendants' statement of case on appeal that the action was for trespass to try title, since the verified complaint, affidavits and orders also appear in the case on appeal. *Owen v. DeBruhl*, 597.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellant not only to show error, but to show prejudicial error amounting to the denial of some substantial right. *Billings v. Renegar*, 17; *S. v. Poolos*, 382; *Spears v. Randolph*, 659.

§ 39b. Error Harmless Because of Answer of Jury to Another Issue.

Where, upon the stipulations of the parties, their rights are dependent upon the answer to the first issue, any error in the charge relating to a subsequent

issue, which is mere surplusage, cannot be prejudicial. *Redd v. Mecklenburg Nurseries*, 385.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The admission of technically incompetent testimony as to a collateral matter cannot justify a new trial when it is apparent that it could not have influenced the jury in its decision on the issue in dispute. *Perkins v. Clarke*, 24.

Appellant may not complain of the admission of evidence upon an issue answered by the jury in his favor. *Moore v. Bezalla*, 190.

The exclusion of evidence cannot be held prejudicial when evidence of the same import is thereafter admitted. *Hege v. Sellers*, 240; *Redd v. Mecklenburg Nurseries*, 385; *Spears v. Randolph*, 659.

Where the record does not show what the answer of the witness would have been, appellant fails to show that the exclusion of the evidence was prejudicial. *Ibid.*

And this rule applies even though the question is asked on cross-examination. *S. v. Poolos*, 382.

Where it does not appear in what way the answer of a witness would have been material or that its exclusion was prejudicial, an exception to the exclusion of the testimony cannot be sustained. *Hege v. Sellars*, 240.

Where it is stipulated that if the jury should find that the contract alleged existed between the parties, plaintiff would be entitled to recover a stipulated sum, whether an officer of defendant considered the amount theretofore paid plaintiff full compensation for his services, is immaterial and exclusion of testimony of the officer to this effect cannot be prejudicial. *Redd v. Mecklenburg Nurseries*, 385.

§ 40c. Review of Injunctive Proceedings.

On appeal from the continuance of a temporary restraining order, the Supreme Court may review the evidence in order to determine on appeal whether the order was justified. *Owen v. DeBruhl Agency*, 598.

§ 40d. Review of Findings of Fact.

In a trial by the court by agreement, the court's findings of fact are as effective as the verdict of a jury, and are conclusive on appeal if there is competent evidence to support them. *Reid v. Johnston*, 201.

Where the evidence is not in the record, it will be presumed that the findings of fact are supported by evidence. *Browning v. Humphrey*, 285.

Even in the absence of statutory requirement, the lower court must find the material facts in order that its conclusions of law may be properly reviewed, but in the absence of request that such findings of fact be made it will be presumed that the court found facts upon supporting evidence sufficient to sustain the judgment. *Morris v. Wilkins*, 507.

Where judgment is entered upon misapprehension of law, presumption of finding from supporting evidence does not obtain. *Ibid.*

Where rulings are made under a misapprehension of the law or the facts, the practice is to vacate such rulings and remand the cause for further proceedings as to justice appertains and the rights of the parties may require. *Ibid.*

In a trial by the court under agreement of the parties, motions for nonsuit and to set aside the findings of fact on the ground that the findings are not

APPEAL AND ERROR—*Continued.*

supported by evidence require a determination only of whether there is competent evidence in the record sufficient to support those findings which are necessary to sustain the conclusions of law of the court. *Scott v. Shackleford*, 738.

§ 40f. Review of Orders on Motions to Strike.

Since the prejudicial effect of objectionable allegations in a pleading ordinarily arises from a reading of such allegations to the jury, it would seem that such allegations could not be prejudicial in a hearing before the clerk. *Gallimore v. Highway Com.*, 350.

The denying or granting of a motion to strike allegations from a pleading under the provisions of G.S. 1-153 will not be disturbed on appeal unless it is made to appear that appellant was prejudiced thereby. *Ibid.*

Upon appeal from a ruling upon a motion to strike, the Supreme Court will not undertake to chart the course of the trial in advance of the hearing. *Ibid.*

§ 48. Partial New Trial.

In this action for wrongful death and for personal injuries between the date of injury and death, and for property damage sustained in the collision, error relating to contributory negligence was committed in the trial. The jury answered in the negative the issue of whether intestate was killed through the negligence of defendants, but it appeared from the record that the answer to this issue was predicated upon a finding that intestate did not die as a result of the injuries sustained in the accident. *Held:* The error requires only a partial new trial and the verdict on the cause of action for wrongful death will stand, since it is entirely separable from the others and the error could not have affected the jury's verdict in that cause. *Hinson v. Dawson*, 714.

§ 50. Remand.

Where the controverted and determinative facts are not established by admission, or findings supported by evidence, or verdict of the jury, the cause must be remanded. *Boswell v. Boswell*, 515.

§ 51a. Law of the Case.

Decision on appeal becomes the law of the case and is controlling when the identical question is thereafter presented. *Hobbs v. Goodman*, 297.

§ 51c. Interpretation of Decision of Supreme Court.

An opinion of the Supreme Court should be considered in the light of the facts in the particular case in which it was delivered. *Morgan v. Brooks*, 527.

ARREST AND BAIL.

§ 3. Criminal Liability for Resisting Arrest.

An indictment charging that defendant did unlawfully "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office . . ." is insufficient to charge the offense of resisting arrest. *S. v. Scott*, 178; *S. v. Faulkner*, 609.

§ 8. Liabilities on Bail Bonds.

Neither the solicitor nor the court is under duty to advise the surety on an appearance bond of the progress of the case in court, the surety being entitled only to notice of default given by service of the *sci. fa.* *S. v. Harrell*, 304.

ARSON.

§ 1. Nature and Elements of the Offense in General.

In order to prove the *corpus delicti* in a prosecution for arson, the state must show not only the burning of the house or other structure, but also that the burning was caused by criminal means. *S. v. Thomas*, 337.

§ 7. Sufficiency of Evidence and Nonsuit.

The *corpus delicti* may be established by direct or by circumstantial evidence. *S. v. Thomas*, 337.

Defendant's confession and evidence *aliunde* establishing the *corpus delicti* *held* sufficient to be submitted to the jury. *Ibid.*

ASSAULT.

§ 8. Degrees of Assault.

An assault with intent to kill, without averment of the infliction of serious injury, is a misdemeanor. *S. v. Floyd*, 298.

An assault on a female committed by a man or boy over eighteen years of age is not a simple assault according to the usually accepted meaning of that charge. It is a misdemeanor punishable in the discretion of the court. *Ibid.*

§ 14. Instructions in Prosecutions for Assault.

In a prosecution for assault, where defendant's evidence tends to show that the shooting was accidental or by misadventure caused by a tussle over the pistol which the prosecuting witness had pointed at him, defendant has a substantial legal right to have the judge declare and explain the law arising on this evidence, and failure of the court to do so is prejudicial error. *S. v. Floyd*, 298.

The charge of the court construed contextually *is held* to have properly instructed the jury that the plea of self-defense was available to defendant if defendant did not provoke the assault and if he did not use more force than reasonably appeared to be necessary to repel an assault or threatened assault against him. *S. v. Cephus*, 562.

ATTORNEY AND CLIENT.

§ 6. Scope of Authority.

The fact that one of the attorneys representing the employer in an action against the third person tort-feasors had theretofore represented the employee in an action against the same defendants, does not import that such attorney was representing the employer in the former action, since the relationship of employer and employee in itself does not confer the power upon the one to represent or bind the other in litigation. *Coach Co. v. Burrell*, 432.

§ 9. Testimony by Attorney at Trial.

It is competent for an attorney who is actively participating in the trial to testify as to matters which transpired in a conference of the parties prior to the controversy for the purpose of contradicting the testimony of a witness of the opposing party as to such matters. *Hege v. Sellers*, 240.

AUTOMOBILES.

§ 6. Breach of Warranty in Sale.

Action *held* one to rescind purchase of auto for breach of warranty of mechanical condition of automobile. *Hendrix v. Motors*, 644.

AUTOMOBILES—*Continued.*

§ 7. Safety Statutes and Ordinances in General.

The doctrine of foreseeability applies even though the action is based on the violation of a motor vehicle regulation. *Billings v. Renegar*, 17.

Where the violation of a criminal statute regulating the operation of motor vehicles is relied upon in a civil action as constituting negligence *per se*, the statute must be strictly construed as a criminal statute, and further, plaintiff must show that its violation was a proximate cause of the accident. *Hinson v. Dawson*, 714.

§ 8c. Turning and Stopping.

First of four cars in line turned right into side road without giving signal, forcing second car to stop. Third car came to stop, but fourth car collided with rear of third car, damaging fourth car. *Held:* Evidence was sufficient for jury on issue of negligence of driver of fourth car in action by owner of fourth car to recover damage. *Ins. Co. v. Motors*, 67.

§ 8g. Skidding.

The mere skidding of a motor vehicle does not imply negligence. *Coach Co. v. Burrell*, 432.

§ 8i. Intersections and Through Streets.

The driver of a car along the dominant highway has the right to assume that the driver along the servient highway will obey the mandates of our traffic regulations and stop or yield the right of way before entering the intersection in the absence of any fact or circumstance sufficient to put him on notice to the contrary. *Loving v. Whitton*, 273.

Driver entering intersection first has right of way over car entering such intersection from left. *Harrison v. Kapp*, 408.

When a motorist traveling on a dominant highway and a motorist traveling on an intersecting servient highway approach the intersection of the two highways so nearly at the same time that either one or the other must yield the right of way or else create a dangerous traffic hazard, it is the duty of the motorist on the servient highway to slow down and, if necessary, stop and yield the right of way. *Marshburn v. Patterson*, 441.

In the absence of some fact or circumstance sufficient to put a man of ordinary prudence on notice that the motorist traveling on the servient highway does not intend to, or cannot slow down in time to, yield the right of way, the failure of a motorist on the dominant highway to keep a proper lookout cannot constitute one of the proximate causes of a collision at the intersection, since under such circumstances the motorist on the dominant highway has the right to assume that the motorist on the servient highway will yield the right of way as required by law. *Ibid.*

It is the duty of a motorist traveling along a dominant highway to keep a proper lookout, and where a person of ordinary prudence who is keeping a proper lookout would see and apprehend that a motorist traveling along a servient highway approaching the intersection with the dominant highway is traveling at such high rate of speed that he cannot or will not stop and yield the right of way, or would apprehend any other circumstance sufficient to give him such notice, and such circumstance is apparent to a driver along the dominant highway in time to enable him to stop or slow down so as to avoid collision, the failure of the driver along the dominant highway to keep a proper lookout and reduce speed constitutes a proximate cause of the resulting collision. *Ibid.*

AUTOMOBILES—*Continued.*

§ 12d. Speed—Business Districts.

Whether a motorist is traveling in a business district within the purview of G.S. 20-38 (a) is to be determined with reference to the frontage along the street or highway on which he is traveling, and conditions along intersecting streets or highways are to be excluded from consideration. *Hinson v. Dawson*, 714.

A building used for business purposes need not be in actual contact with the front property line, but fronts upon the street or highway within the purview of G.S. 20-38 (a) if the space intervening between the front of the building and the front property line and used as a means of access to the building is reasonable in extent. *Ibid.*

A business district within the purview of G.S. 20-38 (a) is to be determined on the basis of frontage actually occupied by buildings when their side lines are projected or extended to the street or highway, without taking into consideration the open spaces between the buildings, notwithstanding such spaces may be used for business purposes or incident to the operation of a business establishment. *Ibid.*

A district is a business district within the purview of G.S. 20-38 (a) if 75% or more of the frontage for a distance for 300 feet or more on either side of the street or highway is occupied by buildings in use for business purposes, and it is not required that the frontage on both sides of the street or highway should be so used. *Ibid.*

Speed less than 20 miles per hour in business district is unlawful if greater than reasonable and prudent under the circumstances. *Ibid.*

§ 14. Following Vehicles Traveling in Same Direction.

First of four cars in line turned right into side road without giving signal, forcing second car to stop. Third car came to stop, but fourth car collided with rear of third car, damaging fourth car. *Held:* Evidence was sufficient for jury on issue of negligence of driver of fourth car in action by owner of fourth car to recover damage. *Ins. Co. v. Motors*, 67.

§ 16. Pedestrians.

It is the duty of a pedestrian on a highway to yield the right of way to vehicular traffic. *Moore v. Bezalla*, 190.

But failure to do so is not negligence *per se*, but only evidence of negligence. *Ibid.*

The driver of a vehicle is required to yield the right of way to a pedestrian crossing a street along an unmarked crosswalk at an intersection at which traffic control signals are not in operation. *Keaton v. Taxi Co.*, 589.

A pedestrian crossing the highway at a place which is not within a marked cross-walk or within an unmarked cross-walk at an intersection, is under duty to yield the right of way to vehicles along the highway, G.S. 20-174 (a), subject to the duty of a motorist to exercise due care to avoid colliding with any pedestrian and to give warning by sounding horn whenever necessary. *Garmon v. Thomas*, 412.

Evidence of negligence of taxi driver in hitting pedestrian crossing street to board bus *held* sufficient for jury. *Keaton v. Taxi Co.*, 589.

§ 18b. Negligence and Proximate Cause.

The doctrine of foreseeability applies even though the action is based on the violation of a motor vehicle regulation. *Billings v. Renegar*, 17.

AUTOMOBILES—*Continued.*

§ 18d. Concurring Negligence.

Upon facts alleged, negligence of driver along servient highway was sole proximate cause of collision, and demurrer of driver along dominant highway should have been sustained in action by guest. *Loving v. Whitton*, 273.

Upon evidence, negligence of driver along street in traveling at excessive speed, and negligence of driver of truck in coming into street from private driveway without lights or signal and without maintaining proper lookout, concurred in causing collision. *Holbrook v. Page*, 487.

§ 18g (2). Relevancy and Competency of Evidence.

Where the question of intestate's intoxication at the time of the fatal accident is germane on the issue of contributory negligence, testimony that he was intoxicated some one and one-half hours prior to the accident, when considered with the other evidence of his intoxication almost up to the time of the accident, *is held* competent as having some bearing on his condition at the time of the accident, the weight of the evidence being for the jury. *Moore v. Bezalla*, 190.

§ 18g (4). Opinion Evidence as to Speed.

It is competent for a person of ordinary intelligence and experience to express an opinion from his observation of a car as to its speed, and while such witness's opportunity to judge generally relates to the weight of his testimony rather than to its admissibility, where the witness has no reasonable opportunity to judge the speed of the car, his testimony in regard thereto is without probative force. *S. v. Becker*, 321.

The witness testified that she first saw defendant's car when it was only 15 feet away, and that she then looked toward her husband, who was in front of her, and saw him shove her son out of the pathway of the car before it struck her and her daughters. Other evidence established that defendant's car came to a complete stop within 8 or 10 feet after the impact. *Held:* Under the circumstances and in the light of the physical facts the witness's testimony that the car was traveling at a speed of 55 miles per hour when she saw it, is without probative value. *Ibid.*

Testimony of a witness that the automobile in question was traveling between 35 and 40 miles per hour, there being no testimony of a greater speed, may not be considered as tending to show a speed in excess of 35 miles per hour. *Hinson v. Dawson*, 714.

§ 18g (5). Physical Facts at Scene.

The physical facts at the scene of the accident may speak louder than the testimony of the witness. *S. v. Becker*, 321.

§ 18h (2). Sufficiency of Evidence of Negligence and Nonsuit.

This action was instituted to recover damages resulting from a collision at an intersection of streets in a municipality. Plaintiff's evidence that she entered the intersection first and that defendants entered the intersection from her left, is sufficient to take the case to the jury over defendants' motion to nonsuit. *Harrison v. Kapp*, 408.

Evidence *held* sufficient for jury on question of whether skidding of vehicle was result of negligence. *Coach Co. v. Burrell*, 432.

The portions of the evidence favorable to plaintiff, considered in the light most favorable to her and giving her every reasonable intendment therefrom, to the effect that she was crossing at an intersection of streets and was struck,

AUTOMOBILES—*Continued.*

when she was approximately two-thirds of the way across, by defendant's taxi which was driven out from behind the bus plaintiff intended to board, *is held* to justify the inference of negligence on the part of the taxi driver as a proximate cause of her injuries, and nonsuit was improper. *Keaton v. Taxi Co.*, 589.

The evidence tended to show that four cars were traveling in line upon a three-lane highway, that the driver of the front car made a right turn into a side road without giving a signal, forcing the second driver in line to stop in order to avoid hitting the first car, that the driver of the third car brought it to a stop without colliding with the second car, and that the driver of the fourth car collided with the rear of the third car. There were no vehicles approaching from the opposite direction. *Held:* The evidence was sufficient to overrule nonsuit in an action by the owner of the fourth car against its driver to recover for the damage to the car. *Ins. Co. v. Motors*, 67.

§ 18h (3). Sufficiency of Evidence of Contributory Negligence and Nonsuit.

Evidence that pedestrian was intoxicated shortly before the accident and failed to yield right of way to motorist *held* to require submission of pedestrian's contributory negligence to jury. *Moore v. Bezalla*, 190.

Evidence *held* to show contributory negligence on part of pedestrian struck while crossing open highway. *Garmon v. Thomas*, 412.

In this action by the owner of a bus to recover for damages to the bus resulting from a collision with a tractor-trailer, the evidence *is held* not to show contributory negligence as a matter of law on the part of the bus driver, and denial of defendants' motion for involuntary nonsuit was proper. *Coach Co. v. Burrell*, 432.

Nonsuit on ground that motorist traveling on dominant highway should have seen that motorist traveling on servient highway was going at excessive speed rendering it impossible for him to stop before entering intersection, *held* properly denied. *Marshburn v. Patterson*, 441.

§ 18h (4). Sufficiency of Evidence and Nonsuit on Issue of Concurring and Intervening Negligence.

Evidence *held* sufficient on issue of concurring negligence of driver along street in going at excessive speed, and driver coming out of private driveway into street without lights and without maintaining proper lookout, and therefore nonsuit requested by one defendant on ground that negligence of other defendant was sole proximate cause of collision, was properly denied. *Holbrook v. Page*, 487.

§ 18i. Instructions in Auto Accident Cases.

The failure of the court to charge the law concerning the operation of an automobile while under the influence of intoxicating liquor *held* not error, there being neither allegation nor proof that defendant at the time was operating his car while under the influence of intoxicating liquor. *Billings v. Renegar*, 18.

Where it is apparent from a plat introduced in evidence that the testimony of the witnesses in regard to the frontage along the highway used for business purposes included not only the buildings but the open spaces between the buildings and that the evidence, when so considered, discloses that the area was not a business district within the purview of G.S. 20-38 (a), an instruction to the effect that if defendant was driving in excess of 20 miles per hour in a business district such speed was unlawful, must be held for prejudicial error. *Hinson v. Dawson*, 714.

AUTOMOBILES—*Continued.*

§ 22. Actions by Guest or Passenger Against Owner.

In this action by administrator of guest in car against owner, the evidence *is held* insufficient to show that owner was driving or that owner in any manner interfered with operation of car by the driver, and nonsuit was proper. *Osborne v. Gilreath*, 685.

G.S. 20-71.1 does not raise presumption that owner was driving or that he permitted incompetent to drive. *Ibid.*

§ 24½e. Sufficiency of Evidence on Issue of Respondeat Superior.

Where the theory of the complaint is that defendant was driving the car or that it was being driven by another under defendant's direction and control, and there is no allegation of agency or of negligence of an alleged agent, plaintiff cannot call to his aid the provisions of G.S. 20-71.1 to prove that defendant himself was operating the car or had entrusted its operation to one he knew or should have known was likely to cause an accident by reason of incompetency, carelessness or recklessness, since the sole purpose of the statute is to prove agency in those cases in which it is charged that the negligence of a nonowner operator caused the accident. *Osborne v. Gilreath*, 685.

§ 28g. Manslaughter Prosecutions.

In this prosecution for manslaughter, each defendant contended that the other was driving the automobile involved in the fatal accident. The jury returned a verdict that one defendant was not guilty of manslaughter and that the other defendant was "guilty of driving." The court immediately inquired "and guilty of manslaughter?". The jury replied, "yes." *Held:* "Guilty of driving" is no crime and the verdict is not responsive to the charge, and while the court had discretionary power to give additional instructions and have the jury redeliberate, the court was without authority to suggest to the jury what their verdict should be, and a new trial is ordered. *S. v. Gatlin*, 175.

Evidence *held* insufficient to be submitted to the jury in this prosecution for manslaughter. *S. v. Becker*, 321.

§ 29a. Reckless Driving and Speeding.

The operation of an automobile in a business district in excess of 20 miles per hour is a criminal offense, punishable by fine or imprisonment, or both, G.S. 20-141, G.S. 20-38 (a), G.S. 20-176. *Hinson v. Dawson*, 714.

But statute defining business district must be strictly construed. *Ibid.*

§ 30d. Prosecutions for Drunken Driving.

In a prosecution under G.S. 20-138 it is competent for an expert witness to testify as to the results of a test of the defendant's blood, based on a sample taken less than an hour after the alleged offense with defendant's consent, as to the alcoholic content of the blood. *S. v. Willard*, 259.

Lay witness may testify from observation as to whether defendant was drunk at particular time. *Ibid.*

Evidence that defendant was intoxicated within the purview of G.S. 20-138 while driving a vehicle on the public highways of this State *held* amply sufficient to be submitted to the jury even in the absence of expert testimony as to the alcoholic content of defendant's blood. *Ibid.*

Evidence of defendant's guilt of driving while under the influence of intoxicating beverage *held* sufficient for jury. *S. v. Cole*, 576.

AUTOMOBILES—*Continued.*

Where a statute proscribes a higher penalty for repeated convictions for similar offenses, whether defendant theretofore had been convicted under the statute is for the jury to determine and not the court. *Ibid.*

§ 34. Revocation and Suspension of Driving Licenses.

The State Department of Motor Vehicles is vested with exclusive authority to issue, suspend, and revoke licenses to operate motor vehicles in this State. *Fox v. Scheidt*, 31; *S. v. Cole*, 576.

A plea of *nolo contendere* offered by defendant and accepted by the State is equivalent to a plea of guilty for the purposes of the case in which it is entered, but does not establish the fact of guilt for any other purpose. *Fox v. Scheidt*, 31.

Defendant entered a plea of *nolo contendere* to a charge of a second offense of operating an automobile while under the influence of intoxicating liquor, which plea was accepted by the court, and a record of the entering and the acceptance of the plea was forwarded to the Commissioner of Motor Vehicles. *Held:* Under G.S. 20-17, it was the mandatory duty of the Commissioner of Motor Vehicles to revoke defendant's license for a period in compliance with G.S. 20-19 (d), as a ministerial act performed in the same case in which the plea was entered, G.S. 20-24 (a) (c), and no appeal lies therefrom. G.S. 20-25. *Ibid.*

An official notice and record of "revocation of license" for the specified reason of "conviction of involuntary manslaughter" mailed to a driver by the Department of Motor Vehicles, *is held* to show that the license was revoked under G.S. 20-17 rather than suspended under G.S. 20-16, and does not support a finding by the trial court that the license was suspended under the latter statute. *Mintz v. Scheidt*, 268.

A plea of *nolo contendere* to a charge of manslaughter resulting from the operation of an automobile supports the revocation of the driver's license under the mandatory provisions of G.S. 20-17. *Ibid.*

The right of appeal under G.S. 20-25 is granted only when the Department of Motor Vehicles exercises its discretionary power under G.S. 20-16; no appeal lies where the Department revokes a license in accordance with the mandatory provisions of G.S. 20-17, and the lower court acquires no jurisdiction by an attempted appeal and the entire proceeding is void *ab initio*. *Ibid.*

Where the Department of Motor Vehicles revokes a driver's license under the mandatory provisions of G.S. 20-17, the Department will not be estopped from denying that it was acting under the provisions of that statute by reason of a letter subsequently written to the licensee granting him a hearing under G.S. 20-16 (c), since in such instance a hearing is not authorized by law. *Ibid.*

Upon defendant's conviction of operating a motor vehicle while under the influence of intoxicating beverage, the court may not suspend judgment upon condition that the defendant not operate a motor vehicle upon the public roads during the period of suspension unless defendant consents thereto, expressly or by implication. *S. v. Cole*, 576.

§ 35. Parking Regulations.

The *prima facie* rule of evidence created by G.S. 20-162.1 is applicable to prosecutions for violation of G.S. 20-162. *S. v. Rumfelt*, 375.

G.S. 20-162.1 creates no criminal offense, but prescribes that when the *prima facie* rule of evidence therein set forth is relied upon by the State in a criminal prosecution, the punishment shall be a penalty of $1.00. *Ibid.*

AUTOMOBILES—*Continued.*

The violation of G.S. 20-162 by parking within 25 feet from the intersection of curb lines at an intersection of highways within a municipality is a misdemeanor, G.S. 20-176, notwithstanding that the *prima facie* rule of evidence created by G.S. 20-162.1 is invoked. The word "penalty" is used in the latter statute in the broad sense of punishment and not in the sense of a penalty recoverable in a civil action. *Ibid.*

BAILMENT.

§ 2. Estoppel of Bailee to Deny Bailor's Title.

The bailee is estopped to dispute or deny the bailor's title for the purpose of setting up title in himself. *Herring v. Creech*, 233.

§ 7. Actions for Conversion.

Surrender of the property to the true owner by the bailee is a complete defense to an action by the bailor for conversion. But if such third person is not the true owner, good faith or honest mistake on the part of the bailee in surrendering possession to him is no defense. *Herring v. Creech*, 233.

Where a lienholder is entitled to possession of the personalty by reason of the debtor's default, the lienholder is entitled to possession as against the bailee of the debtor, since a bailee can have no better right than the bailor. *Ibid.*

BASTARDS.

§ 1. Nature and Elements of Offense of Willful Failure to Support.

The willful failure to support an illegitimate child is a continuing offense, and therefore dismissal for want of evidence that the failure to support was willful will not preclude a subsequent prosecution. *S. v. Perry*, 119.

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions for Willful Failure to Support.

Where, in a prosecution for willful neglect and refusal to support an illegitimate child, the evidence discloses that no demand for support of the child was made upon defendant until after the warrant was drawn, nonsuit must be entered, since the warrant must be supported by the facts as they existed at the time it was formerly laid, and cannot be supported by evidence of willful failure thereafter. *S. v. Perry*, 119.

§ 12. Right to Custody and Control of Illegitimate Child.

The mother of an illegitimate child is its natural guardian, and has a legal right to its custody, care, and control if a suitable person, even though others may be able to offer more material advantages for the child. The right of a mother to the custody of her illegitimate child is not absolute, but must yield to the best interests of the child, and the mother may forfeit or relinquish her right. *Browning v. Humphrey*, 285.

The mother signed a consent for the adoption of her illegitimate child while in the hospital where it was born, withdrew her consent about a month later, and a few months after the child's birth wrote that she was giving the custody permanently to the respondent. Respondent furnished the sole support and maintenance for the child for some eight years. The court found that the best interests of the child would be promoted by permitting him to remain in the custody of the respondent, and awarded custody to respondent. *Held:* The decree awarding custody of the child to respondent is proper. *Ibid.*

BETTERMENTS.

§ 6. Proceedings to Enforce.

In an action to recover for contributions made by plaintiff in money and labor toward the erection of a house on lands under the *bona fide* belief that plaintiff owned a one-half interest in the lands, plaintiff must allege the value of her contributions. *Deans v. Deans*, 1.

BIGAMY AND BIGAMOUS COHABITATION.

§ 3. Prosecutions.

In a prosecution for bigamous cohabitation, the wife is competent to testify against her husband to prove the fact of marriage, but she is not competent to give testimony as to the absence of a divorce, and the admission of her testimony in regard thereto is prejudicial. *S. v. Hill*, 409.

In a prosecution for bigamy, it is not error to exclude defendant's testimony that he had employed a lawyer to obtain a divorce for him, was informed that it would require about thirty days, and that after the expiration of that period he contracted the second marriage, believing that he was divorced. *S. v. Nichols*, 615.

BILL OF DISCOVERY.

§ 1a. Examination of Adverse Party—Nature and Scope of Remedy in General.

The statutes relating to the pretrial examination of witnesses confer no right to investigate or inquire into matters which the court could not investigate or inquire into in the actual trial. *Yow v. Pittman*, 69.

The judge of the Superior Court has no authority to enter an order in chambers for the pretrial examination of a physician in regard to confidential communications of his patient. *Ibid.*

BILLS AND NOTES.

§ 26b. Agreement for Payment Out of Particular Fund.

The evidence was to the effect that the payee of notes given for the purchase price of farm machinery agreed that if the growing season was bad, he would give an extension of time for payment of the notes, and that he extended the time beyond the extension requested by the makers. *Held:* The evidence does not support the defense that the indebtedness was to be paid out of crops to be grown. *Hall v. Christiansen*, 393.

BOUNDARIES.

§ 2. General and Specific Descriptions.

Where a deed contains a specific description by metes and bounds, words in the general description ordinarily may not vary or enlarge the specific description. *Young v. Asheville*, 618.

§ 3c. Reversing Calls.

Where a deed calls for a corner of the contiguous tract as a point of beginning and such corner of the contiguous tract cannot be definitely located, but another corner can be ascertained, the line may be reversed from the ascertainable corner in order that the corner in question may be located. *Coffey v. Greer*, 744.

BOUNDARIES—*Continued.*

§ 3c. Junior and Senior Deeds.

Where a junior deed calls for a corner of an adjacent tract as the beginning corner, such corner or line must be established from the description in the senior deed to which reference is made, if possible, before the description or calls in the junior deed may be considered in establishing such line. *Scott v. Shackleford*, 743.

Where a deed calls for the corner of an adjacent tract as the beginning point, such deed is the junior deed notwithstanding the fact that the deeds to both tracts, from the common source, bear the same date. *Ibid.*

§ 5c. General Reputation.

Common reputation, to be admissible, should have its origin at a time comparatively remote, always *ante litem motam*, and should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location. Testimony in this case *held* substantially in accord with the rule, or at any rate, its admission was not prejudicial since testimony of like import was thereafter admitted without objection. *Spears v. Randolph*, 659.

The witness' testimony in this case as to the boundaries *held* based on general reputation, and not what a particular person told the witness as to the boundaries. *Ibid.*

Testimony as to a boundary line based upon general reputation is not rendered incompetent because the witness, who had testified that he knew the general reputation, also testified that a predecessor in title, while owning the land, had told the witness the location of the line. *Ibid.*

§ 5d. Testimony as to Natural Objects and Declarations.

It is competent for witnesses to testify from their own knowledge as to the location of natural objects called for in the deeds admitted in evidence. The distinction is pointed out between testimony as to personal knowledge and testimony of declarations made by others, which declarations must be made *ante litem motam* by disinterested parties, since deceased. *Perkins v. Clarke*, 24.

The mere fact that a deceased declarant owns an adjoining tract of land does not make him interested and render his declaration as to boundaries incompetent, but the adverse party must make his interest appear in order for an exception to the testimony to be sustained. *Spears v. Randolph*, 659.

§ 5e. Maps.

Where the complaint refers to a map on file in the office of the clerk of the Superior Court of a county in a prior proceeding, and the map is introduced in evidence from the plat book of the clerk's office, with identification that it was the same map referred to in the complaint, and the map purports to be over 30 years old, it is competent in evidence under the Ancient Documents Rule, and may be used as a basis of testimony by the witness, proper custody of the map having been shown. *Spears v. Randolph*, 659.

§ 5f. Surveys.

Where, in a processioning proceeding, there is no exception to the court's order appointing a surveyor to make a survey of the contentions of the parties, exceptions to the testimony of the surveyor because he set out on his map the disputed line as contended for by plaintiff as well as that contended for by defendant, is untenable. *Perkins v. Clarke*, 24.

BOUNDARIES—*Continued.*

§ 6. Processioning Proceedings—Nature and Grounds of Remedy.

Where all the evidence shows that the plaintiff is the owner and in possession of certain lands and that defendant is the owner and in possession of contiguous lands, and the only dispute between the parties is the location of the true dividing line between the respective tracts, title is not in dispute, and the court correctly refuses to submit an issue of title tendered by one of the parties. *Perkins v. Clarke*, 24.

Where plaintiffs and defendant are adjoining landowners, and there is no dispute as to the validity of the title of the parties to their respective tracts, but the only dispute is as to the location of the dividing line between the two properties, the action is in effect a processioning proceeding. *Coffey v. Greer*, 744.

BROKERS.

§ 3. The Contract—Requisites and Validity.

A contract between a broker and an owner of land to negotiate a sale of the land is not required to be in writing. *Carver v. Britt*, 538.

Defendant listed his land for sale with plaintiff broker at a specified price. Thereafter, plaintiff sent defendant a telegram stating that a purchaser for the price agreed had been obtained, and defendant sent a return wire stating "your telegram relative sale my property is accepted subject to details to be worked out . . ." *Held:* The words "subject to details to be worked out" referred not to the acceptance of the offer but to the performance of the contract and does not render the acceptance conditional, and therefore, in the broker's action for commission, nonsuit on the ground that there was no evidence of a valid contract to sell is error. *Ibid.*

§ 11. Right to Commissions Where Sale Is Not Consummated.

The fact that a brokerage contract stipulates that the broker was to be paid commission on the total price obtained from the property does not preclude recovery of commission by the broker upon his obtaining a purchaser ready, able, and willing to buy the property at the stipulated price when the sale is not consummated because of fault of the owner of the land. *Carver v. Britt*, 538.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 8. Parties.

The right to attack the validity of a deed on the ground of mental incapacity of grantor or undue influence and duress, is vested exclusively in the grantor, or, in the event of his death, in his heirs unless the personal representative is required to sell real estate in order to create assets, in which event the grantor's personal representative would have the right to attack the deed. *Kelly v. Kelly*, 146.

CLERKS OF COURT.

(Jurisdiction to enter default judgments, see Judgments.)

§ 3. Jurisdiction in General.

The clerk of the Superior Court has only such jurisdiction as is given him by statute. *Deans v. Deans*, 1.

CONSPIRACY.

§ 2. Civil Conspiracy—Actions.

Plaintiff, a candidate for public office, alleged that the opposing candidate and a newspaper company collaborated and conspired in the publication of defamatory matter for the purpose of causing the defeat of plaintiff in the primary election. The only evidence of conspiracy on the part of the individual defendant was that he had filed a protest and challenge of plaintiff's candidacy with the Board of Elections, that he talked with a reporter and an employee of the paper about it prior to publication, and that the newspaper published the challenge along with plaintiff's denial of the truth of the matters therein asserted. *Held:* The evidence is insufficient to support the allegation of collaboration and conspiracy as against either of the defendants. *Manley v. News Co.*, 455.

A person may not conspire with himself. *Ibid.*

CONSTITUTIONAL LAW.

§ 8c. Delegation of Power by General Assembly.

General Assembly may not delegate to one governmental unit power to determine whether statute should be in force in another governmental unit. *Taylor v. Racing Asso.*, 80.

§ 9. Executive Branch.

The power of parole is vested exclusively in the executive branch of the State government. *S. v. Conner*, 468.

§ 11. State Police Power in General.

The police power of the State is as extensive as may be required for the protection of the public health, safety, morals, and general welfare. *Taylor v. Racing Asso.*, 80.

§ 13. Police Power—Safety and Health.

State has authority, in exercise of police power, to prescribe conditions upon which licenses to drive shall be issued and conditions upon which licenses shall be revoked or suspended. *Fox v. Scheidt*, 31.

§ 14. Police Power—Morals and Public Welfare.

State may regulate gambling in exercise of police power. *Taylor v. Racing Asso.*, 80.

Police power may not be exercised to grant privilege of gambling. *Ibid.*

Statutes and municipal ordinances regulating the observance of Sunday derive their validity from the police power of the State. *S. v. Chestnutt*, 401.

Statute banning Sunday auto racing *held* constitutional. *Ibid.*

§ 17. Monopolies and Exclusive Emoluments and Privileges.

Statute authorizing operation of race track under municipal franchise *held* unconstitutional as granting exclusive privilege and monopoly. *Taylor v. Racing Asso.*, 80.

§ 19½. Religious Liberty.

The courts have no jurisdiction over purely ecclesiastical controversies, Art. I, Section 26 of the Constitution of North Carolina, First Amendment to the Constitution of the United States; the courts do have jurisdiction over civil,

contractual and property rights which are involved in, or arise from, a church controversy. *Reid v. Johnston*, 201.

§ 20a. Due Process of Law and Law of the Land.

Sale of property seized because of maintenance of nuisance is constitutional. *Taylor v. Racing Asso.*, 80.

Every person is entitled to his day in court to assert his own rights or defend against their infringement. *Coach Co. v. Burrell*, 432.

§ 25. Impairment of Obligations of Contract.

Contract based on unconstitutional statute is not within protection of Constitution. *Taylor v. Racing Asso.*, 80.

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. *Ibid.*

§ 28. Full Faith and Credit to Foreign Judgments.

Property settlement contained in decree of divorce of another state is void in so far as it attempts to affect title to land in this State. *Noble v. Pittman*, 601.

§ 32. Necessity for Indictment.

The Superior Court has no jurisdiction to try an accused on the original warrant when it does not appear in the record that defendant was ever tried and convicted for the offense in the inferior court or that there was an appeal from the inferior court to the Superior Court. *S. v. Banks*, 572.

§ 35. Right Not to Incriminate Self.

Testimony as to alcoholic content of blood, based on blood test of defendant, does not violate Constitution. *S. v. Willard*, 259.

CONTEMPT OF COURT.

§ 2a. Acts Constituting Direct or Criminal Contempt.

A direct contempt consists of words spoken or acts committed in the actual or constructive presence of the court while it is in session or during recess, which tend to subvert or prevent justice. *Galyon v. Stutts*, 120.

The acts and omissions enumerated in G.S. 5-1 correspond to criminal contempt and involve offenses against the court and organized society, punishable for contempt for the purpose of preserving the power and vindicating the dignity of the court. *Ibid.*

Refusal of witness to testify at all, or refusal to answer proper question, or the giving of testimony which is obviously false or evasive, is criminal or civil contempt, depending on the facts. *Ibid.*

§ 2b. Indirect or Civil Contempt.

An indirect contempt is one committed outside the presence of the court, usually at a distance from it, which tends to degrade the court or interrupt, prevent, or impede the administration of justice. *Galyon v. Stutts*, 120.

The acts and omissions enumerated in G.S. 5-8 correspond to civil contempt and involve matters tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court, and are punishable as for

CONTEMPT OF COURT—*Continued.*

contempt with the underlying purpose of preserving private rights by coercion. *Ibid.*

The refusal of a witness to testify at all, or his refusal to answer any legal or proper question is punishable for contempt under G.S. 5-1 (6), or as for contempt under G.S. 5-8 (4), depending upon the facts of the particular case. *Ibid.*

The power of the court to require a witness to give proper responses is inherent and necessary for the furtherance of justice, and therefore, testimony which is obviously false or evasive is equivalent to a refusal to testify. G.S. 5-1 (6) and G.S. 5-8 (4). *Ibid.*

Refusal to testify before subordinate officer of the court is indirect contempt. *Ibid.*

§ 3. Summary Punishment.

Contempt committed in the immediate view and presence of the court may be punished summarily. G.S. 5-5. *Galyon v. Stutts*, 120.

§ 4. Procedure to Punish for Indirect or Civil Contempt.

The procedure to punish for indirect contempt is by order to show cause. G.S. 5-7. *Galyon v. Stutts*, 120.

Where the court undertakes to punish a contempt against a subordinate officer appointed by the court, an order to show cause, or other process constituting an initiatory accusation meeting the requirements of due process, must be issued, since the court has no direct knowledge of the facts constituting the alleged offense. *Ibid.*

§ 5. Hearings on Orders to Show Cause and Findings.

Where, in response to an order to produce records of his business for a designated period, defendant appears and testifies that the only business records kept by him were the cash register tapes, that these had been destroyed by rats, and therefore, he had no records or documents with which to comply with the order, and there is no evidence to the contrary, it is error for the court to find and conclude that defendant was in contempt within the purview of G.S. 5-1 (4) for noncompliance with the order. *Galyon v. Stutts*, 120.

CONTRACTS.

§ 4. Offer and Acceptance.

While the acceptance of an offer must be identical and unconditional, where an offer is squarely accepted in positive terms, the addition of a statement relating to the ultimate performance of the contract does not make the acceptance conditional and prevent the formation of the contract. *Carver v. Britt*, 538.

Where an offer stipulates that acceptance must be wired by a specified hour, but the offerer, notwithstanding the offeree's failure to wire acceptance within the time stipulated, goes to the office of the offeree's attorney to complete the transaction in accordance with acceptance later received, the offerer waives the time limit, and the offeree may not maintain there was no contract because the offer was conditional. *Ibid.*

§ 9. Entire and Divisible Contracts.

A contract for the erection of a building in accordance with plans and specifications and the delivery of a turn-key job is an entire and indivisible contract. *Gaither Corp. v. Skinner*, 532.

CONTRACTS—*Continued.*

Ordinarily, for the breach of an entire and indivisible contract only one action for damages will lie. *Ibid.*

CONVICTS AND PRISONERS.

§ 4. Liability for Injury to.

Any negligence in failing to take proper precaution to prevent escape *held* not proximate cause of prisoner's death from being struck on railroad tracks. *Garland v. Gatewood*, 606.

CORPORATIONS.

§ 16. Dividends.

Where, in an action by minority stockholders to compel the directors to declare dividends out of the accumulated profits of the corporation, the pleadings raise issues of fact, *mandamus* may not issue until the issues of fact raised by the pleadings have been finally adjudicated on their merits. *Nebel v. Nebel*, 491.

In an action by minority stockholders to compel the declaration of dividends, the setting aside of the corporate profits as working capital by resolution at a stockholders' meeting held subsequent to the institution of the action and the filing of all pleadings, should not be considered on the issue as to whether the corporate earnings had been set aside in accordance with the provisions of G.S. 55-115, but the issue with respect to compliance with the statute must be determined in accordance with the issues of fact raised by the pleadings. *Ibid.*

Pleadings *held* not to raise issue of bad faith of controlling stockholders in setting aside all profits for working capital, but raise issue as to estoppel of minority stockholders from attacking that part of expenditure of profits for plant and equipment which were made with their knowledge and acquiescence. *Ibid.*

The setting aside of a part of the corporate profits for the expansion of plant facilities and for the purchase from time to time of new and up-to-date machinery to replace obsolete equipment, is a common practice usually essential to the normal growth and development of a corporation, and such expenditures will be presented to have been made in good faith in the absence of fraud or proof of bad faith. *Ibid.*

In an action by minority stockholders to compel the declaration of dividends, uncontradicted evidence tending to show that prior to the institution of the action a part of the accumulated profits of the corporation had been expended in plant expansion and equipment with the full knowledge and approval of plaintiff stockholders, entitles defendants to an instruction that if the jury believes the evidence to find in the affirmative the issue of estoppel of plaintiffs to challenge such expenditures. *Ibid.*

The fact that substantially all of the quick assets of a corporation are invested in inventories is not a bar *per se* to the declaration of a dividend, since the corporation may nevertheless declare a dividend out of profits and borrow the money for payment, and then liquidate the loan by disposing of finished goods, collecting receivables, and reducing its inventory of raw materials. *Ibid.*

Ordinarily, a minority stockholder is entitled to *mandamus* to compel the declaration of dividends out of accumulated profits in excess of such part of the profits as have been set aside as working capital. *Ibid.*

Where a corporation has inadvertently failed to take action with respect to setting aside capital in compliance with G.S. 55-115, *mandamus* will not lie to

CORPORATIONS—*Continued.*

compel the distribution of all the accumulated profits without regard to the financial needs of the corporation, but in such instance, mandatory injunction will lie to compel the stockholders to set aside a reasonable portion of the accumulated profits as working capital, and to declare a dividend only out of such part of the accumulated profits as can be applied to dividends in the wise administration of a going concern. *Ibid.*

§ 20. Power of Stockholders and Directors to Bind Corporation.

Plaintiff corporation owned certain lands and executed a contract with a corporate builder for the construction of certain apartment buildings thereon. After the completion of the buildings, an individual, who had no previous connection with plaintiff corporation, purchased all its common stock from the individual stockholders, and executed an agreement with vendors that no claim should be asserted against them or the building corporation for improper workmanship or defective materials in the construction of the apartments. *Held:* The individual purchasing the stock could not bind plaintiff corporation by the contract of release, since at the time of making the agreement he was neither stockholder, officer, director nor employee of the corporation, and allegations that he was acting in behalf of plaintiff corporation and had authority to execute the agreement are mere conclusions of the pleader. *Terrace, Inc., v. Indemnity Co.*, 473.

A corporation is bound by the acts of its stockholders and directors only when they act as a body in regular session or under authority conferred at a duly constituted meeting. *Ibid.*

§ 21. Ratification.

Where an individual does not purport to be acting for a corporation in executing a contract, the question of corporate ratification of his acts cannot arise. *Terrace, Inc., v. Indemnity Co.*, 473.

COSTS.

§ 4b. Assessment of Costs in Actions Brought by Representative or Fiduciaries.

In an action against individual defendants to determine the right to the control and use of church property the cost may be taxed against the defendants individually, notwithstanding that they are described as trustees when the title is used merely as *descriptio personae*. *Reid v. Johnston*, 201.

COURTS.

§ 5. Jurisdiction of Superior Court After Orders or Judgment of Another Judge.

Where order for alimony without divorce is void for want of notice, another judge may treat order as nullity and enter another order for alimony. *Barnwell v. Barnwell*, 565.

CRIMINAL LAW.

§ 17c. Plea of Nolo Contendere.

The plea of *nolo contendere* is recognized in this jurisdiction, but such plea may not be entered as a matter of right, but only as a matter of grace. *Fox v. Scheidt*, 31.

CRIMINAL LAW—*Continued.*

A plea of *nolo contendere* has the effect of a conviction by a jury, or a plea of guilty, for the purposes of the case in which it is entered. *Mintz v. Scheidt*, 268.

§ 21. Former Jeopardy—Same Offense.

A prosecution for rape of a female over 12 years of age will not bar a subsequent prosecution for carnal knowledge of a female over 12 and under 16 years of age. *S. v. Barefoot*, 650.

The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. *Ibid.*

If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise it does not. *Ibid.*

§ 22. Former Jeopardy—Mistrials and New Trials.

The action of the trial court in ordering, in the exercise of his discretion, a mistrial in a prosecution for an offense less than capital will not support a plea of former jeopardy in a subsequent prosecution. *S. v. Humbles*, 47.

§ 24½. Former Jeopardy—Continuing Offenses.

The willful failure to support an illegitimate child is a continuing offense, and therefore dismissal for want of evidence that the failure to support was willful will not preclude a subsequent prosecution. *S. v. Perry*, 119.

§ 26. Former Jeopardy—Hearing and Determination of Plea.

Where it is apparent from the two indictments that the facts alleged in the second bill, if offered as evidence in the first prosecution, are insufficient to sustain a conviction under the first, defendant's plea of former acquittal in the second prosecution is properly overruled as a matter of law. *S. v. Barefoot*, 650.

§ 31h. Opinion Testimony—Intoxication.

In prosecution for drunken driving, expert may testify as to quantity of alcohol in blood. *S. v. Willard*, 259.

A lay witness is competent to testify whether or not in his opinion a person was under the influence of an intoxicant on a given occasion on which he observed him. *Ibid.*

§ 33. Confessions.

A confession in a criminal action is voluntary in law if, and only if, it was in fact voluntarily made. *S. v. Thomas*, 337.

The competency of a confession is a preliminary question for the trial court, and the court's ruling thereon is not subject to review if supported by any competent evidence. *Ibid.*

The mere fact that the defendant was in jail under arrest, and was there questioned by several officers does not render his confession incompetent. *Ibid.*

It is not essential to the competency of a confession that the officers should have cautioned the defendant that any statement made by him might be used against him, and should have informed him that his refusal to answer could not thereafter be used to his prejudice. *Ibid.*

The fact that officers, while questioning defendant, state that if defendant told them anything, to tell the truth, does not render defendant's confession incompetent. *Ibid.*

Where the trial court duly hears testimony for the state and for the defendant upon the preliminary inquiry as to the voluntariness of the defendant's alleged confession, the trial court's finding that the confession was voluntary is conclusive on appeal when supported by competent evidence, and no error of law or legal inference is made to appear. *Ibid.*

§ 34a. Hearsay Evidence—Declarations.

Declarations *held* incompetent as hearsay, and admission of testimony thereof was prejudicial. *S. v. Ward*, 706.

§ 39c. Competency of Wife as Witness Against Husband.

In a prosecution for bigamous cohabitation, the wife is competent to testify against her husband to prove the fact of marriage, but she is not competent to give testimony as to the absence of a divorce, and the admission of her testimony in regard thereto is prejudicial. *S. v. Hill*, 409.

§ 43. Evidence Obtained by Unlawful Means.

Intoxicating liquor seen by patrolman when he stopped car to inspect driver's license *held* properly admitted notwithstanding absence of search warrant, since search warrant was not necessary. *S. v. Hammonds*, 226.

§ 47. Consolidation of Indictments for Trial.

Ordinarily, where separate bills of indictment are returned and the bills are consolidated for trial, the counts contained in the separate bills will be treated as though they are separate counts in one bill. *S. v. Austin*, 548.

§ 48c. Reception of Evidence—Evidence Competent for Restricted Purpose.

Where the court, upon defendant's objection to certain testimony, overrules the objection and instructs the jury that the evidence is offered for the purpose of corroborating another witness, defendant may not contend that the instruction limiting the evidence was inadequate in the absence of objection thereto or request for further elaboration. *S. v. Cole*, 576.

§ 50d. Expression of Opinion by Court on Evidence During Progress of Trial.

Non-impeaching questions asked by the court of defendant in this case *held* not prejudicial, it being apparent that they could not have left the impression on the jury that in the judge's opinion the defendant was unworthy of belief. *S. v. Humbles*, 47.

§ 50f. Argument and Conduct of Solicitor.

Argument of solicitor will not be held prejudicial where record fails to show that argument was abuse of fair debate. *S. v. Willard*, 259.

The solicitor and counsel have the right to argue every phase of the case supported by the evidence without fear or favor and to deduce from the evidence offered all reasonable inferences which flow therefrom, and wide latitude must be allowed in the argument of hotly contested cases. *S. v. Barefoot*, 650.

The evidence in this prosecution for carnal knowledge of a female child over 12 and under 16 years of age tended to show that defendant persisted in his

CRIMINAL LAW—*Continued.*

efforts to have intercourse with prosecutrix and finally pulled her from the front to the back seat of the car. *Held:* Argument of the solicitor to the effect that they were not dealing with an ordinary boy of 18, but that while defendant was undeveloped in size he was overdeveloped in passion, was warranted by the evidence. *Ibid.*

While the solicitor may not comment on defendant's failure to testify, comment in this case upon the demeanor of the defendant in the courtroom, when reasonably interpreted, *held* not to amount to comment upon such failure. *Ibid.*

Control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court, and it is only in extreme cases of abuse when the trial court does not intervene or correct an impropriety that a new trial may be allowed on appeal. *Ibid.*

§ 52a (2). Sufficiency of Evidence to Overrule Nonsuit in General.

An extrajudicial confession of guilt made by defendant must be corroborated by other evidence tending to establish the *corpus delicti* in order to be sufficient to sustain a conviction. *S. v. Thomas*, 337.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

To withstand nonsuit, the circumstances and evidence must be such as to produce a moral certainty of guilt and to exclude any other reasonable hypothesis. *S. v. Cole*, 576.

§ 53b. Charge on Presumptions and Burden of Proof.

A charge that a reasonable doubt is one growing out of the testimony in the case is erroneous, since a reasonable doubt may also arise from lack of evidence or its deficiency. *S. v. Hammonds*, 226.

The court is not required to define the term "beyond a reasonable doubt" in the absence of request, but when the court undertakes to do so, the definition must be in substantial accord with those approved by the Supreme Court. *Ibid.*

Charge that reasonable doubt is one growing out of evidence *held* not prejudicial under facts of this case. *Ibid.*

The court's instruction to the jury in this case on defendant's evidence of an alibi *is held* correct and not subject to attack on the ground that it placed the burden on defendant to produce evidence to raise a reasonable doubt as to his guilt. *S. v. Stone*, 294.

Construing the instruction as to the permissible verdicts contextually with the rest of the charge *it is held* that the jury could not have been misled as to the burden of proof. *Ibid.*

An instruction which has the effect of charging the jury that if it found beyond a reasonable doubt from the evidence that defendant was guilty of the offense charged in one indictment, they should find defendant guilty of the offense charged in the other indictment consolidated for trial, is error, since the burden rests upon the State in both cases and the weight and credibility of the evidence is for the jury alone to determine. *S. v. Cephas*, 562.

An instruction susceptible to the construction that defendant's evidence must raise a question as to his guilt beyond a reasonable doubt, must be held for prejudicial error. *S. v. Faulkner*, 609.

§ 53d. Instructions—Statement of Evidence and Application of Law Thereto.

Even when the parties waive a recapitulation of the evidence, it is necessary that the court state the evidence to the extent necessary to explain the application of the law thereto. *S. v. Floyd*, 298.

CRIMINAL LAW—*Continued.*

G.S. 1-180 requires the court, in both criminal and civil actions, to declare and explain the law arising on the evidence in the particular case and not upon a set of hypothetical facts. *S. v. Street*, 689.

§ 53f. Instructions—Expression of Opinion by Court on Evidence.

Where, at the beginning of the narration of the testimony of a witness, the court uses the phrase "tending to show," it is not necessary for the court to repeat this phrase throughout the statement of her testimony, and the court's failure to do so *held* not prejudicial in this case as an expression of opinion by the court as to the truth of the witness' testimony. *S. v. Humbles*, 47.

§ 53g. Instructions on Question of Guilt of Less Degrees of the Crime.

When presented by the evidence, it is the duty of the trial court, even in the absence of a request, to submit to the jury the question of defendant's guilt of a lesser degree of the offense. *S. v. Hicks*, 156.

§ 53n. Instructions on Right to Recommend Life Imprisonment.

When, in a prosecution for a capital felony, the question of eligibility for parole arises spontaneously during the deliberations of the jury, and is brought to the attention of the court by independent inquiry of the jury and request for information, the court should instruct the jury that the question of eligibility for parole is not a proper matter for the jury to consider and should be eliminated entirely from their deliberations, and the action of the court in merely telling the jury that he cannot answer the inquiry must be held for prejudicial error upon appeal from conviction of the capital felony without recommendation of life imprisonment. *S. v. Conner*, 468.

§ 54b. Form, Sufficiency and Effect of Verdict.

A verdict is the unanimous decision made by the jury and reported to the court. *S. v. Gatlin*, 175.

A verdict is a substantial right. *Ibid.*

Before a verdict is complete, it must be accepted by the court. *Ibid.*

§ 54e. Power of Court to Have Jury Redeliberate.

Before the verdict is complete, it must be accepted by the court, and when the jury returns an informal, repugnant, or insensible verdict or one that is not responsive to the issues, the court may give additional instructions, direct the jury to reconsider and bring in a proper verdict, but in doing so, the court must act with great caution so as not even to suggest what their verdict should be. *S. v. Gatlin*, 175.

§ 54f. Right to Poll Jury.

Every defendant has the right to have the jury polled in order to determine whether the verdict is unanimous, but this right must be exercised before the jury is discharged or it is waived. *S. v. Cephus*, 562.

§ 54i. Right of Jury to Recommend Life Imprisonment.

In a prosecution for a capital felony, the right of the jury to recommend life imprisonment rests in its unbridled discretion and should be exercised by the jury on the basis that imprisonment for life means imprisonment for life in the State's prison, without consideration of parole or eligibility therefor. *S. v. Conner*, 468.

CRIMINAL LAW—*Continued.*

§ 56. Motions in Arrest of Judgment.

Invalidity or insufficiency of indictment or warrant may be raised by motion in arrest of judgment. *S. v. Scott*, 178; *S. v. Faulkner*, 609.

Indictment charging offenses conjunctively *held* not fatally defective for failing to repeat name of defendant in second count, and motion in arrest of judgment was properly denied. *S. v. Hammonds*, 226.

Motion in arrest of judgment allowed for fatally defective warrant. *S. v. Smith*, 301; *S. v. Faulkner*, 609.

Motion to quash the warrant and motion in arrest of judgment are properly overruled when no defect appears on the face of the record. *S. v. Chestnutt*, 401.

The legal effect of arresting the judgment is to vacate the verdict and sentence, and the State may thereafter proceed upon a new and sufficient warrant or bill of indictment if it so desires. *S. v. Faulkner*, 609.

§ 58. Power of Court to Set Aside Verdict and Order Mistrial.

The ordering of a mistrial in a case less than capital is a matter in the discretion of the judge, and the judge need not find facts constituting the reason for such order. *S. v. Humbles*, 47.

§ 62a. Severity of Sentence and Place of Service.

A defendant may be sentenced to the Central Prison only upon conviction of a felony. *S. v. Cagle*, 134.

In sentencing a *feme* defendant convicted of a misdemeanor, the court may designate the place of imprisonment as the quarters provided by the State Highway and Public Works Commission for women prisoners, G.S. 148-27, and upon a finding that such quarters are maintained in the Central Prison at Raleigh, order defendant's imprisonment in such quarters at that place. *Ibid.*

The imposition of sentence by the court in excess of the statutory maximum does not render the legal and authorized portion of the sentence void, but leaves open to attack only such portion of the sentence as is excessive. *S. v. Austin*, 548.

The courts may impose only such punishments as are authorized by the Constitution. *S. v. Cole*, 576.

§ 62c. Concurrent and Cumulative Sentences.

While cumulative sentences may be imposed on conviction of, or plea of guilty to, two or more offenses charged in separate counts in the same indictment, such sentences must be based upon separate and distinct criminal offenses. *In re Powell*, 288.

Upon a general verdict of guilty or a plea of guilty to each of several indictments consolidated for trial, the court may enter judgment on each count and have the judgments run concurrently or consecutively as it may direct. *S. v. Austin*, 548.

Upon defendant's plea of guilty to the counts in several indictments consolidated for trial, judgment that the defendant be imprisoned for a single specified term is not the imposition of consecutive sentences, and therefore, the court may not impose a sentence in excess of the maximum term for which defendant could have been legally sentenced upon any of his pleas. *Ibid.*

§ 62f. Suspended Judgments and Executions.

Where it appears that the court revoked probation under a suspended sentence in a particular case without a hearing with respect to any violation by

defendant of the terms and conditions of that judgment, the cause must be remanded. *S. v. Haddock*, 182.

Defendant pleaded guilty to a count of larceny and a count of receiving the same property knowing it to have been stolen. The court gave defendant an active sentence on the count of receiving and a suspended sentence on the count of larceny. After serving the full sentence imposed on the count of receiving, the suspended sentence was ordered placed in effect for alleged violations of the terms of probation of the sentence for larceny. *Held:* The sentence on the count of receiving will be treated as the valid sentence of the court, and defendant's confinement on the sentence imposed on the larceny count is invalid. *In re Powell*, 288.

A sentence must be active in full or suspended in full. *Ibid.*

Upon defendant's conviction of operating a motor vehicle while under the influence of intoxicating beverage, the court may not suspend judgment upon condition that the defendant not operate a motor vehicle upon the public roads during the period of suspension unless defendant consents thereto, expressly or by implication. *S. v. Cole*, 576.

§ 62h. Second and Repeated Offenses.

Where a statute proscribes a higher penalty for repeated convictions for similar offenses, whether defendant theretofore had been convicted under the statute is for the jury to determine and not the court. *S. v. Cole*, 576.

§ 63. Modification of Sentence.

During the term a judgment is *in fieri*, and the judge has the discretionary power to make such changes and modifications in the judgment as he may deem wise and appropriate for the administration of justice. In the exercise of this power the court may strike out a suspended judgment, remit the fine paid thereunder, and enter a different sentence in conformity with law. *S. v. Cagle*, 134.

After the expiration of the term, the Superior Court has the power at term time to make its records speak the truth by correction of clerical errors or correction of the judgment to make it express correctly the action taken by the court. This power does not extend to the correction of errors of law. Such power must be exercised at term time in the county, and the judge may not correct such errors while holding court in another district. *Ibid.*

§ 65. Costs.

Where defendant is convicted of an offense constituting a crime or misdemeanor he is properly charged with the costs. *S. v. Rumfelt*, 375.

§ 67. Nature and Grounds of Appellate Jurisdiction of Supreme Court.

Where the record fails to disclose jurisdiction in the court below, the Supreme Court acquires no jurisdiction by appeal, and the appeal must be dismissed. *S. v. Banks*, 572.

§ 74. Term of Supreme Court to Which Appeal Must Be Taken.

Where judgment is entered in an action tried at a term prior to the convening of the Supreme Court, the appeal must be taken to that term of the Supreme Court. *S. v. Freeman*, 78.

§ 77d. Conclusiveness and Effect of Record.

The presumption is that the record as it appears is true. *S. v. Cagle*, 134.

CRIMINAL LAW—*Continued.*

§ 78e. Requirement That Inadvertence in Stating Contentions Be Brought to Trial Court's Attention.

Where a misstatement of a contention is not brought to the trial court's attention in apt time, the matter is not subject to attack or review on appeal. *S. v. Stone*, 294.

§ 78g. Objections and Exceptions to Argument of Solicitor.

An agreement between the solicitor and defense counsel that objection to the solicitor's argument might be shown at the end of every sentence on the reporter's transcript is disapproved since such agreement could not relieve the trial court of his duty at all times to see that the argument remain within proper bounds, and counsel should make timely objections to the court, and the court should pass on the objections as they arise. *S. v. Barefoot*, 650.

§ 78h. Necessity, Form and Requisites of Assignments of Error.

Assignments of error to the charge must be predicated upon exceptions previously noted in the case on appeal. *S. v. Gordon*, 356.

§ 79. The Brief.

The statement in the brief of the general questions involved on the appeal, without bringing forward or mentioning in the brief any of the exceptions taken during the trial or authority in support of any particular exception, is insufficient to bring up for consideration the matters to which the exceptions shown in the record relate. *S. v. Williams*, 259.

Assignments of error not supported by argument or authority cited in the brief are deemed abandoned. *S. v. Gordon*, 356; *S. v. Cole*, 576.

An assignment of error brought forward in the brief but in support of which no argument is stated or authority cited upon any germane ground, is deemed abandoned. *S. v. Faulkner*, 609.

§ 81a. Matters Reviewable.

The action of the trial court in ordering a mistrial in his discretion in a prosecution for an offense less than a capital felony is not reviewable in the absence of gross abuse. *S. v. Humbles*, 47.

§ 81c (1). Burden of Showing Error.

The burden is upon appellant not only to show error, but also to show that the alleged error was prejudicial. *S. v. Poolos*, 382; *S. v. Cole*, 576.

§ 81c (2). Prejudicial and Harmless Error in Instructions.

Error in failing to submit to jury question of defendant's guilt of less degrees of the crime is not cured by conviction of graver offense. *S. v. Hicks*, 156.

Failure of an instruction defining reasonable doubt to charge, even contextually, that such doubt may arise from lack or deficiency of the evidence as well as out of the evidence, is error, but whether such error is prejudicial depends upon the evidence involved, and where the State's evidence is direct and amply sufficient to support the verdict, and the sole question for the jury's determination is whether to accept as true the State's evidence or that of defendant, such error is not prejudicial. *S. v. Hammonds*, 226.

An erroneous instruction on the burden of proof is not corrected by prior and subsequent correct instructions upon the point. *S. v. Faulkner*, 609.

CRIMINAL LAW—*Continued.*

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of certain testimony as to a matter which was brought out on the subsequent cross-examination by defendant of another witness, *held* not prejudicial. *S. v. Humbles*, 47.

Exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified if permitted to answer, even though the question be asked on cross-examination and be a proper question asked for the purpose of impeaching the credibility of the witness by showing that she was mentally and emotionally unstable. *S. v. Poolos*, 382.

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where defendant is convicted under both indictments consolidated for trial, and separate, equal and concurrent sentences are imposed in each case, an error in the charge relating to one case only is harmless. *S. v. Cephus*, 562.

§ 81c (7). Harmless and Prejudicial Error—In Course or Conduct of Trial.

In this prosecution for drunken driving, exception to the statement of the solicitor in his argument "Don't kill my child" is not sustained, since in the absence of the factual setting of the remark it is not made to appear that the argument was an abuse of fair debate and prejudicial. *S. v. Willard*, 259.

Defendant was tried for driving an automobile on the public highways while under the influence of intoxicating liquor. During the solicitor's argument, the court and the solicitor made remarks as to the necessity of a warrant, one of the arresting officers having testified in regard to getting a warrant before making the arrest. *Held:* The officer's testimony was relevant only in explanation of his failure to make the arrest at once, and the statements of the solicitor and judge were wholly immaterial to the issue and cannot be held prejudicial. *S. v. Cole*, 576.

DAMAGES.

§ 1a. Compensatory Damages—Present Worth of Future Damage.

Where the allegations and theory of trial disclose that plaintiff was relying on future damages as a part of his recovery, a charge that he is entitled to recover in one lump sum for all injuries past, present, and prospective, without instructing the jury that the amount awarded for future losses should be based on the present cash value or present worth of such losses, must be held for prejudicial error. *Faison v. Cribb*, 303.

§ 1d. Provision in Agreement for Liquidated Damages.

While liquidated damages which are in the nature of a penalty are not favored, where the liquidated damages as fixed in the contract are not less favorable to defendant than the applicable rule of law would impose, the formula for the liquidation of damages as fixed in the contract may be applied. *Weinstein v. Griffin*, 161.

DEATH.

§ 6. Pleadings in Action for Wrongful Death.

A cause of action for wrongful death, and a cause of action for personal injuries between the date of injury and the death and for property damage sustained in the collision, should be separately stated. *Hinson v. Dawson*, 714.

DEDICATION.

§ 4. Acceptance.

Dedication of street to public *held* accepted by act of Assembly. *Scott v. Shackleford*, 738.

DEEDS.

§ 2a (2). Mental Capacity.

Whether a grantor has sufficient mental capacity to execute a deed is not a question of fact, but is a conclusion which the law draws from certain facts as a premise, such as whether the grantor understood the nature and consequences of his act in making the deed, whether he knew what land he was disposing of and to whom, etc. *McDevitt v. Chandler*, 677.

In this action to set aside a deed for want of mental capacity in the grantor, a new trial is awarded for comments made and testimony elicited by the presiding judge which had the effect of permitting the witnesses to testify that grantor did not have sufficient mental capacity to execute the deed rather than limiting the testimony to the facts from which the law might draw the inference of mental incapacity. *Ibid.*

§ 11. General Rules of Construction.

Ordinarily, in construing a deed it is the duty of the court to ascertain the intent of the grantor or grantors as embodied in the entire instrument, and each and every part thereof must be given effect if this can be done by any fair or reasonable interpretation. *Davis v. Brown*, 116.

In arriving at the intent of the grantor, settled rules of construction should be observed and enforced. *Ibid.*

§ 13b. Rule in Shelley's Case.

Where a conveyance is made to A and his children, and A has children at the time the deed is executed, A and his children take as tenants in common, but if A has no children at the time the deed is executed, A takes an estate tail which is converted into a fee by G.S. 41-1. *Davis v. Brown*, 116.

§ 16b. Restrictive Covenants.

If restrictive covenants are added to a deed after the deed has been executed, such deed must be re-executed, re-acknowledged, and re-delivered after such addition. *Hege v. Sellers*, 240.

A restriction of the enjoyment of property must be created in express terms or by plain and unmistakable implication. *Ibid.*

Where no restrictive covenants are contained in a deed to a particular lot in a subdivision, and the recorded map shows no restrictions, the grantee therein is not bound by restrictive covenants, notwithstanding his knowledge that all the other lots in the subdivision contain restrictive covenants according to a general scheme, since such grantee is chargeable with notice only of such restrictions as appear in his chain of title, and no notice, however full or formal, can take the place of registration. *Ibid.*

A restrictive covenant creates a negative easement within the statute of frauds. *Ibid.*

Restrictive covenants are not favored and will be strictly construed against limitation on use. *Ibid.*

DIVORCE AND ALIMONY.

§ 5d. Pleadings in Actions for Alimony Without Divorce.

In an action for alimony without divorce, allegations that the husband had been abusive and violent toward plaintiff and she had been made to fear for her safety, are insufficient, it being necessary that plaintiff allege specific acts of misconduct on the part of the husband so that the court may determine whether his conduct was in fact such as constituted cause for divorce from bed and board, and also specify what, if anything, she did or said at the time, in order that the court may determine whether she provoked the difficulty. *Ollis v. Ollis*, 709.

Allegations that during the 12 months preceding the institution of the action defendant had repeatedly told plaintiff to leave the home in which they were living, are insufficient to allege a cause of action that defendant maliciously turned plaintiff out of doors as a basis for an action for alimony without divorce under G.S. 50-16. *Ibid.*

Allegations that the defendant spent money lavishly on other women, without allegation as to who they were or what was their relationship to defendant, if any, and without allegation of misconduct on the part of defendant, is insufficient to state a cause of action for divorce as a basis for alimony without divorce under G.S. 50-16. *Ibid.*

Allegations that defendant failed to provide adequate support for the plaintiff and the child of the marriage, without allegations of specific acts and conduct on his part sufficient to justify her leaving him as she admitted she had done, and without allegation of the amount of support defendant provided or what other means he had or what she deemed "adequate support," are insufficient to allege that he separated himself from her and the child without providing them adequate support according to his means and condition in life, as a basis for alimony without divorce. *Ibid.*

§ 12. Alimony and Support Pendente Lite.

An order entered in the wife's action for alimony without divorce requiring defendant to pay subsistence and counsel fees *pendente lite* is void when the order is entered without notice to defendant. *Barnwell v. Barnwell*, 565.

Where it is conclusively established by judicial admission of the parties that an order, requiring defendant to pay subsistence and counsel fees *pendente lite*, was void because entered without notice to defendant, the court properly treats such order as a nullity upon challenge by defendant, and an order thereafter entered for subsistence and counsel fees *pendente lite* after due and proper notice to defendant will be upheld, notwithstanding want of formal decree that the prior order was void, which omission will be remedied *nunc pro tunc*. *Ibid.*

After the wife instituted suit for alimony without divorce, in which action the question of the custody of the minor child of the marriage was not raised, the husband instituted suit for absolute divorce. *Held:* The amendment of G.S. 50-16 by Chapter 925, Public Laws of 1953, does not affect the jurisdictional power of the court to award subsistence for the mother and child *pendente lite* in her action for alimony without divorce. *Ibid.*

§ 16. Enforcing Orders for Custody and Support of Children.

That one child had married and the other was living with father *held* sufficient cause for father to cease paying sums to clerk for their support in accordance with previous order. *Jarrell v. Jarrell*, 73.

DIVORCE AND ALIMONY—*Continued.*

§ 19. Custody and Support of Children—Findings and Decree.

In determining the right to custody of the children as between divorced parents, decision is rightly made to turn upon the best interests of the children, and the findings of the court in regard thereto are conclusive when supported by evidence, the weight to be given the conflicting testimony being for the court. *Smith v. Smith*, 307.

§ 21. Validity and Attack of Foreign Decrees.

A property settlement contained in a decree of divorce entered by a court of another state is void in so far as it attempts to affect title to land in this State. *Noble v. Pittman*, 601.

DOMICILE.

§ 1. Domicile and Residence in General.

Member of Armed Services does not acquire residence here solely because stationed here for period under military orders. *Hart v. Coach Co.*, 389.

A minor dependent son who moves from his father's house to an apartment, maintained by his father, for the purpose of attending classes at an educational institution does not become a resident of the college community, but retains his residence with his father. *Barker v. Ins. Co.*, 397.

EASEMENTS.

§ 2. Easements Appurtenant.

A conveyance or contract to convey a part of an estate ordinarily includes by implication those easements over the remaining land which are visible and apparently permanent and which are in use and reasonably necessary to the fair enjoyment of the property conveyed or contracted to be conveyed. *Goldstein v. Trust Co.*, 583.

EJECTMENT.

§ 13. Parties and Pleadings.

In an action in ejectment where defendant claims under a tax foreclosure deed of bargain and sale, the county is proper party for the purpose of defending its title to defendant, but defendant has no right to litigate in plaintiff's action any rights he may have against the county in the event the tax foreclosure deed is declared invalid. *Kelly v. Kelly*, 146.

§ 14. Answer and Bond.

In an action for the recovery or possession of real property, the defendant is required to give bond before answering to protect plaintiff from any damages he might suffer by reason of defendant's wrongful possession of the land between the commencement of the action and the entry of final judgment, G.S. 1-111, and upon failure of defendant to file the statutory bond plaintiff is entitled to judgment by default final as to title and possession, which judgment the clerk is authorized to enter. *Morris v. Wilkins*, 507.

In actions involving realty, a defense bond, G.S. 1-111, is not required of a defendant who is not in possession of the land in controversy. *Ibid.*

In an action for the recovery or possession of real property, a plaintiff who takes possession of the lands in controversy or any substantial portion thereof by unauthorized entry after commencement of the action and prior to the expiration of time for filing answer, is not entitled to judgment by default final

EJECTMENT—*Continued.*

for defendant's failure to give a defense bond unless and until he first restores the *status quo* in respect to possession existing at the date of the commencement of the action. *Ibid.*

§ 17. Sufficiency of Evidence and Nonsuit.

Where plaintiff attempts to establish a common source of title by showing that defendant claims under a tax foreclosure against the common ancestor, but the documentary evidence fails to include interlocutory judgment of foreclosure or final decree of confirmation, there is a break in the chain of title, and nonsuit is proper. *Kelly v. Kelly*, 146.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

Only public necessity justifies the taking of land from a citizen without his consent. *Utilities Com. v. Story*, 103.

§ 6. Delegation of Power of Eminent Domain to State Boards and Commissions.

Wildlife Resources Commission has been delegated power of eminent domain, but certificate of convenience and necessity is required. *Utilities Com. v. Story*, 103. But application in this case was not made by Commission, but by its director. *Ibid.*

§ 8. Measure and Amount of Compensation in General.

Compensation recoverable by a landowner for the taking of his property by eminent domain for highway purposes, is the difference between fair market value of the property as a whole immediately before the taking, and the value of the remainder immediately after the taking, less general and special benefits. *Gallimore v. Highway Com.*, 350.

In estimating the fair market value of land before and after the appropriation of a portion thereof, all capabilities of the property and all uses to which it is adapted, which affect its value in the market, are to be considered, and not merely its value for that use to which it had been applied by the owner. *Ibid.*

Where property of an educational institution is taken for highway purposes, it should be determined whether the remaining property is more valuable for institutional purposes than for any other use, since elements of depreciation when the property is used for educational purposes may not obtain if the property is put to some other use. *Ibid.*

Where part of the property of an educational institution is taken for highway purposes, the ascertainment of the fair market value of the remaining lands for educational purposes does not depend upon the actual availability of one or more prospective purchasers for that purpose, but the existence of a buyer for such purpose, who is able and willing to buy, but under no necessity to do so, will be assumed. *Ibid.*

Damages for an easement taken under eminent domain are to be determined by the rights the condemnor or grantee actually acquires and not the extent to which he exercises such rights. *Gas Co. v. Hyder*, 639.

Possibility of revision should not be considered, nor the possibility that owner might be allowed to back water of a lake over the right of way when condemnor refuses to agree that he might do so and language of easement negates such right. *Ibid.*

EMINENT DOMAIN—*Continued*

§ 18b. Pleadings in Action to Assess Compensation.

In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, it is not required that petitioners allege with particularity the various respects in which the property has been adversely affected by the new highway, G.S. 40-12, and since evidence in support of all elements of damage recoverable is competent under the general allegation of damage, petitioners are not prejudiced by an order striking from the petition allegations relating to particular elements of damage. *Gallimore v. Highway Com.*, 350.

§ 18c. Competency and Relevancy of Evidence in Actions to Assess Compensation.

In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, G.S. 136-19, any evidence which aids the jury in fixing a fair market value of the remaining land, and its diminution by the burden upon it, including everything which affects the market value of the land remaining, is competent. *Gallimore v. Highway Com.*, 350.

§ 26. Nature and Extent of Right Acquired.

Ordinarily, a mere private easement for the purpose of ingress and egress across agricultural lands does not deprive the owner of the fee of the full enjoyment of his property not inconsistent of the rights granted in the easement. *Gas Co. v. Hyder*, 639.

ESTOPPEL.

§ 2. Estoppel by Deed—After Acquired Title.

Even if the owner of a vested fee simple title cannot convey a valid and marketable title thereto during the life of a trust, his deed executed prior to the termination of the trust will estop him and those claiming through him by deed, will, or inheritance, and his after-acquired title will "feed the estoppel" and vest the title thus acquired in his grantee. *Morrell v. Building Management*, 264.

§ 5. Nature and Essentials of Equitable Estoppel in General.

An estoppel exists where a person is induced by words, conduct, or representation to act to his prejudice. *Air Conditioning Co. v. Douglass*, 170.

EVIDENCE.

§ 2. Judicial Notice.

The courts will take judicial notice of the county seat of a county of this State. *Mintz v. Scheidt*, 268.

The courts will take judicial notice of the fact that the "Umstead Youth Center" is a State penal institution authorized under and by virtue of Chapter 297, Session Laws of 1949, and maintained for the purpose of receiving and detaining youthful and first term prisoners, G.S. 148-49.2. *Alliance Co. v. State Hospital*, 329.

It is a matter of common knowledge that increase in pressure increases the flow of water, and that, therefore, an increase in the height of a highway fill, by increasing the volume of water impounded, will increase the flow of water through a culvert under the fill so as to make the road safer from washouts than it was before the height of the fill was increased. *Floyd v. Highway Com.*, 461.

EVIDENCE—*Continued.*

§ 13. Confidential Communications—Attorney and Client.

It is competent for an attorney who is actively participating in the trial to testify as to matters which transpired in a conference of the parties prior to the controversy for the purpose of contradicting the testimony of a witness of the opposing party as to such matters. *Hege v. Sellers*, 240.

§ 14. Confidential Communications—Physician and Patient.

Confidential communications of the patient to a physician are privileged and the physician will not be permitted to testify thereto except by consent of the patient or upon order of the presiding judge in term time upon a finding duly entered of record that the testimony is necessary to a proper administration of justice. *Yow v. Pittman*, 69.

§ 19. Evidence Competent to Impeach or Discredit Witness.

Testimony of declarations made by a witness to others, which declarations are in conflict with the testimony of the witness upon the trial, is competent for the sole purpose of impeaching the witness' credibility, even though such testimony would otherwise be incompetent as hearsay. *Perkins v. Clarke*, 24.

A party is entitled to introduce evidence of bad character of a witness who has testified for the opposing party for the purpose of impeaching the credibility of the witness. *Moore v. Bezalla*, 190.

§ 26½. Rebuttal of Matter Adduced by Adverse Party.

Where a witness for plaintiff testifies as to previous statements made by a witness for defendants in conflict with such witness' testimony upon the trial, the court has the discretionary authority to permit defendant to recall his witness and permit him to testify in explanation and contradiction of the testimony given by plainiff's witness. *Moore v. Bezalla*, 190.

§ 38. Secondary Evidence of Lost or Destroyed Instruments.

Where a witness testifies that she had received a paper under seal which had been lost, it is error for the court to permit her to testify to the effect that the paper was a decree of divorce from her former husband, it being required that it be shown that the original record, rather than a mere copy thereof, had been lost or destroyed as the foundation for the admission of secondary evidence of its contents, since otherwise the record itself, being in existence, is the only evidence admissible to prove its contents. *Jones v. Jones*, 291.

§ 39. Parol Evidence Affecting Writings.

Where the purchaser of machinery gives written orders therefor, and executes notes, mortgage, and deed of trust setting forth the time and method of payment, the instruments constitute a contract in writing between the parties, and in the absence of evidence that the notes, mortgage, and deed of trust were conditionally delivered, or that there was mutual mistake in drafting them, or fraud in procuring their execution, or a different mode of payment agreed upon, parol testimony is inadmissible to vary or change the contract. *Hall v. Christiansen*, 393.

§ 41. Hearsay Evidence.

Declaration introduced for purpose of showing state of mind and not to prove truth of matters therein declared, does not come within hearsay rule. *In re Will of Duke*, 344.

EVIDENCE—*Continued.*

§ 47. Expert and Opinion Evidence—Mental Capacity.

Witness may not testify that grantor lacked mental capacity, but only to facts from which that conclusion may be drawn. *McDevitt v. Chandler*, 677.

EXECUTION.

§ 4. Limitations.

No execution on money judgment after ten years: only procedure to obtain new judgment is by action on the judgment within ten years, not by *scire facias*. *Reid v. Bristol*, 609.

EXECUTORS AND ADMINISTRATORS.

§ 2a. Jurisdiction to Issue Letters of Administration.

The Superior Court of a county which first issues letters of administration acquires jurisdiction, and letters to administer the estate may not thereafter be entered in another county even though petition of a creditor to administer the estate was pending therein at the time of the issuance of the letters. *Vample v. McNeill*, 308.

§ 5. Assets of the Estate and Right of Personal Representative to Possession.

Where there are adverse claims against the surplus realized upon the foreclosure of a deed of trust after the death of the trustor, and a proceeding is instituted pursuant to G.S. 45-21.32 to determine who is entitled to such funds, it is the clerk and not the administrator who determines the priority of payments, although the administrator claiming the funds is a necessary party. *Lenoir County v. Outlaw*, 97.

§ 13a. Sale of Lands to Make Assets.

Where, in a proceeding for the sale of lands to make assets to pay debts of the estate and for partition among the heirs at law, it is denied that the decedent left no personal funds with which to pay debts, but admitted that the lands could not be actually divided without injury to all or some of the tenants in common, order of sale for petition is proper, but the proceeds of sale must be held pending determination of whether sale is necessary to make assets, in which event the court must order their application to the payment of debts. *Clapp v. Clapp*, 281.

Where the petition for sale of lands to make assets with which to pay debts of the estate alleges that the decedent left no estate so far as could be ascertained, it is sufficient on this aspect, and demurrer on the ground that the petition failed to set forth the value of the estate, as near as may be ascertained, and the application thereof, is properly overruled. *Ibid.*

FORNICATION AND ADULTERY.

§ 1. Nature and Elements of the Offense.

A single act of illicit sexual intercourse does not constitute fornication and adultery as defined by G.S. 14-184, the offense being habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other. However, the duration of the association is immaterial if the requisite habitual intercourse is established, and it has been held that a period of two weeks is sufficient to constitute the offense. *S. v. Kleiman*, 277.

FORNICATION AND ADULTER—*Continued.*

In a prosecution under G.S. 14-184, it is not required that the State prove that the male defendant and his wife were separated. *Ibid.*

§ 2. Prosecutions.

In a prosecution under G.S. 14-184, the acts of illicit intercourse may be proved by circumstantial evidence, and it is not required that even one such act be directly proven. *S. v. Kleiman*, 277.

Evidence of defendants' guilt of fornication and adultery *held* sufficient to be submitted to jury. *Ibid.*

The instruction as to the elements of the offense of fornication and adultery under G.S. 14-184 *held* without error. *Ibid.*

FRAUD.

§ 1. Deception Constituting Fraud in General.

An action will lie to recover damages for false and fraudulent representations in the sale of property when it is made to appear that such representations were calculated and intended to induce the purchase and were reasonably relied on by the purchaser to his injury and damage. A misrepresentation is material if it induces the other party to act. *Keith v. Wilder*, 672.

§ 5. Deception and Reliance on Misrepresentation.

The rule that if the parties are on equal terms and the purchaser has knowledge of the facts or means of information readily available, an action for fraud will not lie for material misrepresentation unless the seller prevents the purchaser from making use of his knowledge or information, is subject to the exception that an action will lie when the seller makes a positive and definite representation which the purchaser does and is entitled to rely upon, and the representation is of a character to induce a person of ordinary prudence to act to his damage. *Keith v. Wilder*, 672.

Where standing timber is conveyed by a deed describing the lands as a named tract without setting out the boundary lines, and one of the brokers points out the boundary lines of an adjacent tract and falsely and fraudulently represents that such adjacent tract is embraced in the description in the deed, the purchasers are entitled to rely upon such positive representation and may maintain an action for fraud, notwithstanding that they could have ascertained by an accurate survey whether the adjacent tract was included in the description in the deed. *Ibid.*

§ 9. Pleadings.

Allegations *held* sufficient to state cause of action for fraud in sale of timber. *Keith v. Wilder*, 672.

§ 12. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to overrule nonsuit in action for fraud in sale of timber. *Keith v. Wilder*, 672.

§ 9. Contracts Affecting Realty—Application in General.

A restrictive covenant creates a negative easement within the Statute of Frauds, and cannot be proved by parol. *Hege v. Sellers*, 240.

An oral contract to devise real estate is void. *Clapp v. Clapp*, 281.

Contract with broker to sell lands is not required to be in writing. *Carver v. Britt*, 538.

GAMBLING.

§ 1. Acts Constituting Gambling.

Betting on dog races under a pari-mutuel system having no other purpose than that of providing the facilities for placing bets, calculating odds, determining winnings, if any, constitutes gambling, and is subject to abatement by injunction as a statutory nuisance. *Taylor v. Racing Asso.*, 80.

HABEAS CORPUS.

§ 2. To Obtain Freedom from Unlawful Restraint.

Where it appears upon *certiorari* in a *habeas corpus* proceeding that the sentence imposed upon the defendant was in excess of the statutory maximum, but that defendant had not served as long as he might have been legally imprisoned, the judgment will be vacated and the cause remanded for proper sentence, giving defendant credit for the time served under the vacated judgment, but where defendant has served for a longer period than he might have been legally sentenced, he is entitled to his immediate discharge. *S. v. Austin*, 548.

HIGHWAYS.

§ 4b. Construction—Liabilities to Pedestrians and Motorists.

It is not required that highways be constructed in such manner as to insure safety under all conditions, it being a matter of common knowledge that culverts, fills, embankments, and whole sections of roads give way to the destructive force of flood waters. *Floyd v. Highway Com.*, 461.

HOMICIDE.

§ 3. Murder in the First Degree.

An unlawful killing of a human being with malice and with premeditation and deliberation is murder in the first degree. *S. v. Street*, 689.

§ 5. Murder in the Second Degree.

Murder in the second degree is the unlawful killing of a human being with malice, and the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt of the presence of each essential element of the offense. *S. v. Adams*, 559.

The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree. *S. v. Street*, 689.

§ 7. Manslaughter.

The unlawful killing of a human being without malice and without premeditation and deliberation is manslaughter. *S. v. Street*, 689.

§ 11. Self-Defense.

The doctrine of retreat as an element of self-defense has no application to a police officer, or one clothed with the powers of such officer, while in the performance of his duties, but to the contrary it is the duty of such officer when assaulted to stand his ground and carry through on the performance of his duties, and meet force with force so long as he acts in good faith and uses no more force than reasonably appears to him to be necessary to effectuate the due performance of his official duties and save himself from bodily harm. *S. v. Ellis*, 702.

HOMICIDE—*Continued.*

As bearing upon the question of excessive force, a peace officer acting in self-defense is presumed to have acted in good faith, and the court should so instruct the jury. *Ibid.*

§ 16. Presumptions and Burden of Proof.

The intentional killing of a human being with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice, constituting it murder in the second degree. *S. v. Gordon*, 356; *S. v. Adams*, 559; *S. v. Street*, 689.

The requirement that the killing of a human being with a deadly weapon must be intentional in order for the presumptions from such killing to arise does not import that defendant must have intended to kill, but only that he should have intentionally used the deadly weapon. *S. v. Gordon*, 356.

Where the State's evidence tends to establish an intentional killing of a human being with a shotgun, and defendant does not contend that the gun was discharged accidentally, but defends solely on the ground that he killed in self-defense, the presumptions from an intentional killing with a deadly weapon obtained, and it is incumbent upon the defendant to satisfy the jury of the truth of facts justifying or mitigating the killing. *Ibid.*

§ 17. Hearsay Evidence—Declarations.

In a prosecution for homicide committed during a drinking party, testimony of a declaration by defendant's brother to a neighbor that defendant had a gun and declarant was afraid he would kill deceased, and testimony of a declaration by defendant's son that his father was drunk and the son wanted the neighbor to come over to see if he could do anything with him, and testimony of a deputy sheriff that one of the men from the party stated that they had come for him when defendant went into the house to get a gun, none of the declarants being witnesses at the trial, *held* incompetent as hearsay and the admission of the testimony was reversible error. *S. v. Ward*, 706.

§ 18. Dying Declarations.

Where, upon the *voir dire*, the State's evidence discloses that at the time of making the declarations, declarant was in an obviously critical condition and stated he would "never make it," and that shortly thereafter he died, *is held* sufficient predicate for the admission of his statements as dying declarations. *S. v. Gordon*, 356.

The admissibility of statements as dying declarations is for the trial court to decide, and its decision is reviewable only for the purpose of determining if there was any evidence tending to show the facts essential to admissibility. *Ibid.*

Proper predicate having been laid for the admission of declarant's statements as dying declarations, testimony of such declarations, including a declaration that declarant was not doing anything to defendant when defendant shot him, is properly admitted, and the fact that the declarations were made in response to questions of an officer spontaneously asked in regard to the *res gestae* does not render them incompetent, the court having excluded a declaration as to a conclusion of declarant that defendant had no cause or reason to shoot him, and limited the declarations to the *res gestae*. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant and deceased, with others, were engaged in a drinking party characterized by bad temper, fighting, and scuffling,

HOMICIDE—*Continued.*

that defendant had a shotgun loaded with two shells, that a neighbor saw defendant shoot one time in the direction of deceased and shortly thereafter found deceased at that place *in extremis*, and that thereafter the gun was found with both shells exploded, *is held* sufficient to overrule motion for nonsuit in a prosecution for homicide. *S. v. Wood*, 706.

§ 27b. Instructions on Presumptions and Burden of Proof.

Where defendant does not admit that he intentionally shot deceased, but contends that he was drunk and had no knowledge of firing the fatal shot and had no malice toward his victim, an instruction to find defendant guilty of murder in the second degree if the jury should find from the admission of defendant that he shot and killed deceased with malice, but without premeditation and deliberation, and that malice is implied from the use of a deadly weapon, must be held for prejudicial error. *S. v. Adams*, 559.

An instruction susceptible to the interpretation that if the jury found that defendant killed deceased with a deadly weapon, but were satisfied from defendant's evidence that in shooting the deceased defendant was justified and did so without malice, defendant would be guilty of manslaughter, must be held for error, since if defendant was justified in shooting the deceased and did so without malice, defendant would be entitled to a verdict of not guilty. *Ibid.*

§ 27f. Instructions on Defenses.

In this case defendant killed deceased in her home after she had requested him to leave, claiming that she killed in self-defense. The court, in illustrating what is meant by real and apparent danger, charged that if "somebody jumps out in the dark and flashes a pistol on you and says he is going to kill you, you have the right to protect yourself and kill him," notwithstanding the pistol may not be loaded or could not be fired. *Held:* The use of hypothetical facts wholly unrelated to the facts in evidence was prejudicial. *S. v. Street*, 689.

The court in charging upon the right of a person in his home to order an intruder to leave the premises and to use such force as is reasonably necessary to cause the intruder to leave, stated "On the other hand one cannot use the excessive force of taking human life." *Held:* The charge was prejudicial, the question for the jury being whether under all of the circumstances defendant had reasonable cause to believe and did believe that the force used was necessary to protect herself from impending danger or great bodily harm from the assault or threatened assault which defendant contended deceased was making upon her. *Ibid.*

Where the evidence discloses that defendant was a wildlife protector and at the time was engaged in the performance of his duties in checking a fisherman for license to give him a citation if he had none, G.S. 113-91d, G.S. 113-141, G.S. 113-152, G.S. 113-157, inadvertence of the court in charging the jury that the incident under investigation did not involve defendant's discharge of official duties and the fact that defendant was an officer would not affect his right to shoot, *is held* to constitute prejudicial error. *S. v. Ellis*, 702.

§ 27h. Form and Sufficiency of Issues and Instructions on Less Degrees of Crime.

Where, in a prosecution for murder in the second degree, the State's evidence tends to establish the intentional killing of a human being with a deadly weapon by defendant, and defendant defends solely upon the plea of self-defense, nonsuit is properly denied, and the cause is properly submitted to the jury upon the question of defendant's guilt of murder in the second degree, guilt of manslaughter, or not guilty. *S. v. Gordon*, 356.

HUNTING AND FISHING.

§ 1. State Regulation, Conservation and Control.

The Wildlife Resources Commission has been delegated the power to acquire land for game farms or game refuges in the public interest, G.S. 113-84, G.S. 143-237, *et seq.*, but the public need for such project in a particular locality must first be established by a certificate of public convenience and necessity from the North Carolina Utilities Commission, G.S. 40-53, before land can be taken by condemnation. *Utilities Com. v. Story*, 103.

The Wildlife Resources Commission, in the discharge of its important duties in the public interest, can act only by resolution passed in a legal meeting of its members sitting as a commission, which resolution should be recorded in its minutes, and thus become the best evidence of the Commission's actions. *Ibid.*

Resolution of the Wildlife's Resources Commission authorizing its director to negotiate for the purchase of certain lands and setting up a certain sum in its budget therefor, even if it be construed to authorize the director to actually purchase the lands designated, is not authorization to him to institute proceedings to condemn any part of the lands. Such resolution cannot support a finding that an application for certificate of public convenience and necessity for the acquisition of the land was filed by the Wildlife Resources Commission so as to confer jurisdiction on the Utilities Commission to issue the certificate. *Ibid.*

HUSBAND AND WIFE.

§ 12c. Conveyances Between Husband and Wife.

Decree of absolute divorce was rendered and quitclaim deed from the wife to the husband was executed the same day. The evidence was conflicting as to whether the deed was executed and delivered prior to the rendition of the divorce decree or was executed and delivered subsequent thereto. It was admitted that the requirements necessary to the validity of a deed from a married woman to her husband as prescribed by statute then in effect were not observed. *Held:* The conflicting evidence presents a question for the jury as to whether the deed was executed and delivered prior to the rendition of the divorce decree, in which event it would be void, or whether it was executed and delivered subsequent thereto, in which event it would be valid. *Noble v. Pittman*, 601.

§ 12d (2). Construction and Operation of Deeds of Separation.

That the parol separation agreement between the parties included a settlement of the notes theretofore executed by the husband to the wife *held* determined by the verdict of the jury in a trial free from prejudicial error. *Troutman v. Troutman*, 71.

§ 13a (3). Husband as Agent for Wife.

No presumption arises from the mere fact of the marital relationship that the husband is acting as agent for the wife; there must be proof of the agency. *Air Conditioning Co. v. Douglass*, 170.

The fact that a contractor, with knowledge that the several tracts of land are held by the entireties, contracts and deals over a period of years solely with the husband in installing heating equipment in houses erected on the several lots, fails to show actual or implied authority in the husband to act in the premises as agent for the wife. *Ibid.*

Where a contractor, with knowledge that the several tracts of land are held by the entireties, contracts and deals over a period of years solely with the husband in installing heating equipment in houses erected on the several lots,

and the husband does not act or profess to act as agent for the wife, and the wife does not by words or conduct represent or permit it to be represented that the husband is acting as her agent, the contractor may not hold the wife liable on the contract by ratification or estoppel. *Ibid.*

§ 16. Estates by Entireties—Conveyance or Encumbrancing.

An estate by entireties cannot be aliened, encumbered, nor a lien acquired upon it without the assent of both husband and wife; nor would a judgment against either be a lien upon the property. *Air Conditioning Co. v. Douglass*, 170.

INDEMNITY.

§ 2a. Nature and Construction of Contracts in General.

A contract indemnifying the employer against loss occasioned by dishonesty, or fraud of employees is in the nature of a contract of insurance, and is subject to the rules of construction applicable to insurance policies generally. *Thomas & Howard Co. v. Ins. Co.*, 109.

§ 7. Actions on Contracts.

Employer may join action against employees in tort with action *ex contractu* on indemnity policy covering the employees. *Thomas & Howard Co. v. Ins. Co.*, 109.

In an action on a fidelity policy, a complaint setting forth the essential features of the contract, and alleging that it was in force at the time in question, and that plaintiff employer had sustained loss by the dishonesty or fraud of its employees acting in collusion or conspiracy with each other, *is held* insufficient, it being required that plaintiff employer alleged the facts upon which the conclusions of fraud and conspiracy are predicated. *Ibid.*

In an action on a fidelity policy, the plaintiff must specify the loss with particularity, and allegation that plaintiff had sustained "property and/or inventory loss" is insufficient. The use of the term "and/or" disapproved. *Ibid.*

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

The allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect the defendant against a subsequent prosecution for the same offense. *S. v. Scott*, 178; *S. v. Faulkner*, 609.

If the warrant or indictment is sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, it will be held sufficient and will not be quashed, or the judgment arrested, for mere informalities or refinements, but nevertheless, accepted and approved forms should be used, and the omission of indispensable allegation is fatal. *S. v. Hammonds*, 226.

An indictment or warrant must be complete in itself and must contain all the material allegations which constitute the offense charged. *S. v. Smith*, 301.

Where a statute sets forth disjunctively several means or ways by which the offense may be committed, a warrant thereunder correctly charges them conjunctively. *S. v. Chestnutt*, 401.

The use of the disjunctive "or" instead of the conjunctive "and" is disapproved. *S. v. Faulkner*, 609.

INDICTMENT AND WARRANT—*Continued.*

§ 10. Identification of Person Accused.

An indictment or warrant must clearly and positively identify the person charged with the commission of the offense. *S. v. Hammonds*, 226.

Where indictment charges offense conjunctively, failure to repeat name of defendant in second count *held* not fatal. *Ibid.*

§ 13. Motions to Quash.

While a motion to quash is the most appropriate method of raising the question whether the bill of indictment charges the commission of any criminal offense, motion in arrest of judgment may be used in the same end. *S. v. Scott*, 178.

Motion to quash must be based on matter appearing of record. *S. v. Chestnutt*, 401.

A defect appearing in a warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment, and may not be presented by motion to nonsuit. *S. v. Faulkner*, 609.

INFANTS.

§ 11. Recovery of Damages in Actions by Infants.

Parent may waive right to recover for loss of services and medical expenses, and permit child to recover full damages in action against tort-feasor. *Shields v. McKay*, 37.

INJUNCTIONS.

§ 4d. Enjoining Operation of Nuisances.

Operation of race track may be abated as nuisance even though carried on under color of unconstitutional statute. *Taylor v. Racing Asso.*, 80.

Verified allegations to the effect that defendants had entered upon plaintiffs' land, established a shooting gallery where high powered firearms were frequently discharged over plaintiffs' land, endangering aircraft approaching and leaving plaintiffs' landing field, and constituting a continuous nuisance, both private and public in character, are *held* sufficient to support and warrant the issuance of a temporary restraining order, and defendants' contention that the action was one in trespass to try title and that plaintiffs have an adequate remedy at law, is untenable. *Owen v. DeBruhl Agency*, 597.

§ 4g. Enjoining Passage or Enforcement of Ordinances.

Ordinarily, equity has no jurisdiction to interfere with the enacting of an ordinance by the governing body of a municipality in the exercise of powers that are legislative in character. *Rheinhardt v. Yancey*, 184.

Even when it appears that a proposed ordinance would be void or unconstitutional, equity will not enjoin the passage of the ordinance unless it appears that irreparable injury will result to plaintiff from its mere passage. If plaintiffs would be injured by the enforcement of such ordinance, the remedy is to enjoin such enforcement, in which action the municipality would be a necessary party. *Ibid.*

§ 5. Issuance of Temporary Orders.

G.S. 1-490 prescribes that a temporary restraining order issued without notice shall not be granted for a longer period than 20 days, but the statute does not require a hearing within 20 days, and when a date fixed in the order for the

INJUNCTIONS—*Continued.*

hearing is within the 20-day period the fact that the hearing is postponed by the judge for good and sufficient reason does not require the dissolution of the order. *Owen v. DeBruhl Agency*, 597.

§ 8. Continuance, Modification and Dissolution of Temporary Orders.

Where, in an action instituted solely for the purpose of obtaining an injunction, demurrer to the complaint is sustained, the temporary order issued in the cause must be dissolved. *Rheinhardt v. Yancey*, 184.

An order continuing the temporary restraining order to the hearing on the merits relates back to the findings and prohibitions of the original order and continues it in effect. *Owen v. DeBruhl Agency*, 598.

Where the facts alleged in the verified complaint are sufficient to warrant and require the issuance of a restraining order, the judge may properly continue the temporary order to the hearing without further findings. *Ibid.*

INSANE PERSONS.

§ 9b. Charges and Claims Against Estate—Support of Dependents.

In a proceeding requesting an increase in the allowance to the dependent of a permanently insane veteran, all persons who would be entitled to a distributive share of the estate in case of death are necessary parties, and the Veterans Administration is a proper party. *Patrick v. Trust Co.*, 76.

§ 12. Attack and Setting Aside Contracts on Ground of Mental Incapacity.

Contracts of insane person are voidable and not void, and may be set aside only by the lunatic or his personal representatives or his heirs, executor or administrator. *Reynolds v. Earley*, 521.

§ 17. Proceedings to Obtain Discharge.

A person committed to a State mental institution under G.S. 122, Art. 3, may not invoke the provisions of G.S. 35-4 for a determination of the restoration of sanity by a jury trial as a condition precedent to his release under G.S. 122-46.1, the proper remedy being by *habeas corpus*, since the recovery from a mental disease after commitment would be an event taking place after commitment within the meaning of G.S. 17-33 (2), entitling an inmate to discharge under G.S. 17-32. *In re Harris*, 179.

INSURANCE.

§ 12. Term and Period of Coverage.

An insurer, in the absence of fraud or concealment, may be held liable for losses antedating the policy if the policy so stipulates and the contract is founded on a consideration, and where a policy or certificate provides that it should not be valid unless countersigned, the inception of the risk need not be delayed until it is so countersigned. *Pruitt v. Ins. Co.*, 725.

§ 13. Construction of Insurance Contracts in General.

Since insurance policies are prepared by insurer, they must be construed liberally in favor of insured and strictly against insurer. *Barker v. Ins. Co.*, 397.

Doctrine of waiver applies to forfeiture provisions, but cannot operate to increase the coverage of the policy. *Hunter v. Ins. Co.*, 593.

INSURANCE—*Continued.*

Statutory provisions applicable to a policy of insurance enter into and form a part of the contract to the same extent as if they were actually written in it. *Brown v. Casualty Co.*, 666.

In the absence of fraud or mistake, a contract of insurance is conclusively presumed to express the agreement between the parties, and their rights must be determined in accordance with what is written. *Pruitt v. Ins. Co.*, 725.

§ 19c. Fire Insurance—Property Insured.

A provision in policy of fire insurance including in its coverage personalty of insured "while elsewhere than on the described premises . . ." does not limit the period during which the property may be "elsewhere," and it will be assumed that the only limitation as to time is the life of the policy. *Barker v. Insurance Co.*, 397.

The policy of fire insurance in suit provided coverage of the described personalty belonging to the insured or any of his family residing with insured. *Held:* Insurer is liable for the destruction of the described property while used by insured's minor son in an apartment maintained by the father for the son while attending classes at an educational institution, since under the facts the son continued to reside with insured within the meaning of the policy. *Ibid.*

§ 34c. Occurrence of Disability During Term of Coverage.

The policy in suit provided for disability coverage until the anniversary of the policy nearest insured's fifty-fifth birthday, with reduction of the annual premiums after the expiration of the disability coverage. Through error, after the expiration of the disability period, insurer continued to mail insured premium notices without reduction, and insured continued to pay the total premium for four years after he was fifty-five, and became disabled during the period covered by the last payment of premium. *Held:* The doctrine of waiver applies to forfeiture provisions, but cannot be applied to bring within the coverage of the policy risks expressly excluded therefrom, and therefore, insured is entitled to return of the premiums paid for disability after the expiration of the coverage of this risk, but is not entitled to recover disability benefits under the policy. *Hunter v. Ins. Co.*, 593.

§ 34d. Occurrence of Disability During Life of Certificate Under Group Policy.

Plaintiff's evidence tended to show that she had suffered from asthma and high blood pressure for sometime prior to her discharge, but her medical expert witness testified to the effect that while such ailments would constitute a handicap, he was unable to state that plaintiff was totally and permanently disabled therefrom at the time of her discharge, and plaintiff herself swore under oath in applying for unemployment benefits after her discharge that she was able to work. *Held:* Nonsuit was properly entered in her suit upon her certificate under a group policy to recover for total and permanent disability, since her evidence fails to show that she was totally and permanently disabled at or before the date of the termination of her employment. *Drummonds v. Assurance Society*, 379.

§ 38. Accident and Health Insurance—Risks Covered.

Where an accident and health policy excludes from its coverage death of the insured caused by intentional act of any person, evidence establishing that insured was intentionally shot and killed by his wife, justifies nonsuit. G.S. 58-253 (6), referring to death by unlawful conduct of insured, is not applicable,

INSURANCE—*Continued.*

and the fact that the exclusion clause in the policy is not in the terms of that statute is immaterial. *Patrick v. Ins. Co.*, 614.

§ 43. Auto Insurance—Construction and Operation of Policy.

A policy of insurance endorsed on its face "N. C. Assigned Risk Plan" is governed by the Motor Vehicles Safety and Responsibility Act, G.S. 20, Art. 9. *Brown v. Casualty Co.*, 666.

Insurer in an assigned risk policy on a truck is not liable for injuries inflicted by insured while driving a farm tractor, since a farm tractor is not a motor vehicle within the purview of the Uniform Drivers' License Act, the statute relating to the registration and certificate of titles of motor vehicles, or the Motor Vehicles Safety and Responsibility Act, G.S. 20-226, G.S. 20-6, G.S. 20-7, G.S. 20-8. *Ibid.*

The certificate of insurance in suit, issued under a master policy, stipulated an 18 month policy period between specified dates. The certificate provided that it should not be valid unless countersigned by a duly authorized agent of the company. *Held:* The certificate does not cover damage sustained in an accident occurring after the expiration of the policy period stipulated, notwithstanding that it occurred within 18 months of the time the policy was countersigned. *Pruitt v. Ins. Co.*, 725.

§ 51. Auto Insurance—Payment and Subrogation.

The trial court has discretionary power, upon motion of defendant, to join as an additional party plaintiff the insurance company which had paid part of plaintiff's loss sustained in the collision in suit. *Elizabeth City v. Hoover*, 569.

INTOXICATING LIQUOR.

§ 9c. Competency and Relevancy of Evidence.

Where officer stopping car to inspect driver's license sees intoxicating liquor therein, search warrant is not necessary, and evidence is competent. *S. v. Hammonds*, 226.

JUDGES.

§ 5. Removal From Office.

Article IV, Section 31, Constitution of North Carolina, states the causes for which, and provides the method by which, a judge or presiding officer of a court inferior to the Supreme Court may be removed from office, and the causes and method therein expressed are exclusive and preclude the removal of the judge of a Recorder's Court by the Mayor and Board of Commissioners of the municipality purporting to act under color of statutory authority. *Reid v. Comrs. of Pilot Mountain*, 551.

JUDGMENTS.

§ 10. Judgments by Default Final.

The clerk of the Superior Court has no jurisdiction to enter a judgment by default final declaring a trust in favor of the plaintiff in real property. *Deans v. Deans*, 1.

§ 20a. Jurisdiction of Trial Court to Modify and Correct Judgment.

During the term a judgment is *in fieri*, and the judge has the discretionary power to make such changes and modifications in the judgment as he may deem wise and appropriate for the administration of justice. *S. v. Cagle*, 134.

JUDGMENTS—*Continued.*

After the expiration of the term, the Superior Court has the power at term time to make its records speak the truth by correction of clerical errors or correction of the judgment to make it express correctly the action taken by the court. This power does not extend to the correction of errors of law. Such power must be exercised at term time in the county, and the judge may not correct such errors while holding court in another district. *Ibid.; Parker v. Robinson*, 612.

§ 23. Life of Judgment and Lien.

Under the proviso in G.S. 1-306 no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof (G.S. 1-234), and the only procedure whereby the owner of the judgment may obtain a new judgment for the amount is by independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as in case of any other action to recover judgment on debt, which action must be commenced within 10 years from the date of the rendition of the judgment. *Reid v. Bristol*, 699.

The remedy of an action on a judgment and the remedy of a motion to revive a dormant judgment, by *scire facias*, are separate remedies, and a concept of a dormant judgment and *scire facias* for leave to issue execution thereon are now obsolete, and a judgment entered upon a motion to revive the judgment, in which no summons is issued and no complaint filed, is a nullity, the remedy of a judgment upon a judgment being obtainable only by an independent action prosecuted in conformity with an action for debt. *Ibid.*

§ 27a. Attack and Setting Aside Default Judgments.

Upon a motion to vacate an order on the ground that it was entered without notice, G.S. 1-582, it is the duty of the court upon request to find the facts not only in respect to the grounds upon which the motion was made, but as to the meritorious defense, the rules as to the setting aside a judgment for surprise and excusable neglect under G.S. 1-220, being applicable. *Sprinkle v. Sprinkle*, 713.

§ 27b. Void Judgments.

A void judgment is a nullity and may be quashed *ex mero motu*, and it is error for the court to deny a motion in the cause to vacate such judgment. *Deans v. Deans*, 1.

Where service by publication is void for defective affidavit, court acquires no jurisdiction and judgment is void. *Nash County v. Allen*, 543.

A void judgment is a nullity and may be disregarded, set aside, or collaterally attacked by the parties, or may be set aside by the court of its own motion. *Reid v. Bristol*, 699.

§ 27c. Erroneous Judgments.

The sole remedy against an erroneous judgment is by appeal. *Johnson v. Board of Education*, 56.

§ 27e. Judgments Obtained by Fraud.

Findings of the general county court on motion to set aside a judgment previously rendered by it that plaintiff had perpetrated a fraud upon the court in the service of process by publication *held* supported by competent evidence and to sustain the decree setting aside the judgment. *Lawson v. Lawson*, 570.

JUDGMENTS—*Continued.*

§ 31. Conclusiveness of Judgment—Foreign Judgments.

A property settlement contained in a decree of divorce entered by a court of another state is void in so far as it attempts to affect title to land in this State. *Noble v. Pittman*, 601.

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

A final judgment on the merits rendered by a court of competent jurisdiction, in the absence of fraud or collusion, is conclusive of the rights and facts in issue as to the parties and their privies, as a universal rule of expediency, justice, and public tranquillity. *Coach Co. v. Burrell*, 432.

The term "privity," when used to describe persons barred by the doctrine of *res judicata*, means persons having mutual or successive rights to the same interests in property, and whose interests therefore have been legally represented at the previous trial. *Ibid.*

The rule that a judgment ordinarily binds only parties and privies, is subject to an exception in favor of an employer, whose liability is purely derivative and dependent entirely upon the doctrine of *respondeat superior*. *Ibid.*

The fact that one of the attorneys representing the employer in an action against the third person tort-feasors had theretofore represented the employee in an action against the same defendants, does not import that such attorney was representing the employer in the former action, since the relationship of employer and employee in itself does not confer the power upon the one to represent or bind the other in litigation. *Ibid.*

In an action by the driver of a bus against the driver and owner of a tractor-trailer involved in a collision with the bus, judgment for defendants was entered on the verdict that the bus driver was not injured by the negligence of the defendants. *Held:* The judgment does not bar a subsequent action by the owner of the bus against the owner of the tractor-trailer to recover for damages sustained by the bus in the same collision, since the two plaintiffs are not in privity and the principle of mutuality is lacking. *Ibid.*

The guest in a car owned and operated by her husband brought action against the driver and the owner and the occupant of the other car involved in the collision, to recover for personal injuries, and judgment was entered in plaintiff's favor. Thereafter defendant occupant brought action against the husband, owner-operator, to recover for personal injuries. *Held:* The husband was not a party to the first action, and therefore, he was not entitled to set up the judgment in the first action as *res judicata* in the second. *Morgan v. Brooks*, 527.

The doctrine of *res judicata* embodies the general rule that any right, fact, or question in issue and directly adjudicated, or which is necessarily involved in the determination of the action and which should have been presented for adjudication, is conclusively settled by the judgment on the merits rendered by a competent court, and cannot again be litigated between the parties and privies. *Gaither Corp. v. Skinner*, 532.

Under the doctrine of *res judicata*, a party defendant who interposes a part of a claim by way of recoupment, setoff, or counterclaim, is ordinarily barred from recovering the balance of his claim in a subsequent action. *Ibid.*

In an action by the contractor to recover the balance alleged to be due on the construction contract, the owner alleged a counterclaim for damages for the contractor's breach of the construction contract as to several specified items. Judgment by consent was entered. After the institution of this action, the owner sued the contractor for breach of the construction contract as to

other specified items. The evidence disclosed that the owner was fully apprised of the defects complained of in the second action prior to the time the consent judgment was entered in the first. *Held:* In the absence of any evidence of fraud or deception, judgment in the first action is a bar to the second. *Ibid.*

§ 33a. Judgments of Nonsuit as Bar to Subsequent Actions.

A judgment of nonsuit will bar a subsequent action only when it is made to appear that the subsequent action is between the same parties or their privies, on the same cause of action and upon substantially the same evidence. *Bowen v. Darden*, 11.

Nonsuit in an action to establish an interest in land on the theory of a constructive trust will not bar a subsequent action between the parties or their privies in an action based upon the theory of a resulting trust. *Ibid.*

A judgment as of nonsuit entered upon demurrer to the evidence constitutes *res judicata* and bars a subsequent action upon substantially the same allegations and evidence, but will not bar a subsequent action in which plaintiff "mends his licks" by the introduction of additional evidence on a material aspect not covered by the evidence at the former trial. *Kelly v. Kelly*, 146.

In a second action after an involuntary nonsuit upon demurrer to the evidence, there is no presumption that available pertinent evidence was introduced at the former trial merely because such evidence was available. *Ibid.*

A judgment of compulsory nonsuit or dismissal not involving the merits of the case is not a bar to a subsequent action. *McDevitt v. Chandler*, 677.

Where after plea of sole seizin in a partition proceeding, the proceeding is nonsuited for matters not involving the merits, the judgment will not bar a subsequent action between the parties to cancel a deed as being a cloud on title. *Ibid.*

§ 35. Plea of Estoppel, Hearings and Determination.

Ordinarily, upon the plea of *res judicata*, recitals of the judgment are conclusive as to the issues involved. *Gaither Corp. v. Skinner*, 532.

On the plea of *res judicata*, defendant introduced in evidence with plaintiff's acquiescence the judgment roll in the prior action. The judgment roll was not in conflict with plaintiff's evidence, but merely explained and clarified the testimony of plaintiff's witnesses in respect thereto. *Held:* The judgment roll was competent to be considered with plaintiff's evidence upon defendant's motion to nonsuit on the ground of *res judicata*. *Ibid.*

When the plea of *res judicata* is established as a matter of law upon the evidence adduced, the plea raises no issue of fact for the jury, and the court properly enters judgment of involuntary nonsuit. *Ibid.*

JURY.

§ 4. Examination of Prospective Jurors.

In an action to recover for the negligent operation of an automobile covered by a liability policy in a mutual company, policyholders as of the time of trial could have a pecuniary interest in the verdict, but it is not made to appear that policyholders as of the date of the accident would be financially affected, and therefore, when the court excludes all policyholders from the jury list, it is not error for the court to refuse to permit plaintiff, in selecting the jury, to request that all prospective jurors who were policyholders at the date of the accident to excuse themselves. *Moore v. Bezalla*, 190.

LABORERS' AND MATERIALMEN'S LIENS.

§ 1. Nature and Grounds of Lien in General.

A lien for labor and material arises out of the relationship of debtor and creditor created by contract, and it is for the debt that the lien is created by statute. *Air Conditioning Co. v. Douglass*, 170.

Mere knowledge by the owner that work is being done or material furnished does not enable the person furnishing the labor or material to obtain a lien. *Ibid.*

Where a contractor contracts solely with the husband for material furnished in the erection of a house held by the husband and wife by entireties, the contractor may not enforce a lien upon the realty unless the wife is bound by the contract through agency, ratification or estoppel. *Ibid.*

LANDLORD AND TENANT.

§ 2. Form, Requisites and Validity of Leases in General.

A lease which describes the land as being in a named township and adjoining and bounded by the lands of named persons, will not be declared unenforceable on the ground that the description is too vague and indefinite. *Reynolds v. Earley*, 521.

§ 22. Termination of Lease for Failure to Pay Rent.

Where the lease contains no forfeiture clause for failure to pay rent, lessors may assert forfeiture for nonpayment of rent only after 10 days from demand upon lessees for payment. *Reynolds v. Earley*, 521.

Where a lease does not provide for forfeiture for nonpayment of taxes or the making of improvements, forfeiture may not be declared on these grounds. *Ibid.*

§ 29. Actions for Rent.

Where the evidence establishes that plaintiff landlords received possession of the leased premises prior to the expiration of the renewal term, an instruction to the effect that if the jury found that defendant lessees had breached the agreement, to award damages for the full amount of the rent for the renewal period, is error. Defendants are entitled to an instruction applying the provisions of the lease for liquidated damages by subtracting from the contract rental the amount of the reasonable rental value for the unexpired term after possession by lessors, or instruction on lessors' duty to exercise due diligence to relet the property and thus minimize the loss. *Weinstein v. Griffin*, 161.

Where, in lessors' action to recover the rent for the yearly renewal in accordance with an extension executed by lessees in conformity with the original lease, defendant lessees claim they surrendered possession of the premises with lessors' approval the day the original lease expired, and that, therefore, there was no breach of the lease, and lessors, while contending that lessees breached the agreement by failure to pay rent during the extension, admit that they reentered possession during the extension period, the court should submit to the jury the question whether the contract was breached, and, if so, when such breach occurred, and should submit with sufficient explicitness defendant lessees' contention and evidence with respect to agreement of lessors to release lessees of their obligation under the lease and renewal thereof. *Ibid.*

LARCENY.

§ 1. Nature and Elements of the Offense.

While the crimes of larceny and receiving stolen property knowing it to have been stolen, are different offenses and not degrees of the same offense, the offense of receiving presupposes that the property in question had been stolen by some person other than the one charged with receiving, and therefore, a person cannot be guilty both of stealing property and of receiving the same property knowing it to have been stolen. *In re Powell*, 288.

§ 5. Presumptions and Burden of Proof.

The presumption arising from the recent possession of stolen property is to be considered by the jury merely as an evidential fact along with other facts in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt, and instruction that such presumption is not conclusive but may be overcome or rebutted by showing that the party in possession did not in fact steal or carry away the goods, is prejudicial error as placing, in effect, the burden upon defendant to rebut the presumption of his guilt. *S. v. Ramsey*, 181.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

The words "libel *per se*" mean actionable *per se*, that is, actionable without allegation of special damage. *Kindley v. Privette*, 140.

Written words may be libelous *per se* even though such words, if spoken, would not be slanderous *per se; a fortiori* words which would be slanderous *per se*, when written or printed, are libelous *per se*. *Ibid.*

Words printed in church bulletin charging ordained minister, acting as guest preacher, with being disorderly member of the church, trouble maker, and unwilling to co-operate in maintaining peace and right spirit in the church *held* libelous *per se*. *Ibid.*

§ 6. Notice and Retraction.

The statutory provision relating to notice and an opportunity for retraction are germane solely to the issue of punitive damage and have no bearing upon the sufficiency of the facts alleged in the complaint to constitute a cause of action for libel. *Kindley v. Privette*, 140.

§ 9. Parties.

Plaintiff, a candidate for public office, brought this action for libel against the opposing candidate and a newspaper alleging that the publication of a libelous article in the newspaper was pursuant to a conspiracy between defendants. There was no contention or evidence that the individual defendant was an employee of the newspaper or was acting for it. *Held:* In the absence of evidence of conspiracy, nonsuit was properly entered, since libel is an individual tort incapable of joint commission. *Manley v. News Co.*, 455.

LIMITATION OF ACTIONS.

§ 9. Fiduciary Relationships and Trusts.

A resulting or constructive trust, as distinguished from an express trust, is governed by the ten-year and not the three-year statute of limitations. *Bowen v. Darden*, 11.

The statute of limitations does not run against a *cestui que trust* in possession. *Ibid.*

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus will lie only to compel an inferior tribunal, board, corporation, or person to perform a clear legal duty at the instance of a party having a clear legal right to demand such performance. *Nebel v. Nebel*, 491.

MASTER AND SERVANT.

§ 1. Creation and Existence of Relationship in General.

The relationship of employer and employee must be created by contract, express or implied, and the word "employee" when used in this connection means one who works for wages or salary in the service of an employer. *Alliance Co. v. State Hospital*, 329.

§ 37. Construction of Compensation Act in General.

While the Workmen's Compensation Act should be liberally construed to the end that its benefits should not be denied by technical, narrow and strict interpretation, the rule of liberal construction cannot be employed to attribute to a provision of the Act a meaning foreign to the plain and unmistakable import of the words employed. *Guest v. Iron & Metal Co.*, 448.

§ 40c. Whether Accident Arises Out of Employment.

The words "out of" as used in the Workmen's Compensation Act refer to the origin or cause of the accident and import that there must be some causal relation between the employment and the injury, but not that the injury ought to have been foreseen or expected. *Guest v. Iron & Metal Co.*, 448.

Whether an injury to an employee received while performing acts for the benefit of third persons arises out of the employment depends upon whether the acts of the employee are for the benefit of the employer to any appreciable extent, or whether the acts are solely for the benefit or purpose of the employee or a third person. *Ibid.*

Injury to employee while pushing stalled car at request of filling station operator *held* in reciprocity for free air requested by employee for employer's benefit, and therefore accident arose out of employment. *Ibid.*

§ 40d. Whether Accident Arises in Course of Employment.

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the injury occurs. *Guest v. Iron & Metal Co.*, 448.

§ 40f. Workmen's Compensation Act—Diseases.

In order to support recovery of compensation for silicosis, there must be medical expert testimony that claimant was disabled as a result of this disease and that such disability occurred within two years from the last exposure to the hazards of silica dust. *Huskins v. Feldspar Corp.*, 128.

Evidence *held* insufficient to support finding that disability from silicosis occurred within two years from last exposure. *Ibid.*

"Disablement" from silicosis and asbestosis is defined in unambiguous terms by G.S. 97-54, and under the statute "the last occupation in which remuneratively employed" is not synonymous with the "place of last injurious exposure" nor does "disablement" mean disability to perform the duties of employment at the place of last exposure. *Ibid.*

MASTER AND SERVANT—*Continued.*

An employee is actually disabled by reason of silicosis when by reason of this disease he is incapable of continuing to perform the normal labor incident to the employment in which he is then engaged with substantial regularity. This definition does not include odd jobs of a trifling nature which the employee may be driven to perform irregularly as a result of economic necessity. *Ibid.*

§ 43. Workmen's Compensation Act—Notice and Filing of Claim.

A workman, whatever his actual physical condition may be, is not charged with notice that he has silicosis until and unless he is so advised by competent medical authority, and the time within which he must file his claim for compensation begins to run from the date he is so advised. *Huskins v. Feldspar Corp.*, 128.

§ 52. Hearings and Findings of Commission.

It is required that the Industrial Commission find all the crucial and specific facts upon which the right to compensation depends in order that it may be determined on appeal whether adequate basis exists for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment, but it is not required that the Commission make a finding as to each detail of the evidence or as to every shade of meaning to be drawn therefrom. *Guest v. Iron & Metal Co.*, 448.

§ 55d. Review in Superior Court.

In reviewing an award of the Industrial Commission, the courts will consider the specific findings of fact of the Industrial Commission, together with every reasonable inference that may be drawn therefrom, in claimant's favor. *Guest v. Iron & Metal Co.*, 448.

MORTGAGES AND DEEDS OF TRUST.

§ 9. Debts Secured.

The mortgage in question secured payment of a note for advancements made and further advancements agreed to be made, and also "any other amount that the party of the second part may advance." *Held:* Whether the mortgage secures other items of indebtedness owed by the mortgagor to the mortgagee depends upon the origin and nature of such other debts and whether they were incurred prior or subsequent to the execution of the mortgage, and where the facts in regard thereto are not established, decision of the question may not be made. *Boswell v. Boswell*, 515.

§ 14. Taxes and Assessments.

In a tax foreclosure by a commissioner duly appointed, the holder of a note secured by a deed of trust on the property has the right to purchase the encumbered land for the purpose of protecting its security, and, nothing else appearing, such purchase creates no trust in favor of the debtor. *Redic v. Bank*, 152.

Provision in a deed of trust that upon default or failure of trustor to comply with any of the conditions or covenants of the instrument, the creditor, immediately before instituting foreclosure proceedings, should have the right to enter upon the land and collect the rents and income and apply same to the debt, taxes, and insurance, *is held* for the protection of the creditor, and creates a right but imposes no duty upon the creditor to prevent foreclosure. Further,

MORTGAGES AND DEEDS OF TRUST—*Continued.*

such right does not accrue prior to default or the institution of foreclosure proceedings. *Ibid.*

G.S. 105-409 was enacted for the benefit and protection of holders of notes and bonds secured by deeds of trust or mortgages, and it vests them with the right, at their election, to pay taxes due on the property to protect their security, but imposes no duty upon them to do so for the protection of the trustor. *Ibid.*

Where the holder of a note secured by a deed of trust purchases the land at a tax foreclosure, but does not go into possession or collect the rents and profits from the land until after trustor had been divested of any interest in the land by such tax foreclosure, the transaction creates no equity in favor of trustor, and trustor is not entitled to impress a trust upon the creditor's title or enforce an accounting, either under the provisions of G.S. 105-409, or under provisions of the deed of trust giving the creditor the right, upon default, to enter upon the land, and apply the rents and income therefrom to the debt, taxes and insurance. *Ibid.*

§ 37. Disposition of Proceeds and Surplus After Foreclosure.

The trustee or mortgagee must pay into the hands of the clerk of the Superior Court the surplus remaining after foreclosure in all cases where adverse claims to the funds are asserted, G.S. 45-21.31 (b) (4), and where the trustee pays such funds into the hands of the administrator of the deceased trustor, the trustee remains liable therefor until they are paid into the hands of the clerk as provided by law. *Lenoir County v. Outlaw*, 97.

The clerk and not the administrator determines priority of payments. *Ibid.*

There is no limit of the amount that may be paid the clerk under G.S. 45-21.31; G.S. 28-68 not being applicable. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 3. Territorial Extent and Annexation.

Upon filing of proper petition for referendum, municipality may not annex territory without vote. *Rheinhardt v. Yancey*, 184. But it may not be enjoined from passing extension ordinance. *Ibid.*

§ 8e. Recreation and Memorial Commissions.

The memorial authorized by Ch. 436, Session Laws of 1945, must consist primarily of an auditorium, and if a playground and recreational facilities are included in the project they must be incidental and subordinate to the auditorium, and any "other activities" included therein must be limited to those which constitute public purposes within the purview of the decisions of the Supreme Court. *Greensboro v. Smith*, 363.

The authority of the Memorial Commission created under the provisions of Ch. 436, Session Laws of 1945, to direct the disbursement of funds donated for the Memorial is subject to the limitations that the disbursements be consonant with the purpose of the act, and also that the entire cost of the project shall not exceed the aggregate of the donated funds, plus such additional amounts, if any, as the city may be authorized and may see fit to appropriate by way of supplement thereto. *Ibid.*

§ 14a. Defects or Obstructions in Streets or Sidewalks.

Nonsuit *held* properly entered in this action by plaintiff to recover for injuries resulting when he stepped from the paved sidewalk to an unpaved grass

MUNICIPAL CORPORATIONS—*Continued.*

plot between the sidewalk and the street, and struck his foot against a rock protruding about two inches above the level of the unpaved grass plot. *Rich v. Asheboro*, 75.

A city or town is not an insurer of the safety of its streets or sidewalks, but is required to exercise ordinary and reasonable care to maintain its streets and sidewalks in a reasonably safe condition, and is liable only for such injuries as are proximately caused by defects of such character that injury to travelers therefrom may be reasonably anticipated, and of which the city has actual or constructive notice. *Welling v. Charlotte*, 312.

A person traveling on a street or sidewalk is required to exercise due care to discover and avoid obstructions and defects, the care being commensurate with the danger or appearance thereof. *Ibid.; Cook v. Winston-Salem*, 422.

Upon evidence that plaintiff could not see defect in sidewalk because of crowd leaving church, nonsuit is proper. *Welling v. Charlotte*, 312.

The duty of a municipality to exercise reasonable care to keep its streets and sidewalks in a reasonably safe condition for travel extends to those who are blind or suffer from defective vision or other physical handicap, who are themselves exercising due care, under the circumstances, for their own safety. *Cook v. Winston-Salem*, 422.

A construction company which has not completed its work on a street under contract with the city is under substantially the same legal duty to the traveling public as is the city. *Ibid.*

Neither a municipality nor a construction company improving a street under contract with the city is an insurer of the safety of travelers, whether blind or physically handicapped, or not. *Ibid.*

Where, in the process of improving a street, a path along an intersecting street is left with a drop or slope of some two feet, plainly visible in the daytime, it would seem that neither the municipality, nor the construction company improving the street under contract with the city, is under duty in the exercise of reasonable diligence to place a signal or guard at the descent during the daytime to warn pedestrians, blind or otherwise, since a person with sight could see its condition, and a blind person must exercise a higher degree of care than would be required of a person in possession of all his senses. *Ibid.*

A blind or otherwise handicapped person has as much right to use public ways open to pedestrians as those physically sound, but in doing so, must exercise for his own safety that degree of care which an ordinarily prudent person with the same disability would exercise under the same or similar circumstances, which requires of him a greater degree of effort to attain due care for his own safety than would be required of a person in possession of all his senses. *Ibid.*

Blind person attempting to traverse street which he knew had not been completed by construction of gutters *held* guilty of contributory negligence as matter of law. *Ibid.*

§ 15b. Damages From Operation of Municipal Sewerage Systems.

Evidence *held* not to show trespass on plaintiff's lands by municipality in discharging sewage in stream. *Young v. Asheville*, 618.

§ 30. Levy of Assessments for Public Improvements.

Where municipal streets cross or run contiguous with the edge of a railroad right of way, the lands of the railroad abut the streets for the purpose of levying assessments for the improvement of the streets. *Goldsboro v. R. R.*, 216.

MUNICIPAL CORPORATIONS—*Continued.*

Legislative determination that property abutting municipal streets, including the rights of way of railroad companies, is benefited by improvement of the streets is conclusive upon the owners and the courts, and the railroad company will not be heard to contest the validity of the assessments on the ground that the railroad lands are not benefited by the improvements. *Ibid.*

Chapter 222, Public Laws of 1931, was intended to be merged into the framework of the Local Improvement Act of 1915, Chapter 56. G.S. 160-79. *Ibid.*

§ 37. Zoning Ordinances and Building Permits.

The side of a street opposite the intersection of such street by a "dead-end street" has no "corner" within the meaning of the proviso of G.S. 160-173, and therefore, the owner of the lot upon one corner of the intersection is not entitled as a matter of right to have the governing authorities of the municipality zone his property for business even though the opposite corner and the area opposite the intersection have been zoned for business. *Robbins v. Charlotte*, 197.

§ 38½. Parking Regulations and Facilities.

City may not lease land for off-street parking without finding of public convenience and necessity. *Henderson v. New Bern*, 52.

§ 48. Actions Against Municipalities—Parties.

In an action against a municipality to restrain it from taking certain proposed action, individuals desiring to be heard in opposition to the relief sought by plaintiffs are neither necessary nor proper parties, but must be heard through the defendant municipality which is the real party defendant in interest. *Henderson v. New Bern*, 52.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

The general rule is that the violation of a statute enacted for the safety and protection of the public constitutes negligence *per se*, *a fortiori*, when such violation is in itself a criminal offense. *Reynolds v. Murph*, 60.

§ 3. Dangerous Substances and Instrumentalities.

Violation of a statute, or ordinance of a city or town, relating to the storage or handling of gasoline, is negligence *per se*, but in order to be actionable such violation must be the proximate cause of the injury in suit, including the essential element of foreseeability. *Reynolds v. Murph*, 60.

§ 5. Proximate Cause.

Proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all of the facts as they existed. *Welling v. Charlotte*, 312.

§ 6. Concurrent Negligence.

Allegations *held* sufficient to allege concurrent negligence of defendants in failing to label jug of gasoline. *Reynolds v. Murph*, 60.

§ 9. Anticipation of Injury: Foreseeability.

Foreseeability of injury is a requisite of proximate cause, and if injury cannot be reasonably foreseen in the exercise of due care, defendant is not liable.

NEGLIGENCE—*Continued.*

Billings v. Renegar, 17; *Reynolds v. Murph*, 60; *Loving v. Whitton*, 273; *Garland v. Gatewood*, 606.

Even when the negligence complained of is the violation of a safety statute. *Ibid.*

§ 11. Contributory Negligence.

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, but is sufficient for this purpose if it is a proximate cause or one of them. *Garmon v. Thomas*, 412.

Where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery. *Cook v. Winston-Salem*, 422.

§ 16. Pleadings in Actions for Negligence.

Where the complaint alleges that the violation of a safety statute was the proximate cause of plaintiff's injuries, it is sufficient as against demurrer without particular allegation as to foreseeability, unless it appears affirmatively from the complaint that there was no causal connection between the negligence and the injury. *Reynolds v. Murph*, 60.

Complaint *held* sufficient to allege concurrent negligence. *Ibid.*

§ 17. Burden of Proof.

In an action to recover damages for negligent injury, plaintiff must show failure of defendant to exercise due care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of the injury. *Welling v. Charlotte*, 312.

In an action to recover for negligence, the burden rests on plaintiff to establish a negligent act or omission and that such act or omission proximately caused the injury or death. *Garland v. Gatewood*, 606.

§ 19a. Questions of Law and of Fact.

Negligence and proximate cause are questions of law, and when the facts are admitted or established, the court must say whether they do or do not exist. *Welling v. Charlotte*, 312.

§ 19c. Nonsuit for Contributory Negligence.

Since the burden of showing contributory negligence is on defendant, nonsuit for contributory negligence should not be allowed if the controlling facts are in dispute or if opposing inferences are permissible from plaintiff's proof. *Garmon v. Thomas*, 412.

Nonsuit on the ground of contributory negligence is proper when plaintiff's own evidence establishes this defense. *Ibid.*

A judgment of involuntary nonsuit on the ground of contributory negligence will not be granted unless the evidence on that issue is so clear that no other conclusion seems to be permissible. *Coach Co. v. Burrell*, 432.

§ 20. Instructions in Negligence Cases.

The charge of the court in this case *held* not subject to the objection that the jury was instructed that it must find defendant guilty of all the acts of negligence complained of in order to support an affirmative answer to the issue of negligence, it appearing that the court correctly charged that if plaintiff proved

NEGLIGENCE—*Continued.*

any of the acts of negligence alleged and further proved that defendant's negligence in any one or more of these respects was the proximate cause of the collision, to answer the issue of negligence in the affirmative, and that the subsequent portion of the charge objected to could not have misled the jury on this aspect, construing the charge contextually. *Billings v. Renegar*, 17.

Illustrations used by the court in its charge on the question of proximate cause *held* not prejudicial in this case. *Ibid.*

An instruction to the effect that if the jury is satisfied by the greater weight of the evidence that plaintiff's intestate by his own negligence contributed to his death, it would then be the jury's duty to answer that issue in the affirmative, but if the jury were not so satisfied, it would be the jury's duty to answer it in the negative, *is held* without error. *Moore v. Bezalla*, 190.

An instruction which charges in effect that defendant must satisfy the jury by the greater weight of the evidence that plaintiff was guilty of all of the acts of negligence relied upon before the jury should answer the issue of contributory negligence in the affirmative, must be held for prejudicial error. *Coach Co. v. Burrell*, 432.

§ 23. Definition of Culpable Negligence.

Culpable negligence in the law of crimes is more than actionable negligence in the law of torts, and culpable negligence is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequence or a heedless indifference to the rights and safety of others. *S. v. Becker*, 321.

NUISANCES.

§ 6b. Matters Relating to Public Morals.

G.S. 19-1 *et seq.*, defining public nuisances and providing for the abatement of such nuisances by the closing of the premises for one year, unless sooner released, and the sale of the personal property seized in the absence of bond by defendant, and the distribution of the proceeds of such sale, is constitutional. *Taylor v. Racing Asso.*, 80.

PARENT AND CHILD.

§ 8. Right of Parent to Recover for Injuries to Child.

Parent may waive right to recover for loss of services and medical expenses, and permit child to recover full damages in action against tort-feasor. *Shields v. McKay*, 37.

§ 9. Nature of Offense of Abandonment.

Abandonment of children by their father is a continuing offense, and therefore, termination of a prosecution in defendant's favor will not preclude a subsequent prosecution. *S. v. Smith*, 301.

§ 12. Indictment for Abandonment.

In a prosecution under G.S. 14-322, a warrant charging that defendant willfully failed and refused to provide adequate support for his named lawful children, is fatally defective in failing to aver that defendant had willfully abandoned them, and motion in arrest of judgment should have been allowed. *S. v. Smith*, 301.

PARTIES.

§ 3. Necessary Parties Defendant.

Individual executing release agreement not binding on corporation *held* not necessary party in corporation's action on builder's performance bond. *Terrace, Inc., v. Indemnity Co.*, 473.

In an action to construe the reversionary clause of a deed executed by trustees, when it appears that all the trustees are dead and there are no successors to them, the University of North Carolina should be made a party so that any right of escheat may be adjudicated, and all others who might claim an interest in the property in the event the title reverts, should also be made parties. *Cutler v. Winfield*, 555.

The naming of one party defendant "and/or" another party defendant is disapproved, it being required that parties defendant be named with more exactitude. *Johnson v. Board of Education*, 56.

§ 10a. Joinder of Additional Parties.

The trial court has discretionary power, upon motion of defendant, to join as an additional party plaintiff the insurance company which had paid part of plaintiff's loss sustained in the collision in suit. *Elizabeth City v. Hoover*, 569.

PARTITION.

§ 4a. Parties and Pleadings.

The defense of sole seizin set up in the answer to a petition for partition stands denied by operation of law as effectively as if specific denial had been interposed by formal reply. *Clapp v. Clapp*, 281.

§ 4c. Hearings and Determination.

Defendants' answer to the petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants. Upon the hearing, defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement. *Held:* The judicial admission effectively removes the defense from the field of issuable matters, since the alleged agreement is void under the Statute of Frauds, and it was not required that the clerk transfer the issue to the civil docket. G.S. 1-399. *Clapp v. Clapp*, 281.

Where it is admitted that actual partition cannot be had without injury, but it is denied that the ancestor left a personal estate, decree of sale is proper, but the proceeds should be held until it is determined whether sale of the real estate is necessary to pay debts of the estate. *Ibid.*

PARTNERSHIP.

§ 5. Representation of Firm by Partner.

Each person engaged in a joint or common enterprise in the sale of timber to purchasers is responsible for the acts and representations of the others in negotiating the sale, and if any one or more of them makes false representations to the purchasers or either of them, such representations are regarded in law as having been made by all the sellers. *Keith v. Wilder*, 672.

PLEADINGS.

§ 2. Joinder of Causes.

An employer may join actions against its employees in tort to recover for loss occasioned by the fraud or dishonesty of the employees acting in collusion or conspiracy with each other, with an action *ex contractu* on an indemnity policy covering such losses executed by the corporate defendant, since both actions arise out of the same transaction. *Thomas & Howard Co. v. Ins. Co.*, 109.

§ 3a. Statement of Cause of Action.

The complaint should allege the substantive and constituent facts of the cause of action, but should not narrate the evidence supporting them. *Thomas & Howard Co. v. Ins. Co.*, 109.

Action for wrongful death and action for personal injuries between date of injury and death and for property damage, should be separately stated. *Hinson v. Dawson*, 714.

§ 7. Answer—Defenses in General.

Ordinarily, a defendant is not required to give bond or other security as a condition precedent to his right to defend the action. *Morris v. Wilkins*, 507.

§ 10. Counterclaims, Set-Offs and Cross-Actions.

An action was instituted by the owner of a car against the owner-operator of the other vehicle involved in the collision, to recover for damages to the car. The original defendant had the driver of plaintiff's car and an occupant thereof joined as additional parties defendant. *Held:* The occupant of plaintiff's car, who was joined as an additional defendant on motion of the original defendant, was under no legal obligation to set up a cross-action against the original defendant to recover for his personal injuries, but had he done so, the original defendant would not be entitled to have the cross-action dismissed. *Morgan v. Brooks*, 527.

§ 10. Counterclaims and Cross-Complaints.

In an action in ejectment where defendant claims under a tax foreclosure deed of bargain and sale, the county is a proper party for the purpose of defending its title to defendant, but defendant has no right to litigate in plaintiff's action any rights he may have against the county in the event the tax foreclosure deed is declared invalid. *Kelly v. Kelly*, 146.

§ 13. Necessity for Reply and Denial of Allegations of Answer by Operation of Law.

New matter set up by answer not relating to a counterclaim, G.S. 1-159, or new matter relating to a counterclaim not actually served on plaintiff, G.S. 1-140, will be deemed as generally denied by operation of law. *Clapp v. Clapp*, 281.

§ 13. Office of and Necessity for Reply.

Allegations of the answer not amounting to a counterclaim are deemed denied without the necessity of a reply. *Nebel v. Nebel*, 491.

§ 15. Office and Effect of Demurrer.

A demurrer admits facts alleged upon information and belief as well as facts alleged on personal knowledge. Whether the plaintiff can prove such allegations upon the trial is irrelevant to the question posed by demurrer. *Reynolds v. Murph*, 60.

PLEADINGS—*Continued.*

The rule that the complaint must be liberally construed upon demurrer does not permit the court to read into it facts which it does not contain. *Thomas & Howard Co. v. Ins. Co.*, 109.

A complaint will not be overthrown by demurrer unless it is fatally defective, and if in any portion it alleges facts sufficient to constitute a cause of action, demurrer should be overruled. *Kindley v. Privette*, 140.

In passing upon a demurrer *ore tenus* for failure of the complaint to state a cause of action, whether or not defendants can make good on the defenses set up in their pleadings is not germane to the decision. *Goldstein v. Trust Co.*, 583.

§ 19c. Demurrer for Failure of Complaint to State Cause of Action.

Where complaint contains defective statement of good cause of action, demurrer should be sustained, but action should not be dismissed. *Thomas & Howard Co. v. Ins. Co.*, 109.

Where the allegations of the complaint constitute a statement of a defective cause of action rather than a defective statement of a good cause of action, judgment sustaining the demurrer and dismissing the action is proper. *Redic v. Bank*, 152.

§ 22. Amendment by Permission of Trial Court.

Where the complaint contains a defective statement of a good cause of action, demurrer thereto is properly sustained, but the action should not be dismissed, since plaintiff is entitled to move for permission to amend so as to allege the essential and ultimate facts omitted. *Thomas & Howard Co. v. Ins. Co.*, 109.

Where the trial court correctly declines to join an additional party defendant, denial of a motion to amend for the purpose of making allegations against such party is without error. *Terrace, Inc., v. Indemnity Co.*, 473.

A motion to be allowed to amend is addressed to the discretion of the trial judge, and his action in declining to grant leave to amend is not reviewable. *Ibid.; Crump v. Eckerd's*, 489; *Sawyer v. Cowell*, 681.

In an action on an option contained in a lease which sufficiently describes the premises, the trial court has the discretionary authority to permit amendment after verdict specifically describing the land, and the action of the trial court in permitting the amendment without notice to the adverse party will not be held prejudicial, particularly when the cause is remanded for a new trial. *Reynolds v. Earley*, 521.

§ 24. Variance.

Allegation and proof must concur to establish a cause of action. *Air Conditioning Co. v. Douglass*, 170; *Manley v. News Co.*, 455; *Young v. Asheville*, 618; *Osborne v. Gilreath*, 685.

§ 25½. Admission or Denial and Necessity for Proof.

A solemn judicial admission effectively removes the fact admitted from the field of issuable matters. *Clapp v. Clapp*, 281.

§ 31. Motions to Strike.

Where plaintiff fails to allege a cause of action against one of the defendants joined as a joint tort-feasor, such defendant's exception to the action of the court in striking certain allegations of his answer setting forth a prior judgment in an action instituted by him against the other defendant, establishing

PLEADINGS—*Continued.*

the negligence of the other defendant as the sole cause of collision, is without merit. *Loving v. Whitton*, 273.

Whether the clerk of the Superior Court has jurisdiction on a motion to strike under G.S. 1-153, *Quaere? Gallimore v. Highway Com.*, 350.

Granting or denial of motion to strike will not be disturbed on appeal in absence of showing of prejudice. *Ibid.*

In action by corporation on contractor's performance bond, allegations that architect had certified work are relevant, but allegations of release signed by individual purchasing plaintiff's stock, not binding on plaintiff corporation, are irrelevant and should have been stricken. *Terrace, Inc., v. Indemnity Co.*, 473.

Defense not available to defendant *held* properly stricken on motion. *Reynolds v. Earley*, 521.

PRINCIPAL AND AGENT.

§ 7d. Ratification by Principal.

Ratification confirms conduct, and the alleged principal cannot ratify the acts of a person in executing an unauthorized contract unless such person professes, represents, reports, assumes or undertakes to be acting as agent for the alleged principal. *Air Conditioning Co. v. Douglass*, 170; *Terrace, Inc., v. Indemnity Co.*, 473.

PRINCIPAL AND SURETY.

§ 8. Bonds for Private Construction.

In an action upon a builder's performance bond to recover for alleged defective materials and improper workmanship, allegations to the effect that the architect responsible for the construction of the project had certified that all work had been completed in accordance with the terms of the contract, are relevant and material, and motion to strike such allegations from the pleadings is correctly denied. *Terrace v. Indemnity Co.*, 473.

In an action by a corporation on a builder's performance bond, allegations in defendants' answers setting up a release from liability for improper workmanship and defective materials, executed by an individual in purchasing all of the common stock of the corporation from its individual stockholders after the completion of the buildings, are properly stricken on motion when the release contract is not binding on the corporation. *Ibid.*

PROCESS.

§ 6. Service by Publication.

Where service of summons is made by publication, the requirements of the statute must be strictly followed and everything necessary to dispense with personal service of summons must appear by affidavit. *Nash County v. Allen*, 543.

An affidavit for service of summons by publication is fatally defective when it fails to allege that the person upon whom the summons is so served cannot, after due diligence, be found within the State. *Ibid.*

§ 8c. Service on Foreign Insurance Companies by Service on Insurance Commissioner.

Findings to the effect that defendant insurance company and its predecessor solicited applications for insurance, delivered policies and collected premiums in this State through the United States mail is sufficient to show that defend-

PROCESS—*Continued.*

ant was transacting business in this State within the meaning of G.S. 58-164 (e), and that process served on the Insurance Commissioner in compliance with this statute renders defendant amenable to the jurisdiction of our courts, and meets the requirements of due process. *Suits v. Ins. Co.*, 483.

§ 10. Service on Nonresident Auto Owner by Service on Commissioner of Motor Vehicles.

The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under G.S. 1-105, is conclusive on appeal if such finding is supported by evidence. *Hart v. Coach Co.*, 389.

The broad purpose of G.S. 1-105 is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. *Ibid.*

Where defendant is in this State solely because of military orders, he remains nonresident for service of process under this section. *Ibid.*

§ 14. Amendment of Process.

The discretionary denial by the trial court of a motion to amend the pleadings and process is not reviewable in the absence of manifest abuse of discretion. *Crump v. Eckerd's*, 489.

PUBLIC OFFICERS.

§ 9. Attack of Validity of Official Acts.

The rule that a public officer or agency may not be enjoined from performing acts under color of legislative authority does not apply to operations of a private person, firm, association, or corporation, and the constitutionality of the statute under which such private person, firm, association, or corporation purports to act may be challenged in the suit for injunction. *Taylor v. Racing Asso.*, 80.

PUBLIC WELFARE.

§ 7. Claim of County Against Estate of Recipient.

There are two separate and distinct statutory methods by which a county may recover the aggregate amount paid as old age assistance to a recipient: One, a claim against the personalty of the estate, which must be filed within one year after the death of the recipient, and the other a general lien upon the recipient's real estate, attaching upon the filing of the statement therefor in the lien docket and its proper indexing. *Lenoir County v. Outlaw*, 97.

The lien against the estate of a deceased recipient of old age benefits under the provisions of G.S. 308-30.1 may not be enforced by action in any event after the expiration of 10 years from the last day from which assistance was paid, and, even if it be conceded that no action to enforce such lien may be maintained after one year from the death of the recipient, such lien, properly filed, remains in force until satisfied, and attaches to the surplus realized upon foreclosure of a mortgage on the realty of the deceased recipient notwithstanding that foreclosure was had more than one year after his death. *Ibid.*

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Remedy.

Where there is no contract between the parties, there is no obligation resting upon the one to accept material furnished by the other. *Thormer v. Mail Order Co.*, 249.

But if material is furnished under agreement to pay therefor or if material is accepted and used, party receiving the material is liable for its reasonable value upon *quantum meruit*. *Ibid.*

But only for the value of the material accepted and used. *Ibid.*

§ 2. Actions.

While it is the better practice to allege an express contract and an implied contract separately, the complaint in the present cause alleging that plaintiff had fully performed his agreement with defendant, and that the services and materials furnished thereunder were well worth a stated sum, *is held* sufficient to support recovery on *quantum meruit*, without amendment. *Thormer v. Mail Order Co.*, 249.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

An action to quiet title under G.S. 41-10 must be based upon plaintiffs' ownership of some title, estate, or interest in real property, and defendants' assertion of some claim adverse to plaintiffs' title, estate, or interest, which adverse claim must be presently determinable. *Vandiford v. Vandiford*, 42.

Plaintiffs alleged that they are lessees in possession of the property in question under a lease giving them the right to a deed in fee simple upon the death of the survivor lessor if lessees continue to meet their obligations under the terms of the instrument, and that lessors had executed a paper writing purporting to make a testamentary disposition of the property to others. The lease also gave lessees the option to terminate the lease under certain conditions. *Held:* Lessors' demurrer to the complaint should have been sustained, since the paper writing is without legal significance either as a transfer of title or as a cloud thereon until probate, and since the right of survivor lessor to devise the land by will is dependent upon events now unknown and unforeseeable, and therefore, is not presently determinable. *Ibid.*

RAILROADS.

§ 5. Injuries to Persons on or Near Tracks.

Where plaintiff's evidence discloses that her intestate was last seen alive about 10:30 p.m. and that his mutilated body was found about 7:30 the next morning lying near the crossties of defendant's track, the evidence may be sufficient to establish that intestate was killed by one of defendant's trains during the night, but it does not establish that he was killed by a particular train, and therefore evidence as to the manner in which a particular train was operated that night does not prove that its manner of operation was the proximate cause of intestate's death. *Ellis v. R. R.*, 747.

If a person enters upon a railroad track at a place other than a crossing or public pathway, he is a trespasser and his act of placing himself on or near the track constitutes contributory negligence, barring recovery for his death unless the doctrine of last clear chance is applicable. *Ibid.*

RAPE.

§ 1. Elements of the Offense.

The offenses of rape of a female over 12 years of age and carnal knowledge of a female over 12 and under 16 years of age are separate and distinct. In the first, the female's chastity is immaterial and her consent is a complete defense; in the second, her former chastity is a material part of the charge and her consent is not a defense. *S. v. Barefoot*, 650.

§ 15. Carnal Knowledge of Female Over 12 and Under 16—Elements of the Offense.

The offenses of rape of a female over 12 years of age and carnal knowledge of a female over 12 and under 16 years of age are separate and distinct. In the first, the female's chastity is immaterial and her consent is a complete defense; in the second, her former chastity is a material part of the offense and her consent is not a defense. *S. v. Barefoot*, 650.

§ 18. Carnal Knowledge of Female Between 12 and 16—Sufficiency of Evidence.

The evidence in this prosecution for carnal knowledge of a female over 12 and under 16 years of age *held* sufficient to take the case to the jury, and the court's refusal to direct a verdict of not guilty is without error. *S. v. Barefoot*, 650.

REAL ACTIONS.

§ 2. Pleadings.

Where, in an action to establish an interest in real property, the complaint describes the land only as a certain parcel of land purchased from a named person, upon which the parties had built a six-room residence, and there is no evidence upon the hearing identifying the land, the description is insufficient to enable the court to enter a valid judgment with respect to the realty. *Deans v. Deans*, 1.

RECEIVING STOLEN GOODS.

§ 1a. Nature and Elements of the Offense.

While the crimes of larceny and receiving stolen property knowing it to have been stolen, are different offenses and not degrees of the same offense, the offense of receiving presupposes that the property in question had been stolen by some person other than the one charged with receiving, and therefore, a person cannot be guilty both of stealing property and of receiving the same property knowing it to have been stolen. *In re Powell*, 288.

REFERENCE.

§ 9. Exceptions and Preservation of Grounds of Review.

Motion by plaintiff for voluntary nonsuit before the referee appointed to hear the cause does not preclude her from filing exceptions to the referee's report. *Crowley v. McDougald*, 404.

Where it does not appear of record that the stipulations were reduced to writing and signed by plaintiff or her counsel, but the stipulations appear only in the findings of fact as formulated and reported by the referee, it would seem that the stipulations are subject to challenge by exception along with the referee's general findings and conclusions. *Ibid.*

REFERENCE—*Continued.*

§ 10. Judgment of Confirmation.

Where the record discloses that judgment confirming the report of a referee was entered at a term of court convening before the expiration of the 30-day period for filing exceptions, G.S. 1-195, and the record discloses no waiver of the right to file exceptions at any time during the 30-day period, the premature entry of judgment of confirmation is error appearing on the face of the record. *Crowley v. McDougald*, 404.

REFORMATION OF INSTRUMENTS.

§ 6. Parties Who May Sue.

Only the parties to a deed, or those claiming in privity with them, may maintain an action to reform the deed for mutual mistake or mistake induced by fraud. *Hege v. Sellers*, 240.

One lot in a subdivision was conveyed direct from the developer to defendant grantees by deed which did not contain any restrictive covenants. The deeds to all the other lots in the development contained restrictions according to a general scheme. *Held:* The real estate agent and the grantees in the other deeds may not maintain an action against defendant grantees and the developer to reform the deed for mistake or fraud so as to have the restrictions inserted in defendant grantees' deed, since plaintiffs are strangers to the chain of title. *Ibid.*

§ 10. Burden of Proof.

In order to reform a deed for mistake or fraud, the proof must be strong, cogent, and convincing. *Hege v. Sellers*, 240.

REGISTRATION.

§ 5c. Rights of Parties Under Unregistered Instrument.

As between the parties thereto, an unregistered contract to convey is as valid and binding as though duly recorded. *Goldstein v. Trust Co.*, 583.

RELIGIOUS SOCIETIES.

§ 2. Title and Management of Property.

A Missionary Baptist Church is congregational in its church polity, and a majority of its membership, nothing else appearing, is entitled to control its church property, the Baptist Associations and Conventions being purely voluntary associations without supervision, control, or governmental power over the individual congregations. *Reid v. Johnston*, 201.

Notwithstanding that a Missionary Baptist Church is a self-governing unit, a majority of its membership is supreme and is entitled to control its church property only so long as it remains true to the fundamental faith, usages, customs, and practices of that particular Church, as accepted by both factions before dissension; if a minority adheres to its faith, usages, customs and practices as they obtained before dissension, such minority is entitled to hold and control the entire property of the Church. *Ibid.*

ROBBERY.

§ 1a. Nature and Elements of the Offense.

The crime of robbery *ex vi termini* includes an assault on the person. *S. v. Hicks*, 156.

ROBBERY—*Continued.*

§ 3. Prosecutions.

In a prosecution for robbery, the court must submit the question of defendant's guilt of assault in those instances where the evidence warrants such finding, even in the absence of a request, and even though the State contends solely for conviction of robbery and the defendant contends solely for complete acquittal. *S. v. Hicks*, 156.

If the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of this offense, the court is not required to submit the question of defendant's guilt of assault. *Ibid.*

SALES.

§ 27. Actions and Counterclaims by Purchaser.

Testimony of the maker of notes given for the purchase price of farm machinery that the seller did not say when the machinery would be delivered, but that it would be delivered in time to make that year's crop, and that in case it was not delivered in time, the seller would give an extension of time for payment of the notes, with further evidence that the delivery of the machinery was completed by July 1st of that year and delivery accepted by the purchaser, and extension of time granted as requested, *is held* insufficient to support a counterclaim for late delivery in the seller's action on the notes. *Hall v. Christiansen*, 393.

In plaintiffs' action on notes for the purchase price of farm machinery, secured by chattel mortgage and deed of trust, defendant set up a counterclaim alleging that in violation of plaintiff's promise, he had the deed of trust registered, and that as a result thereof, a third person refused to lend plaintiffs money for improvements. The evidence disclosed that the deed of trust contained a provision that if such third person should furnish money for the improvements, such third person should have a prior lien to the amount furnished, and there was no allegation that plaintiffs had any control over such third person or anything to do with his failure to advance the money for the improvements. *Held:* The record fails to show a basis for the counterclaim. *Ibid.*

The measure of the damages ordinarily recoverable for breach of warranty of personal property is the difference between the reasonable market value of the article as warranted and as delivered, with such special damages as were within contemplation of the parties. *Hendrix v. Motors*, 644.

The purchaser, at his election, may sue for rescission of a contract of sale for breach of warranty even in the absence of fraud, unless he is barred by retention and use of the property after he discovers or has reasonable opportunity to discover the defect. The purchaser is not required to reject the machinery purchased at once, but has a reasonable time to operate and test it to ascertain whether it fills the specifications of the contract and warranty. *Ibid.*

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

Where it appears upon the *voir dire* that as a patrolman stopped defendant's car to inspect her driver's license and registration card, he saw intoxicating liquor in open paper bags in the car, the court properly admits the matter in evidence notwithstanding the patrolman was not clothed with a search warrant. *S. v. Hammonds*, 226.

STATE.

§ 3a. Nature, Scope and Construction of State Tort Claims Act in General.

The State may prescribe such terms and conditions as it sees fit, subject to constitutional limitations, in waiving its governmental immunity to suit for negligence, and our State Tort Claims Act, G.S. 143, Art. 31, permits recovery against the State only for such injuries as are proximately caused by negligence of a state employee while acting within the scope of his employment when there is no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted. *Alliance Co. v. State Hospital*, 329.

The word "employee" as used in the State Tort Claims Act must be given its ordinary meaning in construing the statute. *Ibid.*

A prisoner detained at a state penal institution is not an employee of the state within the meaning of the State Tort Claims Act, and the state may not be held liable under that statute for negligent injury inflicted by such prisoner while his services are made use of, which is the meaning of the word "employed" as used in G.S. 148-49.3. *Ibid.*

The legislative intent and purpose in enacting the State Tort Claims Act must be ascertained from the wording of the statute, and the rule of liberal construction cannot be applied to enlarge its scope beyond the meaning of its plain and unambiguous terms. *Ibid.*

The State Tort Claims Act is in derogation of the sovereign immunity from liability for torts, and the sounder view is that the Act should be strictly construed, and certainly the Act must be followed as written. *Floyd v. Highway Com.*, 461.

A claim under the State Tort Claims Act must identify the employee of the State whose negligence is asserted, and set forth the act or acts on his part which are relied upon. *Ibid.*

§ 3b. State Tort Claims Act—Negligence and Contributory Negligence.

Intestate was fatally injured when he caught hold of or fell against the door bar of a school bus, causing the locking lever to dislodge and the door to open, through which intestate fell. *Held:* In the absence of any evidence tending to show that the door locking mechanism was loose, or in the slightest state of disrepair, or that a jolt or jar would cause the door to open, a finding of negligence predicated on the disrepair of the door bar is not supported by evidence. *Johnson v. Board of Education*, 56.

Where there is no evidence before the Commission that the school bus in question was being driven at excessive speed, a finding of negligence based on excessive speed is not supported by the evidence. *Ibid.*

Where the evidence discloses that passenger in a school bus left his seat and walked to the front of the bus, that both the bus driver and his companion told him to return to his seat, and that the fatal accident occurred within a matter of moments thereafter, what steps the driver was under duty to take to compel the passenger to return to his seat, is not presented. *Ibid.*

Evidence tending to show that a fourteen-year-old pupil on a school bus was assaulted by another pupil who had been designated by the principal as "bus captain" but who was not an employee of the State or the Board of Education, that she immediately jumped up and rushed to the front door of the bus, jerked the door open, and jumped to her fatal injury, and that the driver did not see anything that happened until she was going out the door, *is held* insufficient to support a finding of negligence on the part of the driver of the bus, and nonsuit is proper. *Smith v. Board of Education*, 305.

STATE—*Continued.*

In order for claimant to prevail in a proceeding under the State Tort Claims Act, he must show not only injury resulting from negligence of a designated State employee, but also that claimant was not guilty of contributory negligence. *Floyd v. Highway Com.*, 461.

State *held* not liable to motorist driving into washout caused by inadequacy of culvert in exceptional rain. *Ibid.*

§ 3f. State Tort Claims Act—Proceedings After Remand.

Where, in a proceeding under the Tort Claims Act, the Superior Court on appeal adjudicates that certain findings of the Commission were not supported by evidence, and remands the cause, the Commission is bound by the order unless and until it is set aside on further appeal to the Supreme Court, and the Commission may not merely rephrase the original findings and adopt them as so rephrased. *Johnson v. Board of Education*, 56.

STATUTES.

§ 2. Constitutional Proscription Against Passage of Certain Local or Special Statutes.

Chapter 540, Public-Local and Private Laws of 1939, which provides for the operation of a pari-mutuel dog racing track by the licensee of the Racing Commission *is held* a local and special act relating to trade, and is unconstitutional. *Taylor v. Racing Asso.*, 80.

Where a local statute giving a municipality power to improve its streets and assess abutting owners for a part of the cost, is enacted prior to the effective date of the amendment of the State Constitution, Art. II, Section 29, a subsequent local law which merely increases the jurisdiction and authority granted to the city in regard to such improvements does not violate the constitutional proscription. *Goldsboro v. R. R.*, 216.

The effect of Art. II, sec. 29, of the State Constitution is to proscribe only such local, private, or special acts as relate to the subjects designated in the amendment. *S. v. Chestnutt*, 401.

Act proscribing Sunday auto racing, without reference to commercial or noncommercial character of activity, does not regulate trade. *Ibid.*

§ 5a. General Rules of Construction.

Where the words used in a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or definitely indicated by the context. *Robbins v. Charlotte*, 197.

Where the words of a statute are clear, certain, and intelligible, they must be given their natural or ordinary meaning. *Alliance Co. v. State Hospital*, 329.

The ascertainment of the legislative intent is the objective of statutory construction. *Greensboro v. Smith*, 363.

Ordinarily, words of a statute will be given their natural, approved, and recognized meaning. *Ibid.*

The language of a statute must be read contextually, and when its meaning is ambiguous, resort may be had to the subject matter and the objects and purposes sought to be accomplished. *Ibid.*

The law in effect at the time of the passage of an act may be considered in ascertaining the legislative intent. *Ibid.*

STATUTES—*Continued.*

§ 5f. Construction of Provisos.

The ordinary function of a proviso of a statute is to qualify the statute to which it is engrafted so as to exclude from its scope something which would otherwise be within its terms. *Robbins v. Charlotte*, 197.

Where the effect of a proviso engrafted in a statute is to enlarge the scope of the statute so as to give the statute a mandatory operation of extended application upon the happening of the event designated in the proviso, the proviso should be held to include no case not clearly within its terms. *Ibid.*

§ 11. Construction of Criminal Statutes.

Statutes creating criminal offenses, including those relating to the operation of motor vehicles, must be strictly construed. *Hinson v. Dawson*, 714.

§ 13. Repeal by Implication.

Ordinarily, a local statute is not repealed by a subsequent general statute upon the subject. *Goldsboro v. R. R.*, 216.

TAXATION.

§ 4. Necessary Expenses and Necessity for Vote.

Auditoriums, playgrounds, and recreation centers are not necessary municipal expenses within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and a city may not borrow money, levy or collect taxes therefor without an approving vote of the people, but such purposes are public purposes for which it may appropriate various surplus funds not derived from taxes. *Greensboro v. Smith*, 363.

§ 40g. Validity and Attack of Tax Foreclosure.

Where service of summons by publication in a tax foreclosure is fatally defective for failure of the affidavit to allege that the defendant cannot, after due diligence, be found within the State, the court acquires no jurisdiction over the person of defendant and the interlocutory order and decree of confirmation are void. *Nash County v. Allen*, 543.

TORTS.

§ 6. Joinder of Parties for Contribution.

The second provision of G.S. 1-240 is designed for the protection of the defendant or defendants in a case where plaintiff elects to sue some, but not all, of the alleged joint tort-feasors, and is not applicable when plaintiff sues all of them. *Loving v. Whitton*, 273.

Where plaintiff sues both the joint tort-feasors and the complaint fails to state a cause of action against one of them, the other has no right to insist that the first be retained in the action for the purpose of enforcing contribution. *Ibid.*

The original defendant is not entitled to set up in his cross action against additional defendants joined for contribution 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. *Hobbs v. Goodman*, 297.

TRESPASS TO TRY TITLE.

§ 3. Actions.

In an action for the recovery of land and for trespass by the cutting of timber therefrom, defendant's denials of plaintiff's title and defendant's trespass,

TRESPASS TO TRY TITLE—*Continued.*

nothing else appearing, raise issues of fact as to the title of plaintiff and trespass by defendant, with the burden of proof on plaintiff as to each issue. *Norman v. Williams*, 732.

In an action for the recovery of land and for trespass by defendant, plaintiff must rely upon the strength of his own title, which he may establish by various methods specifically set forth in *Mobley v. Griffin*, 104 N.C. 112. *Ibid.*

In all actions involving title to real property, title is presumed to be out of the State unless it be a party to the action, G.S. 1-36, but such presumption does not relieve plaintiff of the burden of showing title in himself and is not a presumption in favor of either party. *Ibid.*

Where plaintiffs, in an action for recovery of land and for trespass thereon, seek to establish title by showing a common source of title and better title in themselves from that source, failure of evidence connecting defendant with any source of title common to both parties is fatal. *Ibid.*

TRIAL.

§ 5½. Pre-Trial Stipulations.

Stipulations not signed by plaintiff or her attorney, but appearing solely in referee's findings, are subject to exception. *Crowley v. McDougald*, 404.

§ 17. Admission of Evidence Competent for Restricted Purpose.

Where testimony of an admission made by one defendant after the consummation of the transaction is properly limited by the court to be considered only against the individual making the statement, exception thereto cannot be sustained. *Keith v. Wilder*, 672.

§ 21. Office and Effect of Motion to Nonsuit.

Upon motion to nonsuit in an action in which the burden rests upon the plaintiff to prove his cause by clear, strong, and convincing proof, it is the function of the court to determine only whether there is any substantial evidence to support plaintiff's claim, and it is the function of the jury to determine whether the evidence meets the required intensity of proof. *Bowen v. Darden*, 11.

§ 22b. Nonsuit—Consideration of Defendant's Evidence.

Defendant's undisputed evidence which explains and clarifies plaintiff's evidence is properly considered on motion to nonsuit. *Herring v. Creech*, 233; *Gaither Corp. v. Skinner*, 532.

On motion to nonsuit on ground of the contributory negligence of the driver of the vehicle along the dominant highway, in failing to keep a proper lookout, defendant's evidence as to the speed of the car traveling along the servient highway approaching the intersection must be considered on the question of whether the driver on the dominant highway should have known that the other car would not stop and yield the right of way. *Marshburn v. Patterson*, 441.

§ 22c. Nonsuit—Discrepancies and Contradictions in Plaintiff's Evidence.

Discrepancies and contradictions, even in the plaintiff's evidence, are for the jury and not for the court, and do not justify nonsuit. *Keaton v. Taxi Co.*, 589; *Hendrix v. Motors*, 644.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Where the evidence is conflicting upon the determinative issue, nonsuit is properly denied. *Redd v. Mecklenburg Nurseries*, 385.

TRIAL—*Continued.*

Where there is a total failure of proof to support an essential allegation of the complaint, nonsuit is proper. *Manley v. News Co.*, 455.

§ 23f. Nonsuit for Variance.

Evidence supporting recovery on a theory not alleged in the pleadings cannot preclude nonsuit. *Herring v. Creech*, 233.

§ 24. Nonsuit on Affirmative Defense.

Where plaintiff's evidence establishes as a matter of law an affirmative defense set up by defendant, nonsuit is proper. *Gaither Corp. v. Skinner*, 532.

§ 26. Effect of Judgment of Nonsuit—Dismissal.

Plaintiff brought this action against two defendants, alleging a libel pursuant to a conspiracy. There was a total failure of proof of conspiracy, and nonsuit was entered. *Held:* Defendants' contention that the action should have been divided, but not dismissed, will not be considered when it appears that plaintiff did not request the trial court to dismiss the action against one defendant and to proceed against the other, and did not except and assign as error the failure of the trial court to divide the actions. *Manley v. News Co.*, 455.

§ 28. Directed Verdict and Peremptory Instructions.

Where all evidence tends to show affirmative of issue, court may direct jury to answer the issue yes if they find the facts to be as the evidence tends to show by its greater weight. Such charge is not a directed verdict, since it is made to rest upon the findings of the jury. *In re Will of Duke*, 344.

Even in those instances in which the evidence justifies the court in instructing the jury to answer the issue in favor of the party upon whom rests the burden of proof if the jury believes the facts to be as all of the evidence tends to show, the court must leave it to the jury to determine the credibility of the testimony, and it is error for the court upon failure of the jury to return a verdict immediately to recall the jury and inform them that the court's instructions were to answer the issue "Yes" if the jury found the facts to be as all the evidence tended to show. *Reynolds v. Earley*, 521.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

In order for it to be incumbent upon the court to charge the law upon a particular aspect of law, there must be both allegation and proof in regard thereto. *Billings v. Renegar*, 17.

Court should not use hypothetical facts in explaining law. *S. v. Street*, 689.

§ 31c. Instructions—Conformity to Pleadings and Evidence.

Where evidence relating to a material item of damage is admitted but is thereafter withdrawn by the court, an instruction submitting to the jury the substance of the evidence withdrawn must be held for prejudicial error. *Marshburn v. Patterson*, 441.

§ 31d. Instructions on the Burden of Proof.

An instruction that if the jurors were unable to make up their "minds about how the thing occurred" to find for the defendant, though not approved, *held* not prejudicial when the charge is construed as a whole, the court having repeatedly charged that the burden was on plaintiff to prove his case by the greater weight of the evidence. *Billings v. Renegar*, 17.

TRIAL—*Continued.*

Where the court fully and correctly charges upon the burden of proof, an excerpt from the portion of the charge defining greater weight of the evidence as "evidence that has a greater weight upon your minds than the evidence of defendant" will not be held prejudicial, certainly when the court thereafter instructs the jury that if the evidence of the plaintiff and defendant have equal weight in their minds to answer the issue in the negative, the burden of proof being on plaintiff. *Redd v. Mecklenburg Nurseries*, 385.

§ 32. Requests for Instructions.

A party desiring greater elaboration in the charge on a particular point must appropriately tender a request therefor. *Redd v. Mecklenburg Nurseries*, 385.

§ 37. Issues—Conformity to Pleadings and Evidence.

The issues in an action arise upon the pleadings filed, and the parties may not agree upon improper issues or alter the issues by the introduction of evidence or by the theory of trial. *Nebel v. Nebel*, 491.

§ 48½. Motion to Set Aside Verdict for Surprise in Change of Theory of Trial.

Where the cause is correctly submitted on the theory made out by plaintiff's allegations and evidence, the denial of defendant's motion for a mistrial on the ground that during the course of the trial the theory of the trial had been changed so as to take defendant by surprise, will not be held for error when it appears that the court, after it had returned to the original theory of trial, re-opened the evidence in its discretion, and that defendant then introduced its testimony upon the relevant question. *Hendrix v. Motors*, 644.

§ 49. Motion to Set Aside Verdict as Being Against Weight of Evidence.

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the sound discretion of the trial court, and when no abuse of discretion is shown, the court's refusal to grant the motion is not reviewable. *Upchurch v. Buckner*, 411; *Elizabeth City v. Hoover*, 569.

§ 54. Trial by Court by Agreement—Hearings and Evidence.

In a trial by the court by agreement, the rules as to the admission and exclusion of evidence are not so strictly enforced as in a trial by jury, since the judge is to determine what he will consider, and his rulings are subject to review with all the information before the court; nevertheless, it would be reviewable error for the judge to admit and act upon incompetent evidence in making his findings. *Reid v. Johnston*, 201.

§ 55. Trial by Court by Agreement—Findings of Fact.

The findings by the trial court have the force and effect of a verdict of a jury, and are conclusive when supported by evidence. *Reid v. Johnson*, 201.

In a trial by the court by agreement, the court is required to find and state only the ultimate facts. *Ibid.*

TROVER AND CONVERSION.

§ 2. Actions.

Proof of surrender of the chattel to the true owner is a complete defense to an action in the nature of a common law action in trover and conversion. *Herring v. Creech*, 233.

TRUSTS.

§ 3a. Written Trusts.

An express trust, as distinguished from a trust by operation of law, is based upon a direct declaration or expression of intention, usually embodied in a contract. *Bowen v. Darden*, 11.

§ 4b. Creation of Resulting Trusts.

Where plaintiff and defendant agree to purchase land and to have deed made to them jointly, and unknown to plaintiff, conveyance is made to defendant alone, equity, upon defendant's repudiation of the contract, will declare that defendant holds title to one-half of the property for the benefit of plaintiff. *Deans v. Deans*, 1.

A trust by operation of law is raised by rule or presumption of law based on acts or conduct, rather than on direct expression of intention. *Bowen v. Darden*, 11.

The creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction. In such instance the law presumes or supposes the intention to create a trust. *Ibid.*

Where a husband conveys property to his wife, or purchases property and causes it to be conveyed to her, or places improvements upon her land, the law presumes a gift, and no resulting trust arises in favor of the husband unless such presumption is rebutted by clear, strong, cogent and convincing proof. *Shue v. Shue*, 65.

§ 4c. Actions to Establish Resulting Trusts.

In an action to establish a parol trust in lands on the ground that plaintiff contributed money and labor toward the purchase price, plaintiff must allege the amount or value of her contribution, since her interest would be limited by the proportion of her contribution to the whole purchase price. *Deans v. Deans*, 1.

In pleading a resulting trust it suffices to allege the ultimate facts as to who paid the consideration and to whom the conveyance was made. *Bowen v. Darden*, 11.

Evidence of a conveyance to one person upon consideration furnished by another is ordinarily sufficient to make out a *prima facie* case for the jury in an action to establish a resulting trust. *Ibid.*

Where a conveyance is made to a child on consideration moving from a parent, nothing else appearing, there is a rebuttable presumption that a gift or advancement was intended by the parent, and, in order for equity to declare the child a trustee of a resulting trust in such instance, there must be evidence sufficient to justify the inference that the parent had no intention of making a gift or advancement. *Ibid.*

The evidence must be clear, strong, and convincing to establish a resulting trust. *Ibid.*

In this action to establish a resulting trust, plaintiffs' evidence to the effect that their ancestor furnished the consideration for the deed to the lands in question, that the conveyance was made to the ancestor for life with remainder to one of her children, and that the ancestor thought the deed was made to her in fee and did not intend to make a gift or advancement of the remainder to the child, *is held* sufficient to overrule defendants' motion for judgment as of nonsuit. *Ibid.*

TRUSTS—*Continued.*

Upon a motion to nonsuit in an action to establish a resulting trust, it is the function of the court to determine only whether there is any substantial evidence to support the plaintiff's case, it being the function of the jury upon proper instructions to decide whether the evidence establishes plaintiff's cause by clear, strong, and convincing proof. *Ibid.*

Evidence that husband and wife purchased property, that the husband suggested that deed be made to him and his wife, that the wife stated the deed should be made to her individually because of a possible lawsuit against him, and that the husband stated that he had all confidence in her and to make the deed to her individually, without evidence that he had ever requested her to put the title in their joint names, *is held* insufficient to rebut the presumption of a gift, and a motion to nonsuit in his action to establish a parol trust or an equitable lien upon the land for the amount of his contribution was properly allowed. *Shue v. Shue*, 65.

§ 5b. Transactions Creating Resulting Trusts.

A constructive trust ordinarily arises out of the existence of fraud, actual or presumptive, usually involving the violation of a confidential or fiduciary relation, and arises not only independent of any actual or presumed intention, but usually, contrary to the actual intention of the trustee. *Bowen v. Darden*, 11.

§ 14b. Actions for Advice of Courts.

Where the trustees of a school, who had executed deed to defendants, are dead and there are no successors to them, the nonexistent trustees, in the absence of statutory provision, cannot be made parties and be represented by a guardian *ad litem* in an action to determine the legal effect of the conveyance. *Cutler v. Winfield*, 555.

§ 18. Costs and Charges of Administration.

Under the facts of this case, the costs of the administration of the trust estate were properly charged entirely to income and not to principal. *Seawell v. Cheshire*, 629.

VENDOR AND PURCHASER.

§ 5a. Options.

In North Carolina there is no statute which requires the exercise or acceptance of an option to be in writing. *Kottler v. Martin*, 369.

§ 5c. Assignment of Options.

In an action by the assignee of an optionee, the owners of the land are not entitled to attack the assignment on the ground that at the time of its execution the optionee was mentally incompetent, and allegations setting forth this defense are properly stricken on motion, since the contracts of an insane person are not void but are voidable at the election only of the lunatic or his representative, or his heirs, executor or administrator. *Reynolds v. Earley*, 521.

In an action for specific performance of an option contained in a lease, instituted by the assignee of the optionee, defendants contended that the optionee had surrendered the lease to them, but there was no evidence that the assignee knew of it before the assignment was made to him. *Held:* Since an option in a lease giving lessee the right to purchase the premises at any time before the expiration of the lease, is a continuing offer to sell on the terms set forth in the option, and may not be withdrawn by the lessor within the time limited, defendants' motion to nonsuit on the ground of the surrender of the lease was properly denied on the evidence. *Ibid.*

VENDOR AND PURCHASER—*Continued.*

§ 19a. Necessity for Tender of Purchase Price.

Whether tender of the purchase price is a prerequisite to the exercise of an option depends upon the agreement of the parties as expressed in the instrument. *Kottler v. Martin*, 369.

The lease in suit granted lessee, in consideration of the payment of all rentals theretofore due, the right to elect to purchase the land at a specified price at any time during the term of the lease. *Held:* Tender of the purchase price was not prerequisite to the exercise of the option, but notice by lessee to lessors during the term of the lease is sufficient, and entitles lessee to deed upon payment of the purchase price stipulated. *Ibid.*

§ 26. Actions for Shortage of Acreage on Property Contracted to Be Conveyed.

Ordinarily, where the owner of land makes an enforceable contract to convey the land, and the title to the property proves defective in some particular, or his estate is different from that which he agreed to convey, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest. *Goldstein v. Trust Co.*, 583.

Complaint *held* to allege cause of action for damages for failure of vendor to convey easement appurtenant. *Ibid.*

VENUE.

§ 2a. Subject of Action—Actions Involving Realty.

Where, in an action to establish an interest in real property, the complaint fails to allege that the land or any part thereof lies within the county in which the action is instituted, the Superior Court of such county does not acquire jurisdiction, and such failure of the complaint cannot be supplied by a more definite description in the judgment. *Deans v. Deans*, 1.

WATERS AND WATER COURSES.

§ 1. Riparian Rights in General.

Land must be in contact with stream in order for landowner to have riparian rights. *Young v. Asheville*, 618. Evidence *held* insufficient to show license from riparian owner. *Ibid.*

§ 1½. Acquisition of Riparian Rights by Adverse User.

Ordinarily, water rights may be acquired, even by a nonriparian owner, by adverse user which is visible, notorious, continuous and adverse under claim of right for the period required to acquire rights in real property adversely to the owner. *Young v. Asheville*, 618.

Allegations to the effect that plaintiff and his predecessor had pumped water from a certain creek for the purpose of irrigating crops for a number of years, and that the existence, location, and use of the said irrigation system was obvious and well-known, is insufficient to allege the right to use the waters of the creek by prescription in the absence of any allegation or proof that his user was adverse. *Ibid.*

§ 3. Pollution.

Where municipal corporations negligently permit sewage to pollute the waters of a creek, they may be held liable by riparian owners for damages for

the invasion of their rights to have the stream flow in its natural purity, and damages to nonriparian owners for invasion of property rights by the actual deposit of sewage on their land or the emanation of foul odors which invade land in natural course. *Young v. Asheville*, 618.

Plaintiff's allegation and evidence were to the effect that he operated an overhead irrigating system for his crops, using waters of a natural stream, that defendant municipalities negligently allowed raw sewage to be discharged into the stream and that plaintiff's pumps and overhead irrigating system pumped the sewage from the creek over plaintiff's land, so that the crops grown thereon had to be destroyed. *Held:* Riparian rights in plaintiff not being established, the allegations and evidence fail to show an invasion of plaintiff's property as a result of the acts of defendants complained of, since the deposit of sewage on plaintiff's land was the result of the operation of the irrigating system and not the acts of defendants. *Ibid.*

WILLS.

§ 1. Nature and Essentials of Testamentary Disposition of Property.

A paper writing making testamentary disposition of property is without legal significance either as a transfer of title or as a cloud thereon during the lifetime of the person executing it, since a will takes effect only upon the death of the testator and the probate of the instrument. *Vandiford v. Vandiford*, 42.

§ 23a. Caveat—Competency and Admissibility of Evidence.

The will in suit left all testatrix' property to her husband. Caveators offered evidence tending to show that bad relationship existed between testatrix and her husband. The husband died prior to the trial. *Held:* It was competent for a witness to testify that after the execution of the paper writing, the husband directed the witness to prepare a will for him leaving all of his property to his wife, and stated after the papers had been drawn that they were just as he wanted, since the declaration of the husband is competent as tending to show the state of his mind in refutation of the charges of the bad relationship between him and his wife, and was not introduced for the purpose of proving the contents of the husband's will, in which event it would have been incompetent under the hearsay rule and under the best evidence rule. *In re Will of Duke*, 344.

§ 24. Sufficiency of Evidence and Directed Verdict.

Where all the evidence tends to show that the paper writing propounded was executed in accordance with the formalities required by law, and there is no evidence *contra*, it is proper for the court to charge the jury that if they believe the evidence and find all the facts to be as the evidence tends to show, and by its greater weight, to answer the issue in the affirmative. Such charge does not constitute a directed verdict, since it is made to rest upon the findings of the jury upon the evidence offered. *In re Will of Duke*, 344.

§ 32½. Transmissible Estate.

Where there is a contingent executory devise to named beneficiaries, so that the persons who are to take the contingent limitation over are certain and only the event upon which they are to take is uncertain, the contingent remaindermen take a transmissible estate which is not dependent upon their surviving the first taker. *Seawell v. Cheshire*, 629.

WILLS—*Continued.*

§ 33c. Vested and Contingent Remainders.

A remainder is vested if it is subject to no condition precedent except the determination of the preceding estate. *Trust Co. v. McEwen*, 166.

It is the general rule that remainders vest at the death of the testator unless some later time for the vesting is clearly expressed in the will or is necessarily implied therefrom. *Ibid.*

Ordinarily, adverbs of time and adverbial clauses designating time do not create a contingency, but merely indicate the time when the enjoyment of the estate shall commence. *Ibid.*

Testator devised and bequeathed property to a trustee for the benefit of his wife for life, with provision that upon her death the estate should be equally divided among his children, with further provision that if any child should be then deceased, his or her share should go to his or her children, or held in trust for such children if they were then minors. *Held:* The children of testator took a vested remainder, and the preceding life estate was solely for the benefit of the widow and was not for the purpose of postponing the enjoyment of the remainder. *Ibid.*

Where no other time is fixed by the will and no preceding estate is created, an estate vests *eo instante* the maker's death. *Hummell v. Hummell*, 254.

A devise of property to a trustee for the benefit of testatrix's two sons for a period of ten years with direction that at the expiration of the ten-year period the property should go to the two sons "or to their heirs" in fee simple, *is held* to vest title in the two sons immediately upon the death of testator with the right of full enjoyment postponed until the termination of the trust, and therefore, each son became seized of a vested and transmittible estate in fee simple to a one-half interest in the *locus in quo*. Upon death of one of the sons during the trust period, his children take no interest in the property under the will. *Morrell v. Building Management*, 264.

The will in suit provided that the trustee should hold the estate for the use and benefit of testator's son during his natural life, and after his death, convey the estate to the son's children, "but if he have no lawful issue, then convey . . ." the estate to named beneficiaries in fee. *Held:* The will created a contingent executory devise after a fee conditional, and upon the death of the son without lawful issue then surviving, the ulterior beneficiaries are entitled to the estate. *Seawell v. Cheshire*, 629.

§ 33g. Life Estates and Remainders.

The will provided "I give my home and the balance of my land to my darter Ella for her to hold and have her lifetime." *Held:* In the absence of other provision evidencing an intent to the contrary, the plain and unambiguous language limits the estate devised to a life estate, and the devisee cannot convey the fee. *Owen v. Gates*, 407.

The will in suit devised the land to testator's widow for life and at her death to be equally divided between testator's children and named grandchild (son of a deceased daughter) for life, and at the death of the children the share of each should go to their children, and if they left no children, then to the survivor or survivors of said children and their issue in fee simple. *Held:* It is apparent that the grandchild should stand upon an equal footing with the children and was included in the word "children" as used in the contingent limitation over, and while the children dying without issue prior to the death of the widow took nothing under the will, the other children and the grandson sur-

viving the widow each took a life estate with remainder to their children, which, upon the death of the remaining children without issue, vested in the surviving grandchild in fee under the will, so that he owns a life estate in his share with remainder to his children, and the fee simple in the balance of the land as remainderman. *Edwards v. Edwards*, 694.

§ 33k. Renunciation of Life Estate and Acceleration of Remainders.

Remainders after widow's life estate *held* vested, and upon widow's dissent from will, remaindermen's interest accelerated even though further contingent limitation over might be defeated. *Trust Co. v. McEwen*, 166.

§ 34b. Designation of Devisees and Legatees in General.

A devise and bequest to named children of testatrix, "or survivors," carries the estate to the named children who are living at the time of the testatrix' death as purchasers under the will, and upon the death of one of testatrix' children after the execution of the will but prior to the death of testatrix, such child is not a survivor so as to take under the will and such child's heirs and distributees cannot take through him by inheritance. *Hummell v. Hummell*, 254.

§ 40. Right of Widow to Dissent and Effect Thereof.

Remainders after widow's life estate *held* vested, and upon widow's dissent from will, remaindermen's interest accelerated even though further contingent limitation over might be defeated. *Trust Co. v. McEwen*, 166.

§ 46. Conveyance by Devisees and Estoppel.

Even if the owner of a vested fee simple title cannot convey a valid and marketable title thereto during the life of a trust, his deed executed prior to the termination of the trust will estop him and those claiming through him by deed, will, or inheritance, and his after-acquired title will "feed the estoppel" and vest the title thus acquired in his grantee. *Morrell v. Building Management*, 264.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-36. Title presumed out of State unless it is party. *Norman v. Williams*, 732.

1-52 (9); 1-56. Resulting and constructive trusts are governed by ten-year and not three-year statute of limitations. *Bowen v. Darden*, 11.

1-74. Granting of motion to abate after action had been dorman for almost seven years *held* within discretion of trial court. *Sawyer v. Cowell*, 681.

1-105. Member of armed services does not acquire residence here solely because stationed here for period under military orders and is subject to service under this section. *Hart v. Coach Co.*, 389.

1-111. Where plaintiff takes unauthorized possession after commencement of action, defendant is not required to give bond. *Morris v. Wilkins*, 507.

1-140; 1-259. New matter not relating to counterclaim or new matter relating to counterclaim not actually served on plaintiff, deemed denied by operation of law. *Clapp v. Clapp*, 281.

1-153. The granting or denying of motion to strike will not be disturbed on appeal in absence of showing of prejudice. Whether clerk has jurisdiction to hear motion to strike, *quaere? Gallimore v. Highway Com.*, 350.

1-159. Allegations of answer not amounting to counterclaim are deemed denied without necessity of reply. *Nebel v. Nebel*, 491.

1-163. Amendment rests in sound discretion of trial court. *Sawyer v. Cowell*, 681.

1-180. Court must state evidence to extent necessary for explanation of law. *S. v. Floyd*, 298. Court should not use hypothetical facts in explaining law. *S. v. Street*, 689.

1-184. Court's findings conclusive when supported by evidence. *Reid v. Johnston*, 201.

1-185. Court is required to find and state only ultimate facts. *Reid v. Johnston*, 201.

1-195. Order of confirmation entered before expiration of time for filing exceptions is void. *Crowley v. McDougald*, 404.

1-211; 1-212. Clerk of Superior Court has no jurisdiction to judgment by default which declares a trust. *Deans v. Deans*, 1.

1-240. Original defendant may not allege facts at variance with complaint in order to join additional parties for contribution. *Hobbs v. Goodman*, 297. Second provision of statute is designed for protection of defendants and does not apply when plaintiff sues all joint tort-feasors. *Loving v. Whitton*, 273.

1-282. Exceptions should be grouped. *Ellis v. R. R.*, 747.

1-306. No execution to issue after ten years; judgment cannot be kept alive by *scire facias*, sole remedy being by action on the judgment commenced within ten years after its execution. *Reid v. Bristol*, 699.

1-399. Where it is admitted that contract to devise was oral, allegation of such contract raises no issuable matter, and it is not required that cause be transferred to civil issue docket. *Clapp v. Clapp*, 281.

1-490. Statute does not proscribe continuance of hearing beyond 20 days for good cause. *Owen v. DeBruhl*, 597.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

1-582; 1-220. Upon motion to set aside order on ground that it was entered without notice, it is duty of court, upon request, to find facts. *Sprinkle v. Sprinkle*, 713.

8-57. Wife is competent to prove fact of marriage, but not absence of divorce. *S. v. Hill*, 409.

5-1; 5-8. Civil and criminal contempt distinguished, and procedure against contemnor in each case defined. *Galyon v. Stutts*, 120.

8-71; 8-53. Judge has no authority in chambers to enter order for pre-trial examination of physician concerning confidential communications. *Yow v. Pittman*, 69.

14-17; 148-58. Jury should determine whether to recommend life imprisonment without consideration of possibility of parole. *S. v. Conner*, 468.

14-21; 14-26. Prosecution for rape does not preclude subsequent prosecution for carnal knowledge of female between ages of 12 and 16. *S. v. Barefoot*, 650.

14-184. Single act of intercourse does not constitute the offense, but duration of association is immaterial and intercourse may be proven by circumstantial evidence. *S. v. Kleiman*, 277.

14-223. Indictment for resisting arrest should name officer and allege duty he was performing. *S. v. Scott*, 178; *S. v. Faulkner*, 609.

14-322. Warrant must charge abandonment as well as willful failure to support. *S. v. Smith*, 301.

15-169. Evidence in this prosecution for robbery *held* to require submission of question of defendant's guilt of assault. *S. v. Hicks*, 156.

17-32; 17-33 (2); 35-4; 122-46.1. Person committed under G.S. 122, Art. 3, may not invoke G.S. 35-4 to obtain release, proper remedy being *habeas corpus*. *In re Harris*, 179.

19-1. Dog race track is subject to abatement as nuisance. *Taylor v. Racing Asso.*, 80.

20, Art. 2. Superior Court has no authority to revoke driver's license, and may suspend judgment on condition that defendant not drive only with defendant's consent. *S. v. Cole*, 576.

20-17. Plea of *nolo contendere* to charge of manslaughter supports revocation of license under mandatory provisions. *Mintz v. Scheidt*, 268.

20-17; 20-19 (d); 20-24; 20-25. Upon plea of *nolo contendere* to charge of operating motor vehicle while under influence of intoxicating liquor, it is mandatory duty of commissioner of motor vehicles to revoke defendant's driving license. *Fox v. Scheidt*, 31.

20-38 (a). Business district defined. *Hinson v. Dawson*, 714.

20-71.1. Does not create presumption that owner was driving or that he permitted incompetent to drive. *Osborne v. Gilreath*, 685.

20-138. Blood test for alcohol *held* competent. *S. v. Willard*, 259.

20-138; 20-179. Whether defendant had theretofore been convicted of similar offense is for jury and not court. *S. v. Cole*, 576.

20-141 (a) (c). Fact that speed is less than maximum does not relieve motorist of duty to decrease speed when special hazards exist. *Hinson v. Dawson*, 714.

20-155. Evidence *held* for jury in this action to recover for collision at intersection. *Harrison v. Kapp*, 408.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

20-162.1. *Prima facie* rule of evidence created by this section is applicable to prosecution for violation of G.S. 20-162, which is a misdemeanor, G.S. 20-176, notwithstanding penalty of $1.00. *S. v. Rumfelt*, 375.

20-174 (a). Pedestrian's violation of statute is not negligence *per se*, but only evidence of negligence. *Moore v. Bozalla*, 190.

20-174 (a) (e). Pedestrian is under duty to yield right of way, but motorist is under duty to exercise due care. *Garmon v. Thomas*, 412.

20-226. Farm tractor is not motor vehicle within purview of Motor Vehicles Safety and Responsibility Act. *Brown v. Casualty Co.*, 666.

22-2. Oral contract to convey or devise realty is void. *Clapp v. Clapp*, 281.

28-81; 46-22; 1-276. Upon admission that land could not be actually partitioned, order of sale was proper, with proceeds to be subject to determination of whether personalty was sufficient to pay debts. *Clapp v. Clapp*, 281.

31-39; 31-41. Paper writing purporting to be will has no legal significance until death of testator. *Vandiford v. Vandiford*, 42.

35-23; 35-28; 35-29. In proceeding to increase allowance to insane veteran, all persons who would be entitled to distributive share of estate are necessary parties and Veterans Administration is proper party. *Patrick v. Trust Co.*, 76.

41-1. Where grantee has no children at time of execution of conveyance, grantee takes estate tail, converted into fee. *Davis v. Brown*, 116.

41-10. Adverse claim must be presently determinable in order for action to quiet title to lie. *Vandiford v. Vandiford*, 42.

42-3. Where lease contains no provision for forfeiture for failure to pay rent, lessors may assert forfeiture only after 10 days form demand. *Reynolds v. Earley*, 521.

45-21.31 (b) (4). Surplus after foreclosure must be paid into hands of clerk and not to administrator of deceased mortgagor. *Lenoir County v. Outlaw*, 97.

50-16. Pleadings *held* insufficient to state cause of action for alimony without divorce. *Ollis v. Ollis*, 709.

50-16. Does not affect power of court to award subsistence and alimony *pendente lite* in wife's action for alimony without divorce. *Barnwell v. Barnwell*, 565.

55-115. Pleadings *held* not to raise issue of bad faith of controlling stockholders in setting aside all profits for working capital; but action in setting aside profits for capital, acquiesced in by minority stockholders, is binding on them. *Nebel v. Nebel*, 491.

58-164 (e). Selling policies and collecting premiums through U. S. mail is doing business in this State for purpose of service of summons on Insurance Commissioner. *Suits v. Ins. Co.*, 483.

58-253 (6). Does not apply to exclusion from coverage of death caused by intentional act of third person. *Patrick v. Ins. Co.*, 614.

97-54 (a); 97-58 (a). Evidence *held* insufficient to support finding that that disability from silicosis occurred within two years of last exposure. *Huskins v. Feldspar Corp.*, 128.

97-58 (b). Workman may not be charged with notice that he has silicosis until he is so advised by competent medical authority. *Huskins v. Feldspar Corp.*, 128.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

99-1. Retraction relates solely to punitive damages and has no bearing on sufficiency of complaint to state cause of action. *Kindley v. Privette*, 140.

105-409. Payment of tax by *cestui* creates no equity in favor of trustor. *Redic v. Bank*, 152.

113-84; 143-237; 40-53. Certificate of public convenience and necessity is necessary before Wildlife Resources Commission may condemn lands. *Utilities Com. v. Story*, 102.

113-91 (d) 113-141; 113-152; 113-157. Wildlife protector is not required to retreat when performing official duties, and in such instance, doctrine of retreat has no application upon his plea of self-defense. *S. v. Ellis*, 702.

119-43. Complaint *held* to allege negligence in failing to properly label jug of gasoline. *Reynolds v. Murph*, 60.

136-19. Evidence of all damages proximately resulting from taking is competent without pleading of special circumstances. *Gallimore v. Highway Com.*, 350.

143-291. Prisoner detained at penal institution is not "employee" of the State within meaning of Tort Claims Act. *Alliance Co. v. State Hospital*, 329.

143-291; 143-297 (b). Evidence *held* to support sole conclusion that injury from driving into washout was not result of negligence of county maintenance supervisor in installing culverts. *Floyd v. Highway Com.*, 461.

148-27; 148-28. *Feme* defendant convicted of misdemeanor may not be sentenced to Central Prison, but to Women's quarters at Raleigh. *S. v. Cagle*, 134.

148-49.2; 148-49.3. Courts will take judicial notice that Umstead Youth Center is penal institution; use of prisoners does not make them "employees" of the State. *Alliance Co. v. State Hospital*, 329.

160-79; 160-104. Ch. 222, Public Laws of 1931 was intended to be merged into framework of Local Improvement Act. *Goldsboro v. R. R.*, 216.

160-173. Side of street opposite intersection of dead-end street has no corner. *Robbins v. Charlotte*, 197.

160-446; 160-448; 160-449. No annexation upon petition until approval of majority of qualified voters of area. *Rheinhardt v. Yancey*, 184.

308-30.1. Lien attaches to surplus after foreclosure on mortgage executed by recipient of old age benefits, notwithstanding that foreclosure was had more than year after his death. *Lenoir County v. Outlaw*, 97.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.
ART.
I, sec. 7; Art. I, sec. 31. Ch. 540, Public-Local and Private Laws of 1939, relating to dog race track, *held* unconstitutional. *Taylor v. Racing Asso.*, 80.
I, sec. 11. Blood test for alcohol does not violate constitutional rights. *S. v. Willard*, 259.
I, sec. 29. Courts have no jurisdiction over purely ecclesiastical matters. *Reid v. Johnston*, 201.
II, sec. 29. Where local act giving municipality power to improve streets is in effect at time of effective date of amendment, subsequent act merely enlarging city's jurisdiction does not violate provision. *Goldsboro v. R. R.*, 216. Ch. 540, Public-Local and Private Laws of 1939, relating to dog race track, *held* unconstitutional. *Taylor v. Racing Asso.*, 80. Act banning Sunday auto races is not act regulating trade within purview of this section. *S. v. Chestnutt*, 401.
III, sec. 6. The power of parole is vested exclusively in executive branch of government. *S. v. Conner*, 468.
IV, sec. 31. Judge of recorder's court may be removed from office only by method and for reasons set out in Constitution. *Reid v. Comrs.*, 551.
VII, sec. 7. Municipal auditoriums, playgrounds and recreation centers are for public purposes but not for necessary expenses, and therefore taxes may be levied therefor with approval of voters, but not without their approval. *Greensboro v. Smith*, 363.
XI, sec. 1. Courts may impose only such punishments as are authorized by Constitution. *S. v. Cole*, 576.
XI, sec. 3. Defendant may be sentenced to Central Prison only upon conviction of felony. *S. v. Cagle*, 134.