NORTH CAROLINA REPORTS
VOL. 242

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1955
FALL TERM, 1955

REPORTED BY
JOHN M. STRONG

RALEIGH
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PRINTERS TO THE SUPREME COURT
1955

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
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2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
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1 Murphey	"	5	"	1 " Eq.	"	36	"
2 "	"	6	"	2 " "	"	37	"
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1 Hawks	"	8	"	4 " "	"	39	"
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1 " Eq.	"	16	"	2 " "	"	47	"
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1 Dev. & Bat. Law	"	18	"	4 " "	"	49	"
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3 & 4 " "	"	20	"	6 " "	"	51	"
1 Dev. & Bat. Eq.	"	21	"	7 " "	"	52	"
2 " "	"	22	"	8 " "	"	53	"
1 Iredell Law	"	23	"	1 " Eq.	"	54	"
2 " "	"	24	"	2 " "	"	55	"
3 " "	"	25	"	3 " "	"	56	"
4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
				" Eq.	"	62	"

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

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1955—FALL TERM, 1955.

CHIEF JUSTICE:

M. V. BARNHILL.

ASSOCIATE JUSTICES:

J. WALLACE WINBORNE,
EMERY B. DENNY,
JEFF. D. JOHNSON, JR.,
R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS.

EMERGENCY JUSTICE:

W. A. DEVIN.†

ATTORNEY-GENERAL:

HARRY McMULLAN.*

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
RALPH MOODY,[1]
CLAUDE L. LOVE,
I. BEVERLY LAKE,[2]
JOHN HILL PAYLOR,
HARRY W. McGALLIARD,
SAMUEL BEHRENDS, JR.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

LEONARD S. POWERS.

†On recall from 7 March, 1955, through 30 April, and from 30 August through 8 October, 1955.

*Died 24 June, 1955. Succeeded by William B. Rodman, Jr.

[1]Resigned effective 1 August, 1955, upon appointment to Utilities Commission. Succeeded by Robert E. Giles.

[2]Resigned effective 1 October, 1955. Succeeded by Peyton B. Abbott.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Coinjock.
MALCOLM C. PAUL	Second	Washington.
WILLIAM J. BUNDY	Third	Greenville.
HENRY L. STEVENS, JR.	Fourth	Warsaw.
CLIFTON L. MOORE	Fifth	Burgaw.
JOSEPH W. PARKER	Sixth	Windsor.
WALTER J. BONE	Seventh	Nashville.
J. PAUL FRIZZELLE	Eighth	Snow Hill.

SECOND DIVISION

HAMILTON HOBGOOD	Ninth	Louisburg.
WILLIAM Y. BICKETT	Tenth	Raleigh.
CLAWSON L. WILLIAMS	Eleventh	Sanford.
Q. K. NIMOCKS, JR.	Twelfth	Fayetteville.
RAYMOND MALLARD	Thirteenth	Tabor City.
CLARENCE W. HALL	Fourteenth	Durham.
LEO CARR	Fifteenth	Burlington.
MALCOLM B. SEAWELL	Sixteenth	Lumberton.

THIRD DIVISION

ALLEN H. GWYN	Seventeenth	Reidsville.
WALTER E. CRISSMAN	Eighteenth	High Point.
L. RICHARDSON PREYER	Eighteenth	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
F. DONALD PHILLIPS	Twentieth	Rockingham.
WALTER E. JOHNSTON, JR.	Twenty-First	Winston-Salem.
HUBERT E. OLIVE	Twenty-Second	Lexington.
J. A. ROUSSEAU	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

J. FRANK HUSKINS	Twenty-Fourth	Burnsville.
J. C. RUDISILL	Twenty-Fifth	Newton.
FRANCIS O. CLARKSON	Twenty-Sixth	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh	Gastonia.
ZEB V. NETTLES	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.	Twenty-Ninth	Marion.
DAN K. MOORE	Thirtieth	Sylva.

SPECIAL JUDGES.

GEORGE M. FOUNTAIN	Tarboro.
W. A. LELAND MCKEITHEN	Pinehurst.
SUSIE SHARP	Reidsville.
GEORGE B. PATTON	Franklin.

EMERGENCY JUDGES.

HENRY A. GRADY	New Bern.
JOHN H. CLEMENT	Walkertown.
FELIX E. ALLEY, SR.	Waynesville.
H. HOYLE SINK	Greensboro.
W. H. S. BURGWYN	Woodland.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. COHOON	First	Elizabeth City.
ELBERT S. PEEL	Second	Williamston.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
ROBERT D. ROUSE, JR.	Fifth	Farmville.
WALTER T. BRITT	Sixth	Clinton.
LESTER V. CHALMERS, JR.	Seventh	Raleigh.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
MALCOLM B. SEAWELL[1]	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

HARVEY A. LUPTON	Eleventh	Winston-Salem.
HORACE R. KORNEGAY	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
BASIL L. WHITENER	Fourteenth	Gastonia.
ZEB. A. MORRIS	Fifteenth	Concord.
JAMES C. FARTHING	Sixteenth	Lenoir.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
C. O. RIDINGS	Eighteenth	Forest City.
ROBERT S. SWAIN	Nineteenth	Asheville.
THADDEUS D. BRYSON, JR.	Twentieth	Bryson City.
R. J. SCOTT	Twenty-first	Danbury.

[1]Appointed Resident Judge Sixteenth Judicial District effective 1 July, 1955. Succeeded by Maurice E. Braswell, Fayetteville, N. C.

SUPERIOR COURTS, FALL TERM, 1955

FIRST DIVISION

First District—Judge Morris

Camden—Sept. 26; Nov. 7†.

Chowan—Sept. 12; Nov. 28.

Currituck—Sept. 5; Oct. 10†.

Dare—Oct. 24.

Gates—Oct. 31.

Pasquotank—Sept. 19†; Oct. 17†; Nov. 14*; Dec. 5† (2).

Perquimans—Nov. 21.

Second District—Judge Paul

Beaufort—Sept. 19*; Oct. 17† (2); Nov. 7*; Dec. 5†.

Hyde—Oct. 10; Oct. 31†.

Martin—Aug. 8†; Sept. 26*; Nov. 21† (2); Dec. 12.

Tyrrell—Oct. 3.

Washington—Sept. 12*; Nov. 14†.

Third District—Judge Bundy

Carteret—Oct. 17†; Nov. 7.

Craven—Sept. 5 (2); Oct. 3† (2); Nov. 14; Nov. 28† (2).

Pamlico—Aug. 8 (2).

Pitt—Aug. 22†; Aug. 29; Sept. 19† (2); Oct. 24 (2); Nov. 21†; Dec. 12.

Fourth District—Judge Stevens

Duplin—Aug. 29; Sept. 5†; Oct. 10*; Nov. 7*; Dec. 5† (2).

Jones—Sept. 26; Oct. 31†; Nov. 28.

Onslow—July 18‡ (A); Oct. 3; Nov. 14† (2).

Sampson—Aug. 8 (2); Sept. 12† (2); Oct. 17*; Oct. 24†.

Fifth District—Judge Moore

New Hanover—Aug. 1*; Aug. 8†; Aug. 22*; Sept. 12† (2); Oct. 3*; Oct. 10† (2); Oct. 31* (2); Nov. 21† (2); Dec. 5* (2).

Pender—Sept. 5†; Sept. 26; Oct. 24†; Nov. 14.

Sixth District—Judge Parker

Bertie—Aug. 29; Sept. 5†; Nov. 21 (2).

Halifax—Aug. 15 (2); Oct. 3† (2); Oct. 24*; Dec. 5 (2).

Hertford—July 18 (A); Sept. 12; Sept. 19†; Oct. 17.

Northampton—Aug. 8; Oct. 31 (2).

Seventh District—Judge Bone

Edgecombe—Sept. 19*; Oct. 10* (2); Nov. 7† (2).

Nash—Aug. 22*; Sept. 12†; Sept. 26† (2); Oct. 24† (2); Nov. 21* (2).

Wilson—July 18*; Aug. 29* (2); Sept. 26† (A) (2); Oct. 24* (A) (2); Dec. 5† (2).

Eighth District—Judge Frizzelle

Greene—Oct. 10† (A); Oct. 17* (A); Dec. 5.

Lenoir—Aug. 22*; Sept. 12† (2); Oct. 10† (2); Oct. 24* (2); Nov. 21† (2); Dec. 12.

Wayne—Aug. 15*; Aug. 29† (2); Sept. 26† (2); Nov. 7 (2); Dec. 5† (A).

SECOND DIVISION

Ninth District—Judge Hobgood

Franklin—Sept. 19† (2); Oct. 17*; Nov. 28† (2).

Granville—July 25; Oct. 10†; Nov. 14 (2).

Person—Sept. 12; Oct. 3† (A) (2); Oct. 31.

Vance—Oct. 3*; Nov. 7†.

Warren—Sept. 5*; Oct. 24†.

Tenth District—Judge Bickett

Wake—July 11* (A) (2); July 25† (A); Aug. 8†; Aug. 29†; Sept. 5* (2); Sept. 5† (A) (2); Sept. 19† (2); Oct. 3*; Oct. 10† (2); Oct. 24† (2); Nov. 7† (A) (2); Nov 7* (2); Nov. 21† (2); Dec. 5* (2).

Eleventh District—Judge Williams

Harnett—Aug. 15†; Aug. 29* (A); Sept. 12† (A) (2); Oct. 10† (2); Nov. 14* (A) (2).

Johnston—Aug. 22; Sept. 26† (2); Oct. 24; Nov. 7† (2); Dec. 5 (2).

Lee—Aug. 1*; Aug. 8†; Sept. 12† (2); Oct. 31*; Nov. 28† (A).

Twelfth District—Judge Nimocks

Cumberland—Aug. 8†; Aug. 29* (2); Sept. 12† (2); Sept. 26* (2); Oct. 10† (2); Nov. 7* (2); Nov. 28† (2); Dec. 12*.

Hoke—Aug. 22; Nov. 21.

Thirteenth District—Judge Mallard

Bladen—Oct. 24*; Nov. 14†.

Brunswick—Sept. 19; Oct. 17†.

Columbus—Sept. 5* (2); Sept. 26† (2); Oct. 10*; Oct. 31† (2); Nov. 21* (2).

Fourteenth District—Judge Hall

Durham—July 11* (A) (2); Aug. 1 (2); Aug. 29*; Sept. 5†; Sept. 12* (2); Oct. 3* (2); Oct. 17† (2); Oct. 31* (2); Nov. 14† (2); Nov. 28 (2); Dec. 12*.

Fifteenth District—Judge Carr

Alamance—Aug 1†; Aug. 15* (2); Sept. 12† (2); Oct. 17* (2); Nov. 14† (2); Dec. 5*.

Chatham—Sept. 5†; Oct. 10; Oct. 31†; Nov. 7†; Nov. 28*.

Orange—Aug. 8*; Sept. 26† (2); Dec. 12.

Sixteenth District—Judge Seawell

Robeson—July 11†; Aug. 15*; Aug. 29†; Sept. 5* (2); Sept. 19† (2); Oct. 10† (2); Oct. 31* (2); Nov. 14† (2); Nov. 28*.

Scotland—Aug. 8; Oct. 3†; Oct. 24†; Dec. 5 (2).

THIRD DIVISION

Seventeenth District—Judge Gwyn

Caswell—Nov. 14† (A); Dec. 5*.

Rockingham—July 25* (2); Sept. 5† (2); Oct. 17†; Oct. 24* (2); Nov. 21† (2); Dec. 12*.

Stokes—Oct. 3*; Oct. 10†.

Surry—July 11† (2); Sept. 19* (2); Nov. 7† (2); Dec. 5 (A).

Eighteenth District

Schedule A—Judge Preyer

Guilford Gr.—July 11*; July 25*; Aug. 29*; Sept. 5†; Sept. 12* (2); Oct. 3*; Oct. 10* (2); Oct. 24*; Nov. 7*; Nov. 14† (2); Nov. 28*; Dec. 5*.

Guilford H. P.—July 18*; Sept. 26*; Oct. 31*; Dec. 12*.

Schedule B—Judge Crissman

Guilford Gr.—Sept. 12† (2); Sept. 26† (2); Oct. 10† (2); Oct. 24† (2); Nov. 21† (2).

Guilford H. P.—Sept. 5†; Nov. 7† (2); Dec. 5†.

Nineteenth District—Judge Armstrong

Cabarrus—Aug. 22*; Aug. 29†; Oct. 10 (2); Nov. 7† (A) (2).

Montgomery—July 11 (A); Sept. 26†; Oct. 3; Oct. 31 (A).

Randolph—July 18† (A) (2); Sept. 5*; Nov. 7† (2); Nov. 28†; Dec. 5* (2).

Rowan—Sept. 12 (2); Oct. 24† (2); Nov. 21*.

Twentieth District—Judge Phillips

Anson—Sept. 19*; Sept. 26†; Nov. 21†.

Moore—Aug. 8* (A); Sept. 5† (2); Nov. 14.

Richmond—July 18*; July 25†; Oct. 3*; Oct. 10†; Dec. 5† (2).

Stanly—July 11; Oct. 17† (2); Nov. 28.

Union—Aug. 29; Oct. 31 (2).

Twenty-First District—Judge Johnston

Forsyth—July 11† (2); July 25 (2); Sept. 5 (2); Sept. 19† (3); Oct. 10 (2); Oct. 24† (2); Nov. 7 (2); Nov. 21† (2); Dec. 5 (2); Dec. 5† (A) (2).

Twenty-Second District—Judge Olive

Alexander—Sept. 26.

Davidson—Aug. 22; Sept. 12† (2); Oct. 10†; Nov. 14 (2); Dec. 12†.

Davie—Aug. 1; Oct. 3†; Nov. 7.

Iredell—Aug. 29; Sept. 5†; Oct. 17†; Oct. 24 (2); Nov. 28† (2).

Twenty-Third District—Judge Rousseau

Alleghany—Aug. 29; Oct. 3.

Ashe—Sept. 12†; Oct. 24*.

Wilkes—Aug. 1†; Aug. 15 (2); Sept. 19† (2); Oct. 31† (2); Dec. 5 (2).

Yadkin—Sept. 5*; Nov. 14† (2); Nov. 28.

FOURTH DIVISION

Twenty-Fourth District—Judge Huskins

Avery—July 11 (2); Oct. 17 (2).

Madison—July 25*; Aug. 29† (2); Oct. 3*; Oct. 31†; Dec. 5*; Dec. 12†.

Mitchell—August 1† (A); Sept. 12 (2).

Watauga—Sept. 26*; Nov. 7† (2).

Yancey—Aug. 8 (A); Nov. 21 (2).

Twenty-Fifth District—Judge Rudisill

Burke—Aug. 15; Oct. 3 (2); Nov. 21.

Caldwell—Aug. 29; Sept. 19† (2); Dec. 5 (2).

Catawba—Aug. 1 (2); Sept. 5† (2); Nov. 7 (2); Nov. 28†.

Twenty-Sixth District

Schedule A—Judge Campbell

Mecklenburg—July 11* (A) (2); Aug. 1* (2); Aug. 15† (A) (2); Aug. 29† (2); Sept. 12†; Sept. 19† (2); Oct. 3* (2); Oct. 17†; Oct. 24† (2); Nov. 7†; Nov. 14† (2); Nov. 28†; Dec. 5* (2).

Schedule B—Judge Clarkson

Mecklenburg—Aug. 15† (3); Sept. 5* (2); Sept. 19† (2); Oct. 3† (2); Oct. 17† (2); Oct. 31* (2); Nov. 14† (2); Nov. 28†; Dec. 5† (2).

Twenty-Seventh District—Judge Froneberger

Cleveland—July 11 (2); Sept. 26† (2); Oct. 24† (2); Nov. 28.

Gaston—July 25*; Aug. 8† (A) (2); Sept. 19*; Oct. 10† (2); Nov. 14* (2); Dec. 5† (2).

Lincoln—Sept. 5; Sept. 12†.

Twenty-Eighth District—Judge Nettles

Buncombe—July 11* (A) (2); July 25† (A); Aug. 1† (3); Aug. 22*; Aug. 22† (A); Aug. 29† (3); Sept. 19*; Sept. 19† (A); Sept. 26† (3); Oct. 17* (2); Oct. 24† (A); Oct. 31† (3); Nov. 21†; Nov. 21* (A) (2); Nov. 28† (3).

Twenty-Ninth District—Judge Pless

Henderson—Oct. 17; Nov. 21† (2).

McDowell—Sept. 5 (2); Oct. 3† (2).

Polk—Aug. 29.

Rutherford—Sept. 19 (2); Nov. 7 (2).

Transylvania—Oct. 24† (2); Dec. 5 (2).

Thirtieth District—Judge Moore

Cherokee—July 25; Nov. 7 (2).

Clay—Oct. 3.

Graham—Sept. 5 (2).

Haywood—July 11; Sept. 19† (2); Nov. 21 (2).

Jackson—Oct. 10 (2).

Macon—Aug. 1; Dec. 5 (2).

Swain—July 18; Oct. 24 (2).

*Indicates criminal term.
†Indicates civil term.
‡Indicates jail and civil term.
No designation indicates mixed term.
(A) Indicates judge to be assigned.
(2) Indicates number of weeks of term; no number indicates one week 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 ninth Monday after second Monday in 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. MYRA B. CAIN, 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.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed the written examinations of the Board of Law Examiners as of the 6th day of August, 1955:

ALLEY, ZEBULON DOYLE.....Waynesville.
BAILEY, DAVID WESLEY.....Winston-Salem.
BANKS, MYRON CARROLL.....Raleigh.
BARNES, TROY THOMAS, JR.....Wilson.
BLACKWELL, JOHN VERNON, JR.....Fayetteville.
BLEDSOE, LOUIS ADAMS, JR.....Chapel Hill.
BOOKER, JAMES JACKSON.....Winston-Salem.
BOWEN, TRENT CALVIN.....Durham.
BOYD, MELVIN THOMAS.....Henderson.
BRANHAM, WILLIAM DENNIS.....Rocky Mount.
BRIDGES, KENNETH KNOX.....Shelby.
BRINSON, ALFRED CAMERON.....Grantsboro.
BRINSON, ZEB CREIGHTON.....Tarboro.
BRITT, LUTHER JOHNSON, JR.....Lumberton.
BRITT, GEORGE MILTON.....Tarboro.
BROADFOOT, HAL WALKER.....Fayetteville.
BRYAN, ROBERT CAVENAUGH.....Chapel Hill.
BRYANT, CALVIN B.....Gaston.
BUNTON, ALBERT.....Wake Forest.
BURNS, FRANKLIN KENT.....Winston-Salem.
BYRD, ROBERT BOND.....Morganton.
CAMP, LEWIS FORMAN, JR.....Charlotte.
CAMPBELL, FOREST EDWIN.....Dunn.
CAMPBELL, JAMES THOMAS.....Taylorsville.
CARTER, WILLIAM EUGENE.....Asheville.
CHRISTMAN, EDGAR DOUGLAS.....Wake Forest.
COBB, JAMES ORR, JR.....Chapel Hill.
CUMMINGS, ALTON TUNNELL.....Asheboro.
DAIL, JOSEPH GARNER, JR.....Tarboro.
DAVIS, DON BURTON.....Asheboro.
DAVIS, JOSEPH GOMER, JR.....Spindale.
DAVIS, ROY WALTON, JR.....Marion.
DAWKINS, WILLIAM LEE.....Cary.
DOLLY, STEVE BLAND, JR.....Gastonia.
DORTCH, JOHN JOHNSON.....Chapel Hill.
DUBOSE, HORACE MELLARD, III.....Winston-Salem.
EDMUNDSON, PAUL BURT, JR.....Goldsboro.
FINGER, MICHAEL NEIL.....Maiden.
FITZGERALD, GEORGE LAWRENCE.....Charlotte.
FRANKS, STEPHEN FIELD.....Hendersonville.
FREEMAN, GEORGE KIRBY, JR.....Raleigh.
GALLANT, WADE MILLER, JR.....Raleigh.
GAMBLE, RICHARD O'NEIL.....Summerfield.
GILLESPIE, JAMES WOODROW.....Burlington.

GOLDMAN, HARRY, JR. ..... Winston-Salem.
GREENE, ANN SPENCER LLEWELLYN ..... Concord.
GRIFFIN, JAMES EDWARDS ..... Marshville.
HALL, JOHN ELBERT ..... Spray.
HALL, ROY GRIFFITH, JR. ..... Saluda.
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1955

EARL PEEK v. WACHOVIA BANK & TRUST COMPANY AND SHERMAN MOFFITT.

(Filed 13 April, 1955.)

1. Chattel Mortgages and Conditional Sales § 2—

A chattel mortgage on a tractor unit, which describes the vehicle by make, trade-name, and year, is sufficient when all the evidence tends to show that the mortgagor owned only the one tractor, and such evidence supports a peremptory instruction that the vehicle was covered by the instrument.

2. Trial § 29—

Where all the evidence bearing on an issue points in the same direction and justifies but a single inference, an instruction to answer the issue in the affirmative if the jury finds the evidence to be true, will be upheld. When the credibility of the evidence is left to the jury, it is a peremptory instruction as distinguished from a directed verdict.

3. Estoppel § 5—

The conduct of the party claiming an estoppel must be considered no less than the conduct of the party sought to be estopped.

4. Estoppel § 6a—Elements of equitable estoppel.

A party asserting an equitable estoppel must show conduct on the part of the party sought to be estopped which amounts to (1) a false representation or concealment of material facts or which is reasonably calculated to mislead; (2) intention or expectation that such conduct should be acted upon or which is calculated to induce a reasonably prudent person to believe such conduct was to be relied upon; (3) knowledge, actual or constructive, of the real facts. The party claiming the estoppel must further

show on his part: (1) lack of knowledge and the means of knowledge as to the truth of facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon to his prejudice.

5. Same—

In the absence of actual fraud, a party asserting an estoppel must not have been misled through his own want of reasonable care and circumspection.

6. Estoppel § 11b—

A defendant pleading estoppel by way of affirmative defense has the burden of proof upon the issue.

7. Trial § 29—

A verdict may not be directed in favor of the party upon whom rests the burden of proof.

8. Same—

The court may give a peremptory instruction upon an issue in favor of the party upon whom rests the burden of proof only when but a single inference can reasonably be drawn from the undisputed facts in evidence.

9. Estoppel § 11c—

A bank holding a junior mortgage asserted that the senior mortgagee was estopped from asserting the priority of his lien by reason of the fact that the senior mortgagee accompanied the mortgagor to the bank and represented that there were no liens upon the property. The evidence was conflicting as to whether the senior mortgagee, in endorsing the transfer of title with warranty against liens, read the instrument or if he read it, assumed that it referred to liens against him and not in his favor. *Held:* The court correctly refused to give a peremptory instruction on the issue of estoppel in favor of the junior mortgagee.

10. Evidence § 40—

The rule that parol evidence is not admissible to vary or contradict a written instrument applies when the enforcement of the writing is the basis of the cause of action or the substantial issue between the parties, and not when the writing is collateral to the issue involved in the action.

11. Same—

The warranty of title in the endorsement and transfer of title executed by the holder of the senior lien was set up as an estoppel by the mortgagee of the purchaser of the vehicle. *Held:* Testimony of the holder of the senior lien that he executed the endorsement in blank, did not read it, and that it was not notarized at the time of execution, does not violate the parol evidence rule, since the validity of the transfer of title was conceded by all the parties and was collateral to the substantial issues involved in the case.

12. Appeal and Error § 29—

Assignments of error which are not supported by reason, argument, or citation of authority in the brief, will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

13. Estoppel § 11b—

Where the junior mortgagee contends that the senior mortgagee used the money borrowed from the junior mortgagee and secured by its instrument to make good a check given by the senior mortgagee to discharge a prior lien on the property, testimony of the senior mortgagee that he had other funds with which to make good the check is competent upon the issue of estoppel.

14. Appeal and Error § 39e—

The exclusion of testimony cannot be held prejudicial when appellant fails to show what the testimony would have been had the witness been permitted to answer.

15. Appeal and Error § 6c (6)—

The misstatement of a factual contention of a party must be brought to the court's attention in apt time.

16. Subrogation § 1—

In order for a person who lends money used in the discharge of a lien on property to be subrogated to the rights of the lienholder, it must not only appear that the money loaned was actually used to discharge the lien, but also that the money was advanced for this purpose, either by express understanding or by implication, and when there is no evidence that the money was advanced with the intent and for the purpose of extinguishing the prior lien, the court properly refuses to submit the issue of subrogation.

17. Appeal and Error § 6c (5)—

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

18. Automobiles § 5—

It is not required that the transfer and delivery of certificate of registration of title to a motor vehicle be made at the same time as the sale and transfer of title to the vehicle.

19. Trial § 31f—

The statement by the court of a valid contention of a party based on competent evidence cannot be held for error.

20. Automobiles § 5: Estoppel § 6a—

The printed form warranty of title contained in the assignment of title of a motor vehicle relates to liens against the assignor and not those in his favor, and therefore, nothing else appearing, the assignor is not estopped thereby from asserting a lien in his favor as against the mortgagee of the assignee.

21. Payment § 2—

In the absence of a contrary agreement, the delivery and acceptance of a check is not payment as between the parties until the check is paid.

22. Chattel Mortgages § 15—

Upon failure of the consideration for which a release or satisfaction of a mortgage is executed, such release or satisfaction ordinarily may be set

aside and the lien restored to its original priority as against the mortgagor, a volunteer or one chargeable with knowledge of the rights and equities of the mortgagee, but such priority may not be re-established as against a *bona fide* purchaser or encumbrancer who has acquired an interest in or lien upon the property in reliance upon the entry of satisfaction.

24. Same: Estoppel § 11d—Conduct held merely circumstance to be considered by jury with other circumstances on issue of estoppel.

At the time of the application for a loan by the assignee of title to a motor vehicle, the assignor of title had a purchase money mortgage, and had given a check to discharge a prior lien, which check he knew was not covered by sufficient funds. The assignor of title thereafter made the check good, and the prior lien was discharged, and there was no assertion of subrogation to the rights of the prior lienholder. The evidence was conflicting as to whether the assignor had sufficient income to make his check good without using the funds borrowed from the assignee's mortgagee. *Held:* The court correctly refused to instruct the jury on the issue of estoppel of the assignor to assert his lien, that it was the positive duty of the assignor to inform the assignee's mortgagee that the prior lien was outstanding and unpaid, the circumstance being at most a subordinate factor relating to the conduct and demeanor of the assignor to be considered by the jury with the other facts and circumstances upon the issue.

25. Trial § 32—

A party desiring instructions upon a subordinate feature of the case must aptly tender a request therefor.

26. Appeal and Error § 8—

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

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendant Wachovia Bank and Trust Company from *Sharp, Special Judge,* and a jury, at August 1954 Civil Term of BUNCOMBE.

Civil action in claim and delivery involving priority of chattel mortgage liens on an Auto Car diesel tractor.

On 7 May, 1951, the plaintiff Peek, operator of a fleet of long-distance motor transport units, purchased the 1948 model diesel tractor here involved from Carolina Garage, of Winston-Salem, North Carolina, and executed his purchase money note, secured by chattel mortgage on the tractor, for the deferred balance of $4,026.81. The chattel mortgage was recorded in the Public Registry of Buncombe County on 14 May, 1951.

On or about 1 May, 1952, Peek sold and delivered the Auto Car tractor to the defendant Moffitt for the sum of $5,000. Moffitt agreed to pay the balance of about $2,000 then due on the lien note held by

Carolina Garage and executed to Peek a purchase money note, secured by chattel mortgage on the tractor, for the deferred balance of $2,961.42, due in stated monthly installments. The note and chattel mortgage were executed 19 May, 1952. Both instruments contained the usual accelerating clause. The chattel mortgage was duly filed for registration 6 June, 1952.

On 23 June, 1952, Moffitt secured a loan from the defendant Wachovia Bank and Trust Company in the approximate amount of $1,850, and that day executed to the Bank his installment payment note in the amount of $2,846.37, covering the loan, plus insurance premiums and prepaid interest charges. The note was secured by chattel mortgage on the tractor, duly filed for registration 26 June, 1952.

On 28 August, 1952, Moffitt, admittedly being in default in the payment of his note to Wachovia Bank and Trust Company, surrendered possession of the tractor to the Bank.

On 21 February, 1953, the plaintiff instituted this action, alleging in gist: that Moffitt had failed and refused to pay any sum whatever on the purchase money note to him; that plaintiff is entitled to recover of the defendant Moffitt the full face amount of the note with interest; that the lien of his chattel mortgage is prior to that of the defendant Bank, and that therefore he is entitled to the immediate possession of the tractor as against the Bank. The tractor was seized by the Sheriff under writ of claim and delivery. However, the Bank replevied and held the tractor.

The defendant Bank by answer denied the material allegations of the complaint and set up, among others, these defenses:

1. That the plaintiff's chattel mortgage is fatally defective for failure to describe adequately the Auto Car diesel tractor.

2. That when the defendant Moffitt made application to the Bank for the loan, to be secured by chattel mortgage on the tractor, he was accompanied by the plaintiff, who delivered to the Bank the Certificate of Title issued to him by the North Carolina Department of Motor Vehicles covering the tractor; that the plaintiff falsely represented to the Bank that there were no liens against the tractor, and executed an assignment, affidavit, and warranty that there were no liens and encumbrances on the vehicle, and delivered the Certificate of Title to the Bank; that the representations and warranties were made by the plaintiff for the purpose of deceiving the Bank and inducing it to deal with Moffitt; that in reliance upon the false representations and warranties of the plaintiff the Bank was induced to make the chattel mortgage loan to Moffitt; and that by reason of the plaintiff's representations that there were no liens or encumbrances against the vehicle the plaintiff is estopped from asserting that the lien of his chattel mortgage is prior to that of the Bank.

3. That at the time Moffitt applied for the loan from Wachovia Bank and Trust Company, the first mortgage lien debt of Carolina Garage was in default; that shortly before the Wachovia loan to Moffitt was closed, Peek issued to Carolina Garage his check (on the First National Bank and Trust Company, of Asheville) for the entire balance due on its mortgage; that at the time the check was made, Peek knew he did not have sufficient funds on deposit to cover the check; that at that time he intended to obtain funds from Wachovia with which to cover the check; that when the check reached the drawee bank, it was dishonored for lack of funds and Peek was so notified; that a few days later when the loan was made by the Wachovia Bank to Moffitt, the proceeds of the loan were turned over to Peek, who in turn deposited same to his credit in the First National Bank and Trust Company, and by such deposit and use of the proceeds of the bank loan the check previously issued by Peek to Carolina Garage was paid; and that by reason thereof the canceled mortgage of Carolina Garage should be and in equity is reinstated and that Wachovia Bank and Trust Company is subrogated to the rights of Carolina Garage thereunder.

The defendant Moffitt was never served with process and made no appearance. He was subpoenaed as a witness by the defendant Bank but was not found and did not testify.

At the trial below evidence was offered tending to show these facts: the execution and delivery of the three notes as described in the pleadings, and also the execution and registration, as alleged, of the chattel mortgages securing the notes; that when the tractor was sold by Peek to Moffitt, the latter agreed to pay the monthly installments due on the first mortgage held by Carolina Garage at the rate of $200 each, plus interest; that Moffitt was to make the payments to Peek, who in turn was to forward them to Carolina Garage; that he made only two payments—neither of which was "on time"; that Moffitt "got so far behind" that Peek "had to go" pay off the Carolina Garage mortgage debt. This he did on 17 June, 1952. On that date Peek went to Winston-Salem and gave Carolina Garage his check on the First National Bank and Trust Company, of Asheville, for the balance of $1,576. Next day, Carolina Garage mailed Peek the note and chattel mortgage and also the Certificate of Title issued to Peek by the North Carolina Department of Motor Vehicles, with notation written on the face of the mortgage and Certificate showing payment of the lien debt. The plaintiff Peek admitted that at the time he gave the check to the Garage he knew he did not have sufficient funds in the bank to cover the check, and that when the check reached the bank for collection two or three days later his deposit was not sufficient to cover it, and that he was so notified by the bank. That Moffitt made no payment on his purchase

money note and mortgage to the plaintiff Peek; that when Moffitt surrendered possession of the tractor to Wachovia Bank and Trust Company he owed on its note and mortgage $2,688.93, all of which was in default. That on 12 June, 1952, when Moffitt applied to Wachovia Bank and Trust Company for the loan on the tractor, the application was handled by J. C. Creed of the Bank's Time Payment Department. Creed was advised that Moffitt was obligated to pay off the balance due on the purchase money note and chattel mortgage made by Peek to Carolina Garage, and in investigating Moffitt's credit standing Creed phoned Carolina Garage to verify his information that the Garage lien was outstanding. Creed testified he also had a conversation with Peek several days after taking Moffitt's application. After the mortgage and Certificate of Title had been forwarded to Peek by Carolina Garage, Moffitt called Peek on the phone and asked him if he had the Certificate of Title. Peek replied that he did. Thereupon Peek went to meet Moffitt at the Bank, taking with him the Certificate of Title. Peek had previously "been after Moffitt for some time about some money . . . had been on him different times before that . . . he was behind in his payments . . ." They went inside the Bank together. Peek testified, "I had an idea he (Moffitt) might be getting a loan . . ." This was on 23 June, 1952. Moffitt secured the loan from Wachovia Bank that day and executed his installment note therefor, secured by chattel mortgage on the Auto Car tractor.

There is some conflict in the evidence as to the extent of Peek's participation in the events connected with the closing of the loan. Creed, who handled the application and closed the loan for the Bank, testified in substance that Peek and Moffitt came into the Bank together; that the three of them—Peek, Moffitt and Creed—were present in the office; that Peek "gave me the title." It was marked "paid" by Carolina Garage. "I asked Peek if there was any lien on the Auto Car diesel and he said there was not." Creed then filled out the printed assignment blank on the back of the Certificate of Title designated "A," after which it was executed by Peek before Miss Hollar, a notary public who was called in; that Creed then filled out the purchaser's application for new title, designated "C," on the back of the Certificate of Title, and that Moffitt executed it. The assignment as executed by Peek to Moffitt is as follows, with the parts filled in by Creed being in parentheses:

A. ASSIGNMENT OF TITLE BY REGISTERED OWNER.

For value received, the undersigned hereby sells, assigns or transfers the vehicle described on the reverse side of this certificate unto the purchaser whose name appears below in this block, and the undersigned

hereby warrants the title to said vehicle and certifies that at the time of delivery the same is subject to the following named liens or encumbrances and none other:

Purchaser (Sherman Moffitt)	Amount of lien $
Street or R.F.D. (111 Middlemont)	Kind of Lien
Post Office (Asheville, N. C.)	Date of Lien
Date of Sale (6-23-52)	In favor of
	Address
Earl Peek	All answers supplied and completely subscribed and sworn to before me this 23rd day of June 1952. My commission expires 10/9/53.
Signature of Seller	
(59 Starnes Ave. Asheville, N. C.)	
Address	Joy Hollar
	(SEAL)
WARNING: This assignment must not be signed unless name and address of purchaser appear above.	Notary Public
	Asheville, N. C.
	Address

Defense witness Creed further testified: "The entire paragraph of Form 'A' was copied by me before Peek signed it . . . After my conversation with Moffitt and Peek I completed the transaction and gave Moffitt a check to finish the loan. . . . I did not investigate nor cause to be investigated the records of Buncombe County prior to accepting this chattel mortgage on Moffitt. . . . I knew he (Moffitt) had it (the tractor) in his possession" for two or three weeks before the application was made. The tractor was inspected by Creed and another representative of the Bank while the loan application was pending.

Joy Hollar testified that she notarized Peek's assignment of the Certificate of Title. She said the blanks were filled in before Peek signed and that she watched him sign the paper and then notarized it.

The plaintiff Peek testified that he met Moffitt outside the Bank and handed the Certificate of Title to him; that they then went in the Bank; that he sat down over next to the door at the entrance to the Time Payment Department; that Moffitt went on over to Creed's desk; that he did not hear any conversation between Creed and Moffitt; that they called him over to sign the title and at that time "Creed asked me if I owed anything on the tractor, and I told him I didn't. . . . I then executed the Certificate of Title. Mr. Creed told me where to sign it . . . Q.

Did you read it or fill in the purchaser's name? (Objection—overruled) A. No, I just signed my name. . . . Q. Did any notary public take your acknowledgment . . . on that certificate of title? (Objection—overruled) A. They did not. . . . Creed and Moffitt were present at the time I wrote my name on that certificate of title. . . . After signing the certificate of title, I took my seat back. . . . where I was sitting, I was plumb across the house. . . . I did not hear any conversation between Creed and Moffitt after I signed the certificate of title. Neither Creed nor Moffitt discussed with me the terms of the loan that Moffitt was obtaining. I did not know what security Moffitt was giving the bank . . . for the loan. . . . I had an idea he might be getting a loan but I didn't know what other security he might be using instead of the truck." Cross-Examination: ". . . I waited around there all the time . . . over in front of the door . . . I wasn't expecting any money from Moffitt that day. . . . I was waiting because I went in with him, . . . thought I would wait until he finished and go back out with him. Q. I'll ask you if it is not a fact that you got that money from Moffitt there in the bank and went right over to the First National Bank and deposited it that same day so your check you had given to the Carolina Garage would be covered? A. I deposited the money,—sure. . . . I deposited the money I got from Moffitt there in the bank and went right over to the First National Bank and deposited it that same day, so that the check which I had given to the Carolina Garage would be covered. I had already received the notice, sure, as the notice was in the mail when I got back, but I had other trucks running, and had a service station, and had money coming in from two or three other sources. I didn't have to depend on what Moffitt gave me to obtain a $1,500.00 check."

Hugh M. Felder, Cashier of the First National Bank & Trust Company, Asheville, with the ledger sheet of the plaintiff Peek in hand, testified in substance that Peek's balance at the close of business on 17 June, 1952 was $1,360.05; on 21 June it was $806.34; that on 23 June there was one deposit in the sum of $1,850.85; that a check drawn by Peek for $1,576.36 and returned on 21 June for insufficient funds was paid on 25 June; that no deposit was made on 24 June; on 25 June there was a deposit of $204.27; that on 25 June at the close of business the balance was $405.72.

Other facts appear in the opinion.

The motion for judgment as of nonsuit made by the defendant Wachovia Bank and Trust Company at the close of all the evidence was denied. Exception.

The court also declined to submit the issue of subrogation as tendered by the defendant bank. Exception.

The case was submitted to the jury on the following issues, which were answered as indicated:

"1. Did the plaintiff on or before the 19th day of May, 1952, sell to the defendant Sherman Moffitt a 1948 model Auto Car, as alleged in the Complaint? Answer: YES.

"2. Did the defendant Sherman Moffitt execute and deliver to the plaintiff on or about the 19th day of May, 1952, a chattel mortgage and note covering the 1948 model Auto Car, as alleged in the Complaint? Answer: YES.

"3. What amount, if any, is Sherman Moffitt indebted to the plaintiff by reason of said note and chattel mortgage? Answer: $2,976.42.

"4. Did Sherman Moffitt execute and deliver to the defendant Wachovia Bank and Trust Co. a chattel mortgage and note covering the 1948 model Auto Car tractor on or about the 23rd day of June, 1952, as alleged in the Answer? Answer: YES.

"5. Is the plaintiff Earl Peek estopped by his conduct from asserting a lien prior to the defendant's on the Auto Car tractor in question? Answer: No.

"6. Is the plaintiff entitled to the possession of the 1948 model Auto Car tractor, as alleged in the Complaint? Answer: YES.

"7. What is the fair market value of said 1948 model Auto Car tractor as of February 21, 1953? Answer: $2,500.00."

From judgment entered on the verdict, adjudging the plaintiff entitled to the immediate possession of the Auto Car tractor and directing that it be taken by the Sheriff from the defendant Wachovia Bank and Trust Company and delivered to the plaintiff, the Bank appeals, assigning errors.

Uzzell & Dumont for defendant Wachovia Bank and Trust Company, appellant.

Fisher & Fowler and Ward & Bennett for plaintiff, appellee.

JOHNSON, J. The appellant's assignments of error raise questions relating to (1) the legal sufficiency of the description contained in the chattel mortgage made by the defendant Moffitt to the plaintiff, (2) the refusal to direct a verdict on the issue of estoppel, (3) the reception and exclusion of evidence, (4) the refusal to submit an issue of subrogation, and (5) the charge of the court. We discuss the assignments in that order.

1. *The sufficiency of the description contained in the plaintiff's chattel mortgage.*—First, the appellant urges that its motion for judgment as of nonsuit should have been allowed on the ground that the description "1948 Auto-Car (Sleeper Cab Tractor) Motor No....." con-

tained in the chattel mortgage sued on by the plaintiff is fatally defective. However, we are inclined to the other view. The description, when considered in connection with the evidence that Moffitt owned only one tractor unit, meets identification requirements as approved by authoritative decisions of this Court. *Motor Co. v. Motor Co.*, 197 N.C. 371, 148 S.E. 461. See also *Spivey v. Grant*, 96 N.C. 214, 2 S.E. 45. The decisions cited by the appellant are factually distinguishable.

Next, by Assignment of Error No. 35 the appellant insists that in any event the sufficiency of the evidence *aliunde* tending to identify the Auto Car tractor should have been submitted to the jury as an open question, rather than under the peremptory instruction as given in favor of the plaintiff on the second issue. The challenged instruction is in material part as follows: ". . . if you find the facts to be as all the evidence tends to show, you would answer the second issue Yes, otherwise you would answer it No." The rule is that where all the evidence bearing on an issue points in the same direction and justifies as the single inference to be drawn therefrom an answer in favor of the party having the burden of proof, an instruction to find in support of such inference if the evidence is found to be true, will be upheld. This is a peremptory instruction, as distinguished from a directed instruction. *Commercial Solvents, Inc. v. Johnson*, 235 N.C. 237, and cases cited on p. 243, 69 S.E. 2d 716, *721*. Here, all the evidence in the case tends to show that the plaintiff owned only one tractor. Hence the charge as given is free of legal error. The form of the instruction is approved by numerous decisions of this Court. See *Commercial Solvents, Inc. v. Johnson, supra*. See also *Shelby v. Lackey*, 236 N.C. 369, 72 S.E. 2d 757; *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904.

2. *The refusal to direct a verdict in favor of the defendant Bank on the issue of estoppel.* The general principles governing the operation of the doctrine of equitable estoppel as applicable to this case are set out in *Hawkins v. Finance Corp.*, 238 N.C. 174, pp. 177, 178 and 179, 77 S.E. 2d 669, 672, 673, as follows:

". . . in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighted in the balance of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted

upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489; *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824; 19 Am. Jur., Estoppel, Sections 42 and 46. . . .

"However, he who claims the benefit of an equitable estoppel on the ground that he has been misled by the representations of another must not have been misled through his own want of reasonable care and circumspection. And where the element of actual fraud is absent, the effect of an estoppel ordinarily will be denied where the party claiming it was put on inquiry as to the truth and had available the means for ascertaining it. 19 Am. Jur., Estoppel, Sec. 86."

The Bank pleaded equitable estoppel by way of affirmative defense. Therefore, on that issue the burden of proof was upon the defendant Bank. *Aldridge Motors v. Alexander,* 217 N.C. 750, 9 S.E. 2d 469. The Bank moved for a directed instruction on the issue. The motion was properly overruled. The rule is well established with us that a directed instruction in favor of the party having the burden of proof is forbidden. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *Haywood v. Ins. Co.,* 218 N.C. 736, 12 S.E. 2d 221. See also *Bryant v. Murray,* 239 N.C. 18, 25, 79 S.E. 2d 243, 248.

Conceding *arguendo* that the court below treated the Bank's motion as being intended as a motion for a peremptory, rather than a directed, instruction, even so, the ruling was proper. It is only when a single inference can reasonably be drawn from undisputed facts that the question of estoppel is one of law for the court to determine. *Mason v. Williams,* 53 N.C. 478; *Bank v. Winder, supra;* 19 Am. Jur., Estoppel, section 200. See also *Hawkins v. Finance Corp., supra.*

Here the evidence bearing on the issue of estoppel was conflicting and susceptible of diverse inferences. While the evidence of the defendant Bank was sufficient to justify the inference that it relied upon and was misled by the representations of the plaintiff, nevertheless other phases of the evidence justify the opposite inference.

3. *The reception and exclusion of evidence.*—By Assignments Nos. 4, 5, 6, and 16, based on exceptions bearing the same numbers, the defendant Bank urges that the trial court erred in permitting the plaintiff Peek to testify over objection that when he executed the assignment of the

Certificate of Title to Moffitt at the Bank (1) he executed it in blank, (2) he did not read it, and (3) the assignment was not notarized at the time of execution. The Bank urges that this line of testimony was violative of the parol evidence rule as tending to vary or contradict the provisions of the assignment of the Certificate of Title as executed by Peek to Moffitt. However, the rule against the admission of parol evidence to vary or contradict a written contract does not apply where the writing in respect to which it is sought to introduce parol evidence is collateral to the issue involved in the action. 32 C.J.S., Evidence, section 1011; 20 Am. Jur., Evidence, section 1142. We adhere to this well-established exception to the parol evidence rule. It is recognized and applied in numerous authoritative decisions of this Court, among which are these: *Pollock v. Wilcox,* 68 N.C. 46; *Carden v. McConnell,* 116 N.C. 875, 21 S.E. 923; *Ledford v. Emerson,* 138 N.C. 502, 51 S.E. 42; *Hall v. Giessell & Richardson,* 179 N.C. 657, 103 S.E. 392; *Chatham v. Chevrolet Co.,* 215 N.C. 88, 1 S.E. 2d 117; *Jones v. Chevrolet Co.,* 217 N.C. 693, 9 S.E. 2d 395.

In *Hall v. Giessell, supra,* at bottom of page 659, it is said: ". . . the parol evidence rule as to the contents of a written instrument, applies only to actions between parties to the writing, *and when its enforcement is the substantial cause of action . . .*" (Italics added.) The enforcement of the written assignment of the Certificate of Title made by Peek to Moffitt was in no sense an issue, substantial or otherwise, in the instant case. On the contrary, the validity of the transfer of the tractor title from Peek to Moffitt is conceded by all the parties. Indeed, both chattel mortgages in suit—the purchase money mortgage made by Moffitt to Peek and the later mortgage made by Moffitt to Wachovia Bank and Trust Company—derive their efficacy from Moffitt's ownership of the tractor, as evidenced by Peek's transfer of title to Moffitt. Therefore Peek's cause of action and the Bank's defenses, all based on chattel mortgages made by Moffitt, presuppose a valid transfer of title from Peek to Moffitt. This being so, the written assignment of the Certificate of Title and the parol evidence in respect thereto were collateral to all "substantial" issues involved in the case. And the challenged testimony of Peek, as was that of witness Creed offered *contra* by the Bank, tending to show the facts and circumstances surrounding the execution of the assignment of title and the acts, statements, and conduct of the parties at the time of the execution of the assignment, was relevant and competent as bearing on the issue of estoppel. The challenges to this testimony are without merit.

Assignments of Error Nos. 10 and 11 relate to the testimony of Peek, admitted over objection of the Bank, to the effect that he had additional income with which to cover the check he had given to Carolina Garage

in satisfaction of its first lien chattel mortgage. These assignments, standing as they do unsupported by reason, argument, or citation of authority, may be treated as abandoned by virtue of Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, p. 563, which provides that exceptions "not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." See *S. v. Cole,* 241 N.C. 576, p. 581, 86 S.E. 2d 203, 207; *Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500. In any event, the evidence to which these assignments relate was relevant and competent on the issue of estoppel.

Assignment of Error No. 20 relates to the refusal of the court to allow one of the defendant Bank's witnesses to answer a question propounded to him. The assignment is without merit for the reason that the record fails to show what the testimony would have been if the witness had been permitted to answer the question. It is elemental that the exclusion of testimony cannot be held prejudicial on appeal unless the appellant shows what the witness would have testified if permitted to do so. *Highway Comm. v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *Goeckel v. Stokely,* 236 N.C. 604, 73 S.E. 2d 618.

The remaining assignments of error relating to evidential matters are listed in the appellant's brief as Nos. 21, 22, 23, 24, and 25, along with No. 39. All these are grouped and brought forward in the brief and argued *en masse,* without citation of authority, as relating "to the trial court's refusal to permit cross-examination on matters to which the plaintiff was permitted to testify on direct examination." However, our examination of the record discloses that none of the exceptions on which these assignments are based relate to cross-examination of the plaintiff. All of them, except Assignment No. 39, relate to direct and redirect examination of defense witnesses and have to do with the exclusion, on objection of the plaintiff, of testimony proffered by the defendant Bank. Assignment No. 39, while grouped in appellant's brief with evidential assignments, is based on an exception to the charge. It challenges the correctness of the court's statement of a factual contention of the plaintiff. Yet it nowhere appears that the defendant Bank called the error to the attention of the court at the time. This group of assignments of error, being unsupported by reason, argument, or authority as required by Rule 28, Rules of Practice in the Supreme Court (221 N.C. 544), will be treated as abandoned. *S. v. Cole, supra.* While we dispose of these assignments on procedural ground, nevertheless the exceptions to which they relate have been examined and are found to be without substantial merit.

4. *The refusal to submit the issue of subrogation.*—Subrogation is a mode of equitable relief which operates on principles of natural justice

without regard to form and independent of any contractual relation between the parties to be affected by it. Story's Equity Jurisprudence, Fourteenth Edition, Volume 2, section 706. It has been defined "as that change by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person who, by being subrogated to him, enters into his right. It is a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as entitled to the same rights, and indeed as constituting one and the same person with the creditor whom he succeeds." Sheldon, The Law of Subrogation, Second Edition, section 2. See also Pomeroy's Equity Jurisprudence, Fifth Edition, Volume 4, section 1211.

For present purposes it is not necessary to give a comprehensive classification of the various types of cases and situations to which the doctrine of subrogation may be applied. It suffices to point out that as a general rule one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant. *Wilkins v. Gibson,* 113 Ga. 31, 38 S.E. 374, 84 Am. St. Rep. 204; *Bankers' Loan & Investment Co. v. Hornish,* 94 Va. 608, 27 S.E. 459; *Huggins v. Fitzpatrick,* 102 W. Va. 224, 135 S.E. 19; Pomeroy's Equity Jurisprudence, Fifth Edition, Volume 4, section 1212; Annotation, 70 A.L.R. 1396. See also *Boney v. Insurance Co.,* 213 N.C. 563, 567, 197 S.E. 122; 50 Am. Jur., Subrogation, sections 107, 108, and 109.

However, one who loans money which is used in paying off a mortgage or encumbrance is not entitled, from that circumstance alone, to be subrogated to the rights of the holder of the encumbrance. *Price v. Courtney,* 87 Mo. 387, 56 Am. Rep. 453; *Carolina Interstate Bldg. & Loan Ass'n v. Black,* 119 N.C. 323, 25 S.E. 975; *Kline v. Ragland,* 47 Ark. 111, 14 S.W. 474. See also *Seeley v. Bacon* (N. J. Eq.), 34 Atl. 139. Consequently, the mere fact that the proceeds of a later mortgage are applied to the discharge of a prior one does not, as a rule, entitle the mortgagee therein to be subrogated to the rights of the prior mortgagee. *Ayers v. Staley* (N. J. Eq.), 18 Atl. 1046; *Bradshaw v. Van Valkenburg,* 97 Tenn. 316, 37 S.W. 88; Annotation: 99 Am. St. Rep. 474, p. 513. In order to invoke the equitable remedy of subrogation "it is necessary

both that the money should have been advanced for the purpose of discharging the prior encumbrance, and that it should actually have been so applied." Sheldon, the Law of Subrogation, Second Edition, section 8.

In the case at hand there is neither allegation nor proof that the Wachovia loan was made for the purpose of discharging the prior lien held by Carolina Garage. True, it is alleged, and the evidence discloses, that Peek secured its discharge by the issuance of a worthless check, which was dishonored when presented for payment and not paid until the proceeds of the Wachovia loan to Moffitt were turned over by him to Peek, who deposited them to his credit, and thereupon the worthless check given in discharge of the lien debt was paid. This line of evidence offered by the defendant Bank is sufficient to support the inference that the proceeds of the Wachovia loan to Moffitt were actually applied to the discharge of the prior mortgage held by Carolina Garage. However, the defendant Bank, having failed to show that its loan moneys were advanced with the intent and for the purpose of extinguishing the prior encumbrance, has failed to bring itself within the principles of the doctrine of subrogation. On the record as presented, nothing more than a case of ordinary borrowing and lending has been made to appear. This being so, the court below properly declined to submit the issue of subrogation.

5. *Assignments of error relating to the charge.*—Here the defendant Bank groups and brings forward Assignments Nos. 34 to 49, inclusive.

Assignment No. 34 is based on an exception to this portion of the charge: "Now, the law does not prohibit the sale of a motor vehicle without transfer and delivery of certificate of registration of title; in other words, one can sell a motor vehicle on one day and the title pass, and deliver or transfer the paper certificate of title on a later date." It is nowhere pointed out wherein the court erred in so instructing the jury. The only argument advanced in the brief in connection with the assignment is that the court failed "to explain the law arising on the evidence in relation to the Motor Vehicle Acts (Ch. 236, Public Laws of 1923, and Ch. 407, Public Laws of 1937)," in violation of the provisions of G.S. 1-180. This contention is not only broadside but is unsupported by exception or assignment of error. It is elemental that an exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case. *Karpf v. Adams; Runyon v. Adams,* 237 N.C. 106, 74 S.E. 2d 325. See headnote 10. Thus, the exception to the excerpt from the charge as noted, standing as it does unsupported by argument or citation of authority, is deemed abandoned by virtue of Rule 28, Rules of Practice in the Supreme Court, *supra; S. v. Cole, supra.* While this is

so, it is observed that the instruction as given is precisely in accord with the decision in *Corporation v. Motor Co.*, 190 N.C. 157, 129 S.E. 414.

Assignment No. 35, relating to the legal sufficiency of the description contained in the plaintiff's chattel mortgage, challenges the peremptory instruction given in favor of the plaintiff on the second issue. This assignment has been discussed and overruled.

Assignments Nos. 36, 37, and 38 are based on exceptions to excerpts from the charge and will be discussed together. Assignment No. 36 is based on an exception to an instruction of law exactly as is stated in *Hawkins v. Finance Co., supra* (238 N.C. 174), at middle of page 179; whereas Assignments Nos. 37 and 38 are based on exceptions to the statement of factual contentions, and it nowhere appears that the court's attention was called to any misstatement at the time. Here, again, the defendant gives no reason or argument or citation of authority in support of any of these three assignments. Instead, the Bank in its brief attempts to challenge the omission of the court to charge further on other aspects of the case. It necessarily follows that the exceptions as noted and the assignments of error based thereon will be treated as abandoned (*S. v. Cole, supra*), and the argument made in the appellant's brief to the effect that the court erred in failing to charge further on other aspects of the case, being unsupported by exception or assignment of error, will be disregarded. *Karpf v. Adams, supra* (237 N.C. 106).

While Assignments Nos. 39, 40, 44, 46, 47, 48, and 49 are brought forward in the brief, they are unsupported by argument or citation of authority. They are treated as abandoned. *S. v. Cole, supra.*

Assignments Nos. 41 and 43 are discussed together in the appellant's brief and will be treated the same way here. By No. 41 the defendant Bank assigns error in the following statement of the plaintiff's contention based on his testimony that he did not read the assignment of title as executed by him: "The plaintiff says and contends that, according to the plaintiff's testimony, he did not read it; that if he had read it, he would have assumed it referred to liens against him and not in his favor." Assignment No. 43 is based on the following exceptions, duly made as to form: "That the court did not and should have instructed the jury that the plaintiff was charged with the knowledge of the contents of the certificate of title which he executed at the bank's office and that if they should find that he warranted the title as contained therein to Moffitt, that he would thereby be estopped to controvert said warranty." We see nothing objectionable in the instruction to which Assignment No. 41 relates. The court was charging on the issue of estoppel and was giving two contentions of the plaintiff. In the first, refer-

ence was made to the plaintiff's testimony that he did not read the assignment of title. We have previously discussed the competency of this testimony and concluded it was properly received as bearing on the issue of estoppel. This being so, error may not be predicated on the court's statement of contention embodying the gist of the testimony. As to the second contention—that if the plaintiff had read the assignment "he would have assumed it referred to liens against him and not in his favor"—it is enough to say that while the contention is hypothetical, it is not perceived that it was prejudicial to the appellant. This is so for the reason that conceding, as we may, that the plaintiff was charged with notice of the contents of the printed form assignment and warranty which he signed, even so, the reference to liens in the printed form does in fact relate to liens against the assignor and not in his favor. And this being so, it necessarily follows that the printed form warranty of title executed by the plaintiff in assigning title to Moffitt does not, nothing else appearing, estop plaintiff from asserting the priority of his chattel mortgage. Therefore, there is no merit in the appellant's contention, based on Assignment No. 43, that the court erred in failing to charge that the plaintiff's execution of the form assignment and warranty appearing on the back of the Certificate of Title was sufficient to estop the plaintiff. On the contrary, any such positive instruction would have been erroneous. Assignments Nos. 41 and 43 are overruled.

Assignment No. 42 is based on this exception: "The Court did not and should have instructed the jury that as the plaintiff admitted he knew when he gave the Carolina Garage, Inc., his check in payment of the mortgage held by them that he did not have sufficient funds in the bank to cover said check that this would not constitute a payment of said mortgage and that plaintiff should have advised the defendant Wachovia Bank and Trust Company of this and other facts at the time he executed the certificate of title in the bank's offices." By this assignment the defendant Bank insists that on the basis of Peek's testimony to the effect that he did not have sufficient funds on deposit to cover his check made to Carolina Garage, the court should have instructed the jury (1) that the Carolina Garage mortgage was outstanding and unpaid and (2) that Peek should have so informed the Bank's representative Creed. No such positive instruction was justified by the evidence in the case.

True, as between the parties, the rule is that in the absence of a contrary agreement the delivery and acceptance of a check is not payment until the check is paid. *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908. See also *Hayworth v. Ins. Co.*, 190 N.C. 757, 130 S.E. 612; *Moore & Dawson v. Construction Co.*, 196 N.C. 142, 144 S.E. 692. *Cf. South*

v. Sisk, 205 N.C. 655, 172 S.E. 193. Also, on failure of the consideration for which a release or satisfaction of a mortgage was executed, it may generally be set aside and the lien of the canceled mortgage restored to its original priority as against the mortgagor, a volunteer, or one chargeable with knowledge of the rights and equities of the mortgagee; but such priority may not be re-established as against a *bona fide* purchaser or encumbrancer who has acquired an interest in or lien upon the property in reliance upon the entry of satisfaction. *McConnell v. American National Bank,* 59 Ind. App. 319, 103 N.E. 809; 59 C.J.S., Mortgages, section 283 (d), p. 353.

Here, all the evidence tends to show that the defendant Bank occupied the position of a *bona fide* encumbrancer whose lien was taken in reliance upon the entry of satisfaction of the prior Carolina Garage mortgage. Besides, the garage mortgage debt stands paid and satisfied, and no attempt is made by Peek, whose liability thereon as against Moffitt was that of a surety, to have it reinstated in his favor as against either Moffitt or the defendant Bank. Also, it is noted that the evidence is conflicting in respect to whether Peek had sufficient outside income with which to pay the check he gave Carolina Garage. Therefore, in no aspect of the case was the defendant Bank entitled to have the trial court tell the jury it was Peek's positive duty to have informed the Bank's representative Creed that the check was outstanding and unpaid. Such instruction would have been violative of G.S. 1-180 and prejudicial to the plaintiff.

The fact that Peek failed to disclose to the Bank that his check to Carolina Garage was outstanding and unpaid at most was a subordinate factor relating to his conduct and demeanor to be considered by the jury along with other facts and circumstances in evidence as bearing on the issue of estoppel. If the Bank desired this subordinate phase of the case to be specially presented to the jury, it should have requested the judge to do so by prayer for special instruction tendered in apt time. No such request was made. When a judge has "charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; . . ." *S. v. Merrick,* 171 N.C. 788, bot. p. 795, 88 S.E. 501. And where this is not done, objection may not be raised for the first time after trial. *Hauser v. Furniture Co.,* 174 N.C. 463, 93 S.E. 961; *Chestnut v. Sutton,* 207 N.C. 256, 176 S.E. 743; *Bryant v. Carrier,* 214 N.C. 191, 198 S.E. 619; McIntosh, N. C. Practice and Procedure, p. 634.

Assignment No. 45 is that the court erred in failing to instruct the jury "as to the elements of fraud in the plaintiff's acts and omissions

in dealing with the defendant Wachovia Bank and Trust Company and the effect of such fraudulent conduct and omissions." This assignment of error is without merit. No issue of fraud was tendered, and there is no exception for failure to submit the issue of fraud. *In re Will of Beard,* 202 N.C. 661, 163 S.E. 748. The phases of the evidence tending to show elements of fraud were encompassed by the issue of estoppel. This, no doubt, was favorable to the defendant Bank. At any rate, such was the theory of the trial. And the rule is that the theory upon which a case is tried in the lower court must prevail in considering the appeal and in interpreting the record and determining the validity of the exceptions. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Thrift Corp. v. Guthrie,* 227 N.C. 431, 42 S.E. 2d 601. However, our examination of the record discloses that the trial court in charging on the issue of estoppel presented to the jury all essential phases of the evidence bearing on the question of fraud and deception and properly instructed the jury in reference thereto. If the defendant wished further elaboration on subordinate features, it should have made timely requests therefor. *Chestnut v. Sutton, supra.*

In the trial we find

No error.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

WILLIAM L. MILLS, JR., ON BEHALF OF HIMSELF AND OTHER OWNERS OF BURIAL LOTS IN CAROLINA MEMORIAL PARK, v. CAROLINA CEMETERY PARK CORPORATION AND GAMALIEL COATS SMITH HUGENSCHMIDT.

(Filed 13 April, 1955.)

1. Cemeteries § 4—

After interment, a body is in the custody of the law, and the courts will take cognizance of the profound sentiments and instincts of humanity that the dead rest in uninterrupted repose and will not order a body to be removed except for compelling reasons.

2. Same—

Plaintiff alleged that the defendant cemetery had permitted the individual defendant to bury her deceased husband in a granite tomb above the ground in a section of the cemetery reserved solely for underground sepulchers, and sought by injunction to compel the defendants to remove the body from the tomb. *Held:* The complaint fails to allege any compelling reasons upon which equity could grant the relief sought, and defendants' demurrers to this cause of action should have been sustained.

3. Injunctions § 4g—

The practice of law without a license is a criminal offense, with adequate legal remedy by indictment against a person or corporation practicing law without license, and therefore, injunction will not lie to restrain the unauthorized practice of law.

4. Fraud § 9—

Allegations that defendant cemetery had delivered deeds for burial lots stamped as having been recorded when in fact the deeds had not been recorded, and that such action was willfully and fraudulently intended to keep the owners from having their deeds recorded, *held* insufficient to state a cause of action for fraud.

5. Cemeteries § 2—

The owners of lots or burial rights in a cemetery have the right to demand that the rules and regulations of the cemetery be uniform and reasonable, and an owner of a lot or burial interest may maintain an action in behalf of himself and others having a like interest to enjoin the enforcement of unlawful and unreasonable regulations promulgated by the cemetery.

6. Same—

In an action to enjoin the enforcement of unreasonable regulations promulgated by a cemetery corporation, plaintiff must allege plainly and precisely the rules and regulations he contends are unlawful and unreasonable, and allegations that the rules and regulations adopted by the corporate cemetery set out in the complaint and still others not set out, are unlawful and unreasonable, are insufficient to state a cause of action for injunction, but constitute a defective statement of a good cause of action.

7. Pleadings § 3a—

If plaintiff seeks to recover in one action on two or more causes of action, each cause must be separately stated. Rule of Practice in the Supreme Court No. 20 (2).

8. Cemeteries § 2—

Where a corporate cemetery sells lots under contract that the money paid should be used for protection and ornamentation, such funds cannot be diverted to other purposes.

9. Same: Fraud § 9—

Allegations that the corporate cemetery had sold burial lots upon representation that certain funds should be used for protection and ornamentation and that the cemetery had breached these agreements and had no present intention of performing them, in the absence of allegation that when the cemetery made the representations, it knew them to be false, and made them with the intention that they should be acted upon, *is held* to be a defective statement of good cause of action for fraud.

10. Pleadings § 15—

In passing upon the sufficiency of the allegations of the complaint to state a cause of action, the allegations must be taken as true for the purpose of the demurrer.

11. Parties § 2½—

There is a community of interest of the owners of lots or burial rights in a cemetery, and therefore an owner of a lot or burial right may bring an action in behalf of himself and all others similarly situated to protect the community of interest. G.S. 1-70.

12. Pleadings § 19b—

Where there is a misjoinder of causes of action, but not a misjoinder of parties and causes, the action should not be dismissed upon demurrer, but the court will sever the causes and divide the actions.

13. Pleadings § 2—

A plaintiff may unite in the same complaint several causes of action, legal or equitable, in contract or in tort, provided they all arise out of the same transaction or transaction connected with the same subject of action so that a connected story can be told of the whole. G.S. 1-123.

14. Same—

A cause of action against a cemetery for breach of promissory representations made in the sale of burial lots, and a cause of action against the cemetery to restrain the enforcement of unlawful and unreasonable rules and regulations in the management of the property, are improperly joined in the same complaint.

15. Pleadings § 19b—

Where a complaint improperly joins two separate causes of action which are defectively stated, the court, upon demurrer, should not dismiss the action, but should permit amendment and divide the actions for separate trials.

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

APPEAL by defendants from *Rudisill, J.*, August Term 1954 of CABARRUS.

Civil action heard on demurrer. The demurrer was overruled, and defendants excepted and appealed.

Hartsell & Hartsell and William L. Mills, Jr. for Plaintiff, Appellee.

L. E. Barnhardt, C. M. Llewellyn and M. B. Sherrin for Defendants, Appellants.

PARKER, J. Plaintiff instituted this action on behalf of himself and other owners of burial lots in Carolina Memorial Park against Carolina Cemetery Park Corporation and Gamaliel Coats Smith Hugenschmidt.

This is a summary of the allegations of his Complaint:

One. Prior to June 1942 the defendant Carolina Cemetery Park Corporation—hereafter called Cemetery Park—conceived plans for the Carolina Memorial Park, and through its agents and officers contacted plaintiff, and others, to sell them burial lots in the proposed park.

Two. To induce plaintiff, and others, to purchase burial lots in the proposed Memorial Park, Cemetery Park furnished its agents and officers elaborate maps and brochures of the proposed park, and instructed them to represent to plaintiff, and others, that the main object of the proposed park was to abolish the "old undemocratic method of burial" where a man's wealth and prestige were shown by towering monuments, and to substitute therefor the "new totally democratic method of burial" where all are interred exactly alike. In 1942 Cemetery Park sent two of its agents—both stockholders and one a director—to see plaintiff to sell him a burial lot.

Three. Cemetery Park, through its agents, directors, printed material and deeds, represented to plaintiff, and others, that all sepulchers would be beneath the sod, and marked only by bronze tablets; that certain plots of ground would be set aside in the proposed park for the erection of a multi-colored fountain, a sun dial and garden, a hut of meditation, a Masonic Memorial, a chapel, a singing tower and a Veterans' Memorial; that an adequate perpetual care fund would be established to provide proper care and upkeep of the proposed park; that the less expensive aesthetic features would be erected first, and as the proposed park developed and more funds became available the more expensive features, such as the chapel and singing tower would be built; that a beautiful and imposing singing tower would be erected as a monument to those who found a final resting place in "God's Garden," furnishing sweet sacred music during Sunday afternoon concerts and during funeral services, upon request; that a large and imposing chapel of stone or granite would be erected for funeral services; and that markers for the burial lots could be purchased from any available source, provided they were of bronze and of a size and type approved by Cemetery Park.

Four. The plaintiff, and others, relying upon these representations purchased burial lots in the proposed park, and have been wilfully and intentionally cheated, wronged and defrauded by Cemetery Park in these respects: (1) Cemetery Park has permitted the defendant Hugenschmidt, a former officer of Cemetery Park with full knowledge of its rules and regulations, to bury her deceased husband in a granite tomb above the ground in the Memorial Park in a section reserved solely for underground sepulchers and at the base of the Masonic Memorial; (2) Cemetery Park, though 10 years have passed since construction began on the Memorial Park and though over one-fourth of its total number of lots have been sold, has not set aside one cent for the erection of a singing tower or chapel; (3) Cemetery Park does not intend to erect a singing tower or chapel as represented, but plans to erect a cheap substitute for the singing tower; (4) that Cemetery Park has not estab-

lished, and does not intend to establish a perpetual care fund to care for the Memorial Park, and (5) has paid exorbitant sums of money to stockholders, directors and officers, which sums would have been adequate to fulfill the representations made to plaintiff and others.

Five. The wrongful acts and omissions of Cemetery Park have been wilfully and intentionally planned, and executed or omitted, and are in breach of the specific agreements of Cemetery Park with the plaintiff, and others, property owners in the Memorial Park, and in breach of the contract upon which plaintiff and others purchased property in the Memorial Park.

Six. Cemetery Park has made unreasonable rules and regulations relative to the use of property in the Memorial Park, which it has arbitrarily enforced, and has imposed certain restrictions upon plaintiff, and others, which are not embodied in its rules and regulations, in that: (1) it has refused to authorize plaintiff to place a marker on his property in Memorial Park, which marker was of a type approved by Cemetery Park, because plaintiff planned to buy the marker from someone other than it; (2) it has permitted markers not purchased from it to be placed in the Memorial Park; (3) it has demanded that plaintiff furnish proof that his proposed marker meets its specifications, though it has never obtained such proof on any other marker placed in Memorial Park; (4) it has informed plaintiff that he will be charged a fee of $35.00 for the care of any marker he does not buy from it, though it has never charged anyone else for such service, and does not care for the markers.

Seven. All "restrictions, rules, regulations, and impositions, as well as others hereinafter referred to, and still others contained in the rules and regulations adopted by the defendant corporation, but which have not been set out herein, are unlawful and unreasonable," exceeding its lawful authority and are imposed, applied and enforced "in a capricious, arbitrary, unreasonable and unlawful manner."

Eight. Cemetery Park has wrongfully engaged in these acts to monopolize the business of furnishing markers in Memorial Park in order to enrich its stockholders, and removes all identification from graves making it almost impossible to find them. That this removal of identification is arbitrary and unreasonable, and plaintiff further alleges the custom of morticians in marking graves.

Nine. Cemetery Park adopted unlawful rules forbidding anyone other than itself to do unnamed services in Memorial Park, which the owners could do, thereby extorting from them unreasonable sums of money.

Ten. Cemetery Park has attempted to defraud property owners in Memorial Park by stamping upon their delivered deeds for burial lots

"This Property has been Recorded," when it had not been, and that such acts were wilful and fraudulent and intended to keep the owners from having their deeds recorded.

Eleven. Cemetery Park by its rules and regulations compels all people desiring to sell or transfer property in the Memorial Park to employ it to prepare the deeds for which it charges, thereby attempting to monopolize the making of deeds and is practicing law without a license in violation of G.S. 84-4.

Twelve. Plaintiff, and other owners, of burial lots in the Memorial Park have a property right in the Memorial Park, and are without a remedy at law whereby their interests may be protected.

Wherefore, the plaintiff prays: *One.* That a receiver be appointed for Cemetery Park until such time as an adequate fund is set aside for the perpetual care of the Memorial Park, and plans are perfected for the construction and payment of the proposed singing tower and chapel. *Two.* That Cemetery Park be enjoined from monopolizing the business of selling markers to property owners in Memorial Park; from attempting to coerce the property owners in Memorial Park into buying markers from it; from adopting any rules applicable to property owners in the Memorial Park, which do not apply to all alike; from charging any fee for any service which is unreasonable or above that usually charged by others for similar service; from stamping deeds for lots in Memorial Park "This Property Has Been Recorded"; from practicing law; from removing markers placed flush or can be placed flush with the earth by an undertaker free of charge. *Three.* That Cemetery Park be ordered to place a bronze marker similar to other markers in the Memorial Park at a charge not in excess of the price usually charged by others for similar services. *Four.* That the defendant Hugenschmidt be required to remove the body of her husband from the granite tomb at the base of the Masonic Memorial, and that Cemetery Park be required to restore the Masonic Memorial to its original condition, prior to the erection of the Hugenschmidt tomb.

By leave of Court plaintiff amended his Complaint to allege that the matters complained of are of common or general interest to a large number of persons so numerous that it is impracticable to bring them all into court.

The defendants demurred to the Complaint on four grounds: *One.* Several causes of action have been improperly united. *Two.* The Complaint does not state facts sufficient to constitute a cause of action, in that the plaintiff has not legal capacity to sue, and in that necessary allegations as to fraud are lacking. *Three.* There is a defect of parties defendant because there is no relationship between the defendants as

to the relief prayed. *Four.* There is a defect of parties plaintiff in that plaintiff is the only party in interest.

The Complaint further alleges that the defendant Carolina Cemetery Park Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina with its principal place of business in Cabarrus County.

The Trial Judge overruled the demurrer, and the defendants excepted and appealed.

It would seem from a study of the Complaint that plaintiff has attempted to state and to unite in one cause of action five causes of action. *First.* A cause of action against the corporate defendant for breach of contract based on non-performance of fraudulent representations of promissory acts made to plaintiff, and others, inducing them to purchase burial lots in Carolina Memorial Park, and to compel the performance of such promissory acts. *Second.* A cause of action against the corporate defendant to protect the rights of plaintiff, and others, who own burial lots in Carolina Memorial Park, against the enforcement of unlawful and unreasonable rules and regulations made by the corporate defendant in respect to the use of burial lots therein. *Third.* A cause of action against the corporate defendant to enjoin it from attempting to defraud property owners in Carolina Memorial Park by stamping their delivered deeds "This Property Has Been Recorded." *Fourth.* A cause of action to enjoin the corporate defendant from unlawfully practicing law without a license. *Fifth.* A cause of action to require the defendant Hugenschmidt to remove the body of her deceased husband from the granite tomb at the base of the Masonic Memorial and to require the corporate defendant to restore the Masonic Memorial to its condition prior to the erection of this tomb.

We shall discuss first the attempt by plaintiff to allege a cause of action against the individual defendant and the corporate defendant to compel by injunction the removal of the body of Smith, deceased husband of the individual defendant, from the granite tomb and to compel the corporate defendant apparently to demolish the tomb. In 25 C.J.S., Dead Bodies, Sec. 4, it is said: "There is a distinction between the rights existing prior to burial and those after burial, because after its interment the body is in the custody of the law, and a disturbance of its resting place and its removal is subject to the control and direction of a court of equity in any case properly before it. It is the policy of the law, except in cases of necessity or for laudable purposes, that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed, and a court will not ordinarily order or permit a body to be disturbed unless there is a strong showing that it is necessary and that the interests of justice require it."

The sentiment of all civilized peoples, since earliest Biblical times, has held in great reverence the resting places of the dead as hallowed ground. In such matters we deal with concerns that basically are spiritual. Awe toward the dead was a most powerful force in forming primitive systems for grappling with the supernatural. "It is a sound public policy to protect the burying places of the dead." *Cave Hill Cemetery Co. v. Gosnell,* 156 Ky. 599, 161 S.W. 980.

Courts are reluctant to require disturbance and removal of bodies that have once been buried, for courts are sensitive to all those emotions that men and women hold for sacred in the disposition of their dead. Most people desire, and it is a natural desire, that there shall be forever an uninterrupted repose of their bodies when buried, and a regard for the feelings and love of their kindred and friends demands that their sepulchers shall not be violated except for compelling reasons. These tender sentiments and instincts of humanity are embedded deep in the hearts of men, and cannot be ignored. The aversion to disturbance of one's remains is illustrated by Shakespeare's choice of his own epitaph:

> "Good friend, for Jesu's sake forbear
> To dig the dust enclosed here.
> Blest be the man that spares these stones,
> And curst be he that moves my bones."

S. v. Wilson, 94 N.C. 1015; *S. v. McLean,* 121 N.C. 589, 28 S.E. 140, 42 L.R.A. 721; *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N.C. 176, 162 S.E. 223; *Thompson v. Deeds,* 93 Iowa 228, 61 N.W. 842, 35 L.R.A. 56; *Gardner v. Swan Point Cemetery,* 20 R.I. 646, 40 A. 871, 78 Am. St. Rep. 897; *McGann v. McGann,* 28 R.I. 130, 66 A. 52; *Silvia v. Helger,* 75 R.I. 397, 67 A. 2d 27, 10 A.L.R. 2d 216; *Sexson v. Commonwealth,* 239 Ky. 177, 39 S.W. 2d 229; *Fowlkes v. Fowlkes,* Tex. Civ. Appeals, 133 S.W. 2d 241; *Goldman v. Mollen,* 168 Va. 345, 191 S.E. 627; *Kusky v. Laderbush,* 96 N.H. 286, 74 A. 2d 546, 21 A.L.R. 2d 536; *Currier v. Woodlawn Cemetery,* 300 N.Y. 162, 90 N.E. 2d 18, 21 A.L.R. 2d 465.

"Neither the ecclesiastical, common, nor civil system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes compelling reasons. Securing 'unbroken final repose' has been the object of both civil and criminal legislation." Anno. 21 A.L.R. 2d p. 476.

The unauthorized disinterring of a dead body in this State is an indictable offense. G.S. 14-150. See also G.S. 14-148 as to criminal offense of removing or defacing monuments and tombs.

The plaintiff has completely failed to allege any compelling reasons to force the individual defendant by injunction to remove the buried

body of her deceased husband from the tomb and to force the corporate defendant to disturb the tomb, and restore the Masonic Memorial to its condition before erection of the tomb at its base, and has stated no cause of action against them for those ends. The demurrer on the part of the individual defendant and of the corporate defendant on this alleged cause of action should have been sustained.

The plaintiff has alleged no cause of action to prevent the corporate defendant by injunction from practicing law without a license—a criminal offense, G.S. 84-4, since he has an adequate remedy at law by having the corporate defendant indicted and convicted by the State. *Matthews v. Lawrence,* 212 N.C. 537, 193 S.E. 730; *Town of Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244. For the purposes of the demurrer we must take as true the allegation of the Complaint that the corporate defendant is engaged in the unlawful practice of law. *Belch v. Perry,* 240 N.C. 764, 84 S.E. 2d 186.

The plaintiff has attempted to allege a cause of action against the corporate defendant to enjoin it from attempting to defraud property owners in Carolina Memorial Park by stamping their delivered deeds "This Property Has Been Recorded." In this respect the allegations of the Complaint completely fail to state the essential elements of fraud, and state no cause of action. *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131.

We come now to plaintiff's attempt to state a cause of action to enjoin the enforcement of unlawful and unreasonable rules and regulations made by the corporate defendant, and to his attempt to state a cause of action for breach of contract against the corporate defendant. The instrument conveying the burial lot to plaintiff is not a part of the Complaint. Therefore, we do not know whether plaintiff owns the lot in fee or has a mere easement or right of burial; nor do we know whether or not plaintiff's rights in the lot are expressed in the instrument to be subject to any rules, regulations or by-laws of the corporate defendant. It seems plain that plaintiff does not have entire control over his lot, but has acquired a limited interest in the lot, which is part of one connected whole: that whole being conducted, maintained and managed by the corporate defendant for the benefit of him and those similarly situated. Plaintiff and the other owners of burial lots in Carolina Memorial Park have a common interest, and where plaintiff has a right to sue, he may sue in behalf of himself and others having a like interest in Carolina Memorial Park for purposes common to all and beneficial to all. *Beatty v. Kurtz,* 2 Pet. (U.S.) 566, 7 L. Ed. 521; 10 Am. Jur., Cemeteries, Sec. 39. See also G.S. 1-70.

Whether plaintiff owns the lot in fee, or has a mere easement or right of burial therein, he has a right to sue in behalf of himself and in behalf of others having a like interest for purposes common to all and beneficial to all to protect by injunction his rights as a lot owner against the enforcement of unlawful and unreasonable regulations made by the corporate defendant in respect to his use of his lot, for the rules and regulations adopted must be uniform and reasonable. *Nicholson v. Daffin,* 142 Ga. 729, 83 S.E. 658, L.R.A. 1915 E 168; *Scott v. Lakewood Cemetery Asso.,* 167 Minn. 223, 208 N.W. 811, 47 A.L.R. 64; *Mansker v. City of Astoria,* 100 Or. 435, 198 P. 199 (rehearing denied in 100 Or. 459, 199 P. 381); Anno. 32 A.L.R. 1406; 10 Am. Jur., Cemeteries, p. 505 and p. 515; 14 C.J.S., Cemeteries, pp. 95-96. Plaintiff has alleged that the rules and regulations adopted by the corporate defendant set out in its Complaint and still others not set out are unlawful and unreasonable. That is totally inadequate, for plaintiff must allege plainly and concisely the rules and regulations he contends are unlawful and unreasonable. G.S. 1-122 (2); *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47. Apparently plaintiff has a defective statement of a good cause of action which is fatal, *Scott v. Veneer Co.,* 240 N.C. 73, 81 S.E. 2d 146, and which in violation of Rule 20 (2) Rules of Practice in the Supreme Court, 221 N.C. 557, and what was said in respect thereto in *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648; and *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615, he has not stated separately but has incorporated in another cause of action.

It seems also that plaintiff has alleged a defective statement of a good cause of action in behalf of himself against the corporate defendant for breach of contract predicated on promises made by it to him with a present intention not to perform them. The allegations of the Complaint that the plaintiff has been wrongfully cheated, wronged and defrauded by the corporate defendant's failure to erect the buildings and aesthetic features it represented to him it would build, that it has not established and does not intend to establish a perpetual care fund for the cemetery, it represented to him it would do, and that it has paid large sums of money to its stockholders, officers and directors, which sums were adequate to fulfill the representations made to plaintiff, state facts that have a direct tendency to impair the value of plaintiff's lot, and gives him a cause of action. We, of course, are dealing with allegations in pleadings which we accept as true on a demurrer, and not with proof. *Clark v. Rahway Cemetery Co.,* 69 N. J. Eq. 636, 61 A. 261; *Brown v. Maplewood Cemetery Ass'n.,* 85 Minn. 498, 89 N.W. 872; 14 C.J.S., Cemeteries, Sec. 14; 10 Am. Jur., Cemeteries, Sec. 39; *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364. ". . . funds derived by a cemetery association from the sale of lots, under a contract that the

money paid shall be used in the protection and ornamentation of the cemetery, cannot be diverted to other purposes." 14 C.J.S., Cemeteries, p. 73. However, plaintiff has failed to allege the essential elements of fraud, in that he has not alleged that such representations made to him were false, that when the corporate defendant made them it knew the representations were false, and that it made such representations with intention that they should be acted upon by plaintiff. *Cofield v. Griffin, supra.*

Plaintiff has alleged in his Complaint that other owners of burial lots in this cemetery were induced by similar representations to purchase lots, that they have been similarly cheated and defrauded by the failure to fulfill such representations; that these things are of common or general interest to a large number of persons so numerous that it is impracticable to bring them all into court. Each owner of a lot in this cemetery, who was induced by such representations to buy a lot, has a part of one connected whole, has a common interest in the erection of the buildings and aesthetic features and in the establishment of a perpetual care fund for the upkeep and maintenance of the cemetery and has a common interest with plaintiff, for the purpose of his action is common and general to all and beneficial to all. There is a community of interest in the cemetery. Plaintiff is authorized by G.S. 1-70 to bring this action in behalf of himself and other owners of lots in the cemetery who by reason of such representations were induced to buy lots. See *Bronson v. Ins. Co.,* 85 N.C. 411; *Beatty v. Kurtz, supra.*

The defendants demurred on the ground that there was a misjoinder of causes. When that exists, the action will not be dismissed: the court will sever the causes and divide the actions. G.S. 1-132; *Smith v. Gibbons,* 230 N.C. 600, 54 S.E. 2d 924; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382. The defendants did not demur on the ground that there was a misjoinder of parties and causes: such joinder is fatal, and causes a dismissal of the action. *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *Mills v. Bank,* 208 N.C. 674, 182 S.E. 336.

The plaintiff, in violation of our rules of practice, has attempted to state and unite in one cause of action two good causes of action in a defective manner. Is this a misjoinder of causes requiring a severance, or may both be stated separately in one cause?

G.S. 1-123 provides, "the plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—1. The same transaction, or transaction connected with the same subject of action. . . . But the causes of action so united . . . must affect all the parties to the action, and not require different places of trial, and must be separately stated."

"The word 'transaction,' as employed in this section (G.S. 1-123), means something which has taken place whereby a cause of action has arisen, and embraces not only contractual relations but also occurrences in the nature of tort." *Smith v. Gibbons, supra.* The term "subject of action" as used in the same statute denotes "the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had." *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

Tested by these rules it is apparent that the two causes of action defectively stated did not arise out of the same transaction, or transactions connected with the same subject of action. One cause of action defectively stated arose out of a breach of contract in the sale of a burial lot. The other out of a different subject of action, the adoption by the corporate defendant of unlawful and unreasonable rules and regulations enforced in an arbitrary and unlawful manner. The two causes of action are not so interwoven that a full story as to one cannot be told without telling the essential facts of the other.

The Trial Court should have sustained the demurrer to the Complaint for the reason that it does not state facts sufficient to constitute a cause of action against either defendant, or both of them. *Scott v. Veneer Co., supra.* This conclusion does not compel a dismissal of the action, because plaintiff has alleged a defective statement of two causes of action, and as to these two causes of action he will be permitted to amend. *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43. Further, as to these two causes of action there is a misjoinder of causes, and the Judge of the Superior Court will divide the action on the docket for separate trials.

The Complaint does not refer to Article 7, Chapter 65, of the General Statutes, which is headed "Cemeteries Operated for Private Gain." It is alleged that the corporate defendant is a North Carolina corporation. *Quaere:* Is it required to report information as to its perpetual care fund to the Burial Association Commissioner?

For the reasons given, the judgment overruling the demurrer is

Reversed.

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

VIRGINIA MANESS BRADY v. NEHI BEVERAGE COMPANY, INC. (ORIGINAL DEFENDANT) AND LESTER W. BRADY (ADDITIONAL DEFENDANT).

(Filed 13 April, 1955.)

1. Automobiles § 18h (6)—

The allegations of plaintiff's complaint predicated recovery upon the theory that defendant's truck entered the intersection with a dominant highway from a private road or drive, and failed to stop and yield the right of way as required by statute, G.S. 20-156; G.S. 20-158. The evidence showed that the highway upon which plaintiff was traveling was paved, and that the highway upon which defendant's truck was traveling was unpaved, but also that the two roads were public roads and that neither had been designated by the State Highway and Public Works Commission as a through highway. *Held:* There was material variance between the allegations and proof.

2. Pleadings § 24—

Plaintiff must make out her case according to her allegations, and the court cannot take notice of any proof unless there be corresponding allegation.

3. Trial § 23f—

Where there is a material variance between allegation and proof, such defect may be taken advantage of by motion for judgment as of nonsuit.

4. Trial § 22b—

Upon motion to nonsuit, defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff.

5. Automobiles § 8i—

Where a dirt road makes a "dead-end" intersection with a paved highway, but both highways are public roads. and neither has been designated as a through highway, G.S. 20-158 (a), both roads are of equal dignity, and a vehicle traveling along the dirt highway and first in the intersection in making a left turn into the paved highway, has the right of way over a vehicle approaching the intersection along the paved highway from the left. G.S. 20-155 (a).

6. Same—

The "right of way" at an intersection means the right of a driver to continue in his direction of travel in a lawful manner in preference to another vehicle approaching the intersection from a different direction.

7. Same—

A driver having the right of way is not required to stop, and may act upon the assumption, in the absence of notice to the contrary, that another motorist approaching the intersection will recognize his right of way and grant him free passage over the intersection.

8. Automobiles § 18h (2)—Evidence held to show that truck driver had right of way and was not guilty of negligence causing collision at intersection.

The evidence favorable to plaintiff tended to show that she was a guest in a car operated by her husband, which was traveling along a paved highway toward an intersection with a dirt road, that a truck entered the intersection at a slow and lawful speed from the dirt road, to make a left turn into the paved road, but that both roads were public highways of equal dignity, and that the truck first entered the intersection from the right of the car in which plaintiff was riding. The left front of the car struck the truck on its left side at about the rear wheels after the front of the truck had cleared the intersection and was on its right side, but with its rear extending over plaintiff's lane of travel. *Held:* The driver of the truck had the right of way and was not required to stop, and had the right to assume and act upon the assumption, in the absence of notice to the contrary, that the operator of the car would yield to him the right of way, and therefore the evidence fails to show negligence on the part of the truck driver, and motion to nonsuit by the owner of the truck should have been allowed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by original defendant Nehi Beverage Company, Inc., from *Armstrong, J.*, at 22 March, 1954 Civil Term of MOORE.

Civil action to recover damages for personal injuries allegedly resulting proximately from negligence of original defendant, Nehi Beverage Company, Inc., in respect to a collision which occurred about 2:15 p.m. on 21 May, 1952, between Chevrolet automobile owned and operated by plaintiff's husband, Lester W. Brady, the additional defendant, in which she was riding, and a truck owned by said original defendant, and operated by its servant and agent, Ray A. Harwood, in distributing soft drinks to customers in Moore County, North Carolina. The collision took place on the Bennett-Robbins Road at the Howard Mill road.

Plaintiff alleges in her complaint substantially these pertinent facts in respect to the collision: That at the time the plaintiff was riding with her husband, Lester Brady, sitting in the front seat "when a large truck of defendant entered the highway from a side road behind a high bank and came into the road within 60 feet of the car in which plaintiff was riding and she was injured" as thereinafter "more particularly set forth"; "that as the truck of defendant was suddenly driven out into the road in front of the automobile in which plaintiff was riding, and that the direct and proximate cause of the injuries to this plaintiff was the negligence and carelessness of defendant as herein set forth in particular," (numbered by this Court) as follows:

(1) "That there was a large and high bank to the left of the direction in which the truck was being driven and said truck was driven from

behind said bank out into said highway within 60 feet of approaching traffic";

(2) "That the operator of said truck" (a) "drove it into the said highway from a side road without looking to see approaching traffic"; (b) "failed to heed the sound of the horn of the car in which the plaintiff was riding and came out into the highway without stopping and continued to drive at such an angle as to block the said road"; (c) "failed to use due caution and circumspection and entered the highway from a blind road which was not an intersection nor a cross-road"; (d) "entered the highway in such a reckless and careless manner as to be a thoughtless and heedless disregard of the safety and rights of others upon said highway"; and (e) "entered the highway from a blind side of the road within 60 feet of the automobile in which the plaintiff was riding and drove said truck out into a main highway without observing or looking or heeding the warning horn of the automobile in which the plaintiff was riding, thereby causing a collision, the direct and proximate cause of her injuries in a large sum . . ."

The defendant, Nehi Beverage Company, Inc., answering, denies in material aspect each of the foregoing allegations of the original complaint. And further answering the complaint, and as a further defense thereto, defendant, Nehi Beverage Company, Inc., avers and says:

"A. That defendant's 1948 Dodge truck was being operated near what is known as Howard's Mill in Moore County, North Carolina, by the defendant's agent and servant, Ray A. Harwood, who had driven said truck to Howard's Mill where he had made a delivery of bottled drinks and had just left Howard's Mill, and, driving in a northeastern direction, was approaching the intersection of the road from Howard's Mill with the highway leading from Bennett, North Carolina, to Robbins Bridge; that he came almost to a complete stop,—operating same at a speed of not over 5 or 10 miles per hour; that he looked both to his left and right as he approached the intersection of the road with said highway, and seeing nothing approaching from either direction along said highway, slowly entered into said highway and commenced to turn to his left; that when the truck had almost fully entered said highway and the front of it was on its right and proper side of said highway and only a small portion of the rear of said truck was remaining on the left side thereof, the automobile in which plaintiff was riding, and which was being driven by her husband, Lester Brady, in a southerly direction along said highway or county road from Bennett, North Carolina, to Robbins Bridge, and operated by said Brady in a careless, reckless manner and without keeping a proper lookout, and at a high, dangerous and reckless rate of speed, ran into and collided with the left rear end of the truck; that notwithstanding that Harwood did everything in his

power to avoid the collision of the automobile with the truck, he was unable to do so because of the negligent, careless and speedy operation of the automobile driven by said Brady.

"(B) That at the time of the matters and things alleged in the complaint, plaintiff's husband, was negligent in some one, more or all of the following particulars, to wit:

"(1) He operated his automobile at a high, negligent and dangerous rate of speed . . . greater than was reasonable and proper under the circumstances in violation of G.S. 20-141.

"(2) He operated his automobile upon the public highways of the State of North Carolina carelessly and heedlessly, in willful or wanton disregard of the rights and safety of others and without due caution and circumspection, and at a speed and in a manner so as to endanger or to be likely to endanger any person or property using said highway, in violation of G.S. 20-140.

"(3) He failed to reduce the speed of his automobile when going around a hill and a curve and traveling upon a narrow and winding roadway when special hazard existed with respect to other traffic thereon, in violation of G.S. 20-141 (c).

"(4) Notwithstanding plaintiff was familiar with the conditions surrounding the highway at the point where the collision referred to in the complaint occurred, he negligently failed to give any warning of his approach to the intersection at which defendant's truck was being operated.

"(5) He failed to keep a proper lookout for traffic lawfully using said highway.

"(6) He was negligent in other particulars not herein specifically enumerated."

"C. That the injuries to plaintiff, if any, and the resulting damage, if any, all of which are again denied, were caused solely and proximately by the negligence of her husband, Lester Brady, in some one, more or all of the particulars set forth in this further answer and defense, and defendant hereby pleads said sole negligence on the part of plaintiff's husband, Lester Brady, in bar of plaintiff's right to recover of it in this action."

Thereafter on pretrial hearing, at the 8 February, 1954 Term of Civil Court, plaintiff and original defendant, each being represented by counsel, an order was entered, first reviewing the allegations of the complaint and the averments of the answer and then

"2." it was "judicially stipulated in open court by all parties to the action:

"(a) That at the time and place mentioned in the pleadings, Ray Harwood was the employee, agent and servant of the defendant Nehi

Beverage Company, Inc., Albemarle, N. C., and acting in the scope of his employment and in the furtherance of the business of said Nehi Beverage Company, and as such employee, agent and servant, and that the vehicle operated by Harwood was a 1948 Dodge truck owned by the defendant Nehi Beverage Company, Inc.

"(b) That said collision occurred on a paved, public highway in Moore County, N. C., outside of a business or residential district.

"(c) That five pictures, marked Plaintiff's Exhibits Nos. 1, 2, 3, 4 and 5, are pictures taken of various views of the scene of the collision referred to in the pleadings, and were taken on April 20, 1953, and correctly and fairly represents the scene of said collision, and may be offered in evidence without further proof for illustrative purposes, and the court shall so explain to the jury fully upon the offering of said pictures the purpose for which they are offered.

"(d) That a map, Defendant Beverage Company Exhibit 1, correctly and fairly represents the place of the collision mentioned in the pleadings, and may be introduced for illustrative purposes, at which time the court shall explain to the jury such evidence and how it is to be considered without further proof.

"3. The plaintiff contends that the defendant Nehi Beverage Company was negligent in the following respects: (a) Failed to keep a reasonable lookout; (b) That the defendant violated G.S. 20-140, the reckless driving statute; (c) That the operator of said truck entered said highway from a blind side of the road within 60 feet from the automobile in which plaintiff was riding, without observing or looking or heeding the warning horn of the automobile in which plaintiff was riding, in violation of G.S. 20-158.

"4. The court in its discretion allows Nehi Beverage Company to amend its Answer.

"5. Subject to further developments at trial, the court settled the issues . . ."

Thereafter at 22 March Civil Term 1954, by permission of the court, plaintiff filed the following amendment to her complaint:

"1. The plaintiff is informed, advised, believes and alleges that Ray A. Harwood was the driver and operator of the defendant's Dodge truck at the time of the collision of said truck and the Chevrolet automobile of Lester Brady in which plaintiff was riding, and the agent or employee of the defendant, and in the course of his employment as the operator of said truck at the time of the said collision.

"2. That at the time of and immediately preceding the said collision, the defendant's agent and employee was negligent in that: (a) He entered a public highway from a private road or drive and failed to yield the right of way to all vehicles approaching on such public high-

way, including the automobile in which plaintiff was riding, in violation of G.S. 20-156; (b) He failed to stop at the public highway upon which the automobile in which plaintiff was riding was traveling and proceeding in violation of G.S. 20-158."

The record shows defendant Nehi Beverage Company, Inc., denied the foregoing amendments, and was permitted, if it so desire, to file a written denial.

Thereafter defendant Nehi Beverage Company, Inc., by leave of court, amended its answer theretofore filed, and added to paragraph B of the further answer and defense the following:

"7. In violation of G.S. 20-155 he entered an intersection and failed to yield the right of way to defendant's vehicle which had approached and entered the intersection from the plaintiff's right-hand side.

"8. In violation of G.S. 20-155, he approached and endeavored to enter an intersection and failed to yield the right of way to defendant's vehicle which had already entered said intersection prior to the time plaintiff reached same."

The record discloses that it is uncontroverted that the collision involved in this action occurred about 2:15 p.m. on 21 May, 1952, "a clear, hot day," at the intersection of the unnamed road leading from Bennett, North Carolina, by way of the new bridge over Deep River, to Robbins, North Carolina, known as the Bennett-Robbins Road, and the Howard's Mill Road, at a point north of the new Deep River bridge; that in the vicinity of the point of collision the Bennett-Robbins Road runs in general direction from north to south to southwest to and over said bridge; and that the Howard's Mill Road dead-ends near the Howard's Roller Mill and runs in general direction from northwest to southeast, to and connecting with the Bennett-Robbins Road thereby and therewith forming a "T"-shaped intersection north of the said new bridge.

The Chevrolet automobile in which plaintiff was riding and which was owned and operated by her husband, Lester Brady, was traveling in a southerly direction from Bennett toward Robbins on the Bennett-Robbins Road, which appellee describes in her brief as "a public paved road." And the truck of defendant Nehi Beverage Company was moving in an easterly direction from Howard's Mill on the Howard's Mill Road, which appellee describes in her brief as a "public dirt road," to and across the Bennett-Robbins Road, turning left or north. And there is no evidence that either of these public roads had been designated a "main traveled or through highway." G.S. 20-158 (a).

The Bennett-Robbins Road was paved to a width of eighteen feet with shoulders about two and a half feet wide. From a point about 300 or 400 feet north of the intersection, the Bennett-Robbins Road

begins to curve to the right downgrade to the intersection, and levels out down about the new bridge. Along this section of the Bennett-Robbins Road to the right of one traveling south, as plaintiff and her husband were doing, there was an embankment eight to ten feet above the side ditch.

Upon the trial in Superior Court plaintiff in respect to the collision testified: "On May 21, 1952, . . . I was working at Robbins Cloth Mill . . . I had been working there about two years. Off and on, I had worked there about eight years . . . On May 21, 1952, I was traveling on the paved unnumbered road from Bennett to Robbins with my husband . . . We were alone in the car, and I was sitting on the right front seat. I had been over that road every day since I have been working at Robbins. We were just riding along and we came to Howard's Mill, and all at once from behind a high embankment a big truck started to run in the road in front of us, and my husband started blowing his horn and sliding the wheels, and the truck acted like it didn't hear the horn, just kept coming in the road in front of us, and we couldn't possibly miss him unless we'd 'riz' and flew and we just run into him. . . . When I first saw the truck it was just fixing to come out on the highway, and in my opinion it was moving at five or ten miles per hour at that time. It did not stop before it entered. We hit the back wheels of the truck on its left side. My husband was driving on his right-hand side. A part of the body of the truck was across his right-hand lane at the time of the collision. When the vehicles came together it knocked me out, so that is the last I remember until I come to in the hospital."

Then on cross-examination, plaintiff testified: ". . . The road we were on curves about 300 feet back up the highway, but you can see 300 feet before you get to the road that turns down to Howard's Mill. My husband was driving about 40 miles per hour as we came around the curve and approached the bridge across the river which was just a few feet beyond the Howard's Mill road. My husband had not been going any faster than 40 miles an hour back up the road . . . We were 60 or 65 feet from the truck when it came out into the highway in front of us . . . But I would say we were about 60 or 65 feet away when the truck came into the intersection and at that time my husband was driving at 40 miles an hour and the truck was going between 5 and 10, real slow like . . . but the truck just came on across the road right in front of us and we slid into him. The truck came from our right side and was going across to the left side . . . it was our car that hit the wheels of the truck. At that intersection there was a service station and garage on the left side of the road and an embankment . . . on the right side . . . And up the road to the right is the Howard Mill, which

was the road that the truck came out of. Back up the road from the direction in which we had come a few hundred feet there was another intersection where another road came into the road that we were on and we had just passed that point. My husband and I travel over this road every day."

Then on re-direct examination, plaintiff continued: "You can see down the highway about 300 feet at this point, but you can't see off the side of the highway for much distance on account of the bank on the right side. The truck came from behind the high bank . . ."

Then on re-cross-examination: "The truck that we hit was not coming at us, but was going across the road in front of us. It did not stop at any time . . ."

Plaintiff's husband, Lester Brady, as witness for her, testified in respect to the collision: ". . . We were going toward Robbins, passed Howard's Mill, and we were coming into the Deep River Bridge. I could see the bridge for about 300 feet before I got there. . . . Looking to my right coming down the hill, I could not see anything behind the bank. At that time I was driving about 35 or 40 miles per hour. The first thing I saw with respect to the truck was . . . the front portion of the truck, the bumper and grill was entering the edge of the road. I hit the car horn and my brakes at the same time. I'd say we were about 60 feet away at that time. We couldn't see the truck at all until he got near the edge of the road . . . I was driving . . . on my right side of the road . . . If the truck stopped before entering the road, I didn't see him stop. He was moving when I first saw him. The truck kept moving from the time I saw him until I hit him and it seemed to be going straight across the road. This truck was a long drink distributing truck used for delivering drinks. It was probably 35 or 40 feet long, and six or seven feet high. My automobile came into contact with the left back wheels of the truck. It had dual wheels and we struck somewhere in the area of the rubber part of the tires . . . At the time of the actual impact, I would say maybe I was going 5 to 10 miles per hour and I had come down considerably from the 40 miles an hour we were running before. From the time I saw the truck until the contact, I did not have room to stop, and I slid into the truck. . . . The service station was on my left and the bank was on my right and I couldn't go either way. I had only one choice and that was straight down the line into the truck. The truck filled up completely across the road."

Then on cross-examination by attorney for original defendant, the witness continued: "I had been working at Robbins Mill for about two years before the accident. Going to and from my work I passed the scene of this collision twice a day and I was familiar with the road and

the surrounding area . . . When I first saw the truck, the front of it was not on the highway, but was at the edge of the road I was traveling on and at that time I was going at 35 or 40 miles per hour. There is no curve along the road where the collision occurred. . . . My tires skidded on the pavement, but I do not know how long the skid marks were . . . Referring to the map, I do not know exactly where the truck was with respect to the middle of the road shown as going to Howard's Mill. I can guess at where the wreck happened and where the truck came from and I will put a mark on the map at the 't,' but that's guesswork. (This mark appears on map about midway the intersection—shown to be 74 feet.) . . . I don't remember if, when I hit the truck, that the front of the truck had crossed the highway. I don't know how far the truck had got across the road and I don't know whether he was sitting straight or at an angle."

Then on cross-examination by attorney for additional defendant Brady, the witness testified: ". . . From the time I first saw the truck and applied my brakes it was about two or three seconds before we hit the truck. There was no room to pass the truck on my right-hand side."

Then on re-direct examination the witness concluded his testimony by saying, "I was traveling down grade and the truck came out from behind the high bank on the right-hand side."

Ted Howard, as witness for plaintiff, testified in respect to collision in pertinent part: "On May 21, 1952 . . . I was living at Howard's Mill . . . I did not see the collision, but I heard it and I went out to the scene right after it. My place of business is on the left side of the road about 30 feet from the point of the collision . . . on the opposite side of the road from Howard's Mill. When I came out to the scene, the truck was headed across the highway from the mill towards my place of business. The Chevrolet automobile was about middleways of the road. There were tire marks leading up to the Chevrolet automobile and they were on the right side of the road going toward Robbins. The tire marks went right on up to the point of the impact." And the witness continued: "There was broken glass on the highway . . . kindly in the middle of the road. There was a hole knocked out right in the center of the road about 3 or 4 inches square and two inches deep. It was about at the center of the road, but a little on the right side going towards Robbins and the glass and dirt was in the highway—some on the right side . . . and on across the highway where the truck was. The truck was hit right close to the rear wheel on the left side. When the car hit the truck, the back end of the truck was knocked down a little bit. I didn't look at the injury to the Chevrolet car, but it was injured at the front end, and looked like it was torn up pretty bad . . .

When I saw it it was straight going into the road and was on the right-hand side of the road."

Then on cross-examination by attorney for original defendant, the witness testified: ". . . The road that comes out from Howard's Mill and enters the Bennett-Robbins Road fans out both ways and that's at the point where the collision occurred. At that place, where it comes into the Bennett-Robbins Road, it is a very wide road. Although there is a bank on the right-hand side of the Bennett-Robbins Road, you could see up the road towards Howard's Mill for a little piece. The bank curves around the corner and it is not a sharp corner. Before a car coming from Bennett actually reaches the intersection with the Howard's Mill Road, they can see up toward the mill a little distance . . . I . . . saw skid marks leading to the Chevrolet automobile. We measured them and they were about 30 to 40 feet. We measured on the ground. The skid marks started north of the point of impact and went 30 or 40 feet down into where the vehicles collided . . . the truck was sitting on the highway at an angle to the Bennett-Robbins Road. The car and the truck were locked together. The front end of the truck was kind of on the side of the highway toward my store. It wasn't quite all the way off the paved surface. There was a center line in this road and the skid marks of the automobile were on the right-hand side. The left skid mark was right on the center mark of the highway and that was right where the left wheel was when the vehicles hit. The left rear wheel of the truck was about on the center line of the road when the vehicles collided."

Then, on re-direct examination, the witness stated: ". . . I heard the horn blowing the first thing I heard, then I heard the tires squeal, and then I heard them come together."

Then R. N. Harris, another witness for plaintiff, testified in pertinent part: "I am a former North Carolina Highway patrolman and investigated this accident. I got there about 3:30 p.m., and the vehicles had not been moved, and were in the same place. The 1949 Chevrolet coupe was headed south on the county road, coming in the direction of Robbins from Bennett. The truck was at a 45-degree angle across the highway on the left-hand side headed south. The Chevrolet car was directly on the right-hand side headed south with the left front wheel approximately six inches from the center line . . . the bank is high all the way down until you get to the Howard's Mill Road. . . . After you get out into that road from coming out from behind the bank, a man coming out there could look up the road and could see approximately 25 or 30 feet. The front wheels would almost have to be on the hard surface before you could see it. When I got there the truck was across

the highway on the left-hand side. This was what I call open highway. . . . To my knowledge there was no caution or slow signs or anything like that, but I think there is a sign designating the bridge ahead back up the road."

Then on cross-examination the witness continued: ". . . I measured the skid marks which were on the right-hand side of the road and which led up to the Chevrolet automobile and found that they extended 60 feet north from the Chevrolet. I stepped them off and they were 20 steps long. The skid marks were lighter right at first and then grew heavier as they neared the point of collision . . . It is 5 or 10 feet more from the left rear wheel to the front of the truck than it is from the left rear wheel to the rear of the truck."

Then on re-cross-examination by attorney for additional defendant: "The bed of the truck extended approximately 4 feet beyond the rear wheels."

Plaintiff introduces the following from answer of original defendant: "As the defendant's truck approached said highway and the driver thereof brought the same almost to a complete stop, and was not operating the same at a rate of speed of over 5 or 10 miles per hour."

And plaintiff, recalled by defendant Brady for re-cross-examination, testified: "When I first saw the truck, it was just at the edge of the road and had not started up onto the pavement. From the time I saw it until the time of the crash, about a second elapsed."

At this stage of the trial plaintiff rested her case. Defendant Nehi Beverage Company moved for judgment as of nonsuit. Motion was overruled, and this defendant excepted. Exception No. 3.

Thereupon defendant Nehi Beverage Company offered evidence. First, the witness Dexter Hough testified, on cross-examination, that: "The road to Howard's Mill . . . is about 72 feet wide where it comes into the highway. We cut off the corner there . . . The original road came around the corner there. A car coming out of Howard's Mill Road could get into the Bennett-Robbins Road at any place along the 74-foot width where it intersects with the Bennett-Robbins Road."

Then defendant, Nehi Beverage Company, introduced as witness Ray Harwood who testified: ". . . I was the driver of the truck when it had the collision near Howard's Mill. I had been down to Howard's Mill to deliver some soft drinks, and when I left I was headed toward Bennett . . . I was going to come out from Howard's Mill Road and turn left on Bennett-Robbins Road. The collision happened at the intersection of the Bennett-Robbins Road and Howard's Mill Road. As I approached the intersection . . . there is a big bank to my left which obstructs the vision up the Bennett-Robbins Road for a certain dis-

tance. As I came up to the intersection, I looked to my right and I looked to my left and there wasn't a thing there, so I looked back to my right and entered the highway and after I entered the highway a few feet . . . I saw Mr. Brady's car . . . approximately 60 to 100 feet to the north of me, which was to my left. When I first looked to my left, as I approached the Bennett-Robbins Road, I was 4 to 10 feet from the pavement and I was going at about 5 to 10 miles an hour . . . driving in low gear . . . When I looked up to the left, I could see 100 or 150 feet and there wasn't a thing there when I looked . . . I could see a quarter of a mile to my right. When I first saw Mr. Brady 60 to 100 feet up the road to my left, I realized that if I had stopped we would have had the collision, so I just kept going and was turning to my left when the vehicles collided. The automobile hit the left rear wheel of my truck with the left front of the automobile. My left rear wheel was just about in the center of the Bennett-Robbins Road when the collision happened . . . I saw tire marks on the pavement . . . approximately 60 feet long, leading . . . to the rear of his car . . . At the time I first heard the horn and the brakes and saw Mr. Brady's car . . . I was in the highway and had already entered the intersection. I don't know how far . . . but I was in the intersection."

Then on cross-examination: ". . . When I came back to the intersection, I went on into the road without stopping . . . I knew that automobiles went to and fro over the bridge. When I came up to the intersection, I looked to the right and then to the left and then back to the right and drove out into the intersection without looking back to the left again and I was going to make a left-hand turn into the Bennett-Robbins Road. I did not stop before entering the intersection . . . I didn't stop because Mr. Brady would still have run into me, if I had stopped. When I heard the horn blow I kept on going . . . I was already on the road when I heard the horn blowing and brakes squeal . . . When I stopped . . . the rear wheels of the truck were sitting just about the center line of the pavement. The truck is approximately 22 feet long . . . I was going to make a left turn . . . and I didn't give any signal . . ."

And B. W. Paschal, as witness for defendant, testified: ". . . I am a surveyor, and I made the map which is being exhibited. I made it from my personal measurements at the scene of this intersection. The Bennett-Robbins highway is 18 feet wide. The Howard's Mill Road intersects with the Bennett-Robbins Road and it flares out and fans out to about 74 feet wide and is 74 feet wide at the point the two roads intersect."

Defendant Nehi Beverage Company introduced in evidence the map prepared by B. W. Paschal, its Exhibit No. 1. And thereupon this

defendant rested its case—and at the close of all the evidence renewed its motion for judgment as of nonsuit. Motion overruled. Defendant Nehi Beverage Company excepted. Exception No. 4.

The case was submitted to the jury upon the issues shown in the record on this appeal, and from judgment on adverse verdict defendant Nehi Beverage Company, Inc., excepted to the signing and entering of judgment, for errors assigned and to be assigned, and appeals to Supreme Court.

Seawell & Wilson and Boyette & Brogden for plaintiff, appellee.

W. D. Sabiston, Jr., and Ruark, Young & Moore for defendant Nehi Beverage Company, appellant.

Gavin, Jackson & Gavin for additional defendant Brady, appellee.

WINBORNE, J. While appellant brings forward many assignments of error, those numbered 3 and 4 based upon exceptions of like numbers, to the overruling of motion of appealing defendant, entered when plaintiff first rested her case and renewed at the close of all the evidence, for judgment as of nonsuit under the provisions of G.S. 1-183, present the determinative question. The exceptions are well taken.

The defendant appellant contends, as two of the grounds for judgment as of nonsuit, and we hold rightly so, that the record and case on appeal show: I. That there is a material variance between the allegations of plaintiff's complaint, and the proof offered upon the trial. II. That there is no evidence of actionable negligence against defendant, the appellant.

I. In the first place there is a fatal variance between the allegation and the proof.

Turning to the complaint of plaintiff, and the amendment thereto, it is apparent that the theory on which she based her case is that the paved road on which the automobile in which she was riding was traveling was the dominant highway, and that the dirt road on, and out of which defendant's truck came into the intersection of the two roads, was the subservient road. In the order entered at pre-trial hearing she contended "that the operator of said truck entered said highway from a blind side of the road, within 60 feet from the automobile in which plaintiff was riding, without observing or looking or heeding the warning horn of the automobile in violation of G.S. 20-158." And in the amendment to her complaint it is alleged: "2. That defendant's agent . . . was negligent in that (a) He entered a public highway from a private road or drive and failed to yield the right of way to all vehicles approaching on such public highway, including the automobile in which plaintiff was riding,

in violation of G.S. 20-156"; and "(b) He failed to stop at the public highway upon which the automobile in which plaintiff was riding was traveling and proceeding in violation of G.S. 20-158."

In this connection G.S. 20-156 provides in pertinent part that "(a) The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway."

And G.S. 20-158 provides in pertinent part that "(a) The State Highway and Public Works Commission, with reference to State highways . . . are (is) hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto . . ."

But the evidence offered upon the trial, instead of supporting the theory of the complaint, and the amendment thereto, clearly shows that the two roads here involved were public roads of equal dignity, neither having been designated by the State Highway and Public Works Commission as "main traveled or through highway" as defined in G.S. 20-158 (a).

Therefore, there is a material variance between the allegation and the proof. Plaintiff must make out her case according to her allegations, that is, *secundum allegata.* The court cannot take notice of any proof unless there be a corresponding allegation. And where there is a material variance between the allegation and the proof, such defect may be taken advantage of by motion for judgment as of nonsuit. *Whichard v. Lipe,* 221 N.C. 53, 19 S.E. 2d 14; *Wilkins v. Finance Co.,* 237 N.C. 396, 75 S.E. 2d 118; *Lyda v. Marion,* 239 N.C. 265, 79 S.E. 2d 726; *Andrews v. Bruton, post,* 93, and numerous other cases cited therein, and annotated thereon.

II. In considering motion for nonsuit, "the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff," *Stacy, C. J.,* in *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598, citing *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769. See *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543, and cases there cited. See also *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Ward v. Cruse,* 236 N.C. 400, 72 S.E. 2d 835; *Harris Express v. Jones,* 236 N.C. 542, 73 S.E. 2d 301; *Nance v. Hitch,* 238 N.C. 1, 76 S.E. 2d 461; *Hawkins v. McCain,* 239 N.C. 160, 79 S.E. 2d 493.

Therefore, taking the evidence offered by the plaintiff, and so much of defendant's evidence as is favorable to plaintiff, or tends to explain and make clear that which has been offered by the plaintiff, as shown in the case on appeal, in the light most favorable to plaintiff, and giving to plaintiff the benefit of every reasonable inference to be drawn therefrom, as the law directs in considering a motion for judgment as of nonsuit, G.S. 1-183, *Nance v. Hitch, supra,* this Court is of opinion, and holds, that in the light of the pleadings, there is not sufficient evidence to take the case to the jury on the issue of negligence of defendant, Nehi Beverage Company, as alleged in the complaint as amended.

All the evidence further shows that the truck of defendant came to, and entered the intersection before the automobile in which plaintiff was riding reached the intersection, and that the truck approached the intersection from the automobile's right side of the road. Under such factual situation the truck of defendant had the right of way. G.S. 20-155 provides: "(a) 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 is otherwise provided in G.S. 20-156." The exception relates to entering from a "private road or drive" as above set forth.

(Take notice in passing that the use of term "and/or" in the statute is not approved. See *Gibson v. Ins. Co.,* 232 N.C. 712, 62 S.E. 2d 320.)

The term "right of way" as applied to vehicular travel at intersections of highways and streets, means "the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path." 60 C.J.S., Motor Vehicles, Section 362—quoted by *Ervin, J.,* and applied in *S. v. Hill,* 233 N.C. 61, 62 S.E. 2d 532.

In the *Hill case* the Court declares these relevant rules:

"1. 'When two vehicles approach or enter an intersection . . . at approximately the same time,' the driver on the right has the right of way, and the driver on the left must yield him that right. G.S. 20-155 (a).

"2. This statutory rule does not apply, however, unless the two vehicles approach or enter the intersection at approximately the same time. When that condition does not exist, the vehicle first reaching and entering the intersection has the right of way over a vehicle subsequently reaching it, irrespective of their directions of travel; and it is the duty of the driver of the latter vehicle to delay his progress so as to allow the first arrival to pass in safety. (citing cases)

"3. Two motor vehicles approach or enter an intersection at approximately the same time within the purview of these rules whenever their respective distances from the intersection, their relative speeds, and the

other attendant circumstances show that the driver of the vehicle on the left should reasonably apprehend that there is danger of collision unless he delays his progress until the vehicle on the right has passed. (citing cases) A corollary of this proposition may be stated conversely in these words: When the driver of a motor vehicle on the left comes to an intersection and finds no one approaching it on the other street within such distance as reasonably to indicate danger of collision, he is under no obligation to stop or wait, but may proceed to use such intersection as a matter of right. . . .

"4. A driver having the right of way may act upon the assumption in the absence of notice to the contrary that the other motorist will recognize his right of way and grant him a free passage over the intersection."

In the light of these rules the driver of defendant's truck had the right of way, that is, the right to proceed uninterruptedly in a lawful manner. He was not required to stop. And the evidence is uncontradicted that he entered the intersection operating the truck at a speed of five or ten miles per hour—"real slow like," in the language of plaintiff. And he had the right to assume, and to act on the assumption, in the absence of notice to the contrary, that the operator of the automobile in which plaintiff was riding would recognize his right of way and grant him a free passage over the intersection. *S. v. Hill, supra.* In entering the intersection in the way and manner disclosed by the evidence the driver of the truck was proceeding within the law.

For reasons stated the judgment below as it relates to appealing defendant is

Reversed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

STATE v. CHARLIE ARCHIE NORRIS, JR.

(Filed 13 April, 1955.)

1. Criminal Law §§ 52a (8), 81f: Trial § 21½—

Where, after refusal of motion to nonsuit at the close of the State's evidence, defendant introduces evidence and moves for nonsuit at the close of all the evidence, he waives his exception to the refusal of his motion at the close of State's evidence, but his later exception challenges the sufficiency of the entire evidence to go to the jury, considering all the evidence in the light most favorable to the State, and the exception must be overruled if the entire evidence is sufficient to go to the jury.

2. Criminal Law §§ 52a (4), 81f—

In passing upon motion to nonsuit, the Supreme Court does not weigh the evidence or attempt to reconcile contradictions therein, but will consider only the evidence favorable to the State and disregard defendant's evidence in conflict therewith.

3. Automobiles § 30½—

It is unlawful to drive a motor vehicle in the nighttime without lights, G.S. 20-129.

4. Automobiles § 29a—

It is unlawful to drive at any time on a State highway at a speed greater than is reasonable and prudent under the conditions then existing or in any event at a higher rate of speed than 55 miles per hour, G.S. 20-141 (a) and (b) (4).

5. Same—

It is unlawful to drive a motor vehicle upon a public highway carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due circumspection, or at a speed or in any manner so as to endanger or be likely to endanger any person or property. G.S. 20-140.

6. Automobiles § 28a—

Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.

7. Same—

The violation of a safety statute regulating the use of highways which proximately causes injury or death to another is culpable negligence if such violation is intentional, willful or wanton; the violation of such statute, even though unintentional, constitutes culpable negligence if such violation is accompanied by recklessness amounting to a thoughtless disregard of consequences of a dangerous nature when tested by the rule of reasonable prevision, or a heedless indifference to the safety and rights of others.

8. Automobiles § 28c—

The evidence favorable to the State tended to show that defendant was driving his car at nighttime without lights at a speed between 50 and 60 miles per hour toward an intersection, that shortly before the accident his car was seen "wobbling" on the highway in heavy traffic, that the driver of the car in which deceased was riding along a servient highway stopped before entering the intersection, waited for cross-traffic to pass, and then entered the intersection when it was apparently safe, and that the car had cleared the intersection except for two or three feet of its rear, when it was struck by defendant's car. *Held:* The evidence was sufficient to be submitted to the jury in a prosecution for manslaughter.

9. Automobiles §§ 8i, 28b—

The evidence tended to show that the driver along the servient highway stopped before entering the intersection with the dominant highway, permitted two cars with lights to pass, started across the highway when it was apparently safe, and had cleared the highway except for about three

feet of the rear of her car when she was struck by a car traveling along the dominant highway at excessive speed and without lights. *Held:* The evidence fails to show any negligence on the part of the driver along the servient highway constituting a proximate cause of the collision.

10. Criminal Law § 38d: Evidence § 46f—

A physician may use X-rays as an aid in enabling him to determine the nature and extent of the injuries, and may testify thereto even though the X-ray pictures are not introduced in evidence.

11. Criminal Law § 31c: Evidence § 51—

Where objections are entered to the testimony of a physician in respect to X-ray pictures which he saw made of head injuries received in the accident, but no reason for the objections are assigned at the time, appellant may not contend on appeal that the evidence was incompetent because the State failed to qualify the expert as a brain surgeon, certainly when it appears that the defendant brought out the testimony in more detail on cross-examination and also the fact that the witness had performed successfully a large number of brain operations.

12. Criminal Law § 38d: Evidence § 30a—

Where a patrolman identifies photographs as representing the true condition of the cars immediately after the accident, such photographs are competent for the purpose of enabling the witnesses to illustrate and explain their testimony.

13. Same: Criminal Law § 81c (2)—

Where the court, in admitting in evidence properly identified photographs, instructs the jury that they are offered as corroborative evidence and not as substantive evidence, and adds that they are offered for the purpose of illustrating the testimony of the witnesses. *Held:* The use of the word "corroborative" is technically incorrect, but the explanation following made plain to the jury the proper function of the photographs, and the technical error is not prejudicial.

14. Criminal Law § 48f—

A policeman, who had followed defendant's car for some distance shortly before the accident, in response to a question as to what defendant said at the hospital some hour after the accident, stated that he told defendant he was "afraid" something was going to happen and that he had planned to stop him, to which defendant replied that he wished the policeman had stopped him. *Held:* The officer's statement was incompetent and should have been stricken on motion aptly made.

15. Criminal Law § 81c (3)—

Where the court erroneously fails to strike an unresponsive statement of witness upon motion aptly made, but in the light of the entire evidence in the case, the error is not of such prejudicial import as to have affected the result, a new trial will not be awarded.

16. Criminal Law § 78e (1): Appeal and Error § 6c (5)—

An assignment of error to a long excerpt from the charge which fails to point up any objectionable instruction with the definiteness and certainty

required by Rule of Practice in the Supreme Court No. 19 (3), is defective as a broadside objection.

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

APPEAL by defendant from *Rousseau, J.,* November 1954 Term, CALDWELL.

Criminal prosecution upon an indictment charging the defendant with the crime of manslaughter. The charge grew out of the death of Karen Denise Patterson in an automobile collision at the intersection of North Carolina Highway No. 18 and Virginia Street, near the City of Lenoir.

The evidence shows Highway 18 runs east and west, by-passing Lenoir on the south. It is of tar and gravel construction, 19 feet wide, with shoulders extending an additional four feet on either side. From its intersection with Virginia Street, the view is unobstructed 1,000 feet to the east and 3,500 feet to the west. The highway south from Lenoir is designated as Virginia Street to the intersection where the accident occurred. From the intersection south, it is designated as Miller Hill Road. North Carolina Highway No. 18 is the dominant highway on which there are no stopsigns. Virginia Street and Miller Hill Road is the servient highway on which stopsigns are placed, both north and south of the intersection. It is of hard surface construction, 17 feet wide.

On 17 October, 1954, according to the State's evidence, Mrs. Margaret Ann Patterson approached the intersection from the south on Miller Hill Road at about 6:35 p.m., driving a 1950-model Oldsmobile in the direction of Lenoir. Before entering the intersection she stopped in obedience to the stopsign. Two cars were approaching the intersection, traveling east on No. 18. After they passed, Mrs. Patterson, observing no other traffic on No. 18, attempted to cross and as the front of her car had cleared the intersection and entered Virginia Street, leaving about three feet of the rear within the intersection, her car was hit by a 1946 Ford driven by the defendant. The automobile driven by Mrs. Patterson turned over on its side and stopped 75 feet from the point of impact. The Ford driven by the defendant came to rest upside down 90 feet from the point of collision. In the car with Mrs. Patterson were her cousin, Geraldine Patterson, and her daughter, Karen Denise Patterson, two years and five months of age. All were injured and taken to the hospital. The defendant, too, was taken to the hospital. The Oldsmobile was badly damaged on the right rear and side. The Ford was badly damaged on the right front and top. Karen Denise Patterson died two days after the accident. Among other injuries, she had a depressed

fracture of the skull, about 2 x 3 inches. X-ray photographs were taken of her injury, not by, but under the observation of Dr. Roach.

Two days after the accident Dr. Roach performed an operation, elevating the fracture which was pressing on the brain. "Some clotted blood had escaped and also a large clot was removed." While her pulse and respiration were good, to quote Dr. Roach again, "approximately two hours after the operation she suddenly went out . . . the only thing that could have caused it, to my knowledge, was the sudden release of the clot, either that or she had a hemorrhage . . . that in my opinion was due to the injury which she received in the accident."

Both Mrs. Patterson and Geraldine Patterson testified that Mrs. Patterson stopped at the intersection and after two cars had passed going east on No. 18, and the way seemed clear, Mrs. Patterson proceeded into the intersection and had almost cleared it when her car was hit by a car "driven without lights." Mrs. Gertrude Epps testified she and her husband were driving toward Lenoir on Miller Hill Road and stopped at the intersection immediately behind Mrs. Patterson's car which had also stopped for the intersection. After two cars passed, "I looked both ways. You can see a pretty good ways out that way. I didn't see anything coming. There was not anything coming. I didn't see any lights . . . we were right behind Margaret's car. We both looked both ways and didn't see any car coming." William Epps testified he was driving immediately behind Mrs. Patterson. She stopped at the intersection and he stopped his car immediately behind hers. After two cars passed going east, she crossed the intersection, entering Virginia Street. "I would say that about two and three-quarters or three feet was projecting over Highway No. 18 when the collision took place. The defendant's car did not have any lights." Mr. Graham, a highway patrolman, testified: "I had a conversation with the defendant after the accident, who stated that at the time of the accident he was driving between 50 and 60 miles per hour."

The defendant offered evidence to the effect that his lights had been repaired the day before the accident, were burning and in good order at the time of the accident. George Martin, Chief of the Lenoir Police Force, a witness for the defendant, testified he saw the defendant about 6:30, south of the city limits of Lenoir, about one mile from the intersection of No. 18 and Miller Hill Road, and that the defendant's headlights were burning at that time. His taillights were not burning. "I was behind him for about three-fourths of a mile. The traffic was very heavy down that hill. He made several attempts to pass a car in front of him but traffic was too heavy. I followed on down to the by-pass, that is out of the city limits. I later had a conversation with him at the hospital about an hour after the accident." In answer to a question by

the solicitor about what the defendant said, and over objection, the witness testified: "I told him I was afraid that was going to happen and that I had planned to stop him, and he said 'I wish you had stopped me, whether you had jurisdiction out there or not.'" The solicitor asked the following question: "When you turned right at the Shell station, the defendant was going down the by-pass wobbling?" Objection, overruled. Answer: "Yes." The defendant's motion to strike was overruled, to which he excepted. It is approximately one mile from the Shell station to the place where the collision occurred. Marshall Haas, another witness for the defendant, testified that the lights on defendant's car were still burning after the accident and that he turned them off.

The defendant testified in his own behalf: "I met two cars just before I got to the intersection . . . just as they passed me this Oldsmobile came from the center of the road in front of me. I was driving between 50 and 60 miles, about the speed I usually drive, and this car came right out. I put on my brakes and tried to go around the car and I hit the side of the car. The accident occurred about 20 minutes to seven o'clock. It was dark . . . my lights were burning and I asked the Haas boy to turn them off." On cross-examination, he testified: "I did not cut in and out trying to pass cars going down the hill . . . I did not do it to my knowledge— . . . I did not know that it was an officer behind me I later told him I wished he had stopped me." Question by the solicitor: "And that was after he had told you that he had an idea that was going to happen." Objection, overruled. Answer: "Yes." Question: "The dashlights being out, you didn't know how fast you were driving, do you?" Answer: "I know I was not driving over 60 miles per hour. I don't ever drive over that."

The defendant made timely motions for judgment of nonsuit, which were overruled, and exceptions were duly entered. The jury returned a verdict of guilty. Motions to set aside the verdict and to arrest the judgment were made and overruled, to which the defendant excepted. From the judgment that the defendant be committed to jail for a period of 18 months and assigned to work on the roads, he appealed.

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

W. H. Strickland for defendant, appellant.

HIGGINS, J. The defendant assigns as error the court's refusal to grant motions for judgment of nonsuit, to set aside the verdict, and to arrest the judgment. In addition, he claims errors in the admission of evidence over his objection, and in the court's charge.

At the trial the defendant introduced testimony. By so doing he waived his right to bring forward on appeal his exception to the court's refusal to grant his motion for nonsuit at the close of the State's evidence. His later exception, however, challenges the sufficiency of the entire evidence to go to the jury. *S. v. Norton,* 222 N.C. 418, 23 S.E. 2d 301; *S. v. Pasour,* 183 N.C. 793, 111 S.E. 779; *S. v. Earp,* 196 N.C. 164, 145 S.E. 23.

If the evidence in its entirety, taken in the light most favorable to the State, is sufficient to go to the jury, it is sufficient to survive the defendant's motion and to support the verdict. *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Stephenson,* 218 N.C. 258, 10 S.E. 2d 819; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604.

The evidence, in the light most favorable to the State, tends to show the defendant was driving his car west on N. C. Highway No. 18, on the by-pass south of Lenoir. As he approached within one mile of the accident his car was "wobbling." Traffic was heavy. It was dark. He was driving without lights and at a speed between 50 and 60 miles per hour. Being unable to discover his approach because of the darkness and the absence of lights on his car, Mrs. Patterson entered the intersection, cleared it except for about three feet, when the defendant's car smashed into hers. Her car stopped 75 feet and his 90 feet from the point of collision. Karen Denise Patterson died two days later as a result of the injuries received in the accident.

The foregoing is a brief summary of the evidence most favorable to the State. This Court is fully aware the evidence in the case as disclosed by the record is conflicting in material parts. It is neither our duty to reconcile the conflict nor ascertain who told the truth. We do not see the witnesses. We do not hear them testify. We do not weigh the evidence. That duty is given to the jury alone. So, in determining whether the evidence, given the interpretation most favorable to the State, is sufficient to sustain a conviction of manslaughter, we must have recourse to applicable rules of law.

It is unlawful to drive in the nighttime without lights, G.S. 20-129. It is unlawful to drive at any time on a State highway at a speed greater than is reasonable and prudent under the conditions then existing or in any event at a higher rate of speed than 55 miles per hour, G.S. 20-141 (a) and (b) (4). It is unlawful to drive a motor vehicle upon a public highway carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due circumspection and at a speed or in any manner so as to endanger or be likely to endanger any person or property, G.S. 20-140. The foregoing statutes were enacted for the protection of persons and property and in the interest of public safety, and the preservation of human life. The test as to the sufficiency of

evidence to go to the jury in a case of culpable negligence is clearly set forth in the case of *S. v. Cope,* 204 N.C. 28, 167 S.E. 456. We quote from that forceful opinion by the late *Chief Justice Stacy:*

"5. Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.

"6. An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.

"7. But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility.

"8. However, if the inadvertent violation of a prohibitory statute or ordinance be accompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death proximately ensue, would be culpable and the actor guilty of an assault or manslaughter, and under some circumstances of murder."

Tested by the foregoing rules, the evidence in this case is sufficient to go to the jury. No defect appears upon the face of the indictment. The motions for nonsuit, to set aside the verdict, and to arrest the judgment were properly overruled, and the assignments of error based thereon cannot be sustained.

The defendant strenuously contends it was the duty of the mother to remain stopped on the servient highway until traffic had cleared on the dominant highway and her failure to do so in this instance was the proximate cause of the child's death, citing G.S. 20-155, 156, and *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683, and *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155. According to the State's evidence, the mother stopped and waited until the two cars with lights had passed. The defendant's car, without lights, was concealed by the darkness according to the evidence of four witnesses. It came upon her at 50 to 60 miles per hour according to the defendant's own admission.

Assignment of error No. 5 is directed to the testimony of Dr. Roach with respect to X-ray photographs of the child's injury. These photographs were made by Dr. Templeton, but Dr. Roach saw them made. They would have been admissible in evidence for the purpose of enabling Dr. Roach to explain and illustrate his testimony. However,

they were not introduced, apparently. Regardless of who made them, Dr. Roach had a right to use these photographs or any other aids which would enable him to determine the nature and extent of the injuries, and to testify with respect thereto. If the X-ray photographs were properly identified they could be used for the purpose of illustrating his testimony in the same manner as ordinary photographs are used.

Three further objections were interposed to testimony of Dr. Roach with reference to the nature and extent of the injuries sustained by the deceased child and the cause of death. At the time the objections were interposed, no reasons were assigned for them. The defense counsel cross-examined Dr. Roach and he testified in much greater detail than on direct examination with respect to the injuries and the cause of death. In the brief, defendant assigns as a reason why the testimony of Dr. Roach should have been excluded, the failure of the State to qualify him as a brain surgeon. No objection on that ground was made. The defendant brought out the testimony given on direct examination, and in more detail. In addition, the defendant brought out the fact the witness had performed successfully 45 or 50 similar operations. The assignments are without merit.

Highway Patrolman Graham identified a number of photographs of the two cars involved in the accident. He testified they represented the true condition of the cars just after the accident. When the photographs were offered, the court ruled as follows: "Gentlemen of the Jury, these photographs are only offered as corroborative evidence and not as substantive evidence. They are offered for the purpose of illustrating the testimony of the witness." The court plainly told the jury the photographs were not substantive evidence; they were admitted for the purpose of illustrating the testimony of the witness. The further statement that they were offered as corroborative evidence is not technically correct, but the jury could not have misunderstood the limited purpose for which they were admitted.

The question of admissibility of photographs was raised for the first time in this Court in the case of *Hampton v. R. R.*, 120 N.C. 534, 27 S.E. 96. They were excluded. The exclusion rested at least in part upon the ground of changed conditions before the photographs were made. The admissibility of photographs in a trial in the Superior Court was first upheld in the case of *Davis v. R. R.*, 136 N.C. 115, 48 S.E. 591. In that case, *Chief Justice Clark*, speaking for the Court, said: "Photographs frequently convey information to the jury and the court with an accuracy not permissible to spoken words, if their admission is properly guarded by inquiry as to time and manner when made. The admissibility of this species of evidence was, it is true, somewhat questioned (by a divided Court) when presented in this Court for the

first time in *Hampton v. R. R.*, 120 N.C. 534. *But they have since become a well recognized means of evidence* and are not infrequently used on trials below and are sometimes sent up in the record on appeal, especially in actions for personal injury." (Emphasis added.)

Photographic evidence was admitted *"for the purpose of enabling a witness to explain* his testimony." (Emphasis added.) *Pickett v. R. R.*, 153 N.C. 148, 69 S.E. 8. And in *Bank v. McArthur*, 165 N.C. 374, 81 S.E. 327, referring to *Hampton v. R. R., supra,* the Court held: "Even in that case there was a dissent by the present *Chief Justice* who gave forceful expression of his views as to the admissibility of the copy (photograph) in the particular instance *and of the general value of the same as evidence* when properly guarded and identified; views which have in the main since prevailed as the controlling opinion of the Court, *Pickett v. R. R., supra,* and *Davis v. R. R., supra,* and which are in accord with enlightened decisions in other courts of highest resort. *United States v. Otey,* 176 U.S. 422." In *Hoyle v. Hickory,* 167 N.C. 619, 83 S.E. 738, this Court said: "Judging from the photograph exhibited to us at the hearing, we think the jury might well have found that there had been negligence. *The photograph itself was competent as explanatory of the other testimony.* (Emphasis added.)

In *Lupton v. Express Co.,* 169 N.C. 671, 86 S.E. 614, this Court said: "It has been held in several cases in our Reports that the ordinary photograph, when shown to be a true representation and taken under proper safeguards *is admissible in evidence* . . . and the same rule prevails as to photographs taken by the X-ray process."

The following is a quotation from *Bane v. R. R.,* 171 N.C. 328, 88 S.E. 477: "Photographs *are admissible in evidence* when shown to be a true representation and have been taken under proper safeguards. (Emphasis added.)

"Exceptions to the use of the photograph *for the purpose of allowing the witness to illustrate or explain his testimony is not well taken.* (Emphasis added.) *S. v. Jones,* 175 N.C. 709, 95 S.E. 576.

In *S. v. Lutterloh,* 188 N.C. 412, 124 S.E. 752, following some of the earlier decisions, this Court said: "The defendant complains that the action of the trial court in allowing the State to offer in evidence certain photographs of the scene of the accident. *These photographs were designed to show the width and general topography of the road where the accident occurred and were used by the witnesses in explaining their testimony.* There was evidence of the correctness of the photographs and with respect to the time and manner of their taking. The evidence was sufficient to render them competent *for the purposes for which they were offered and used.* (Emphasis added.)

"The Court has held that a photograph correctly representing the premises where the homicide occurred may be used by a witness for the State *for the purpose of explaining his testimony.*" (Emphasis added.) *S. v. Matthews,* 191 N.C. 378, 131 S.E. 743, citing *S. v. Mitchem,* 188 N.C. 608, 125 S.E. 190."

In *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824, *Justice Winborne* said: "The decisions of this Court uniformly hold that in the trial of cases, civil or criminal, in this State, photographs may not be admitted as substantive evidence . . . but when there is evidence of the accuracy of a photograph, a witness may use it *for the restricted purpose of explaining or illustrating to the jury his testimony* relevant and material to some matter in controversy." (Emphasis added.) "Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything it is competent for him to describe in words. . . . The accuracy of a photograph must be shown by extrinsic evidence that the photograph is a true representation of the scene, object, or person it purports to portray. . . . The correctness of such representation may be established by any witness who is familiar with the scene, object, or person portrayed."

In *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909, it is said: "The court instructed the jury in effect that the photographs are not substantive evidence and are offered and received only for the purpose of illustrating the testimony of the witness if the jury find that they do illustrate and for no other purpose."

In *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17, *Justice Winborne* said: "Attention is given to photographs sent us as parts of the case on appeal. They were admitted in the trial court only for the purpose of illustrating the testimony of witnesses. They may not be admitted as substantive evidence but where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy."

In *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326, *Justice Ervin* said: "The presiding judge gave the jury the customary instruction that the photographs were not admitted as original or substantive evidence but were received solely for the purpose of enabling the witness to explain and the jury to understand the testimony."

The language of many of the old cases (*Pickett v. R. R., supra,* excepted) seems to be broad enough to make photographs, when properly made, admissible as evidence generally. *S. v. Lutterloh, supra,* held that photographs in that case were admissible (1) to show the width and topography of the road where the accident occurred and (2) to enable the witness to explain his testimony. The general rule followed

by the other cases, however, seems to be firmly fixed and established that photographs, properly identified, are now admissible only for the purpose of enabling the witnesses to illustrate and to explain their testimony in order that the court and jury may better understand and evaluate the oral testimony.

The presiding judge in this case told the jury the photographs were offered as corroborative evidence. He then explained that they were offered not as substantive evidence, but for the purpose of illustrating the testimony of the witness. While it may not be technically correct to say the photographs are corroborative evidence, the explanation which followed made plain to the jury their proper function in the case.

The defendant, by his assignment of error No. 10, challenges the correstness of the court's ruling in refusing to strike the answer to a question asked by the solicitor of the witness, George Martin, Chief of Police of the City of Lenoir, who testified for the defendant. Mr. Martin had testified on cross-examination that he was driving behind the defendant on Highway No. 18 a short distance before the defendant turned off on the by-pass around Lenoir, about one mile from the scene of the accident. He further testified the defendant was driving in and out, trying to pass cars in front, but the traffic was too heavy for him to do so. The witness then testified he had a conversation with the defendant at the hospital about an hour after the accident. The solicitor asked the following question, which was objected to: "Question: Tell us what he said." Answer: "I told him I was afraid that was going to happen and that I had planned to stop him and he said, 'I wish you had stopped me whether you had jurisdiction out there or not.' " The defendant made a motion to strike the answer. The motion was denied and the defendant duly excepted.

The answer above referred to was not responsive to the question. Yet, if the police officer had told only what the defendant said, his response would be meaningless without telling what the witness said to the defendant to bring forth the defendant's answer. Yet it must be admitted the officer's statement was not properly admissible, and the motion to strike should have been allowed. In the light of the entire evidence in the case, however, the error does not appear to justify sending the case back for another trial. As was said by this Court in *S. v. Gardner, supra*, "It may be conceded the question is improper and that objection to it should have been sustained, yet when it is considered with the testimony immediately preceding, we fail to find it error of such prejudicial import to warrant a new trial."

Assignment of error No. 13 embraces more than two pages of the court's charge. It does not point up any objectionable instruction with that definiteness and certainty required, Rule 19 (3), Rules of Practice

in the Supreme Court, 221 N.C. 555; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175.

The same objection applies to other assignments of error to the charge, except No. 14. That part of the charge covered by assignment of error No. 14 is taken from the opinion of *Justice Stacy* in *S. v. Cope, supra,* with such rewording as makes the principles there stated applicable to the evidence in this case.

This is a tragic case—a boy 18 years of age must go to prison—another life of that alarming number has been exacted as toll for a few moments of carelessness. The care and vigilance of one driver are not sufficient to give immunity from injury and death which often single out those who are free from blame. In the judgment of the Superior Court of Caldwell County, we find

No error.

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

STATE v. ALFRED HORACE EASON.

(Filed 13 April, 1955.)

1. Arrest § 8—

An indictment charging defendant with resisting, delaying and obstructing a public officer in the performance of his official duties must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out in a general way, at least, the manner in which defendant is charged with having resisted, delayed or obstructed such public officer. G.S. 14-223.

2. Indictment and Warrant § 9—

Ordinarily an indictment for a statutory offense is sufficient if it is framed upon the statute and charges the offense in the language of the act, and unless the exact time and place of the alleged occurrence are essential elements of the offense itself, defendant must move for a bill of particulars if he desires more definite information in respect thereto. G.S. 15-143.

3. Same—

If the words of a statute do not charge the essential elements of the offense in a plain, intelligent and explicit manner, an indictment charging the offense in the language of the statute is defective, it being necessary in such instances that the words of a statute be supplemented by allegations which explicitly and accurately set forth each element of the offense, G.S. 15-153.

4. Criminal Law § 56—

Where motion in arrest of judgment is allowed for a fatal defect in the indictment, defendant is not entitled to his discharge, but is subject to further prosecution if the solicitor so elects.

5. Automobiles § 30½—

An indictment for driving upon a public highway of the State without lights during the period from a half hour after sunset to a half hour before sunrise, is sufficient if it follows the language of the statute, G.S. 20-129. G.S. 20-176 (b).

6. Criminal Law § 62f—

The court may not suspend execution of its judgment upon prescribed conditions without the consent of the defendant, express or implied.

7. Assault § 10—

An indictment charging that defendant unlawfully and willfully did assault a named person with a deadly weapon, "to-wit: a certain automobile and some hard substance to the great damage" of the said person, is sufficient to charge assault with a deadly weapon.

8. Criminal Law § 56—

A judgment may be arrested only for some error or defect appearing upon the face of the record.

9. Automobiles § 28a—

The operator of an automobile who either with actual intent, or culpable negligence from which such intent may be implied, injures another, is guilty of assault with a deadly weapon regardless of whether the vehicle strikes the injured person or the vehicle in which such person is riding, and when death ensues, is guilty of manslaughter at least.

10. Same: Assault § 8d—

The evidence considered in the light most favorable to the State tended to show that defendant willfully and intentionally used the automobile which he was driving as a means for causing an officer lawfully on the running board or side of the car to be thrown therefrom while the car was in motion, so that death or great bodily injury to the officer was likely under the circumstances. *Held:* The automobile was a deadly weapon under the facts and the evidence supports a conviction of assault with a deadly weapon.

11. Criminal Law § 48c—

A general objection to the admission of testimony which is competent for the purpose of corroboration, cannot be sustained.

12. Criminal Law § 81c (3)—

Objection to the admission of testimony cannot be sustained when defendant thereafter testifies to the same import.

13. Arrest § 1b—

A highway patrolman has legal authority to stop the operator of a motor vehicle for the purpose of determining whether he is operating the car in violation of any of the penal provisions of Art. 3, G.S. 20, and may arrest

any driver on sight whom he sees violating any of such provisions, such as driving without lights, G.S. 20-129. G.S. 20-183.

14. Assault § 13: Automobiles § 28c—Evidence held sufficient to support verdict of assault with a deadly weapon.

The evidence considered in the light most favorable to the State tended to show that a highway patrolman attempted to stop or arrest defendant for operating a motor vehicle without lights at nighttime, and got upon the running board or side of defendant's car, that defendant knew the officer and knew he was a patrolman, saw him in uniform within the range of his lights and recognized him, knew that he himself had been violating the motor vehicle law, and to avoid being stopped or arrested, willfully and intentionally drove or struck the officer so as to cause the officer to be thrown from the car. *Held:* The evidence is sufficient to be submitted to the jury on the charge of assault with a deadly weapon.

15. Criminal Law § 79—

Assignments of error not supported by any reason, argument, or authority cited in the brief are deemed abandoned.

16. Criminal Law § 81c (5)—

Where one judgment is pronounced upon conviction on each of two indictments, consolidated for trial, and the judgment is arrested as to one of the indictments, the cause will be remanded for proper judgment relating to the verdict in the other case.

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

APPEAL by defendant from *Martin, Special J.*, November Term, 1954, of PITT.

The two bills of indictment, upon which this criminal prosecution was based, charge that defendant, on 7 May, 1954, in Pitt County, "unlawfully and willfully," did commit alleged criminal offenses, viz.:

Indictment #5222, a single count, "assault, beat and wound one W. E. Whitehurst with a deadly weapon, to-wit: a certain automobile and some hard substance to the great damage of the said W. E. Whitehurst."

Indictment #5223, in the first count, "drive a motor vehicle upon the public highways without lights during the period from one-half hour after sunset to one-half hour before sunrise"; and in the second count, "resist, delay and obstruct a public officer, to wit: a North Carolina Highway Patrolman in the performance or attempted performance of his duty."

The two cases were consolidated for trial. The jury returned a general verdict of guilty as charged.

Judgment was pronounced as follows: Indictment #5222 and the second count of indictment #5223 were consolidated for judgment; and for the offenses charged therein a prison sentence of one year was imposed. For the offense charged in the first count of indictment #5223,

driving without lights, a prison sentence of thirty days was imposed, to begin upon expiration of the one-year sentence, which thirty-day sentence was suspended "for a period of one year upon condition that the defendant pay a fine of $25.00, and the cost of the action."

Defendant appealed, assigning as error (1) the denial of his motions in arrest of judgment, (2) the denial of his motions for judgment of nonsuit, (3) rulings on evidence, and (4) portions of the charge.

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

C. W. Beaman for defendant, appellant.

BOBBITT, J. The second count in indictment #5223, which purports to charge a violation of G.S. 14-223, is fatally defective. While it refers to "a North Carolina Highway Patrolman," it does not identify him by name or indicate the official duty he was discharging or attempting to discharge, nor does it point out even in a general way the manner in which the defendant is charged with having resisted or delayed or obstructed such public officer. Defendant's motion in arrest of judgment as to this count should have been allowed. *S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d 155; *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796; *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d 654.

"An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same." *Barnhill, J.* (now *C. J.*), in *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, 131 A.L.R. 143; *S. v. Sumner,* 232 N.C. 386, 61 S.E. 2d 84. Unless the exact time and place of the alleged occurrence are essential elements of the offense itself, a defendant may obtain further information in respect thereto by motion for a bill of particulars. G.S. 15-143.

But an indictment following substantially the language of the statute is sufficient *only when it thereby charges* the essential elements of the offense "in a plain, intelligible and explicit manner." G.S. 15-153. If the statutory words fail to do this, they "must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged." *Parker, J.,* in *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917.

The second count in indictment #5223, being fatally defective, judgment thereon is arrested. This does not bar further prosecution for a

violation of G.S. 14-223, if the Solicitor deems it advisable to proceed on a new bill. *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Greer, supra.*

In contrast to the second count in indictment #5223, the first count of said indictment, by following substantially the language of the statute, charges the essential elements of the offense "in a plain, intelligible and explicit manner." G.S. 15-153. The charge is that defendant drove a motor vehicle upon the public highway *without lights* during the period from a half hour after sunset to a half hour before sunrise. Such conduct is in violation of G.S. 20-129 and punishable as prescribed in G.S. 20-176 (b). It is noteworthy that we are not here concerned with lights which in some particular fail to comply with statutory requirements. The charge here is that defendant had *no lights.* The State's evidence directly and positively supports this charge. Indeed, defendant's evidence supports it.

As to the first count in indictment #5223, defendant's motions in arrest of judgment and for nonsuit were properly overruled. Other errors assigned do not concern this count. The verdict thereon will stand. Even so, the judgment thereon is stricken and the cause remanded for proper judgment on the verdict as to this count. The court may suspend execution of its judgment upon prescribed conditions only with the defendant's consent, express or implied. Here defendant did not consent. He excepted and appealed. *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

Indictment #5222 sufficiently charges a criminal offense, to wit, that defendant unlawfully and willfully did "assault, beat and wound one W. E. Whitehurst with a deadly weapon, to-wit: a certain automobile and some hard substance to the great damage of the said W. E. Whitehurst."

Since a judgment may be arrested only for some error or defect appearing on the face of the record, the motion therefor was properly denied. *S. v. Grace,* 196 N.C. 280, 145 S.E. 399; *S. v. McKnight,* 196 N.C. 259, 145 S.E. 281. Hence, our inquiry concerns defendant's motion for nonsuit as to the charge in indictment #5222.

There was evidence for the State tending to show the following facts.

1. About 10:45 p.m., W. E. Whitehurst, a State Highway Patrolman in uniform, was operating a Patrol car in Winterville, Pitt County. Preston Hardy, Chief of Police in Winterville, and Rick Jackson, Township Constable, were in the back seat of the Patrol car.

2. Observing a car being operated (by defendant) without lights, Whitehurst drove to and stopped at a railroad crossing where he would be in position to head off defendant's car. The Patrol car was then headed north, with headlights burning. About thirty feet before reach-

ing the railroad crossing, defendant turned his lights on the railroad track and stopped. Defendant was headed west, with lights burning.

3. Whitehurst, who then recognized defendant, stepped out of the Patrol car, and "walked up in front of him," *i.e.,* the defendant. Defendant's car started up and was moving slowly as it approached Whitehurst. As it came closer, Whitehurst stepped back "about two steps." When the front of defendant's car had passed him, still "barely moving," Whitehurst opened the left front door of defendant's car. When he did this, defendant "took off" at a fast rate of speed, causing Whitehurst to fall up against defendant's car.

4. Whitehurst managed to get on the running board or side of defendant's car, tried to get his foot on the clutch, and did manage to get his hand on the steering wheel. The car was headed down the ditch on the right side of the road. He told defendant to stop the car. Instead, defendant struck Whitehurst's hand, then on the steeling wheel, causing him to turn loose; then Whitehurst grabbed for the horn ring, which broke; defendant's car then swerved to the left side, then to the right, then to the left, getting up more speed, causing a great cloud of dust. After traveling some two blocks, Whitehurst was thrown from his precarious position on the left side of defendant's car. He was confined to his home on account of injuries so received for a week and a half.

5. There was another person in the car with defendant, but the State's witnesses could not say whether it was a man or woman. Such person was a passenger, seated to defendant's right.

There was evidence for defendant tending to show the following facts.

1. The person with him was Mrs. Angeline Croom, a defense witness. At first she had been riding with him, in his own car, which he drove to the home of Onnie Cannon, a colored man. According to defendant's testimony, he parked and left his car right in front of Cannon's house. After a conversation with Cannon, he got Cannon's car, backed it out, and drove it up beside his own car and stopped. There Mrs. Croom got in with him. He was driving Cannon's car when the incident occurred.

2. Admitting that he drove along the street a short distance without lights, defendant's explanation was that he couldn't find the light switch on Cannon's car.

3. When the incident occurred, according to defendant's testimony, he didn't know the car was a Patrol car or that the man who opened the door and jumped on his car was an officer. There was evidence that defendant had previously stated that he thought he was being robbed. Defendant testified: "I did not know who it was, and so I tried to knock him off, and I knocked him out of the car and kept going."

4. Defendant testified further: "He (Whitehurst) has stopped me many a-time. That's the first time he ever jumped on my car."

The operator of a motor vehicle may be convicted of an assault with a deadly weapon when, by means thereof, he strikes and injures a person, provided there is either (1) an actual intent to inflict injury, or (2) culpable or criminal negligence from which such intent may be implied. *S. v. Sudderth,* 184 N.C. 753, 114 S.E. 828, 27 A.L.R. 1180; *S. v. Agnew,* 202 N.C. 755, 164 S.E. 578; 5 Am. Jur. 914, Automobiles, sec. 763; Annotation: 99 A.L.R. 756 (835). This is true whether the motor vehicle strikes the person of the victim or the vehicle in which he is riding. 61 C.J.S. 689, Motor Vehicles, sec. 597 (b); *S. v. Sudderth, supra.*

When these conditions exist, and death ensues the injury so inflicted, the actor is guilty of manslaughter at least. *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580. As stated by *Brogdon, J.*: "The decided cases are to the effect that if admitted or proven facts constitute an assault or assault with a deadly weapon, the same state of facts constitutes the crime of manslaughter if death ensues as a proximate result. *S. v. Leary,* 88 N.C. 615; *S. v. Sudderth,* 184 N.C. 753, 114 S.E. 828." *S. v. Agnew, supra.*

Where death to an occupant of a car proximately results from the driver's culpable negligence, such driver is guilty of manslaughter. *S. v. Whaley,* 191 N.C. 387, 132 S.E. 6.

In *S. v. McLean,* 234 N.C. 283, 67 S.E. 2d 75, a conviction of involuntary manslaughter was upheld. There the deceased, with the knowledge and acquiescence of defendant, was riding, "squatting," on the left running board of defendant's car; and by reason of defendant's culpable negligence deceased was caught between defendant's car and an approaching car, thrown to the highway and fatally injured.

Conceding that a defendant in such case may be guilty of manslaughter, does it necessarily follow that, where the injury does not result in death, the automobile so used is a deadly weapon? We need not deal now with a situation where a person in or on the car is unintentionally caused to be thrown therefrom or otherwise injured by the driver's culpable negligence. In this case, the evidence, considered in the light most favorable to the State, was sufficient to support a jury finding that defendant willfully and intentionally used the automobile as a means of causing Whitehurst to be thrown therefrom under circumstances such that it was an instrument likely to produce death or great bodily harm. If so, it was a deadly weapon. *S. v. Perry,* 226 N.C. 530, 39 S.E. 2d 460, and cases cited.

The fact that defendant's primary purpose may have been to get rid of Whitehurst is immaterial on this phase of the case. Nor do we think the fact that defendant was also attempting to "knock" Whitehurst from the car is inconsistent with his willful and intentional use of the

car itself as a primary means of causing Whitehurst to be thrown therefrom.

Careful consideration of assignments of error directed to rulings on evidence does not disclose prejudicial error. Only general objections were interposed to the testimony offered as corroborative of Whitehurst's testimony. *S. v. Cole, supra,* and authorities cited. Defendant's objections to the testimony of Whitehurst, that he had with him for service on defendant "a revocation to pick up his driver's license," appear to have been sustained. In any event, any prejudicial effect of this testimony was erased when defendant testified that his driver's license had been revoked for transporting whiskey.

Did Whitehurst have authority to stop and arrest defendant? If so, was defendant aware of the fact that the man attempting to stop him was an officer?

G.S. 20-183 provides: "Duties and powers of law enforcement officers.—It shall be the duty of the law enforcement officers of the State and of each county, city, or other municipality to see that the provisions of this article are enforced within their respective jurisdictions, and any such officer shall have the power to arrest on sight or upon warrant any person found violating the provisions of this article. Such officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this article."

There can be no question but that defendant was guilty of violating G.S. 20-129, *i.e.,* driving without lights, one of the provisions of the article referred to in G.S. 20-183. (G.S. ch. 20, Art. 3.) He was "found violating" G.S. 20-129, not only by the officers but also by the jury. His own testimony is that he drove without lights. In any event, the circumstances were such that the officer, Whitehurst, had the legal authority to stop defendant for the purpose of determining whether he was operating his car in violation of any of the provisions of said article.

The evidence, considered in the light most favorable to the State, was sufficient to warrant a jury finding that defendant (1) knew Whitehurst, (2) knew he was a State Highway Patrolman, (3) saw him in uniform within the range of his lights and the lights of the Patrol car and recognized him, (4) knew that he (defendant) had been violating the motor vehicle law; and determined, for reasons of his own, to avoid being stopped or arrested, and by means of his automobile and otherwise willfully and intentionally caused Whitehurst to be thrown therefrom and injured.

For the reasons stated, defendant's assignments of error, based on the court's denial of his motions for judgment of nonsuit, are overruled.

No reason or argument is stated and no authority cited in defendant's brief in support of his assignments of error relating to the charge. Hence, they are deemed abandoned. *S. v. Cole, supra,* and authorities cited. Indeed, defendant's brief, in stating the questions for decision, does not refer to any of the assignments of error to the charge.

For the reasons stated, we find no error in the verdict rendered on indictment #5222. It will stand.

The second count in indictment #5223, and indictment #5222, were consolidated for judgment; and one judgment was pronounced on the two convictions. Judgment having been arrested as to the second count in indictment #5223, the cause will be remanded for proper judgment relating only to the verdict as to indictment #5222. *S. v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895.

Error and remanded as to Indictment #5222.

Error and remanded as to Indictment #5223, first count.

Judgment arrested as to Indictment #5223, second count.

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

NORMA POTTER v. FROSTY MORN MEATS, INC., LUTHER COBB, J. L. GOLDMAN, AND ELBERT POTTER.

(Filed 13 April, 1955.)

1. Torts § 6—

The right of one defendant sued in tort to maintain a cross action against another for the purpose of contribution in the event plaintiff should recover, is purely statutory and may be enforced only in accord with the provisions of the statute, G.S. 1-240.

2. Same—

In order to be entitled to have another joined as additional defendant for the purpose of contribution, the original defendant must allege facts tending to show liability of himself and such additional party as joint tort-feasors predicated upon negligence of each concurring in proximately producing the injury, and the right to contribution may not be predicated upon allegations showing that the negligence of such additional party was the sole cause of the injury, or that the accident resulted from the negligence of an outside agency or responsible third person, or which invoke the doctrine of primary and secondary liability.

3. Automobiles §§ 8d, 18d—

Where a truck has been stopped on the highway for an appreciable length of time, the fact that the driver of the vehicle failed to give signal of his intention to stop cannot be a proximate cause of a rear-end collision.

4. Automobiles § 18a—Allegations held insufficient to show that stopping of truck on highway was proximate cause of rear-end collision.

Plaintiff, a guest in an automobile, sued the driver for injuries received when the car ran into the rear of a truck which was stopped on the highway. The driver of the car filed a cross action against the owner and the driver of the truck for contribution, alleging facts to the effect that an automobile had been left standing on the paved portion of a much traveled, two-lane highway, that the driver of the truck, traveling in the same direction, stopped behind the car without giving any signal of his intention to do so, and that the truck had been driven carelessly and at an unlawful speed. It was not alleged how long the truck had been stopped on the highway before the driver of the car struck its rear, but from all the facts alleged, the truck apparently had been stationary for an appreciable period of time. *Held:* The failure of the truck driver to give signal of his intention to stop and the fact that the truck was alleged to have been driven carelessly and at an unlawful rate of speed, may be disregarded as being without causal significance, and therefore demurrer to the cross-complaint should have been sustained for its failure to allege concurring negligence on the part of the truck driver constituting a proximate cause of the accident in suit.

5. Negligence § 7—

If the original negligent omission of a party becomes injurious only in consequence of the intervention of some wrongful act or omission on the part of another, the injury is to be imputed to the last cause rather than the first.

6. Torts § 6—

The cross-complaint in this action *is held* insufficient to allege facts tending to show that the negligence of the other defendants concurred in proximately causing the injury in suit, and therefore, the demurrer of such defendants to the cross-action was properly sustained.

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

APPEAL by defendant Elbert Potter from *Williams, J.*, September Term 1954 of LENOIR.

Civil action to recover damages for personal injury resulting from collision of motor vehicles, alleged to have been caused by the negligence of the defendants.

On 21 April, 1951, the plaintiff was a passenger in an automobile being driven by defendant Elbert Potter westwardly toward Raleigh on Highway No. 70. In passing through the village of Auburn, the automobile in which she was riding collided with the rear of a truck belonging to the defendant Frosty Morn Meats, Inc., and being operated by its employee, the defendant Luther Cobb. The truck of the corporate defendant was at the time stopped on the highway. It was alleged that the stopping of the corporate defendant's truck was due to the fact that defendant J. L. Goldman had previously left his automobile standing or parked in the north lane of the paved highway at this point, and the

truck had stopped behind it. Here there was a right curve in the highway, and the view around the curve was somewhat obstructed by shrubbery.

The plaintiff was unable to obtain service of process on defendant Goldman.

The defendant Frosty Morn Meats, Inc., and defendant Cobb demurred to the complaint, and their demurrer was sustained, and they were dismissed from the action. The plaintiff did not amend or appeal. This left only the defendant Elbert Potter to answer plaintiff's complaint.

However, the presiding judge, Judge Frizzelle, by way of modification or amendment to the judgment sustaining the demurrer, entered subsequent order retaining the defendants Frosty Morn Meats, Inc., and Luther Cobb in the action to enable the defendant Elbert Potter to file amended answer to the complaint and cross action against them for contribution.

Thereafter, defendant Elbert Potter filed his cross complaint against the defendants Frosty Morn Meats, Inc., and Luther Cobb, alleging that the plaintiff's injury was proximately caused by the negligence of these defendants in that they suddenly stopped their truck on the highway without signal, and operated the truck on the highway in careless and reckless manner. It was further alleged if defendant Potter was in in any respect negligent, his negligence was passive and that of these defendants positive; that they were the principal delinquents, and that "if it should be held that the negligence of the defendants did not concur in causing said accident, the active and positive negligence of Luther Cobb, employee and agent of his co-defendant Frosty Morn Meats, Inc., as hereinbefore alleged, intervened, insulated and rendered inoperative the alleged negligence of this answering defendant, and was the direct and proximate cause, or one of the proximate causes of said collision and of the damages and injuries complained of by the plaintiff."

"That if this answering defendant was negligent in the operation of his said automobile, which is denied, the negligence of the defendants J. L. Goldman, Frosty Morn Meats, Inc., and Luther Cobb concurred with this defendant's alleged negligence in causing said collision and in producing the injuries alleged by plaintiff."

The defendants Frosty Morn Meats, Inc., and Luther Cobb demurred to the cross complaint on the ground that it did not state facts sufficient to impose liability on them for contribution, and that it appeared from the face of the cross complaint that the injury to the plaintiff was proximately caused by the negligence of defendant Elbert Potter, and that his negligence intervened, insulated and rendered inoperative the alleged negligence of the demurring defendants.

The demurrer was sustained, and the defendant Elbert Potter excepted and appealed.

Whitaker & Jeffress for defendant, appellant.
White & Aycock for defendant, appellees.

DEVIN, J. We note that the record on appeal in this case contains the stipulation that "the only question presented in this appeal is the sufficiency of the defendant appellant Elbert Potter's alleged cross-action, as contained in his answer." Hence we will confine our consideration to the facts alleged in defendant Elbert Potter's cross complaint as the basis for subjecting the appellees to contingent liability for contribution as joint tort-feasors.

The right of one defendant sued in tort to maintain a cross action against another to determine his contingent liability for contribution in the event of recovery by the plaintiff is conferred by statute, G.S. 1-240, and recognized in numerous decisions of this Court. *White v. Keller, post,* p. 97; *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73; *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736; *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566. The right is purely statutory. Its enforcement must accord with the provisions of section 1-240 of the General Statutes. *Hayes v. Wilmington,* 239 N.C. 238, 79 S.E. 2d 792. The purpose of the statute is to permit litigation of contingent liabilities before they have accrued. *Evans v. Johnson, supra.* "It creates a new right, provides an exclusive remedy, and substantial compliance with its terms is necessary to make it available." *Hoft v. Mohn,* 215 N.C. 397, 2 S.E. 2d 23.

In order to maintain a cross action against another for contribution under this statute, the original defendant must allege facts sufficient to show that both of them are liable to the plaintiff as joint tort-feasors. *Hayes v. Wilmington, supra.* It will not be sufficient for this purpose if the facts alleged merely make it appear that the injurious acts of which the plaintiff complains were those of "an outside agency or responsible third person," as defined in *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108, or are sufficient only to invoke the application of the doctrine of primary and secondary liability. *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269; *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648; *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. The right permitted to be enforced under this section is one of contribution and not one of subrogation. *Tarkington v. Printing Co., supra.* Allegations in the cross complaint alleging negligence of another defendant as the sole proximate cause of the injury are demurrable. *Walker v. Loyall,* 210 N.C. 466, 187 S.E. 565; *Perry v. Sykes,* 215 N.C. 39, 200 S.E. 923. The

cross complaint must allege facts which, if proven, would render the alleged joint tort-feasor liable to him for contribution in the event the plaintiff recovers. *Bost v. Metcalfe, supra.* It must allege facts tending to show negligence on the part of the alleged joint tort-feasor proximately contributing to the injury.

"It is the joint tort and common liability to suit which gives rise to the right to enforce contribution under the statute." *Tarkington v. Printing Co., supra.*

"To constitute two or more persons joint tort-feasors the negligent or wrongful act of the one must be so united in time and circumstance with the negligent or tortious act of the other that the two acts in fact constitute but one transaction." *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295.

In the case at bar the pleadings tend to show that on a curve in a much traveled two-lane highway, in the village of Auburn, the defendant Goldman had left his automobile standing on the paved portion of the highway. The front of Goldman's automobile was toward the west. In that situation the truck of defendant Frosty Morn Meats, Inc., driven by defendant Cobb, moving west, drove up behind the Goldman automobile and stopped without any signal being given of intention so to do. Thereafter the defendant Elbert Potter, also traveling west, drove his automobile into the rear of the truck of the corporate defendant, causing injury to plaintiff Norma Potter who was a passenger in defendant Potter's automobile. It was alleged in the complaint that defendant Potter was negligent in failing to keep proper lookout and driving at unsafe distance back of the truck. It was also alleged by the defendant Potter that the truck of defendant Frosty Morn Meats, Inc., had been driven carelessly and at unlawful speed. But these last allegations may be disregarded as the truck was standing still at the time of the collision. We observe that appellant's cross complaint is lacking in definite statement as to what occurred on this occasion, and deals more in general expressions.

It is not alleged how long the truck had been stopped on the highway before the defendant Potter's automobile struck it, but apparently for an appreciable space of time. We note that the court previously, on substantially similar allegations, had sustained the demurrer of these defendants to the complaint of the plaintiff, who was a passenger in defendant Potter's automobile, and had dismissed them from plaintiff's action. It would seem to follow that any negligence on the part of the driver of the truck in failing to give a signal of his intentions to stop as required by the statute had ceased to operate, and that it was the active negligence of defendant Potter in failing to observe the truck and avoid the collision which proximately caused the plaintiff's injury. The

principle is recognized in *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, that if the original negligent omission only becomes injurious in consequence of the intervention of some distinct wrongful act or omission on the part of another, the injury is to be imputed to the last wrong as the proximate cause rather than the first.

The facts in this case in some respects appear similar to those in *McLaney v. Motor Freight,* 236 N.C. 714, 74 S.E. 2d 36. In that case the complaint alleged that the plaintiff was a passenger in an automobile driven by one of the defendants; that this automobile collided with the rear of the truck and trailer of defendant Motor Freight, Inc., which had stopped on the highway. It was alleged that the driver of the truck had failed to give signal of his intention to slow down or stop. The demurrer of Motor Freight, Inc., was, on appeal, sustained by this Court in an opinion by *Winborne, J.,* in which *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326, was cited as an authority.

The same principle was applied in *Hollifield v. Everhart,* 237 N.C. 313, 74 S.E. 2d 706, where, on similar facts alleged, the demurrer was sustained.

Also in the recent case of *Loving v. Whitton,* 241 N.C. 273, a similar result was reached. There it was alleged that Whitton drove his automobile from a side street into an arterial highway without stopping at the stop sign, and was struck by Gibson's automobile coming from his right. It was alleged that Gibson was driving at excessive speed and without sounding warning. The demurrer of Gibson was sustained. In the opinion written for the Court by *Barnhill, C. J.,* it was said:

". . . 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."

In the case of *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111, the plaintiff sued both the driver of the automobile in which she was riding and the driver of another automobile with which her automobile collided. It was held the negligence of plaintiff's driver in driving into the highway insulated that of the driver of the second automobile though he was driving at excessive speed, under the rule enunciated in *Butner v. Spease, supra.*

Likewise the same principle is illustrated in *Smith v. Grubb,* 238 N.C. 665, 78 S.E. 2d 598. In this case the plaintiff sued both Grubb and Delma Smith, alleging that Grubb's automobile was stopped on the pavement of the highway and that plaintiff, in a pick-up truck, drove up and stopped behind the Grubb automobile. In this position plaintiff's truck was struck from the rear by the automobile of Delma Smith. The impact forced plaintiff's truck into the left lane of the highway

where it was struck by an automobile being driven in the opposite direction, and plaintiff was injured. It was held that Grubb's demurrer *ore tenus* should have been sustained. The principles to which this Court gave expression in *Balcum v. Johnson*, 177 N.C. 213, 98 S.E. 532; *Hinnant v. R. R.*, 202 N.C. 489, 163 S.E. 555; *Butner v. Spease, supra*, were applied.

We reach the conclusion that the facts alleged in defendant Potter's cross complaint, upon which he seeks to hold the defendants Frosty Morn Meats, Inc., and Luther Cobb in the case in order to determine their contingent liability to him as joint tort-feasors under the statute, are insufficient for that purpose, and that the judgment sustaining the demurrer should be upheld.

Affirmed.

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

MRS. LOIS SANDERS McGOWAN v. BENJAMIN BEACH, ADMINISTRATOR OF THE ESTATE OF WADE H. McGOWAN, DECEASED.

(Filed 13 April, 1955.)

1. Trial § 36—

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

2. Evidence § 32—

In an action by the widow against the executor of her husband upon an acknowledgment of indebtedness executed by the husband to her, the widow is incompetent to testify that she had loaned her husband the sum or that she saw him sign the instrument. G.S. 8-51.

3. Executors and Administrators § 15c—

Where a widow files claim against the estate of her husband upon a written acknowledgment of indebtedness executed by him under seal, her right to recover depends upon the legal effect of the writing coupled with the fact that she had it in her possession and introduced it in evidence, and therefore issues as to whether he signed and delivered the instrument and whether it was supported by valuable consideration are sufficient, and the court correctly refuses to submit a further issue as to whether she had loaned the money to her husband.

4. Seals § 3—

Where an acknowledgment of debt, including the word "seal" after the signature of the maker, is in the handwriting of the maker, it will be presumed that the maker intended to adopt the seal, and, in the absence of

proof to the contrary by the maker or his personal representative, the seal is valid.

5. Appeal and Error § 8—

Where the question of whether the maker of an instrument placed the seal thereon and adopted same is not controverted in the trial court, controversy in the trial court being solely as to the execution of the instrument, the appeal will follow the theory of trial in the lower court, and appellant will not be heard to contest the validity of the seal on appeal.

6. Seals § 4: Bills and Notes § 3: Contracts § 5: Executors and Administrators § 15c—

Plaintiff declared upon an acknowledgment of debt executed by her husband under seal, and filed claim thereon against his administrator. *Held:* The fact that the instrument was under seal imports consideration and the law will imply a promise to pay from the unqualified acknowledgment of debt as a subsisting obligation, and the introduction of the instrument in evidence, together with evidence tending to show that it had been executed and delivered by the husband to the wife, is sufficient to support judgment in her favor upon affirmative findings by the jury.

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

APPEAL by defendant from *Fountain, Special Judge,* January Special Term, 1955, of CALDWELL.

Civil action to recover from the estate of Wade H. McGowan (who died on 6 April, 1951, leaving him surviving his widow, the plaintiff herein, but no lineal descendants), the sum of $15,000, together with interest on said sum from 2 January, 1945, until paid.

It is alleged in the complaint and admitted in the answer that the plaintiff and defendant are citizens and residents of Caldwell County, North Carolina; that the defendant is the duly qualified and acting administrator of the estate of Wade H. McGowan, deceased, having qualified as such on 23 April, 1952, before the Clerk of the Superior Court of Caldwell County; that the plaintiff duly filed with the defendant, as administrator, her verified claim against the estate of Wade H. McGowan, deceased, in the amount above set forth on 25 November, 1953, and that the administrator denied such claim on 4 February, 1954.

The plaintiff alleges in her complaint that on or about 2 January, 1945, W. H. McGowan (being the same person as Wade H. McGowan) borrowed from her the sum of $15,000, and as evidence of such indebtedness executed under seal his memorandum in words and figures as follows: "January 2, 1945. I owe my wife Lois McGowan $15,000. W. H. McGowan (Seal)." That there is entered thereon as credit for interest payments the following items: "Interest paid $100.00 Jan. 6, 1947. Interest paid $50.00 Jan. 5, 1948." Plaintiff introduced this instrument in evidence as her Exhibit No. 36.

The defendant denied, upon information and belief, that W. H. McGowan on 2 January, 1945, or at any other time, borrowed the sum of $15,000 from the plaintiff, and further denied, upon information and belief, that W. H. McGowan executed any such instrument as alleged by the plaintiff. Issues were submitted to the jury and answered as follows:

"1. Did W. H. McGowan sign the instrument described as Plaintiff's Exhibit No. 36, as alleged in the Complaint? Answer: Yes.

"2. If so, did W. H. McGowan deliver the same to the plaintiff? Answer: Yes.

"3. If so, was the said instrument based upon a valuable consideration? Answer: Yes."

Judgment was entered on the verdict, and the defendant appeals, assigning error.

W. H. Strickland for plaintiff, appellee.

L. H. Wall and Hal B. Adams for defendant, appellant.

DENNY, J. The defendant interposed no objection to the issues submitted to the jury but excepts and assigns as error the refusal of the court below to submit the following issue: "Did the plaintiff loan the deceased, Wade H. McGowan, the sum of $15,000, as alleged by the plaintiff?"

The general rule with respect to the sufficiency of issues was stated by *Winborne, J.*, in *Cherry v. Andrews*, 231 N.C. 261, 56 S.E. 2d 703, as follows: "Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly." See also *Lister v. Lister*, 222 N.C. 555, 24 S.E. 2d 342; *Oliver v. Oliver*, 219 N.C. 299, 13 S.E. 2d 549; *Saieed v. Abeyounis*, 217 N.C. 644, 9 S.E. 2d 399; *Hill v. Young*, 217 N.C. 114, 6 S.E. 2d 830. In our opinion, the issues submitted were not only sufficient but proper in light of the allegations in the complaint, the denials thereof in the answer, and the evidence adduced at the trial.

It should be kept in mind that the alleged transaction, which resulted in the execution of the instrument upon which the plaintiff brings this action, was a personal transaction between the plaintiff and her deceased husband. Therefore, it was not permissible under the provisions of G.S. 8-51 for the plaintiff to have testified that she loaned her deceased husband the alleged sum of $15,000, or that she saw him sign the instrument and that he delivered it to her. *Lister v. Lister, supra.* Any right to recover on the instrument must flow from its legal effect as

written, coupled with the fact that the plaintiff had it in her possession and introduced it in evidence at the trial. *Pate v. Brown,* 85 N.C. 166.

The instrument in this action purports to be under seal and wholly in the handwriting of the executant thereof, and the plaintiff offered evidence to the effect that the entire instrument was in the handwriting of W. H. McGowan. Moreover, the defendant does not attack the sufficiency of the evidence to support the answer of the jury to the first issue, except by motion to nonsuit. However, in his brief, the only argument in support of this motion is to the effect that the plaintiff offered no proof that the word "seal" was written after the name of the maker at the time he executed the instrument and, if so, that he adopted it as his seal. There is no contention on the part of the defendant that if the maker of the instrument wrote the word "seal" after his name at the time he executed the instrument and adopted it as his seal that the defendant would be entitled to a nonsuit. We think that where an instrument is wholly in the handwriting of the maker, it would be strange indeed for him to go to the trouble of writing the word "seal" after his name unless it was his intention to adopt it as his seal, and such intention will be presumed. In fact, our Court has held that a seal appearing upon an instrument, opposite the name of the maker, in the place where the seal belongs, will in the absence of proof that the maker intended otherwise, be valid as a seal. *Hughes v. Debnam,* 53 N.C. 127; *Devereux v. McMahon,* 108 N.C. 134, 12 S.E. 902, 12 L.R.A. 205; *Allsbrook v. Walston,* 212 N.C. 225, 193 S.E. 151; *Bank v. Jonas,* 212 N.C. 394, 193 S.E. 265. And this Court said in *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606, that ". . . in any event, the maker would have the burden of overcoming the presumption arising from the presence of a seal." Furthermore, the defendant admits in his brief that in the trial below, "no questions were asked about the seal, and no evidence offered tending to show its presence or adoption."

From an examination of the evidence, it is quite clear that the battle below was waged over the question as to whether the instrument introduced by the plaintiff was executed by W. H. McGowan, deceased. Moreover, counsel for defendant in the oral argument before this Court admitted that the questions now urged with respect to the seal were not raised in the trial below. "An appeal *ex necessitate* follows the theory of the trial"—*Stacy, C. J.,* in *Coral Gables, Inc., v. Ayres,* 208 N.C. 426, 181 S.E. 263. See also *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 498, and *Potts v. Insurance Co.,* 206 N.C. 257, 174 S.E. 123. Therefore, since the question as to whether the seal was placed on the instrument by the maker and adopted by him, was not raised in the trial below, except by a general denial of the genuineness of the instrument, and no issue having been tendered with respect thereto, the motion for judgment as of

nonsuit will be denied. Consequently, the plaintiff's right to recover must turn solely upon the legal effect of the instrument as written, including the seal, since the jury found that W. H. McGowan executed it as alleged in the complaint.

It is said in 12 Am. Jur., Contracts Under Seal, section 74, page 567: "At common law a promise under seal, but without any consideration, is binding because no consideration is required in such a case or, as is sometimes said, because the seal imports, or gives rise to a presumption of, consideration. It has been said that the solemnity of a sealed instrument imports consideration or, to speak more accurately, estops a covenantor from denying a consideration except for fraud," citing *Thomason v. Bescher,* 176 N.C. 622, 97 S.E. 654, 2 A.L.R. 626.

Hoke, J. (later *Chief Justice*), in speaking for the Court in the last cited case, said: "It is the accepted principle of the common law that instruments under seal require no consideration to support them. Whether this should rest on the position that a seal conclusively imports a consideration or that the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instruments are held to be binding agreements, enforceable in all actions before the common-law courts."

Pearson, C. J., in considering this question in *Harrell v. Watson,* 63 N.C. 454, said: "A bond needs no consideration. The solemn act of sealing and delivering is a *deed, a thing done,* which, by the rule of the common law, has full force and effect, without any consideration. *Nudum pactum* applies only to simple contracts." To like effect are *Angier v. Howard,* 94 N.C. 27; *Samonds v. Cloninger,* 189 N.C. 610, 127 S.E. 706; *Basketeria Stores, Inc., v. Indemnity Co.,* 204 N.C. 537, 168 S.E. 822; *Coleman v. Whisnant,* 226 N.C. 258, 37 S.E. 2d 693; *Crotts v. Thomas,* 226 N.C. 385, 38 S.E. 2d 158; *Royster v. Hancock,* 235 N.C. 110, 69 S.E. 2d 29.

Whether we construe the instrument under consideration to be a nonnegotiable note, a due bill, or merely an acknowledgment by W. H. McGowan of a debt to his wife in the sum of $15,000, the fact that it was executed under seal, which in the absence of proof to the contrary, imports a consideration, the instrument is sufficient as an acknowledgment of such debt.

In the case of *Phillips v. Giles,* 175 N.C. 409, 95 S.E. 772, Mary J. Richmond executed a paper writing in pertinent part as follows: "Sept. 18, 1916: This is to certify that I, Mary J. Richmond, owe my daughter, Bettie M. Phillips, $283.95 (two hundred eighty-three dollars and ninety-five cents) for borrowed money at different times." The paper writing was not under seal. Bettie M. Phillips filed a claim with the defendant administrator of Mary J. Richmond. The claim was denied,

and as in the instant case, an action was instituted based on the paper writing. *Hoke, J.* (later *Chief Justice*), in speaking for the Court said: "It is the principle very generally prevailing on the subject, and would seem to be required with us by the phraseology of the statute itself, which clearly recognizes that either a promise to pay *or acknowledgment of the debt as an existent obligation will suffice, unless there is something to qualify the express promise or to repel that which the law would imply from the definite acknowledgment of the debt as a subsisting obligation.*" (Emphasis added.) When one unqualifiedly acknowledges a debt as a subsisting obligation, the law will imply a promise to pay. *Trust Co. v. Lumber Co.*, 221 N.C. 89, 19 S.E. 2d 138, and cited cases. See also *Shepherd v. Thompson*, 122 U.S. 231, 30 L. Ed. 1156; *Miller v. Jones*, 137 Neb. 605, 290 N.W. 467, 127 A.L.R. 646; *Shimel v. Williams*, 136 Misc. Rep. 464, 240 N.Y.S. 161; *Cummings v. Freeman*, 21 Tenn. 143; Anno. 127 A.L.R., Admission of Indebtedness, page 650, *et seq.*

The appellant cites in support of his contention that the instrument sued upon is insufficient to show a promise to pay, the following cases: *Faison v. Bowden*, 76 N.C. 425; *Riggs v. Roberts*, 85 N.C. 151, 39 Am. Rep. 692; *Hussey v. Kirkman*, 95 N.C. 63; *Helm Co. v. Griffin*, 112 N.C. 356, 16 S.E. 1023; *Wells v. Hill*, 118 N.C. 900, 24 S.E. 771; *Cooper v. Jones*, 128 N.C. 40, 38 S.E. 28; *Hunt v. Eure*, 188 N.C. 716, 125 S.E. 484; *Smith v. Gordon*, 204 N.C. 695, 169 S.E. 634; *Bryant v. Kellum*, 209 N.C. 112, 182 S.E. 708. These decisions are not controlling on the facts involved in this appeal.

In the trial below we find

No error.

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

ANNIE GREEN v. PATRIOTIC ORDER SONS OF AMERICA, INC.; FUNERAL BENEFIT ASSOCIATION OF THE STATE CAMP OF NORTH CAROLINA, PATRIOTIC ORDER SONS OF AMERICA, INC.

(Filed 13 April, 1955.)

1. Burial Associations § 4c: Time—

The word "year" means twelve calendar months, G.S. 12-3 (3), and will be given this meaning in the interpretation of the by-laws of a burial association.

2. Same—

A person is "over" fifty years of age when he has passed his fiftieth birthday, and therefore under the provisions of a burial association that a member cannot be reinstated except as a new member, and that the qualifications for membership should be that the applicant be not less than sixteen years of age nor over fifty years of age, the reinstatement of a member after he had passed his fiftieth birthday upon the erroneous statement of the date of his birth, is not binding on the association in the absence of waiver.

3. Waiver § 2—

Waiver is the intentional relinquishment of a known right, and there can be no waiver unless so intended by one party and so understood by the other, unless one party has acted so as to mislead the other.

4. Burial Associations § 4c—

The by-laws of a burial association prescribing the maximum age at which a person might join or reinstate his membership is not waived by the reinstatement of membership upon a misstatement of age in the application.

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

APPEAL by plaintiff from *McSwain, S. J.*, at December Term 1954, of CABARRUS.

Civil action to recover funeral benefits allegedly accruing to plaintiff as widow of George Thomas Green, upon his death while enrolled as a member of defendant Patriotic Order Sons of America, Inc., Washington Camp No. 20.

The parties waived a jury trial and agreed that the court should hear and determine all questions of fact and law presented by the action. And the cause being heard on the complaint and answer and stipulations entered into by the parties as follows:

"STIPULATIONS:

"(For clarity and brevity, George Thomas Green is referred to hereafter as Green; Patriotic Order of Sons of America, Inc. is referred to as P. O. S. of A.; Funeral Benefit Association of the State Camp of North Carolina, Patriotic Orders Sons of America, Inc., is referred to as Funeral Benefit Association; and Washington Camp No. 20, Patriotic Sons of America, Inc., is referred to as Washington Camp.)

"(1) Green was born on February 12, 1894 and died on October 28, 1951.

"(2) Plaintiff Annie Green is the widow of Green and his legal dependent.

"(3) Green was enrolled as a duly qualified member of Washington Camp on May 19, 1934, at which time his date of birth was reported to Funeral Benefit Association by Washington Camp as February 12,

1894; that his membership then continued until May 21, 1941, when it was terminated for non-payment of dues.

"(4) Green was again enrolled as a member of Washington Camp on June 20, 1944, at which time his date of birth was reported to Funeral Benefit Association by Washington Camp as February 12, 1895.

"(5) Green continuously paid regular dues after June 20, 1944, until the date of his death, and to December 31, 1951, and was carried on the roll as a member of Washington Camp No. 20 at the time of his death.

"(6) Washington Camp was duly affiliated with defendant Funeral Benefit Association prior to May 19, 1934, and has continued as a duly affiliated camp to the present.

"(7) During the period of membership of Green in Washington Camp from May 19, 1934, until May 19, 1941, and from his re-enrollment on June 20, 1944, until the death of Green, Washington Camp paid the full required funeral benefit assessments for him to defendant Funeral Benefit Association; that Green was entered upon the rolls of the Funeral Benefit Association during these periods of time and at his death.

"(8) The laws of the Funeral Benefit Association, State Camp of North Carolina, are those appearing in printed pamphlet dated 1932 and marked Exhibit A. Among the by-laws of Funeral Benefit Association there are the following provisions:

"'Article III, Sec. 3 . . . This Camp hereby further agrees to make no claim on your Association for Funeral Benefits in case of the death of any member of this Camp: (f) If said member had been received to membership in the Camp and his name enrolled in the Funeral Benefit Association in violation of the laws and decisions of the Order . . . This Camp further agrees that it shall be estopped from pleading in any court that it or any of its officers are agents of the State Camp or Funeral Benefit Association.

"'Article III, Sec. 4. The qualifications for membership of persons in Camps belonging to this Association shall be that they are not less than sixteen years of age nor over fifty years, and in good sound bodily health and in good physical condition at the time of application for membership in this Association . . .

"'Article III, Sec. 5. But after said Camp has been enrolled as a member of this Association there shall not be received by this Association the name of any member of said Camp if over the age of fifty years . . .

"'Article VI, Sec. 3. Members of Camps in the Association who have been dropped from the roll of such Camp cannot be re-entered upon the rolls of this Association, except as new members . . .

"'Article XII, Sec. 1. The Funeral Benefit payable by the Association, upon the death of a member of a Camp, holding membership and

in good standing in this Association, shall be as prescribed in the following sections of this Article, provided, that the death of such member was not caused by or originated from intemperance, vicious or immoral conduct; and provided further, that the laws of this Association have been fully complied with.

" 'Sec. 2. No Camp shall receive funeral benefits from this Association in the following cases: (h) for the death of a member whose name was illegally enrolled in this Association, as provided by the laws of the Order.

" 'Article XVII, Sec. 1. No Camp nor any of its officers or members shall have the power to waive any of the provisions of these laws and the same shall be binding upon the Funeral Benefit Association and each and every camp thereof and all legal dependents of deceased members of such Camps.'

"(9) That at the time of his enrollment on both occasions Green was in good sound bodily health and in good physical condition.

"(10) That Washington Camp, defendant P. O. S. of A., and defendant Funeral Benefit Association were duly notified of the death of Green, due proof of death was submitted, and claim for death benefit made.

"(11) Plaintiff, as the widow and legal dependent of Green, is entitled to receive $500.00 as a death benefit from defendants by reason of Green's death as a member of defendants, if said death benefit is payable.

"(12) The death benefit is payable to plaintiff by defendants contingent only upon the legal questions raised by the pleadings concerning Green's age.

"(13) The total amount of assessments collected by Funeral Benefit Association from the camp on account of the enrollment of George T. Green from June 20, 1944 until October 28, 1951, was $47.55, which said amount was refunded by Funeral Benefit Association to camp, and has been tendered by said camp to the plaintiff herein."

And the court being of opinion therefrom that the plaintiff is not entitled to recover in this action entered judgment that plaintiff take nothing by her action, and that it be dismissed.

Plaintiff excepts to the conclusions of the court and to the judgment entered, and appeals to the Supreme Court and assigns error.

John Hugh Williams for plaintiff, appellant.

Hugh G. Mitchell, Hartsell & Hartsell, and William L. Mills, Jr., for defendant, appellee.

WINBORNE, J. Upon the stipulated facts of the case in hand, as shown in the record on appeal, and as hereinabove set forth, two questions arise for decision on this appeal: (1) Was Green "over the age of fifty years" on 20 June, 1944, the date on which he was re-enrolled as a member of a Funeral Benefit Association within the meaning of the by-laws of the association?

(2) If so, did the Funeral Benefit Association waive such age requirement?

The first question merits an affirmative answer, and the second a negative one.

In connection with the first question, admittedly on 20 June, 1944, Green had passed his fiftieth birthday by four months and eight days. But appellant contends that Green was "not over fifty years of age" until he reached his fifty-first birthday. On the other hand, appellees contend that Green was "over fifty years of age" after he had passed his fiftieth birthday.

Appellant cites in a support of her position two cases decided by the Supreme Court of Oklahoma, *Watson v. Loyal Union Life Association,* 143 Okla. 4, 286 P. 888, and *Wilson v. Mid-Continent Life Ins. Co.,* 159 Okla. 191, 14 P. 2d 945, and Annotations 84 A.L.R. 389, also 67 C.J.S. 541, 29 Am. Jur. 454 Insurance Sec. 558.

Appellees cite in support of their position the case of *Bay Trust Co. v. Ins. Co.,* 279 Mich. 248, 271 N.W. 749.

And upon examination of the annotations and texts above cited, it appears that the two Oklahoma cases and *Allen v. Baird,* 208 Ark. 975, 188 S.W. 2d 505, are the bases for the text that "it has been held generally that a person is not over a specified age in years until he has passed his birthday next beyond the age specified," as contended for by appellant. The principle so stated is not convincing.

Moreover, the Michigan case, *supra,* is the basis for the text that "it has been stated that a person is over the age of sixty years when he has lived in excess of sixty calendar years" as contended by appellees. This principle is consonant with the views of this Court.

However neither party cites a case, nor has this Court found any in this State, treating of the particular question thus raised.

Statutes of a kindred nature, in this State, and decisions of this Court pertaining to related matters, lend light to the subject, and point the way to a reasonable and satisfactory conclusion.

In this connection it is appropriate to note that the words "over" and "years" in the phrase "not over fifty years of age" have ordinary meaning, and are in common use. "Over" means "beyond or above, or in excess of a certain quantity or limit, as boys of 12 years and over." 67 C.J.S. 540.

And in respect to the word "year" it is noted that our General Assembly has adopted appropriate rules for construction of statutes, among which is G.S. 12-3, that "in the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say . . .

"3. . . . The word 'month' shall be construed to mean a calendar month, unless otherwise expressed; and the word 'year,' a calendar year, unless otherwise expressed; . . ."

And this Court has held that a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight days to thirty-one. *S. v. Upchurch,* 72 N.C. 146. The Court has also held that the word "year" will be interpreted to mean twelve calendar months. *Muse v. London Assurance Corp.,* 108 N.C. 240, 13 S.E. 94. See also *Shaffner v. Lipinsky,* 194 N.C. 1, 138 S.E. 418.

Moreover it is significant that the General Assembly of North Carolina has enacted legislation pertaining to fraternal benefit societies, Article 28, Sub-chapter VII, Chapter 58, of General Statutes, in Section G.S. 58-279 of which it is declared that "any society may admit to beneficial membership any person not less than sixteen and not more than sixty years . . ."

In interpreting this statute, manifestly the definition of the word "year" as set out in the statute, G.S. 12-3 (3) would be appropriate. Likewise in interpreting a by-law of a funeral benefit association, the word "year" should have like meaning.

Therefore this Court holds that when a person reaches his fiftieth birthday he would have lived fifty calendar years, of twelve calendar months each. Hence after his fiftieth birthday he would be over fifty years of age.

Now, as to the second question. "Waiver is the intentional relinquishment of a known right. It is usually a question of intent; hence knowledge of the right and intent to waive it must be made plainly to appear . . . There can be no waiver unless so intended by one party and so understood by the other, or unless one party has so acted as to mislead the other. 2 Herman on Estoppel, Sec. 825." *Brady v. Benefit Asso.,* 205 N.C. 5, 169 S.E. 823.

In the light of the by-laws Article VI, Sec. 3, Article XII, Section 2, and Article XVII, Section 1, hereinabove quoted, it is clear that the Funeral Benefit Association has not waived the age requirement as to Green.

For reasons stated the judgment below is hereby

Affirmed.

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

STATE v. JOSEPH L. LUCAS.

(Filed 13 April, 1955.)

1. Husband and Wife § 22—

Evidence in this prosecution of the defendant for willful abandonment of his wife without providing her adequate support *is held* sufficient to overrule defendant's motion to nonsuit.

2. Husband and Wife § 17—

The husband's willful separation of himself from his wife is not a criminal offense so long as he provides her with adequate support, but becomes a criminal offense only if after abandonment he intentionally and without just cause or excuse ceases to provide adequate support for her according to his means and condition in life.

3. Same—

Under certain circumstances the willful abandonment of the wife by the husband may be a significant factor in determining whether his failure to provide adequate support was willful, as when he leaves and goes to a new community where there is no prospect of equally satisfactory employment.

4. Husband and Wife § 23—

Where, in a prosecution for abandonment and willful failure to support, the evidence tends to show that the husband was employed and had earnings, and had in some measure made provision for the support of the wife, the adequacy of such support and the willfulness of the defendant's failure to do more, are the crucial questions to be submitted to the jury, and an instruction to the effect that defendant's earning capacity made no difference is erroneous, and an instruction that the failure to provide support would be excusable only if the husband had no income or earning capacity whatsoever, is inexact.

5. Husband and Wife §§ 17, 20: Parent and Child § 9—

Under G.S. 14-322, as amended, defendant's abandonment and willful failure to support his wife and his abandonment and willful failure to support the children of the marriage, are separate and distinct offenses, and each offense should be fully charged in separate bills of indictment or in separate counts in a bill of indictment.

6. Parent and Child § 9—

Where the indictment of a husband for abandonment and willful failure to support his wife does not charge defendant with such offense as to the children of the marriage, the solicitor, if he deems it advisable, may proceed on a new bill as to the children and move that the cases be consolidated for trial, since the offense is a continuing one.

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

APPEAL by defendant from *Whitmire, Special J.*, December Term, 1954, of RANDOLPH.

Criminal prosecution on bill of indictment charging that defendant on the ..... day of October, 1953, at and in Randolph County, "unlawfully and willfully did abandon his wife, one Eunice Lucas, without providing adequate support for her, the said Eunice Lucas and minor child, namely, Marie Lucas, which he, the said Joseph L. Lucas upon the body of his said wife had theretofore begotten," etc.

The prosecutrix, Mrs. Eunice Lucas, and defendant were married 5 September, 1938. They have one child, Marie Lucas, now fifteen years old. While they lived together, both wife and husband were gainfully employed, she earning about $1,500.00 per year and he earning about $2,000.00 per year. With their joint earnings, they bought and paid for a home in Randolph County, now worth about $8,000.00, and furniture and equipment therein of value such that to replace it would cost between $4,000.00 and $5,000.00. Some two years and one month before the trial at December Term, 1954, the husband and wife separated. It does not appear clearly whether he then left the community. In any event, he returned to the Randolph County home in October, 1953, spending two nights there with his wife and daughter. The wife and daughter at all times have lived in the home in Randolph County. The wife's gainful employment has continued.

The prosecutrix was the only witness. Her testimony tends to show that in October, 1953, defendant left her and their daughter, without just cause, justification or excuse; and that later he telephoned that he was in Baltimore, looking for a job, and subsequently wrote her that he was employed by the Fisher Body Plant at wages of $2.08 an hour. Her further testimony tends to show her own earnings, the amounts of money sent to her by defendant, the nature and value of presents sent by defendant to their daughter, and other items bearing upon the character and extent of such provision as was made by defendant for her and their daughter.

The trial judge gave the following instruction to the jury:

"The statute makes no distinction between the difference in earning capacity of people. There is no burden imposed upon the State to show one's earning capacity. The statute simply makes it a crime to willfully abandon one's wife or child or both without providing adequate support for them.

"Now by using the word willful in the statute the law simply means without just cause, excuse or justification. Now it follows from that, that if a man is out of work or if he is sick or in ill health, and because

of being out of work and because of physical disability he has no income or earning capacity, then there could be no willful abandonment or failure to support."

The jury returned a verdict of guilty. Judgment was pronounced thereon. Defendant excepted and appealed. He assigns as error the denial of his motion for judgment of nonsuit; also, portions of the charge, including the excerpt quoted above.

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

Ottway Burton for defendant, appellant.

BOBBITT, J. Since a new trial is awarded for reasons set out below, we refrain from further narration and analysis of the evidence in the record before us. Careful consideration of such evidence, in the light most favorable to the State, discloses that it was sufficient for submission to the jury under appropriate instructions. Hence, the assignment of error, directed to the court's denial of defendant's motion for judgment of nonsuit, is overruled.

In a prosecution under G.S. 14-322, the State must establish (1) a willful abandonment, and (2) a willful failure to provide adequate support. *S. v. Carson,* 228 N.C. 151, 44 S.E. 2d 721; *S. v. Campo,* 233 N.C. 79, 62 S.E. 2d 500. Proof of a wrongful discontinuance of cohabitation is not in itself sufficient to support a conviction. As stated by *Barnhill, J.* (now *C. J.*), in *S. v. Carson, supra:* "A husband is not compelled to live with his wife and his refusal to do so does not constitute a criminal offense so long as he provides adequate support. *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540. His act becomes criminal when and only when he, having willfully or wrongfully separated himself from his wife, intentionally and without just cause or excuse, ceases to provide adequate support for her according to his means and station in life. *S. v. Hooker,* 186 N.C. 761, 120 S.E. 449."

The defendant is required to provide support commensurate with his ability. *S. v. Clark,* 234 N.C. 192, 66 S.E. 2d 669; *S. v. Love,* 238 N.C. 283, 77 S.E. 2d 501.

While the two elements stated above must be established, the abandonment and the failure to provide adequate support may be so closely interrelated, under the circumstances of a particular case, that the willful abandonment may be a significant factor in determining whether the failure to provide adequate support was willful. This would be true where a defendant, incident to the willful abandonment, willfully leaves a community where he is employed or may be employed at sub-

stantial wages and goes into a new community where there is no reasonable prospect of equally satisfactory employment.

If defendant failed to provide adequate support for his wife after he left in October, 1953, his earnings and his earning capacity were relevant and vital factors bearing upon the alleged willfulness of his failure to meet this marital obligation. The challenged excerpt from the charge, in stating in effect that defendant's earning capacity made no difference, is erroneous. Too, the further statement that there would be no willful failure to support "if a man is out of work or if he is sick or in ill health, and . . . has no income or earning capacity," while correct as a general proposition, would seem to suggest that a failure to provide adequate support is willful unless a man on account of illness or inability to find work has *no* income or earning capacity. In any event, the instruction does not apply the law to one of the crucial questions presented for decision by the jury. The evidence here discloses that defendant had earnings and earning capacity and in some measure was making provision for the support of his wife. On this phase of the case, the adequacy of such support and the willfulness of defendant's failure to do more were the crucial questions for decision.

For errors in the charge as indicated above, 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. Even so, we deem it appropriate to call attention to the significance of the statutory changes set out below in relation to the bill of indictment on which this prosecution is based.

C.S. 4447 provided: "Abandonment of family by husband. If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

It was decided, by a divided Court, in *S. v. Bell,* 184 N.C. 701, 115 S.E. 190, that this statute created two separate offenses, as if worded as follows: "If any husband shall willfully abandon his wife without providing adequate support for such wife, he shall be guilty of a misdemeanor, and if he shall willfully abandon the children which he may have begotten upon her without providing adequate support for such children, he shall be guilty of a misdemeanor."

In *S. v. Bell, supra,* the defendant was tried and convicted upon the *first* count of a three-count bill, which separately charged him with the willful abandonment of his children without providing adequate support for them.

C.S. 4447 was amended by ch. 290, Public Laws of 1925, and as amended was codified as G.S. 14-322 in Volume 1 of the General Statutes of 1943. Thereafter, G.S. 14-322 was amended by ch. 810, Public

Laws of 1949. As amended in 1949, the statute is now codified as G.S. 14-322 in Volume 1B of the (Recompiled) General Statutes and is worded as follows:

"Abandonment by husband or parent.—If any husband shall willfully abandon his wife without providing her with adequate support, or if any father or mother shall willfully abandon his or her child or children, whether natural or adopted, without providing adequate support for such child or children, he or she shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father or mother shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years."

G.S. 14-322 now defines clearly two separate and distinct offenses. If the State desires to prosecute for both offenses, each offense should be fully charged in a separate bill of indictment or as a separate count in the bill of indictment.

The bill of indictment in this case sufficiently charges that defendant willfully abandoned his wife without providing adequate support for her. However, it does not charge that defendant abandoned his child. Hence, it is insufficient as an indictment for the offense of willfully abandoning his child without providing adequate support for her. However, by the express terms of the statute, this is a continuing offense. *S. v. Jones,* 201 N.C. 424, 160 S.E. 468. The solicitor, if he deems it advisable, may proceed on a new bill and move that the cases be consolidated for trial.

New trial.

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

L. F. WORTHINGTON v. FRANK M. WOOTEN, JR., AS COMMISSIONER, AND PITT COUNTY DRAINAGE DISTRICT NO. 8.

(Filed 13 April, 1955.)

1. Judgments § 32—A judgment is an estoppel as to all matters therein decided or which could have been properly determined therein.

Judgment by default final after due service of summons and complaint on the defendant was entered in an action to collect past-due drainage assessments and to enforce the lien therefor. Defendant thereafter filed motion to set aside the default judgment on the grounds of excusable neglect and also on the ground that the proceedings were void. The clerk's judgment denying the motion was affirmed by the Superior Court on appeal.

Held: The judgment of the Superior Court on appeal is conclusive and binding as to all matters therein decided and also as to all matters which could properly have been determined therein, and bars a subsequent action by the defendant therein to restrain the enforcement of the lien and to vacate the proceedings as invalid and a cloud on title.

2. Judgments § 25—

Where the court has jurisdiction over the person and the subject matter, the judgment is not void and is not subject to collateral attack, but is binding on the parties even if irregular or erroneous until set aside upon motion in the cause or reversed on appeal.

3. Judgments § 35—

Where all the facts sufficient to constitute estoppel by judgment are set out in the answer, it is a sufficient pleading of the estoppel.

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

APPEAL by plaintiff from *Frizzelle, J.,* PITT Superior Court—in Chambers, 2 September, 1954.

This was a civil action instituted by the plaintiff to restrain the enforcement of a lien on his lands for unpaid drainage assessments, and to vacate the proceedings by which the assessments were levied as invalid and a cloud on plaintiff's title.

The material facts out of which this controversy arose, briefly stated, were these: The Pitt County Drainage District No. 8 was established in 1947. The original petition was filed 27 April, 1947, and docketed as Special Proceeding No. 4822. The proceedings incident to the organization of the Drainage District were had and recorded, and the final report of the viewers was filed, and adjudication confirming the report was entered 29 September, 1947. On 9 October, 1947, plaintiff Worthington was by order made party to the proceeding, and summons was duly issued and personally served on him. Thereafter notices of assessment were mailed to plaintiff but ignored. On 18 December, 1952, the Drainage District instituted action in the Superior Court against the plaintiff Worthington to collect past-due assessments and to enforce the lien therefor on plaintiff's 113 acres of land. Summons and complaint were duly served, and plaintiff Worthington filed no answer. On 27 January, 1953, judgment by default final was entered by the clerk. On 31 January, the plaintiff filed motion before the clerk, setting out the facts, and asking that the judgment be vacated, alleging excusable neglect and also that the proceedings were void. The clerk entered judgment denying the motion, finding no excusable neglect or meritorious defense and that the judgment was in all respects valid. On appeal to the Superior Court, Judge Godwin entered judgment affirming the judgment of the clerk, declaring the judgment in all respects regular,

and that plaintiff's failure to answer was not due to excusable neglect. The motion to vacate the judgment was denied. Plaintiff did not appeal. Instead, plaintiff instituted this action against the Drainage District and the commissioner appointed by the court to enforce the lien on his lands, alleging that the claim of the Drainage District was invalid and a cloud on his title, and he asked that sale of his land to pay drainage assessments be restrained.

There were no facts at issue, and it was agreed that Judge Frizzelle should hear the case on the pleadings and records in chambers.

Judge Frizzelle found facts and entered the following judgment:

"1. That in a suit regularly brought in the Superior Court of Pitt County by Pitt County Drainage District Number Eight *v.* L. F. Worthington, a judgment by default final was regularly entered and in all respects according to the course and practice of the courts, for the reason that the defendant Worthington had failed to file answer to said complaint, which was duly verified, within the time prescribed by law for filing of such answer.

"2. That after the rendition of said default judgment by the said H. L. Lewis, Jr., Assistant Clerk of the Superior Court of Pitt County, the said defendant, L. F. Worthington, moved before the Clerk that said default judgment be set aside and canceled, for that same was entered through the excusable neglect of the said defendant under Section 1-220 of the General Statutes of North Carolina and further upon the ground that judgment of H. L. Lewis, Jr., Assistant Clerk of the Superior Court, was absolutely void and a nullity, and upon said motion which was heard in due course, the Clerk of the Superior Court found no excusable neglect which would justify setting aside the said judgment and thereupon, after finding such facts, denied the defendant's motion.

"3. That thereafter the defendant, through his attorney, S. B. Underwood, Jr., gave notice of appeal from the ruling of the Clerk of (to) the Superior Court of Pitt County, in Term time.

"4. That thereafter on the 23rd day of February 1953, the said appeal from the ruling of said Clerk came on in regular course of procedure for hearing before Honorable Howard G. Godwin, Judge presiding at the said February 23, 1953 Term of said Pitt Superior Court, and after hearing the pleadings read, the contentions of the parties and such affidavits as were used by both parties to the proceedings, after due consideration, Godwin, Judge, held and concluded that there was no proper cause shown for setting aside said judgment; that said judgment was regularly signed by the Clerk and was valid in all respects.

"5. That from the judgment of Godwin, Judge, no appeal was taken.

"6. That thereafter, in an independent action, L. F. Worthington, as plaintiff, instituted a suit in the Superior Court of Pitt County in which he reiterated in substance all of the allegations contained in the motion filed before the Clerk and again alleging the invalidity of the said default judgment and upon the allegations of the complaint, a temporary restraining order was issued by the Honorable J. Paul Frizzelle, Judge, restraining the sale under execution, of the lands of the said Worthington until the further order of the Court. That this proceeding in which this judgment is entered was a proceeding between the same parties to the original suit and the Court finds and so holds that the judgment entered by Godwin, Judge, and above referred to and from which no appeal was taken, is final and conclusive and all matters and things alleged in this suit are *res judicata* as to all matters and things in controversy herein.

"IT IS NOW, upon said findings of fact above set forth, ORDERED, ADJUDGED AND DECREED:

"1. That the judgment of H. L. Lewis, Jr., Assistant Clerk of the Superior Court, and the judgment on appeal entered by Godwin, J., are valid and conclusive as to the matters and things involved herein and that the restraining order heretofore issued in this cause be and the same is hereby dissolved, and Frank M. Wooten, Jr., the Commissioner appointed in said judgment of H. L. Lewis, Jr., as aforesaid, to sell the lands of L. F. Worthington in said Drainage District and upon which drainage assessments were levied, is authorized and directed to proceed as he may be advised to sell the said lands for the purpose of collecting said assessments."

The plaintiff excepted and appealed.

Sam B. Underwood, Jr., for plaintiff, appellant.

Frank M. Wooten, Jr., for defendant, appellee.

DEVIN, J. From the pleadings and the records introduced in the trial, Judge Frizzelle concluded that the plaintiff was estopped further to prosecute this action. He held that the judgment heretofore rendered in a former action between the same parties involving the same subject matter was valid and conclusive as to the matters herein alleged as the basis of the present action. Judgment was rendered accordingly and in this we concur.

"Where a second action or proceeding is between the same parties as a first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could prop-

erly have been litigated and determined in the former action or proceeding. *Distributing Company v. Carraway,* 196 N.C. 58, 144 S.E. 535; *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564, rehearing denied in 179 N.C. 525, 103 S.E. 12; *Clothing Co. v. Hay,* 163 N.C. 495, 79 S.E. 955; *Tuttle v. Harrill,* 85 N.C. 456." *King v. Neese,* 233 N.C. 132, 63 S.E. 2d 123.

The judgment of Judge Godwin (affirming on appeal the judgment of the clerk) from which no appeal was taken was conclusive and binding as to all matters therein decided and also as to all matters which could properly have been determined in that action. *Gaither Corp. v. Skinner,* 241 N.C. 532; *In re Canal Co.,* 234 N.C. 374, 67 S.E. 2d 276; *Banks v. Lane,* 171 N.C. 505, 88 S.E. 754; 30 A.J. 914.

The Godwin judgment was not void (*Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311) and even if irregular or even erroneous was binding on the parties, unless set aside or reversed on appeal, *Collins v. Highway Comm.,* 237 N.C. 277, 74 S.E. 2d 709; *In re Canal Co., supra;* provided the court had jurisdiction of the person and the subject matter. *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20; McIntosh N. C. P. & P. 746. It is not subject to collateral attack. *Price v. Edwards,* 178 N.C. 493, 101 S.E. 33.

It is suggested by the plaintiff that estoppel is not pleaded by the defendants and that this defense is not now available. But the rule is that when all the facts sufficient to constitute estoppel by judgment are set out in the answer, formal pleading in terms is not required. It is the substance and not necessarily the form of a plea that matters. *Alston v. Connell,* 140 N.C. 485 (494); *Current v. Webb,* 220 N.C. 425, 17 S.E. 2d 614; *Miller v. Bank,* 234 N.C. 309 (320), 67 S.E. 2d 362; McIntosh N. C. P. & P., p. 481; 31 C.J.S. 446.

We have examined the entire record in this case and reach the conclusion that the judgment of Judge Frizzelle should be

Affirmed.

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

F. R. ANDREWS AND CHARLOTTE H. ANDREWS v. CLAY L. BRUTON.

(Filed 13 April, 1955.)

1. Pleadings § 24—

Recovery must be based on the case made out by the allegations of the complaint, and proof without allegation is as ineffective as allegation without proof.

2. Trial § 23f—

When there is material variance between allegation and proof, motion for judgment as of nonsuit will be allowed.

3. Trespass to Try Title § 3—

In an action to recover for trespass on lands by the cutting and removal of timber therefrom, defendant's denial of plaintiffs' title places the burden upon plaintiffs to establish both their title and defendant's trespass, and where plaintiffs' proof of ownership relates to a description of the property not alleged in the complaint, but at variance therewith, nonsuit should be entered for material variance and for lack of jurisdiction.

4. Same—

In an action to recover for the wrongful cutting and removal of timber from land claimed by plaintiffs, plaintiffs must locate the land by fitting the description in their deeds to the earth's surface, regardless of whether they rely upon their deeds as proof of title or color of title, G.S. 8-39, or, in the absence of title or color of title, they are required to establish the known and visible lines and boundaries of the land actually occupied by them for the statutory period.

5. Trespass to Try Title § 4—

When one wrongfully enters upon the land of another and cuts trees therefrom, the owner of the land has an election of remedies, but when the owner elects to sue for the value of the timber alleged to have been converted by defendant, recovery cannot be had on the basis of the difference in the value of the land before and after the alleged trespass.

6. Trespass to Try Title § 3—

Plaintiffs alleged that defendant owned land adjoining their lands. There was a finding that beginning at the stake as claimed by defendant and running the boundaries of the tract of land claimed by defendant, the disputed area is included in the description of the lands claimed by the defendant in his answer. *Held:* The finding does not in effect establish defendant's title to the disputed area, but only that defendant claims it does.

7. Trespass to Try Title § 2—

Where, in an action for damages for wrongful cutting and removal of timber from land claimed by plaintiffs, defendant denies plaintiffs' title and alleges that defendant owned the described tract and that the timber cut by him was on this tract, and prays that he be adjudged the owner of the tract described in the answer, *held*, the answer amounts to a cross action to establish defendant's title to the tract described in the answer,

and when no determination is made either by the referee or the court of the issues raised by the answer, the defendant's cross action is still pending, and a new trial on the cross action will be ordered.

8. Reference § 14i—

Where on appeal to the Supreme Court from an order affirming the referee's report and judgment entered in accordance therewith in favor of plaintiffs in an action to recover for the wrongful cutting and removal of timber from lands claimed by plaintiffs, nonsuit is entered in plaintiffs' cause and a new trial is ordered on defendant's cross action to establish title; the findings of fact and conclusions of law of the referee are vacated.

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

APPEAL by defendant from *Rudisill, J.*, judgment entered 30 August, 1954, after hearing at July Term, 1954, of MONTGOMERY.

Action for damages for alleged wrongful cutting, removal and conversion by defendant of plaintiffs' timber.

Plaintiffs allege that defendant trespassed and cut timber on their tract of land in Pee Dee Township, Montgomery County, described in the complaint as follows:

"On the waters of upper Richland Creek adjoining the lands of R. Bruton (formerly) and Mrs. Gaines. BEGINNING at the second corner of Lot No. 2 stake, two red oaks, post oak and dogwood pointers and runs N 85 poles to a stake, three blazed pines, thence West 85 poles to the beginning of Lot No. one, post oak and red oak pts.; thence South 86½ East 67 poles to the BEGINNING, containing 35 acres, more or less."

Answering, defendant denied plaintiffs' title to the land described in the complaint; and, by way of further answer and defense, averred that defendant owned a described tract containing 100 acres, more or less, "Except a lappage of about 20 acres taken off by James Livingston Estate," and that the timber cut by him was on defendant's said tract. Defendant prayed that he be adjudged the owner of the tract described in the answer.

A court survey was made, showing the respective contentions of the parties.

The parties consented to a reference. After hearing, the referee filed his report, setting forth his findings of fact and conclusions of law. Defendant excepted to findings of fact numbered 4, 5, 7, 8, 9, 10, 11 and 12 and to all conclusions of law. At July Term, 1954, the cause came on before Rudisill, J., then presiding, upon defendant's exceptions to, and upon plaintiffs' motion for confirmation of, the referee's report. It was stipulated that judgment might be rendered out of term and out of the county. On 30 August, 1954, Judge Rudisill, adopting the findings of fact and conclusions of law made by the referee, entered judgment in accordance therewith in favor of plaintiffs.

It was adjudged, *inter alia,* that plaintiffs, as tenants in common, are the owners of the land, from which the timber was cut, shown on the court maps and described in the judgment as follows:

"BEGINNING at point numbered 1 in red and running thence south 85-00 east 1084, plus or minus, feet to point marked X in red; thence south 2-00 west 227.5, plus or minus, feet to point marked Y in red; thence north 87-00 west 1097.5 feet to point marked B in red; thence south 5-00 west 192 feet to beginning, point 1 in red. That this is the same area as that area indicated on Map number 2 prepared by Frank Clark shown in red lines lying between area 1 to X to Y to B to 1 on said Map number 2."

Defendant appealed, assigning errors.

Garland S. Garris for plaintiffs, appellees.
David H. Armstrong for defendant, appellant.

BOBBITT, J. A plaintiff must make out his case *secundum allegata. Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898. There can be no recovery except on the case made by his pleadings. *Collas v. Regan,* 240 N.C. 472, 82 S.E. 2d 215. Proof without allegation is no better than allegation without proof. *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654. When there is a material variance between allegation and proof, motion for judgment of nonsuit will be allowed. *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470.

The subject matter of which the court had jurisdiction extended only to the tract of land as described in plaintiffs' allegations. *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321, and cases cited.

It will be readily observed that the tract of land described in plaintiffs' allegations, if located, would be triangular in shape. Plaintiffs made no attempt to locate their land in accordance with the calls alleged.

Plaintiffs undertook to establish ownership of Lot No. 3 in the division (1860) of the Edmund Andrews land, a quadrangular tract containing 35 acres, more or less. But plaintiffs' allegations do not describe said Lot No. 3, nor do they incorporate by reference a description thereof as set forth in any deed, map or land division. Finding of fact No. 1 was that the deeds under which plaintiffs claim convey to them "the lands described in the complaint." Hence, we refrain from discussing either the competency or the sufficiency of the evidence offered by plaintiffs for the purpose of locating (1) the boundaries of the Edmund Andrews tract, (2) the boundaries of said Lot No. 3, and (3) the boundaries of the area where the timber was cut within said Lot No. 3.

Both for lack of jurisdiction and for material variance between allegation and proof, defendant's motion for judgment of nonsuit should have been allowed.

It seems appropriate to call attention to certain well-established rules. Their allegations as to title having been denied, it was incumbent upon plaintiffs to establish both ownership and trespass. *Norman v. Williams,* 241 N.C. 732, 86 S.E. 2d 593, and cases cited. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface. G.S. 8-39; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Parsons v. Lumber Co.,* 214 N.C. 459, 199 S.E. 626. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. *Carswell v. Morganton,* 236 N.C. 375, 72 S.E. 2d 748.

It is well to note that no issue of title was involved in *Newkirk v. Porter,* 240 N.C. 296, 82 S.E. 2d 74. The sole issue was the location of the true dividing line between adjoining owners. Such is not the case here. Here defendant explicitly denied plaintiffs' title.

Attention is directed to the fact that plaintiff sued for the value of the timber alleged to have been converted by defendant to his own use. However, the damages awarded by the judgment are based on the difference in value of the 35 acre tract, being said Lot No. 3, before and after the alleged trespass. When one wrongfully enters upon the land of another and cuts trees thereon, the owner of the land has an election of remedies. *Williams v. Lumber Co.,* 154 N.C. 306, 70 S.E. 631; *Brady v. Brady,* 161 N.C. 324, 77 S.E. 235; *Cedar Works v. Lumber Co.,* 161 N.C. 603, 77 S.E. 770; *Blevens v. Lumber Co.,* 207 N.C. 144, 176 S.E. 262; *Bunting v. Henderson,* 220 N.C. 194, 16 S.E. 2d 836. Damages recoverable by plaintiffs, if any, would have to be determined on the basis therefor as alleged. *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785.

Plaintiffs alleged that defendant owned land adjoining their lands on the north. Defendant admitted that he owned the land adjoining on the north the land *claimed* by plaintiffs but denied plaintiffs' title.

Defendant assigns as error the refusal of the court to enter judgment establishing defendant's ownership of the tract of land described in the answer. He bases his position upon finding of fact No. 6, to which no exception was taken, viz.: "According to the Clark survey in this action, beginning at the iron stake corner No. 1 on Map No. 2, pointed out by the defendant and claimed by him as his southwest corner, and running the boundaries of the tract of land claimed by defendant, the disputed area shown on Map No. 2 is included in the description of the

lands claimed by the defendant in his answer." Defendant argues that since plaintiffs alleged that defendant owned the land adjoining plaintiffs' on the north and since the boundaries of defendant's tract *as claimed* by him include the area where the timber was cut, this in effect established defendant's title to the disputed area. This is a *non sequitur*. The quoted finding does not establish defendant's ownership of the land comprising the disputed area, but only that defendant claims it does.

Defendant offered evidence bearing upon the location of the tract described in the answer. Neither the referee nor the court made specific findings of fact bearing upon defendant's evidence and contentions as to the location of his boundaries.

It is noted that the location of the lappage "of about 20 acres taken off by James Livingston Estate," specifically excepted from the boundaries described in the answer, is not shown.

Treating the defendant's answer as alleging a cross action to establish his ownership of the tract of land described therein, we note that no determination was made either by the referee or by the court of the issues raised thereby. Hence, defendant's cross action is still pending; and the cause must go back to the Superior Court for trial thereof. Plaintiffs may move for leave to file amended pleadings, if so advised.

For reasons stated, the judgment of the court below is reversed as to plaintiffs' action, and a new trial on defendant's cross action is ordered. This disposition vacates the findings of fact and conclusions of law of the referee.

As to plaintiffs' action: Reversed.

As to defendant's cross action: New trial.

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

MRS. GERTRUDE S. WHITE v. WILLIAM B. KELLER AND HARRY VANDER LINDEN.

(Filed 13 April, 1955.)

1. Trial § 49—

The trial court has the discretionary power to set aside the verdict as being against the weight of the evidence, and such action by the trial court is not reviewable in the absence of abuse of discretion.

2. Appeal and Error § 2—

Where the trial court sets aside the verdict in favor of defendant on the ground that the verdict is contrary to the weight of the evidence, defendant may not appeal from the action of the trial court in denying the defend-

ant's motion for judgment as of nonsuit, since there is neither verdict nor judgment as the basis upon which the appeal on this ground can rest.

3. Torts § 6—

A defendant sued in tort is given the right by statute to bring into the action another joint tort-feasor for the purpose of determining his contingent liability for contribution so that all matters in controversy growing out of the same subject of action may be settled in one action, even though the plaintiff may thus be delayed in securing his remedy, G.S. 1-240.

4. Same—

Those who are joint tort-feasors for the purpose of contribution within the purview of G.S. 1-240 are those who act together in committing the wrong, or whose acts, if independent of each other, unite in causing a single injury.

5. Same—

The right to join additional parties for the purpose of contribution under G.S. 1-240 may not be used for the purpose of injecting into the litigation another action not germane to plaintiff's action.

6. Same—Cross action held insufficient to state facts entitling one defendant to joinder of additional defendant for contribution.

Defendant in his cross action for contribution alleged that his co-defendant parked his car so close to the highway that its rear projected into the highway about two feet, that defendant was driving a jeep which was pulling a hay baler eight feet wide, that the hay baler struck the co-defendant's car, then struck the side of a bridge abutment, causing the jeep to be deflected or "jackknifed" in front of plaintiff's automobile, causing the injury in suit. *Held:* Either the hay baler struck the co-defendant's car as a result of the defendant's negligence in miscalculating the distance, there being ample unobstructed highway for defendant to have passed the parked car in safety, or the hay baler struck the bridge abutment through the negligence of the defendant in driving too close to the abutment, so that in either event the negligence of the co-defendant in parking his car too close to the highway was not a proximate contributing cause of plaintiff's injury, and the co-defendant's demurrer to the cross action was properly allowed.

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

APPEAL by defendant from *Rudisill, J.*, January Term 1955 of CATAWBA.

Civil action to recover damages for injury to person and property resulting from collision of motor vehicles alleged to have been caused by the negligence of defendant Keller.

The material facts upon which rest the questions of law presented by the appeal are these:

On the 3rd day of June 1954, about 3:00 p.m., the plaintiff White was driving her automobile south across the highway bridge over the Catawba River north of Hickory. Near the south end of the bridge her

automobile came in collision with a jeep being driven north by defendant Keller. Attached to the rear of the jeep, as a trailer, was a hay baler eight feet wide. As result of the collision plaintiff suffered injury to her person and property and instituted this action to recover damages therefor from defendant Keller, alleging negligence in the operation of the jeep.

The defendant Keller denied negligence on his part, but further alleged that if he were in any respect negligent, the injury complained of was proximately caused or contributed to by the negligence of Harry Vander Linden, in that Vander Linden had parked his automobile on the east side of the highway a short distance (24 feet) from the south abutment of the bridge and so close to the highway that the rear of his automobile projected into the highway about two feet in which position it was struck by the hay baler, and it was alleged that this caused the jeep to go out of control and to collide with plaintiff's automobile. On defendant Keller's motion, Vander Linden was made party defendant for the purpose of determining his contingent liability for contribution as joint tort-feasor.

At the close of all the evidence the court entered judgment of nonsuit as to Vander Linden. On issues submitted in plaintiff White's action against Keller the jury returned verdict in favor of Keller, and the court in its discretion set the verdict aside as being against the weight of the evidence.

Defendant Keller excepted to these rulings of the court and appealed.

Willis & Geitner for plaintiff, appellee.
L. H. Wall and Claude F. Seila for defendant, appellant.
Townsend & Todd for defendant, appellee.

DEVIN, J. By this appeal the defendant Keller seeks to review the ruling of the trial judge in denying his motion for judgment of nonsuit as to plaintiff White's action, and in setting aside the verdict as contrary to the weight of the evidence. As the verdict was set aside by the judge in the exercise of his discretionary power, his action may not be reviewed, in the absence of any suggestion of abuse of discretion. *Anderson v. Holland,* 209 N.C. 746, 184 S.E. 511; *Hawley v. Powell,* 222 N.C. 713, 24 S.E. 2d 523; *Poniros v. Teer Co.,* 236 N.C. 145, 72 S.E. 2d 9.

Nor will an appeal lie at this time from the ruling of the judge denying defendant's motion for judgment of nonsuit. Since there is neither verdict nor judgment, there is no basis upon which his appeal on this ground can rest. As result of the action of Judge Rudisill, the case is still on the docket of Catawba Superior Court for trial on the issues raised by the pleadings as between White and Keller.

The defendant Keller also assigns as error the action of the trial judge in allowing defendant Vander Linden's motion for judgment of nonsuit as to Keller's cross complaint for contribution under the statute, G.S. 1-240.

It seems the judge inadvertently nonsuited the plaintiff White as to Vander Linden, but the plaintiff has sought no recovery as to him. She offered neither allegation nor evidence tending to impose on him any liability for her injury. *Pascal v. Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534. But the judge entered judgment of nonsuit as to defendant Keller's cross complaint against Vander Linden for contribution. Whether this be regarded as a nonsuit (G.S. 1-183) or more accurately a demurrer to the evidence, it was adjudged by the court, upon consideration of all the testimony adduced, that the evidence was insufficient to make out a case for contribution as joint tort-feasor as against Vander Linden, and he was accordingly dismissed from the case *sine die*.

It was said in *Evans v. Johnson*, 225 N.C. 238, 34 S.E. 2d 73:

"The right of a defendant sued in tort to bring into the action another joint tort-feasor and upon sufficient plea to maintain his cross action against him for the purpose of determining his contingent liability for contribution is given by statute, G.S. 1-240, and upheld by numerous decisions of this Court. *Wilson v. Massagee*, 224 N.C. 705; *Godfrey v. Power Co.*, 223 N.C. 647. The purpose of the statute is to permit defendants in tort actions to litigate mutual contingent liabilities before they have accrued, *Lackey v. R. R.*, 219 N.C. 195, 13 S.E. 2d 234, so that all matters in controversy growing out of the same subject of action may be settled in one action, *Freeman v. Thompson*, 216 N.C. 484, 5 S.E. 2d 434, though the plaintiff in the action may be thus delayed in securing his remedy. *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397. Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury. *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648. The right thus conferred by the statute is 'rooted in and springs from the plaintiff's suit, but projects itself beyond that suit.' *Godfrey v. Power Co., supra.*"

The question of the sufficiency of the cross complaint of a defendant to make out a case for contribution against an alleged joint tort-feasor was considered by this court on appeal from the ruling of the court below sustaining a demurrer in *Hobbs v. Goodman*, 240 N.C. 192, 81 S.E. 2d 413, as was also done in *Evans v. Johnson, supra.* In *Bass v. Ingold*, 232 N.C. 295, 60 S.E. 2d 114, the demurrer of the alleged joint tort-feasor was overruled by the trial court but sustained on appeal. In *Read v. Roofing Co.*, 234 N.C. 273, 66 S.E. 2d 821, the cross com-

plaint of the original defendant against an alleged joint tort-feasor for contribution was challenged by demurrer and on appeal the ruling of the trial court was affirmed. The sufficiency of the cross complaint for contribution among defendants in tort was also considered on appeal in *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566. The sufficiency of the evidence offered in support of a cross action for contribution was considered on demurrer to the evidence in *Pascal v. Transit Co., supra.* It was there held that the motion of the alleged joint tort-feasor for judgment as of nonsuit on the cross action was properly denied.

The cross action for contribution between defendants charged with tort, permitted by G.S. 1-240, may not be used, however, to interject into the litigation another action not germane to the plaintiff's action. *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397. It was said in *Hobbs v. Goodman, supra:* "Defendants are not permitted to litigate in plaintiff's action differences which are not directly related thereto . . . The purpose of the Act, G.S. 1-240, is to permit a defendant who has been sued in tort to bring into the action, for the purpose of enforcing contribution, a joint tort-feasor whom the plaintiff could have joined as party defendant in the first instance. *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335."

However, upon consideration of the evidence offered in the case at bar as shown by the record, we reach the conclusion that the ruling of the trial judge in holding this evidence insufficient to make out a case for contribution by Vander Linden should be sustained.

It appears that defendant Vander Linden's automobile was parked diagonally near the highway, 24 feet south from the south abutment of the bridge, and that the rear of his automobile (left rear fender) extended out two feet into the paved road which was at that point seventeen feet wide. It was midafternoon on a clear day. No other traffic was moving in the vicinity save the automobile of plaintiff some distance away moving south along the bridge. The hay baler attached to Keller's jeep was eight feet wide, considerably wider than the jeep. In passing the automobile Keller apparently miscalculated the distance or was oblivious of the extra width of the hay baler. In any event, the hay baler came in contact with the automobile and then struck the side of the bridge abutment. This caused the jeep to be deflected, or "jackknifed," in front of plaintiff's automobile.

So that whether the contact of the hay baler with the rear of the Vander Linden automobile should have been foreseen and avoided—fifteen feet of the roadway was unobstructed—or whether Keller, in meeting plaintiff's oncoming automobile, negligently drove the jeep so close to the abutment of the bridge that the hay baler was caused to strike it,

resulting in the collision complained of, we think the evidence is insufficient to show that any negligence on Vander Linden's part proximately caused or contributed to plaintiff's injury.

We reach the conclusion that the rulings of the court below should be sustained.

Affirmed.

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

CAROLYN CHRISTIE (PRETLOW) JAMES, PETITIONER, v. RUTH RAINES PRETLOW, RESPONDENT.

(Filed 13 April, 1955.)

1. Appeal and Error § 6c (2)—

A sole exception to the signing of the judgments presents the one question whether the facts found are sufficient to support the judgment.

2. Appeal and Error § 40d—

When there are no exceptions to the findings of fact, it will be presumed that they are supported by evidence, and they are binding on appeal.

3. Parent and Child § 4a—

Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children, and while this right is not absolute, it will be interfered with or denied only when the welfare of the children clearly requires it for the most substantial and compelling reasons.

4. Same—

While the preferences of the children will be given weight in accordance with their age and intelligence in determining their custody, in a contest between a parent and one not connected by blood to the children, such preferences will not ordinarily prevail over the natural right of the parent, unless essential to the children's welfare.

5. Same—

In this special proceeding to determine the custody of children as between their mother and their stepmother, their father being dead, the court found that the mother, stepmother, and the father, a few days before the father's death, had agreed that the children should stay with their father and stepmother during the scholastic year. *Held:* The best interest and the welfare of the children demand that their custody for the school year be not disturbed, and that part of the judgment awarding their custody to their stepmother for the balance of the current school year is affirmed.

6. Same—Findings held insufficient to support judgment awarding custody of children to stepmother in preference to mother.

In this special proceeding to determine the custody of children as between their mother and their stepmother, their father being dead, the court found that their father had set up a trust agreement to provide for the children's support and education and had appointed their stepmother as trustee for that purpose, and that the children wished to live with their stepmother so that they might continue to attend the same high school, but there were no findings clearly and plainly showing that the interests and welfare of the children would be promoted by awarding their custody to their stepmother. *Held:* In the absence of such findings, the custody of the children should have been awarded to their mother after the end of the current school year, and the judgment awarding their custody to their stepmother after the expiration of the current school year is thus modified.

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

APPEAL by petitioner from *Burgwyn, Emergency Judge,* Special August Term 1954 of CARTERET.

Special proceeding brought under the provisions of G.S. 50-13 to determine the custody of the 16 year old twins, Carolyn Ann Pretlow and Robert Joel Pretlow: petitioner Carolyn Christie James is their mother, and respondent Ruth Raines Pretlow is their stepmother.

The facts found by the Judge material for decision of this appeal are these: Petitioner and James Paddison Pretlow, Sr. were married in March 1934, and the twins, Carolyn Ann Pretlow and Robert Joel Pretlow, were born of that marriage on 16 February 1939 in Wilmington, North Carolina. On 18 April 1941 petitioner secured a divorce in the State of Florida from her husband, and shortly thereafter married her present husband, John James, Jr., who, since August 1953, has practiced law in Beaufort, North Carolina. After the divorce James Paddison Pretlow, Sr. married Ruth Raines Pretlow, the respondent. On 16 August 1954 James Paddison Pretlow, Sr. was killed in an automobile wreck. For the last few years of his life the custody of the twins had been divided between their father living in Brunswick County with his wife, the respondent, and petitioner. By agreement between their parents the twins, during the school year 1953-1954, lived with their father and respondent, and attended Chestnut Street High School in Wilmington. After the scholastic year 1953-1954 ended, the twins lived with petitioner but returned to their father's home to attend his funeral. About 12 August 1954, the father and mother of the twins and their stepfather agreed that the twins should live with their father and respondent during the scholastic year 1954-1955 in order to attend the New Hanover High School in Wilmington. Although the twins agreed with their stepfather to return and live with him and their mother, they

desire to live with their stepmother, so that they can attend the High School in Wilmington. The twins expressed equal affection and love for their mother, stepmother and stepfather. The mother and stepmother are both ladies of good character, and their respective homes are fit and proper places for the twins to live in. Their father by trust agreement and indenture and by will provided for the support, maintenance and education of these children, and for the maintenance of respondent: appointing for that purpose respondent as trustee of his property. The best interest and welfare and happiness of these children will be promoted by awarding their custody to respondent, who lives in the home of her deceased husband, *at least* for the coming scholastic year of 1954-1955, so that they can attend the New Hanover High School in Wilmington, where they are enrolled. Whereupon the Judge entered judgment awarding the custody of the twins to respondent, and ordered that they be permitted to visit their mother at such times as are agreeable to the parties, but only on week-ends during the school year or during vacation.

From the judgment entered, the petitioner appeals, assigning error.

Luther Hamilton and Luther Hamilton, Jr., for Plaintiff, Appellant.
Rountree & Rountree for Respondent, Appellee.

PARKER, J. Petitioner's sole exception is to the signing of the judgment. Therefore, her assignment of error, based on this exception, presents one question for decision: whether the facts found by the Judge are sufficient to support the judgment. *Warshaw v. Warshaw,* 236 N.C. 754, 73 S.E. 2d 900; *Glace v. Throwing Co.,* 239 N.C. 668, 80 S.E. 2d 759; *Wyatt v. Sharp,* 239 N.C. 655, 80 S.E. 2d 762; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664.

The judge's findings of fact not having been excepted to "are presumed to be supported by the evidence and are binding on appeal." *Donnell v. Cox, supra.*

Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it. *Latham v. Ellis,* 116 N.C. 30, 20 S.E. 1012; *In re Turner,* 151 N.C. 474, 66 S.E. 431; *Atkinson v. Downing,* 175 N.C. 244, 95 S.E. 487; *Brickell v. Hines,* 179 N.C. 254, 102 S.E. 309; *Clegg v. Clegg,* 186 N.C. 28, 118 S.E. 824; *In re Shelton,* 203 N.C. 75, 164 S.E. 332; 67 C.J.S., p. 637. See *Wall v. Hardee,* 240 N.C. 465, 82 S.E. 2d 370.

This Court said in *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144: "In determining the custody of children, their welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after judicial investigation, it is found that the best interest of the children is subserved thereby."

Courts should ever bear in mind that a child "over whom . . . immortality broods like the day" is "father of the man," and his happiness and welfare is a matter of prime consideration.

However, courts should never lightly disregard the legal rights of parents, or a surviving parent, nor should their natural and emotional ties with their children be overlooked. ". . . the law seeks to work in harmony with nature, and to continue those ties which bind man to his own flesh . . ." *Morris v. Grant,* 196 Ga. 692, 27 S.E. 2d 295.

"In order to justify depriving a parent of the custody of a child in favor of third persons there must be substantial reasons or, as various courts have put it, the reasons must be real, cogent, weighty, strong, powerful, serious, or grave." 67 C.J.S., Parent and Child, p. 651.

The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between parents, but is not controlling. Where the contest is between a parent and one not connected by blood to the child, the desire of the child will not ordinarily prevail over the natural right of the parent, unless essential to the child's welfare. 39 Am. Jur., Sec. 21; 67 C.J.S., Sec. 12c.

The case of *Harris v. Harris,* 115 N.C. 587, 20 S.E. 187, involved the custody of a 9½ year old boy between the mother and father of the child. The Court said: "What the preferences of the child were is not found as a fact, though this has weight always with a court in such cases according to the age and intelligence of the child."

Chief Justice Pearson said for the Court in *Spears v. Snell,* 74 N.C. 210: "The boy during a long residence in the family of his grandfather and uncle has formed attachments and associations which he is unwilling to sever. At the age of thirteen, a minor has a right to have his wishes and feelings taken into consideration, whether in the choice of a master as an apprentice, or of a guardian to whom *his estate* and person are to be committed, or of a friend who, without respect to the want of an estate, will undertake to provide for his maintenance and education, to prevent his being put out as an apprentice, as in our case." This Court reversed the lower court holding that the facts of the case "show beyond all question that it is for the interest of the boy to remain with his uncle," and not to be given to the custody of his stepfather or mother.

The Judge found that the father, mother and stepmother of these two children, some four days before their father was killed in an automobile wreck, agreed that they should live with their father and stepmother during the scholastic year 1954-1955 in order to attend the New Hanover High School in Wilmington. This special proceeding was argued before us on 22 March 1955. The school year 1954-1955 will end in two or three months. The custody of these two children for that school year is now almost a *fait accompli,* and it is perfectly clear that their best interests and welfare demand that their custody for this school year be not disturbed.

The awarding of their custody to their stepmother after this school year is based primarily upon the findings of fact that these children desire to live with their stepmother so that they can attend the High School in Wilmington, that their father by trust agreement and indenture and by will provided for their support and education and appointed their stepmother as trustee of his property for that purpose, and the conclusion of law that their best interest and welfare and happiness will be promoted by awarding their custody to respondent so that they can attend this school. The appellee contends that this Court "should be satisfied that the opportunities offered these children in the educational field in the New Hanover High School are far superior to those offered them at the Beaufort High School, or the High School in Carteret County, as the children themselves specifically testified without serious contradiction," and that this Court under the supervisory powers given us under Article IV, Section 8, of the State Constitution, should correct the judgment below so as definitely to give the custody of these children to their stepmother, at least, for the school years 1955-1956 and 1956-1957 so that they can graduate from the High School in Wilmington. Whether the contention that the High School in Wilmington offers better educational advantages than the High School in Beaufort or Carteret County is correct or not, we have no opinion. Suffice it to say that the Trial Judge made no such findings of fact in that respect, as contended for by the appellee.

In this contest between a mother and a stepmother for the custody of these children, the findings of fact by the Judge do not clearly and plainly show that their interests and welfare will be promoted by awarding their custody to their stepmother, and the judgment below must be modified by striking out the part awarding their custody to their stepmother after the scholastic year 1954-1955.

The mother and stepmother are both ladies of good character, and both have fit and proper homes to rear these children. These 16 year old children at the trial below expressed equal affection and love for

their mother, stepmother and stepfather. It is unfortunate that this contest over their custody has arisen. In passing upon this appeal it is our duty to apply to the facts found below and the judgment the applicable principles of law, and in doing so, in accordance with what has been said above, the judgment below must be

Modified and affirmed.

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

GUY FRYE & SONS, INC., v. JOHN J. FRANCIS.

(Filed 13 April, 1955.)

1. Trial § 49—

A motion to set aside the verdict and grant a new trial on the ground that the verdict is contrary to the greater weight of the evidence is directed to the sound discretion of the trial judge, and his ruling thereon is not reviewable on appeal in the absence of abuse of discretion, G.S. 1-207.

2. Trial § 47—

A motion for a new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his ruling thereon is not reviewable in the absence of abuse of discretion.

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

APPEAL by plaintiff from *Pless, J.*, and a jury, at May Term, 1954, of CATAWBA. Judgment signed 1 October, 1954.

Civil action by plaintiff contractor to recover balance alleged to be due for materials furnished and labor performed in constructing and remodeling several buildings for the defendant.

The plaintiff's bill of particulars filed in support of the complaint shows total charges for labor and materials amounting to $21,315.35, and partial payments made by the defendant thereon totaling $17,614.91, thus indicating a balance due in the sum of $3,700.44. The partial payments shown in the bill of particulars are ten in number. They are itemized as to dates and amounts and range from $500 to $5,000. Only one is in the amount of $5,000. It is shown to have been made 21 May, 1949.

The defendant in his answer does not challenge the charge items totaling $21,315.35, and he admits all the credits shown in the bill of particulars. However, in addition to the credit of $5,000 shown to have been made on 21 May, 1949, the defendant alleges he made a like pay-

ment of $5,000 on 19 August, 1949, and that by reason thereof he has overpaid the plaintiff in the approximate amount of $1,300. On the basis of these allegations, the defendant prays judgment by way of counterclaim over against the plaintiff for the amount of the alleged overpayment.

In the trial below the single question at issue was whether the defendant made two payments of $5,000 each, or only one.

Guy Frye testified for the plaintiff in substance: that the defendant made only one payment of $5,000 and that it was made on 21 May, 1949. He explained that on that date he endorsed the defendant's note at the First National Bank, in Hickory, in the amount of $5,000 and the Bank made the defendant a loan in that amount and that the proceeds were turned over to the plaintiff for credit on the defendant's account; that the defendant later paid the note. Cross-examination: "Yes, that's the note I endorsed May 21, 1949, and I got the money out of it that day. . . . I did my banking at the First National . . . He did not pay but one $5,000 . . . No he did not pay me down at Myrtle Beach in August of 1949."

The defendant Francis testified in material part: ". . . Mr. Frye went on a note for me for $5000 on May 21. Mr. Frye wanted me to pay him some money and I did not have it. . . . Mr. Frye went with me to the bank . . . and he signed it—a note for 30 days, . . . The note was for $5,000. Mr. Frye endorsed the note and Mr. Frye got the money May 21. The note was renewed at the end of 30 days. It was paid July 16, 1949, by check. . . . In August, 1949, Mr. Frye came to me and complained and said he had to have some more money, . . . I told him I did not have any money . . . I thought maybe they would go on another note, . . . He went and . . . made out another note for $5000. . . . He signed it for 90 days. . . . Mr. Frye got the money. When it was due, it was renewed, . . . It was paid when I sold the plant in 1952." Cross-examination: "Yes, I am telling the jury I made two $5000 payments. . . . Q. And how much is it that you claim you overpaid . . .? A. $1,300. Q. When do you say the overpayment occurred? A. When we made the last $5000 payment August 19."

T. L. Cilley, Assistant Cashier of First National Bank, testified: ". . . There is a credit to Guy Frye's account August 19, 1949, for $5000. I have the original deposit slip with me. It is . . . dated 8-19, the item being described Francis, amount $5,000. . . . The ledger liability sheet shows August 19, 1949. John Francis signed a note for $5000, endorsed by Guy Frye. This was a new note to be due February 17, 1950." Cross-examination: ". . . The August 19 proceeds were deposited to Mr. Frye's account."

Guy Frye, recalled, testified: "I did not get but one $5000 payment. . . . I am absolutely certain that it was May 21 when I got the $5000, and my books show that this was the date."

T. L. Cilley, recalled by the court, testified in substance: that he was satisfied separate loans of $5000 each were made the defendant, on Frye's endorsement, one in May 1949, the other in August 1949; that when a loan of that kind is made the proceeds may be disbursed in either of three ways: (1) deposit credit may be given, (2) the proceeds may be paid out in cash, or (3) a bank check may be issued. The plaintiff's ledger sheet shows no record of a $5,000 deposit on 21 May, 1949, nor at any time during May of that year; that on 21 May, 1949, there "was a smaller credit to Mr. Frye's account, but apparently no connection with this particular note. The credit is $3,610, but I do not have the original deposit slip. I do not know from what source that came."

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

"1. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: Nothing.

"2. What amount, if any, is the defendant entitled to recover of the plaintiff? Answer: Nothing."

The plaintiff moved to set aside the verdict on the first issue as being against the greater weight of the evidence. Whereupon the court stated that since the jury had gone out, the witness Cilley had communicated with the court and stated that on further investigation he learned that the Bank had paid the proceeds of the 21 May note to the defendant with its cashier's check, which check had been deposited in or cashed by a bank in Myrtle Beach, South Carolina.

The plaintiff moved to amend the bill of particulars by changing the 21 May $5,000 credit to read 19 August, 1949.

The presiding Judge stated that under all the circumstances he would like to have Mr. Cilley make a thorough investigation of the records of the Bank as to Mr. Frye and such records as the defendant might have. Thereupon, by consent, the court took the motions under advisement and instructed Mr. Cilley to report to him his findings.

It was further agreed the court could pass upon the motions in or out of term, out of the county and out of the district.

Thereafter, and under date of 10 July, 1954, the witness Cilley mailed the presiding Judge at his home in Marion, N. C., a written report based on his further examination of the records of the Bank. These in substance are the material facts reported:

1. That there is no record of any deposit of $5,000 to the plaintiff's credit on 21 May, 1949.

2. That the original deposit slip exhibited to the court at the trial shows a credit to plaintiff's account on 19 August, 1949, "in the amount of $5,000, described as proceeds of Francis note."

3. In an attempt to reconcile the discrepancy under investigation, it was found that Mr. Frye's daughter went to the First National Bank when the action was being prepared and requested information about a note for $5,000 that Mr. Frye had endorsed for the defendant, and on the basis of information received, Mr. Frye assumed that he had received the proceeds of the $5,000 loan made on 21 May, 1949, but the records of the Bank show that these proceeds were given to the defendant in the form of a cashier's check for $4,975, and that he deposited or cashed the check at his bank in Myrtle Beach, South Carolina.

The judgment entered 1 October, 1954, recites that after full consideration of the motion and additional evidence the court is of the opinion the verdict should not be disturbed. The judgment decrees that neither party recover anything of the other.

From the judgment so entered, the plaintiff appeals.

Theodore F. Cummings for plaintiff, appellant.

Willis & Geitner for defendant, appellee.

JOHNSON, J. A motion to set aside the verdict and grant a new trial on the ground that the verdict is contrary to the greater weight of the evidence is directed to the sound discretion of the presiding judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. G.S. 1-207; *Poniros v. Teer Co.*, 236 N.C. 145, 72 S.E. 2d 9; *Goodman v. Goodman,* 201 N.C. 808, 161 S.E. 686. See also *Roberts v. Hill,* 240 N.C. 373, bot. p. 380, 82 S.E. 2d 373.

Similarly, a motion for new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his decision, whether granting or refusing the motion, is not reviewable in the absence of an abuse of discretion. *Farris v. Trust Co.*, 215 N.C. 466, 2 S.E. 2d 363; *Bullock v. Williams*, 213 N.C. 320, 195 S.E. 791; *Fleming v. R. R.*, 168 N.C. 248, 84 S.E. 270; *Carson v. Dellinger,* 90 N.C. 226.

In the case at hand abuse of discretion is not claimed by the appellant and has not been made to appear. It necessarily follows that the result of the trial must be upheld.

No error.

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

STATE v. MAMIE GARRETT HARVEY.

(Filed 13 April, 1955.)

1. Arrest § 3: Criminal Law § 56—

A warrant charging the defendant with resisting, delaying and obstructing a named officer while in the performance of his official duties, *is held* fatally defective in failing to indicate what official duty the officer was discharging or attempting to discharge, and in failing to point out, even in a general way, the manner in which defendant is charged with having resisted or delayed or obstructed such public officer, and defendant's motion in arrest of judgment is allowed.

2. Assault § 10: Criminal Law § 56—

A warrant charging defendant with assaulting a named officer while in the performance of his official duties is sufficient to repel a motion in arrest of judgment.

3. Assault § 13—

Evidence tending to show that defendant attempted to strike one officer with a Coca-Cola bottle and kicked him four or five times on his legs, and that she swung a Coca-Cola bottle at another officer, and bit him on the hand, *is held* sufficient to overrule nonsuit in prosecutions of defendant for assaulting the officers, notwithstanding defendant's evidence to the contrary.

4. Criminal Law § 62f—

The trial court may suspend the execution of its judgment upon prescribed conditions only with defendant's consent, express or implied, and when defendant appeals from such suspended judgments, the judgments will be stricken out and the cause remanded for proper judgments on the verdicts.

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

APPEAL by defendant from *Parker, Joseph W., J.*, at August Term 1954, of PITT.

Criminal prosecution upon four separate warrants issued out of Municipal Recorder's Court of the city of Greenville, N. C., charging that on or about the 20th day of September, 1952, Mamie Garrett Harvey did unlawfully and willfully violate an ordinance of the city of Greenville, and laws of the State of North Carolina; "(1) Did resist, hinder, delay and obstruct a duly sworn officer, namely: V. C. Ackert, a Greenville police officer, while performing his official duty or attempting to discharge his duty . . .," etc.

(2) "Did assault Jim Davis, an authorized highway patrolman, while in the discharge of his official duty . . ."

(3) "Did assault V. C. Ackert, an authorized police officer, with her hands and fist and a Coca Cola bottle, while in the discharge of his official duty . . .," and

(4) "Did resist, hinder, delay and obstruct Jim Davis, a duly authorized State highway patrolman, while in the discharge of his official duty,"

"each contrary to said ordinance, against the statute in such cases made and provided, and against the peace and dignity of the said city and State" heard in Superior Court, on appeal thereto by defendant, and being there numbered 4651, 4652, 4653 and 4654, and consolidated for trial.

Defendant entered in each case a plea of not guilty.

Verdict: Guilty as charged.

Judgment: In cases No. 4652 and No. 4654, respectively, confinement in common jail of Pitt County for a term of 12 months, to be assigned to the quarters provided for women by the State Highway and Public Works Commission to run concurrently, execution of each sentence suspended on payment of a fine and costs and remain of good behavior for two years. And in cases No. 4651 and No. 4653, respectively, confinement in common jail of Pitt County for a term of 30 days, to run concurrently, execution of each sentence suspended on condition defendant be of good behavior for two years and pay court costs.

To the entering of the foregoing judgments, defendant objects and excepts and appeals to Supreme Court,—assigning error.

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

C. J. Gates and M. E. Johnson for defendant, appellant.

WINBORNE, J. Defendant moves in this Court for arrest of judgment (1) in the two cases based on warrants charging the defendant "did resist, hinder, delay and obstruct" a named officer, while in the performance of his official duty, and (2) in the case based on warrant charging that defendant "did assault Jim Davis, an authorized highway patrolman, while in the performance of his official duty."

(1) In the light of decisions of this Court in *S. v. Raynor,* 235 N.C. 184, 69 S.E. 2d 155; *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796; *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d 654; *S. v. Eason, ante,* 59, interpreting and applying the provisions of G.S. 14-223, the charge in each of the two cases, first mentioned above, is fatally defective. While the public officer is identified by name, the charge fails to "indicate the official duty he was discharging

or attempting to discharge, nor does it point out even in a general way the manner in which the defendant is charged with having resisted or delayed or obstructed such public officer,"—quoting language of *Bobbitt, J.*, in the *Eason case, supra.*

Therefore defendant's motions in arrest of judgment as to the charge in these two cases are allowed.

(2) However, the charge of assault upon the officer Davis is sufficient to repel a motion in arrest of judgment. Hence the motion is denied.

Moreover, the evidence offered by the State tends to show that while police officer Ackert, assisted by highway patrolman Davis, had defendant under lawful arrest for traffic violations committed in the presence of officer Ackert, at the police station she was "kicking, biting and hollering," and that she attempted to strike Ackert with a Coca Cola bottle and kicked him four or five times on his legs; and (b) that she grabbed a Coca Cola bottle, and swinging at patrolman Davis, she turned it "aloose" and it struck him across the knee, and that she bit him on the hand.

True, defendant on the other hand denied in the main evidence of the State in these respects, but the evidence offered by the State was sufficient to take the case to the jury and to support the verdicts of guilty on the charges of assault. Hence the case was properly one of fact for the jury to decide under appropriate charge of the court.

Other assignments of error presented by defendant, in brief filed in this Court, have been given due consideration, and in them prejudicial error is not made to appear. Therefore express consideration of them *seriatim* would serve no useful purpose.

It is noted that the numbering given to the case in Superior Court is not clear as to which case each applies. This needs clarification, and may be done in Superior Court in the light of this opinion.

Also, it appears that the judgments in the assault cases were suspended on conditions stated. But a court may suspend the execution of its judgment upon prescribed conditions only with defendant's consent, express or implied. Here defendant did not consent. She excepted and appealed. The judgment, therefore, is stricken out in each of the assault cases and the causes remanded for proper judgment on the verdicts, *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203, and cases cited. See also *S. v. Eason, supra.*

For reasons stated:

Judgments arrested: On charges resisting officer.

Judgments stricken and causes remanded for proper judgment: On charges of assault.

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

STATE v. STEPHEN WILEY AND J. T. WHALEY.

(Filed 13 April, 1955.)

1. **Criminal Law § 52b—**

A motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury.

2. **Criminal Law § 78h—**

Assignments of error which are not based on exceptions duly taken will not be considered.

3. **Intoxicating Liquor § 5b—**

In a prosecution for possession of materials and equipment for the purpose of manufacturing nontaxpaid whiskey, the State must prove possession of such materials and equipment, either actual or constructive, and the mere fact that defendants were apprehended near the equipment raises no presumption that they were the owners or in possession.

4. **Same—Evidence held insufficient to sustain conviction of possession of equipment for manufacture of whiskey.**

In this prosecution of defendants for the possession of materials and equipment for the purpose of manufacturing nontaxpaid whiskey, the State's evidence tended to show that a still was found in the woods some two and one-half miles from defendants' residence, that defendants approached the place early in the morning, one of them carrying a five-gallon jug in a burlap bag, and that one of the defendants said to the other, "They are in here." The evidence further disclosed the absence of cap, connecting pipe, and worm for the still, necessary for its operation, and there was no evidence as to the ownership of the land where the material was found or that defendants exercised any control or dominion over, or possession of, the material. *Held:* The evidence raises no more than a suspicion of defendants' guilt and their motions for a directed verdict of not guilty should have been allowed.

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

APPEAL by defendants from *Williams, J.*, August-September 1954 Term, DUPLIN.

Criminal prosecution tried before the General County Court for the County of Duplin upon separate warrants charging each of the defendants with "possession materials & equipment for purpose of mfg. nontaxpaid whisky & aiding and abetting in the same." The cases were consolidated and tried before a jury, resulting in a verdict of guilty and a jail sentence of 24 months as to each defendant, from which they appealed to the Superior Court. A jury trial in the Superior Court upon the warrants, which were amended before judgment, resulted in a verdict of guilty and a jail sentence of 24 months, from which the defendants appealed. The evidence is summarized in the opinion.

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

Carl V. Venters for defendants, appellants.

HIGGINS, J. At the close of the State's evidence the record discloses, "The defendants each moved to dismiss. Motion denied. The defendants each offer no evidence and renew their motion. Motion denied." The agreed statement of the case on appeal signed by the solicitor and by counsel for the defendants recites: "At the conclusion of the State's evidence, motion was made in behalf of each defendant for a directed verdict of not guilty, which motion was denied and exception thereto allowed."

The motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury, *S. v. Brackville,* 106 N.C. 701, 11 S.E. 284. A number of other assignments of error appear in the record. However, they are not based on exceptions, therefore, cannot be allowed. *S. v. Biggerstaff,* 226 N.C. 603, 39 S.E. 2d 619.

The State offered two witnesses. Thomas J. Marshall, Sheriff of Onslow County, testified that in response to information he called Sheriff Miller of Duplin County and they, with their deputies, met about 3:00 on Sunday morning near the Onslow-Duplin County line. They found in the woods three barrels of mash, a steel drum lying on its side with a hole cut in it suitable for fitting a cap; these materials are "used to make whisky out of." They also found a doubling keg or cooling barrel. "The equipment found was about two and one-half miles back in the woods and was not near any home or residence." The sheriffs, with their deputies, concealed themselves and waited.

Soon after daylight the defendants approached the site of the equipment. The defendant Wiley was carrying on his shoulder a five-gallon jug in a burlap bag. Sheriff Miller told the defendants to stay where they were. They complied with the sheriff's order. The mash had the odor of alcohol and in the opinion of the witness could be made into liquor. The defendants lived about two and one-half miles away. There was no cap for the still. There were no connecting pipes or worm. These are indispensable parts of the equipment if whisky is to be made. No cap was found.

Ralph Miller, Sheriff of Duplin County, testified substantially as did Sheriff Marshall. In addition, he testified the defendants came together and that Wiley said to Whaley, "They are in here." That when Whaley saw the witness, the witness said, "Hold it right where you are at . . . we know who you are." The defendants made no effort to get away. They had just looked in the barrels. Wiley set the jug down near the drum. The materials found were not sufficient to make liquor without

a cap and worm. Wiley, on request, was permitted to drink some of the beer.

There is no evidence in the record as to the ownership of the land where the material was found. The defendants were not shown to have exercised any control or dominion over, or possession of the material. The material at the site was incomplete. Liquor could not be made with the material at hand. The defendants were not taking into the site anything that would do for a cap or for a worm—indispensable parts of the equipment in the making of liquor. If the men went to the site to make liquor, their equipment would not enable them to do so. If they went to get beer, which was there, they were fully equipped to carry it away. Wiley, the man who carried the jug, drank some of the beer. If the men, with or without permission of the owner, went after beer to drink and not to make into whisky, they would not be guilty of possessing materials intended for use in the manufacture of liquor. From the mere presence of the defendants near the equipment, the law raises no presumption they are the owners or in possession. Possession, actual or constructive, must be proved as a fact or the prosecution fails. *S. v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537.

Of course, to those who are looking for guilt, Wiley's statement, "They are in here," meant the officers are in here and we are caught. To those who are looking for innocence, the statement meant, the owners are in here and we can get a jug of beer. Those who are not looking for either guilt or innocence are left in doubt. The evidence is too uncertain to do more than raise a strong suspicion of guilt. The trial judge should have entered judgment as of nonsuit, or directed the jury to acquit. *S. v. Brackville, supra.* If the officers had been a little more patient, the purpose of the defendants would have been disclosed. The covey flushed while the birds were just a little out of range.

The judgment of the Superior Court of Duplin County is reversed. The defendants will be released and their bonds discharged.

Reversed.

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

DAVID W. DIXON v. TESSIE WILEY.

(Filed 13 April, 1955.)

Automobiles § 18i: Negligence § 20: Trial § 31b—

A charge on the issue of contributory negligence which merely gives the respective contentions of the parties that each was first in the intersection, and that each was not guilty of negligence, without defining contributory negligence and without explaining the law applicable to the facts in evidence, must be held for reversible error. G.S. 1-180.

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

APPEAL by plaintiff from *Grady, Emergency Judge,* November Term, 1954, of LENOIR.

This is an action to recover damages for personal injuries sustained by the plaintiff in a collision between a passenger bus operated by him, and a dump truck operated by the defendant, which collision the plaintiff alleges was the result of negligence on the part of the defendant.

On 31 May, 1948, the plaintiff was driving a Seashore Transportation Company passenger bus. He had left the bus station in Kinston about 1:45 p.m. on the above date, en route to New Bern. His route out of Kinston carried him westwardly on King Street which intersects with Independent Street. At the same time, the defendant, driving a dump truck owned by the City of Kinston, was proceeding northwardly along Independent Street and approaching its intersection with King Street. The width of the paved portion of King Street is 50.2 feet, and the width of the paved portion of Independent Street is 35 feet. The evidence is conflicting as to which vehicle first entered the intersection. Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant Tessie Wiley, as alleged in the Complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injuries, as alleged in the Answer? Answer: Yes.

"3. What amount, if any, is the plaintiff entitled to recover? Answer: ....."

Judgment was entered on the verdict and the plaintiff appeals, assigning error.

White & Aycock and Teague & Johnson for plaintiff, appellant.
Sutton & Greene for defendant, appellee.

DENNY, J. The plaintiff excepts to and assigns as error the entire portion of his Honor's charge relating to the second issue, which is as follows:

"The burden of that issue, gentlemen, is upon the defendant. He contends, gentlemen, in the first instance, that he was not guilty of any act of negligence at all, but he says further that if you find that he was, that is, that if you should answer the first issue YES, that you should proceed further and find from this evidence that the plaintiff, himself, was guilty of negligence in the manner in which he operated the bus at the time and the manner in which he entered the intersection. The burden of that issue is upon him. He denies in the first instance that the other man had entered the intersection first. He contends that he had entered it first, and that wrongful conduct of the plaintiff was at least one of the proximate causes of the collision between the two cars, and he contends that you, therefore, ought to answer this second issue YES.

"On the other hand, the plaintiff contends that you ought to answer it No. His argument upon that, gentlemen, is substantially the same as it would be upon the first issue. In other words, he says he is not guilty of anything at all; that he was driving along as he had a right to do, on the right-hand side of the street, that he had entered the intersection first, which was no violation of the law, which he had a right to do and that the other man's conduct was the sole cause of the collision between the two cars, so he is asking you to answer the second issue No."

The plaintiff contends that the foregoing instruction does not constitute an adequate charge on contributory negligence, and we agree. In essence, it is a statement of the contentions of the parties with respect thereto and not a declaration and explanation of the law arising on the applicable evidence as contemplated by G.S. 1-180. In fact, an examination of the entire charge reveals that the court did not define negligence or contributory negligence anywhere therein. *Mikeal v. Pendleton*, 237 N.C. 690, 75 S.E. 2d 756.

In the case of *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484, in considering a charge with respect to certain omissions, *Ervin, J.*, in speaking for the Court, said: "The vice of this excerpt and of the charge as a whole . . . lies in the inadvertent omission of the court to call the attention of the twelve jurors unfamiliar with legal standards to what was necessary to guide them to a right decision on the issue. The charge gave no explanation as to what constitutes careless and reckless driving in the eyes of the law, or as to when a motorist is keeping a proper lookout in legal contemplation."

Moreover, it is error simply to state the contentions of a party and not declare and explain the law applicable to the facts which the jury might find from the evidence offered in support of such contentions. *Hawkins v. Simpson*, 237 N.C. 155, 74 S.E. 2d 331; *Mallard v. Mallard*,

234 N.C. 654, 68 S.E. 2d 247; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *S. v. Herbin,* 232 N.C. 318, 59 S.E. 2d 635; *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142; *Nichols v. Fibre Co.,* 190 N.C. 1, 128 S.E. 471.

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

New trial.

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

STATE v. NOLAN M. IPOCK.

(Filed 13 April, 1955.)

1. Criminal Law § 44—

A motion for a continuance is addressed to the discretion of the trial judge, and refusal of the motion upon certificate of a physician, stating that the physician had advised home care for defendant, but which does not state the defendant was unable to stand trial or that a trial would endanger his health, does not show abuse of discretion.

2. Automobiles § 30d—

Testimony of officers that defendant was intoxicated at the time he drove a truck upon a public highway, and that a partially filled bottle of whiskey was found in the seat of the truck, is sufficient to support a conviction of driving while under the influence of intoxicating liquor, and defendant's motion for nonsuit, to set aside the verdict, and to arrest the judgment, were properly denied.

3. Criminal Law § 41i—

Defendant sought to introduce evidence as to his physical condition the day before and on the day of trial for the purpose of accounting for his failure to testify in his own defense. *Held:* Defendant's physical condition at the time of trial was irrelevant to the issue of whether the defendant was intoxicated at the time of driving the truck some six months prior thereto, and the evidence was properly excluded and the court properly interrupted counsel in arguing the matter to the jury.

4. Criminal Law § 53b—

The court's charge on reasonable doubt *held* without error.

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

APPEAL by defendant from *Martin, S. J.,* September 1954 Term, CRAVEN.

Criminal prosecution upon an indictment charging the operation of a vehicle upon the public highway while under the influence of liquor or narcotic drugs.

When the case was called for trial on 17 September 1954, defendant's counsel moved for continuance on the ground the defendant was not physically able to attend court. In support of the motion he presented the following certificate: "9/16/54. Mr. Nolan M. Ipock was seen and treated in my office today. Diagnosis—arthritis, back and shoulders. Diarrhea and vomiting—3 hours. Advised home care. Respectfully, Charles Duffy, M.D."

The court overruled the motion on the ground the doctor's certificate did not present sufficient cause for a continuance. The defendant was called and upon his failure to answer, capias was issued, he was brought into court, and placed upon trial upon his plea of not guilty.

The State offered the evidence of Highway Patrolman Herring and Constable Miller who testified they observed the defendant driving a truck upon the public highway in Craven County on 2 February 1953, and in the language of the patrolman, the truck was being driven "from one side of the road to the other. He was very much under the influence. He was drunk enough to stagger back and forth on the road. He more or less mumbled everything he said so I couldn't understand." The constable testified, "He was right much intoxicated with liquor or some drug. He was staggering." Both officers testified a part of a pint of whisky was found in the seat of the truck.

The defendant called Calvin Hawks as a witness, who would have testified if permitted, (1) that the defendant was in court on Wednesday before the trial began on Friday; (2) that the witness was present when Dr. Duffy examined the defendant and would have testified as to statements made by Dr. Duffy with respect to the defendant's physical condition and the treatment prescribed. Upon objection, the evidence was excluded. The defendant excepted.

The defendant made timely motions for judgment of nonsuit, which were overruled, and the defendant excepted.

The jury returned a verdict of guilty and from judgment pronounced, the defendant appealed.

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

Charles L. Abernethy, Jr., for defendant, appellant.

HIGGINS, J. The defendant's assignment of error No. 1A is to the refusal of the court to continue the case on the ground of defendant's illness. The only evidence presented on the motion to continue was the certificate of Dr. Duffy who advised "home care," but does not say the defendant is unable to stand trial or that a trial would endanger his health. Granting or denying a motion for continuance rests in the

sound discretion of the presiding judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing the defendant has been deprived of a fair trial. *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5; *S. v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778; *S. v. Culberson,* 228 N.C. 615, 46 S.E. 2d 647; *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. No abuse of discretion is shown.

Assignments of error Nos. 15, 24 and 25 relate to the refusal of the court to grant the motions for nonsuit, to set aside the verdict, and to arrest the judgment. The evidence made out a case for the jury and no defect appears upon the face of the record. The assignments are without merit.

During the course of the trial the defendant sought to introduce evidence as to his physical condition the day before and on the day of the trial. Upon objection, the evidence was excluded. The defendant sought to argue to the jury that the defendant's illness accounted for his inability to go upon the stand and testify in his own defense. The court interrupted counsel and cautioned the jury not to consider the argument. The testimony as to defendant's physical condition at the trial in September, 1954, could have no bearing on the issue before the jury as to whether the defendant operated a truck upon the public highway on 2 February 1953, while he was under the influence of liquor. The evidence was properly excluded and the instruction to the jury not to consider the argument was warranted. *S. v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474; *S. v. Page,* 215 N.C. 333, 1 S.E. 2d 887.

The court's charge as to what constitutes reasonable doubt is in accord with the decision of this Court in *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, and cases there cited. Assignments of error Nos. 18, 19 and 23 relating thereto are without merit.

The record leaves the impression the defendant's principal effort in the trial was directed not to the question of his guilt or innocence of the charge, but to his physical condition at the time of the trial. Two officers testified the defendant was intoxicated at the time he drove the truck upon the public highway and that a partially filled bottle of whisky was in the seat of the truck. There was no evidence to the contrary. That the jury believed the officers does not present a question for review on appeal.

No error.

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

C. R. AMMONS v. JOEL G. LAYTON, JR.

(Filed 13 April, 1955.)

1. Appeal and Error § 40f—

The denial of defendant's motion to strike certain allegations from the complaint will not be disturbed on appeal when it is not made to appear that defendant is prejudiced by the allegations challenged.

2. Appeal and Error § 29—

An assignment of error not brought forward in the brief is deemed abandoned.

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

APPEAL by defendant from *Martin, Special Judge,* at September Civil Term, 1954, of HARNETT.

Civil action for slander.

The defendant, before answering or otherwise pleading, moved to strike all of Paragraphs 4 and 5 and portions of Paragraphs 6 to 13, inclusive, of the complaint. The court ruled that certain portions of Paragraphs 5, 6, 12, and 13 should be stricken, but that otherwise the motion should be denied.

To the order entered in accordance with the foregoing ruling, the defendant excepted so far as the motion to strike was overruled in any part, and appealed.

Taylor, Spence & Taylor and Douglass & McMillan for plaintiff, appellee.

Wilson & Johnson and Clem B. Holding for defendant, appellant.

JOHNSON, J. The essential rules governing appeals from lower court rulings on motions to strike are collected and assembled in *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660. Under application of the principles there stated, we conclude it has not been made to appear that the defendant will be prejudiced by the allegations challenged on this appeal. See *Ledford v. Transportation Co.,* 237 N.C. 317, 74 S.E. 2d 653; *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185. See also *Wright v. Credit Co.,* 212 N.C. 87, 192 S.E. 844; 33 Am. Jur., Libel and Slander, sections 236 and 241.

It is noted that the assignment of error relating to Paragraph 4 of the complaint is not brought forward in the brief. Hence this assignment is treated as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544; *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

The order entered below is
Affirmed.

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

SID P. CHILDRESS v. MURRAY J. ABELES AND CLARENCE A. TROUTMAN, T/A UNIVERSAL COMPANY.

(Filed 13 April, 1955.)

PETITION by defendants to rehear the above entitled case, which is reported in 240 N.C. 667, 84 S.E. 2d 176.

Thomas Turner, Jordan & Wright, and Perry C. Henson for Plaintiff, Respondent.

Womble, Carlyle, Sandridge & Rice and Arthur A. Beaudry for Defendants, Appellants.

PER CURIAM. The petition to rehear was ordered docketed by the two Justices to whom it was referred, and the Court directed an oral argument. After the rehearing it is ordered that the petition be
Dismissed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this rehearing.

COOPERATIVE WAREHOUSE, INC., v. LUMBERTON TOBACCO BOARD OF TRADE, INC.

(Filed 20 April, 1955.)

1. Agriculture § 9—

The business of operating warehouses for the public marketing of tobacco is one affected with a public interest and is subject to reasonable public regulation.

2. Common Law—

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State, G.S. 4-1.

3. Agriculture § 11—

Where the owner of a warehouse for the sale of leaf tobacco at public auction applies for membership in the board of trade, pays the required membership fees and is accepted as a member, *held*, the articles of association for the purposes expressed in the charter and by-laws of the board of trade constitute a contract between the board of trade and the warehouse member, and such member is deemed to have consented to all reasonable rules and regulations pertaining to the business which have been properly determined and promulgated.

4. Agriculture § 9—

Construing G.S. 106-465, as amended, *it is held* that the tobacco boards of trade in the several towns and cities in North Carolina in which auction markets for leaf tobacco are situated are given authority to make reasonable rules and regulations respecting the allotment of sales time among the owners of warehouses or groups of warehouses, and such delegation of authority is constitutional.

5. Constitutional Law § 8c—

While the General Assembly may not delegate the power to make law, it may delegate to an administrative commission or board authority to promulgate subordinate rules and regulations for the complete operation and enforcement of a law within its express general purpose, and to determine the existence of facts upon which the statute declares the law shall apply, so long as the General Assembly lays down the policy and prescribes the standards.

6. Agriculture § 9—Regulations of the tobacco board of trade as to allotment of sales time held reasonable and valid.

The findings of fact by the trial court were to the effect that the local tobacco board of trade was allotted a daily maximum amount of tobacco which could be sold by auction, that only about twenty per cent of the total warehouse space was actually needed for the auction of this quantity of tobacco, and that the board of trade allotted selling time to the owners of each warehouse or group of warehouses in accordance with the proportion which the floor space bore to the total warehouse space available, with further provision that the owner of more than one warehouse might transfer part or all of any selling time allotted to any one of his warehouses to other warehouses that he might own, and that the allotment of selling time should be based upon the total warehouse space owned, notwithstanding that part of the space might be used for storage of green tobacco and leased for other purposes with provision that the lessees should make the warehouses available for auction of tobacco, if required. *Held:* The regulations are reasonable and binding upon the membership, including a member who owns only one warehouse, the only difference between such owner and the owner of several warehouses being that his surplus space is under one roof.

7. Appeal and Error § 29—

Exceptions and assignments of error not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Clifton L. Moore, J.*, at February-March Civil Term 1954 of ROBESON, to Fall Term 1954 of Supreme Court as No. 679, carried over to Spring Term 1955 as No. 665.

Civil action to have rules and practice of allotment of daily selling time upon the Lumberton Tobacco Market (1) declared null and void; (2) that defendant Lumberton Tobacco Board of Trade be declared affected with a public trust; (3) that it be required and enjoined to allot to plaintiff a fair and equal portion of the over-all selling time allotted to the Lumberton Market; (4) that it be restrained from counting in said apportionment any warehouse, or warehouse building, not intended to be actively used or presently actively used for the auction sale of leaf tobacco at said market; and (5) for such other and further relief as to the court may seem just and proper.

The cause coming on for hearing, and at the close of evidence the court, being of opinion that there is no issue of fact to be determined by the jury, dismissed the jury; and, having heard the testimony of witnesses for plaintiff and defendant, stipulations of counsel, documentary evidence and admissions in the pleadings, and, having personally viewed the tobacco warehouses involved in this action, by consent of plaintiff and defendant, the court finds therefrom the following facts:

"(1) The Bright Belt Tobacco Warehouse Association is a voluntary trade association, including in its membership practically all of the warehouses engaged in the auction sale of leaf tobacco in Georgia, Florida, North Carolina, South Carolina and Virginia; seventy-four markets, including the Lumberton market, are members of the association. The Association makes regulations controlling the sales of tobacco at auction on the several markets, that is, it fixes the opening and closing dates of the markets for auction sales of tobacco and determines the number of hours tobacco may be sold per day, the number of days per week, and the number of baskets that may be sold per day, on a given market. Non-member markets are governed by the same selling regulations as member markets. The Association was organized in April 1945 and has made regulations governing sales of tobacco, as above stated, since that date. 'The primary reason (for allotment of selling time on tobacco markets) is to keep the flow of tobacco, the total amount of tobacco sold, below the amount that the processing plants can redry. Tobacco is perishable . . . it is highly desirable and necessary that order be maintained in the process of sales. Sales should stop and start at uniform intervals, in order that growers may know when their tobacco will be sold . . .'

"(2) The defendant, Lumberton Tobacco Board of Trade, is a member of the Bright Belt Tobacco Warehouse Association and said Association makes regulations governing the auction sales of tobacco on the

Lumberton Market. The Lumberton Market is known as a 'Three-Set Market,' that is, for a major portion of its selling season it has three sets of buyers, and three separate auction sales can be and are conducted simultaneously on this market. For the 1953 season, the Association provided five and one-half (5½) hours selling time per day, five days per week, on the Lumberton Market, and allocated the maximum sale of 400 baskets per hour for each set of buyers on this market. The result was that under the regulations of the Association the Lumberton Market was permitted to sell daily 6,600 baskets of tobacco during the 1953 season. The same allocation of 6,600 baskets per day was made by the Association to the Lumberton Market each year from and after the organization of the association and the Lumberton Market had observed this selling limitation under prior regulatory agency each year from 1942 to the organization of the Association.

"(3) The defendant, Lumberton Tobacco Board of Trade, is a non-stock corporation, incorporated in 1942 under the provisions of Section 465, Chapter 106, of the General Statutes of North Carolina, and its members are warehousemen and purchasers of leaf tobacco at auction, of the Lumberton market. The defendant is authorized by statute 'To make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction on the warehouse floors,' of Lumberton, but it is not authorized to make rules and regulations for 'The control of prices' or 'In restraint of trade.'

"(4) In the preamble to the Constitution and By-Laws of the defendant corporation, is the following: 'That the Lumberton Tobacco Board of Trade, Inc. has been organized and chartered in order that persons, firms and corporations engaged in the tobacco industry of Lumberton may become associated and prescribe such reasonable rules and regulations as experience has shown are necessary for the honest, orderly and economic conduct of the said business.'

"And Section VIII of said Constitution and By-Laws is as follows: 'Each member by the application of membership, and the acceptance of same, shall be deemed to have as fully consented and agreed to all of the terms and provisions of the by-laws, rules and regulations, as if he had duly entered into a written contract with the Lumberton Tobacco Board of Trade, embodying the same and containing his and its covenant to keep and perform the same.'

"(5) That for the selling season of 1942, and for each season thereafter, including 1953, the defendant has by regulation put into effect what is known as the 'Floor Space System' of allotting selling time among the member warehousemen of the Lumberton Market. The majority of tobacco markets use this system. Under this system the warehouseman is permitted to sell a certain number of baskets of tobacco

per day. The number of baskets allotted to him, in relation to the total number of baskets allotted to the entire Lumberton Market, is in the same ratio as the number of square feet of floor space in the warehouse or warehouses, owned, leased and controlled by him, bears to the total number of square feet of floor space in all of the warehouses on the Lumberton Market. For example, if he owns, leases and controls ten per cent of the warehouse floor space on the market, he received ten per cent of the total daily basket allotment for the market. Under this system, if a warehouseman (often a group of persons) owns, leases and controls a number of warehouses, he is permitted to sell his entire allotment in one warehouse, if it is large enough and he so elects; this is known in the trade as 'Transferring Selling Time.'

" 'From a warehouseman's standpoint (this) makes a difference in his overhead; same thing is true of purchasers of tobacco, if they have to go to sixteen warehouses per day as against six warehouses, why naturally (they) have more expense with labor and truck hire; from the grower's standpoint, he pays the bill for the whole operation, the cheaper (the) market process, (the) more he gets for his tobacco . . .'

"Under this system a warehouseman may put more baskets on his warehouse floor than is allotted to him for a given day (this excess is known as 'overage'). If another warehouseman, or other warehousemen, have for sale less baskets than allotted to them, then the warehouseman with an overage may sell his overage. This right is rotated, in order, among all the warehousemen, all having an equal chance to sell overage. The 'Floor Space System' is the prevailing custom in the industry.

"(6) In 1942 there was 402,125 square feet of warehouse floor space on the Lumberton Market, in ten warehouses, owned and controlled by five warehousemen (groups); and there were sales in only five warehouses. A basket of tobacco occupies only twenty square feet. 132,000 square feet of floor space (plus some small addition to prevent crowding and for convenience in handling, loading and unloading) would have been sufficient to sell the entire 6,600 baskets allotted to the Lumberton Market. Competition among warehousemen for larger percentage of the basket allotment, resulted in the construction of additional warehouses. In 1946 there were fourteen warehouses, owned or controlled by six warehousemen (groups) with 636,213 square feet of floor space (even though one warehouse was removed from the industry entirely and not considered in the allotments). In 1947 one warehouse was enlarged, making total floor space of 668,291 square feet on the market. In 1951 there were eighteen warehouses, owned or controlled by seven warehousemen (groups) with 872,275 square feet of floor space. In 1953 there were twenty warehouses, owned or controlled by eight warehouse-

men, with 1,363,628.97 square feet of floor space. All the while from 1942 to 1953 inclusive, the basket allotment for the Lumberton Market remained the same each year, 6,600, requiring only 132,000 to 200,000 square feet of floor space for actual auction sales. In 1953 there were regular sales in only eight warehouses.

"(7) From 1942 to 1953 inclusive, the greater part of the surplus floor space on the Lumberton market was used for storage of green tobacco (tobacco which had been sold but not redried) and redried tobacco in hogsheads. One warehouse was used for storage of cotton, a part of another for storage of lumber and building supplies, part of another for storage of tractors and automobiles, and parts of others for storage of miscellaneous items. Tobacco has never been sold at auction in some of the warehouses. Leases of the warehouses for storage, provide that the lessees will make the warehouses available for auction sale of tobacco, if required.

"(8) In the trade as a whole (not just in Lumberton), 'Not more than fifteen per cent to twenty per cent of floor space is needed for actual auction sale of the crop.'

" 'Storage of green tobacco and hogshead tobacco is considered in the industry as essential to the efficient and economic handling of flue cured tobacco at auction. Without the means of adequately taking care of tobacco after it leaves the auction, your whole operation breaks down and it is just as necessary and as important part of the marketing process as the actual auction sale itself.'

" 'Here there are two or three redrying plants' in Lumberton.

" 'Experience in the industry shows that lack of storage space for green tobacco slows the selling process, causes farmers to keep tobacco on hand longer, resulting in deterioration of tobacco and decrease in its value.'

"Storage space is important for the Stabilization Corporation, which is the world's largest Farmers Cooperative. It administers a loan program, ninety per cent parity support guaranteed under Federal legislation to the growers. If tobacco does not bring a bid above support price, the Stabilization Corporation takes it, processes and stores it through the facilities of the industry until it can be resold. The profit is distributed to the growers. The Stabilization Corporation is not permitted to own warehouses for storage or redrying plants.

"(9) The defendant, Lumberton Tobacco Board of Trade, Inc., adopted a resolution on April 12, 1951 in part, as follows: '. . . It is expressly provided that the owner or operator of tobacco warehouses in the City of Lumberton shall have the right and privilege to transfer part or all of any selling time allotted to any warehouses, which he may operate to any other warehouses that he may own or operate.

" 'This resolution shall become operative and be binding upon the warehousemen operating warehouses in the City of Lumberton beginning with the tobacco selling season of 1951, and continuing each successive year thereafter and including tobacco selling season of 1956.'

"(10) That the plaintiff, Cooperative Warehouse, Inc., is a corporation, organized in January 1953, under the provisions of Article 19, Chapter 54, Sub-chapter V of the General Statutes of North Carolina, for the cooperative marketing of tobacco and other farm products; that it erected a tobacco warehouse just outside the city limits of Lumberton, and within 1,000 feet thereof, said warehouse being completed in July 1953, and contained 209,861.92 square feet of floor space; that in January 1953 plaintiff applied for membership in the Lumberton Tobacco Board of Trade, defendant, was accepted for membership and paid its fee, and received a copy of the by-laws in February 1953, and its Secretary in February 1953 discussed with an officer of the defendant the method of allotting selling time; that on July 14, 1953 the plaintiff wrote a letter to the defendant, in part, as follows: 'The Board of Directors of Cooperative Warehouse, Inc. advise that this warehouse was organized and constructed for the sale of leaf tobacco, and all of the selling time allotted or assigned to this warehouse will be used in this warehouse. The Directors further advise that the Lumberton Tobacco Board of Trade be requested by them that Cooperative Warehouse, Inc. and all other warehouses be allotted only that portion of the total sales time, assigned to the Lumberton Market, that will be used in the warehouse, claiming credit for the selling time or floor space for such allotment.'

"(11) That the plaintiff was represented by its secretary at a meeting of the Lumberton Tobacco Board of Trade on July 16, 1953, the plaintiff then being a member thereof; and at said meeting the above letter of plaintiff to defendant was read . . . 'It was received as information with no action Taken,' and at said meeting the following allotments were approved and adopted:

	Square Feet	*Baskets*
Carolina Group	261,080.11	1264
Hedgepeth Group	155,186.91	751
Star Group	165,913.09	803
Liberty Group	261,080.12	1264
Cooperative W'hse.	209,861.92	1016
Dixie Group	118,517.91	573
Smith Group	124,336.91	602
Britt Group	67,652.00	327

"According to the 'Floor Space System,' plaintiff received its pro rata share. These allotments were approved by the members except the plaintiff. The representative of the plaintiff at the meeting objected to these allotments and informed the meeting that the plaintiff could not agree until there was a meeting of its directors, further stated he could find nothing in the by-laws as to how allotments were to be made, and was advised that allotments were adopted upon the recommendation of the Sales Committee each year before the market opened. Plaintiff's representative made no motion for change of method for allotting selling time.

"(12) That the plaintiff filed this action for injunctive relief on July 25, 1953.

"(13) All of the twenty tobacco warehouses on the Lumberton market are constructed in the way and manner of tobacco warehouses generally, in the industry, and all are fit and suitable for auction sale of leaf tobacco if goods in storage were removed."

Then there follow separate findings of fact, Numbers 14 to 32, both inclusive, in respect to the use to which each warehouse in the various groups listed in paragraph (11) above is devoted,—including the Co-operative Warehouse.

Then the court continued findings of fact as follows:

"(33) All of the twenty tobacco warehouses on the Lumberton market are available for auction sales of tobacco. It would not be economical to have twenty auction sales per day.

"(34) The plaintiff used approximately 82.5 per cent of the selling time allotted to it during the 1953 season, including overage sales. At times during the season, it could have sold more than its allotment.

"(35) The plaintiff constructed a warehouse with more floor space than it needed for auction sale of tobacco, in fact more than was needed to sell the entire allotment to the Lumberton Market; likewise, the other warehousemen had acquired much more floor space than was actually needed for the auction sale of tobacco. The only difference between the situation of the plaintiff and the situation of the other members of the defendant corporation is that the plaintiff's facilities are all under one roof."

Upon the foregoing findings of fact, the Court concludes as a matter of law:

"(a) That the allotment of selling time in accordance with 'Floor Space System' by the defendant is not and was not for the selling season, 1953, unreasonable, arbitrary or inequitable, but constitutes a reasonable regulation of selling time and a reasonable exercise of the authority conferred on the defendant by statute.

"(b) That the allotment of selling time in accordance with the 'Floor Space System' by the defendant is not and was not for the selling season 1953, a regulation in restraint of trade.

"(c) That the defendant's motion for judgment as of nonsuit at the close of all the evidence should be allowed."

Thereupon the court "Ordered, Adjudged and Decreed that the plaintiff's action be and the same is hereby dismissed, and that the injunctive relief sought by the plaintiff is hereby denied, and that the plaintiff pay the costs to be taxed by the Clerk."

Plaintiff (or petitioner) appeals therefrom to Supreme Court of North Carolina, and assigns error.

F. D. Hackett and Robert Weinstein for plaintiff, appellant.

Varser, McIntyre & Henry for defendant, appellee.

WINBORNE, J. Appellant states this as the question presented on this appeal: "Did the court err in holding that the regulation brought into question was a reasonable exercise of the authority conferred upon the defendant by statute and that the same was not in restraint of trade?" Upon careful consideration of the subject this Court holds that the court did not so err.

In this connection, it is noted that the General Assembly of North Carolina in 1933 enacted a statute, P.L. 1933, Chapter 268, entitled "AN ACT TO AUTHORIZE TOBACCO BOARDS OF TRADE TO MAKE REASONABLE RULES AND REGULATIONS FOR THE SALE OF LEAF TOBACCO BY AUCTION." This Act provides in pertinent part:

"Section 1. That tobacco warehousemen and the purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize, either as non-stock corporations, or voluntary associations, Tobacco Boards of Trade in the several towns and cities in North Carolina in which leaf tobacco is sold on warehouse floors, at auction.

"Section 2. Such Tobacco Boards of Trade as may now exist, or which may hereafter be organized are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated.

"Section 3. The Tobacco Boards of Trade in the several towns and cities in North Carolina are authorized to require as a condition to membership therein the applicants to pay a reasonable membership fee and the following schedule of maximum fees shall be deemed reasonable, to wit: (Omitted because not pertinent to this appeal.)

"Section 4. Membership, in good standing, in a local Board of Trade shall be deemed a reasonable requirement by such Board of Trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction therein . . .

"Section 5. Nothing in this Act shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade.

"Section 6. This Act shall be in force from and after its ratification . . . 18th day of April A. D. 1933."

This statute was codified and became G.S. 106-465.

And the General Assembly, 1951 Session Laws of North Carolina, Chapter 383, by "An Act to Amend G.S. 106-465, provided for optional non-participating memberships in Tobacco Boards of Trade" by inserting after the paragraph reading: "Membership, in good standing . . .," provision that

"Membership in the several boards of trade may be divided into two categories:

"A. Warehousemen.

"B. Purchasers of leaf tobacco other than warehousemen."

"Purchasers of leaf tobacco may be: (1) Participating, or (2) Non-participating. The holder of a membership as a purchaser of leaf tobacco shall have the option of becoming, upon written notice to the Board of Trade, either a participating or a non-participating member. *Individuals, partnerships, and/or corporations who are members of Tobacco Boards of Trade, established under this Act or coming within the provisions of this Act, as non-participating members shall not participate in or have any voice or vote in the management, conduct, activities, allotment of sales time, and/or hours, fixing the dates of the opening or closing of tobacco auction markets, or in any other manner or respect.*" (Emphasis ours.)

The Act of 1951 also provided that "All laws and clauses of laws in conflict with this Act are hereby repealed," and that the Act shall become effective upon ratification, which was done 27 March, 1951.

In this connection, even before the enactment of the above statute in 1933, this Court upheld the principle that the business of operating warehouses for the public marketing of tobacco is one affected with a public interest, and subject to reasonable public regulations. The Court so held in *Gray v. Warehouse* (1921), 181 N.C. 166, 106 S.E. 657.

In the *Gray case, supra, Clark, C. J.,* in writing the main opinion, quotes this principle: "The sale of tobacco at auction at tobacco warehouses is a business affected with a public interest, and those carrying it on are under the duties and obligations by common law to carry it on in a way that is reasonable and beneficial to the tobacco trade . . ."

And *Hoke, J.*, in a concurring opinion in the *Gray case, supra,* had this to say: "Subject to such reasonable rules and regulations as may be established by the public agencies, and when not interfering with same, the authorities in control and management of these warehouses have the power to establish for themselves such reasonable rules and regulations as may be required to promote business efficiency and insure fair and honest dealing in the transactions occurring there."

Here it may be noted that so much of the common law as has not been abrogated or repealed by statute is in full force and effect within this State. G.S. 4-1, formerly C.S. 970. See *Elliott v. Elliott,* 235 N.C. 153, 69 S.E. 2d 224, and cases there cited.

And since the enactment of the statute of 1933, the principle has been recognized in the light of the provisions of the statute. See *Warehouse Assn. v. Warehouse* (1949), 231 N.C. 142, 56 S.E. 2d 391, and *Board of Trade v. Tobacco Co.* (1952), 235 N.C. 737, 71 S.E. 2d 21.

Indeed, in *Warehouse Assn. v. Warehouse, supra, Devin, J.*, later *C. J.*, speaking for the Court and of the plaintiff there, Bright Belt Warehouse Association, Inc., declared: "From the pleadings herein summarized, it appears that the plaintiff is an association of tobacco warehousemen. Although incorporated without capital stock, and given legal entity with power to sue and be sued, it is nevertheless a voluntary association organized primarily for the benefit of those engaged in this business. While apparently there is no definite criterion or procedure for determining membership therein, it would seem that those engaged in the business who affiliate with the plaintiff, contribute to its support, attend its meetings, and receive whatever benefits are derived, may properly be regarded as members thereof."

And *Devin, J.*, continued: "It follows that the articles of association for the purposes expressed in the charter and by-laws of the plaintiff constitute a contract between plaintiff and its members which imposes certain obligation on the members among themselves and with respect to the association or corporation. Hence, as a consequence of membership in an incorporated association for mutual benefit, each member is deemed to have consented to all reasonable rules and regulations pertaining to the conduct of the business which have been properly determined and promulgated . . ."

In the light of the principle so declared in *Warehouse Assn. v. Warehouse, supra,* it is here appropriate to note that this action was instituted 25 July, 1953, and plaintiff alleges in its complaint that defendant is a corporation duly created, organized and existing with its principal office and place of business in the city of Lumberton, North Carolina, "the purpose of its creation being 'in order that persons, firms and corporations engaged in the tobacco industry of Lumberton may become

associated and prescribe such reasonable rules and regulations as experience has shown was necessary for the honest, orderly and economic conduct of said business,' and functions as the supervising authority in regulating the sale of leaf tobacco at auction on the Lumberton Tobacco Market, pursuant to the laws of the State of North Carolina and particularly Section 106-465, General Statutes of North Carolina."

Defendant, answering, admits that it is a corporation, created, organized and existing, with its principal office and place of business in the city of Lumberton, North Carolina, and that it is incorporated for the purposes declared in the Charter, and in General Statutes of North Carolina, Section 106-465, and it has such powers as are vested in it by the said statute and amendments thereto, as well as the powers conferred upon trade organizations at common law, and that it functions as the supervising authority in regulating the sale of leaf tobacco at auction, on the Lumberton Tobacco Market.

Therefore, it being admitted that plaintiff has applied for membership, and paid the required membership fees, and has been accepted as a member by defendant, Lumberton Tobacco Board of Trade, Inc., it follows, paraphrasing the language used in *Warehouse Assn. v. Warehouse, supra,* that the articles of association for the purposes expressed in the charter and by-laws of Lumberton Tobacco Board of Trade, Inc., constitute a contract between it and its members, including the present plaintiff, which imposes certain obligation on the members among themselves and with respect to the corporation. Hence as a consequence of membership in the corporation for mutual benefit, each member, including the present plaintiff, is deemed to have consented to all reasonable rules and regulations pertaining to the business which have been properly determined and promulgated.

Turning then to the provisions of the Act, Chapter 268 of P.L. 1933, it is seen that the General Assembly authorized Tobacco Boards of Trade, incorporated as therein provided, "to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated." And it is seen further that by the amendment, 1951 Session Laws of North Carolina, Chapter 383, the General Assembly provided for dividing the membership into two categories. "A. Warehousemen. B. Purchasers of leaf tobacco other than warehousemen." And it is significant that the General Assembly declared that a holder of membership as a purchaser of leaf tobacco should have the option of being a participating or a non-participating member, and that a non-participating member "shall not participate in or have any voice or vote in the management, conduct, activities, *allotment of sales time, and/or hours,* fixing the

dates of the opening or closing of tobacco auction markets . . ." (Emphasis added.) These provisions clearly indicate an intent that such matters come within the authority "to make reasonable rules and regulations . . ." granted by the General Assembly. In this connection, the Court in *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511, in opinion by *Barnhill, J.,* now *C. J.,* expressed the following principle: "The authority to make rules and regulations to carry out an express legislative purpose or to effect the operation and enforcement of a law is not an exclusively legislative power, but is rather administrative in its nature and may be delegated. An administrative commission, within definite valid limits, may be authorized to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. So long as a policy is laid down and a standard is established by statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities both the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply . . . The authority granted is to 'fill in the details' in respect to procedural and administrative matters. Such board may not adopt a rule under such delegated authority which has the effect of substantive law . . ." To like effect are *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896; *S. v. Curtis,* 230 N.C. 169, 52 S.E. 2d 364; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310; *Williamson v. Snow,* 239 N.C. 493, 80 S.E. 2d 262, and cases cited.

The 35th finding of fact seems to correctly portray the case; that is, "The plaintiff constructed a warehouse with more floor space than it needed for auction sale of tobacco, in fact, more than was needed to sell the entire allotment to the Lumberton Market; likewise, the other warehousemen had acquired much more floor space than was actually needed for the auction sale of tobacco. The only difference between the situation of the plaintiff and the situation of the other members of the defendant corporation is that the plaintiff's facilities are all under one roof."

And while there are exceptions to certain findings of fact and assignments of error based thereon, yet in brief of appellant filed in this Court no argument is advanced in support of either, and hence are deemed abandoned. Rule 28 of Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562.

In the light of the findings of fact, the conclusions of law made by the trial court, on which judgment below is grounded, are proper. The judgment in accordance therewith is

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

C. T. DAY v. ASHEVILLE TOBACCO BOARD OF TRADE, A CORPORATION.

(Filed 20 April, 1955.)

1. Agriculture § 11—

Members of a tobacco board of trade organized and existing by virtue of G.S. 106-465 are deemed to have consented to all reasonable rules and regulations pertaining to the business which have been properly determined and promulgated for the purposes expressed in the charter and by-laws of the board of trade.

2. Agriculture § 9—

The authority granted tobacco boards of trade by G.S. 106-465, as amended, to make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction on warehouse floors, includes the authority to make reasonable rules and regulations in respect to the allotment of sales time to each warehouse.

3. Same: Constitutional Law § 17—Regulation for allotment of selling time to new warehouses held not in restraint of trade.

G.S. 106-465 does not authorize tobacco boards of trade to promulgate rules and regulations in restraint of trade or to control prices, but a rule requiring any member desiring to operate a new warehouse or a warehouse which had not been operated during the preceding season to give timely notice of such intention, and allotting to such new operator selling time in proportion to its size in relation to the other warehouses, with further provision that if such new warehouse is larger in size than the average of all warehouses operating on that market, such new warehouse should not be allotted selling time for that portion of its size in excess of the average size of all of the warehouses operating on the market, *is held* reasonable, fair and equitable, and not a regulation in restraint of trade.

4. Same—

A tobacco board of trade is not required to adopt any particular plan for the allotment of selling time to its respective warehouse members, it being required only that the standard be reasonable and equitable.

5. Agriculture § 11: Notice § 4—

Where a member of a tobacco board of trade is present and participates in a meeting at which its by-laws are amended and does not make any protest as to the regularity or validity of the meeting or the notice thereof, he waives any defect of notice.

6. Appeal and Error § 1—

Where an appeal is subject to dismissal for failure to comply with the rules of court, but the case involves matters of public interest, the Supreme Court of its own motion may elect to treat the appeal on its merits.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Nettles, J.*, in Chambers at Asheville, November 1954 (order signed 8 December, 1954), BUNCOMBE Superior Court.

Civil action (1) to enjoin defendant "from attempting to enforce that portion of its by-laws adopted October 2, 1954, relating to selling time and number of baskets allotted to plaintiff," and (2) to command and direct defendant "to revert to the former custom and practice of allocating selling time on the basis of floor space of the various tobacco warehouses operating on the Asheville market, including those of plaintiff."

The record on this appeal is too voluminous to admit of more than brief recital of essential data. It discloses (1) that summons for defendant was duly issued and served; and that at the same time upon verified complaint, used as an affidavit for injunctive relief, the Honorable Dan K. Moore, Judge holding the regular courts of the 19th Judicial District of North Carolina, signed an order directing defendant to appear before Honorable Zeb V. Nettles, Resident Judge of the 19th Judicial District, at a stated time at the courthouse in Asheville, N. C., and show cause, if any it may have, why the injunctive relief prayed for in the verified complaint should not be granted to plaintiff herein; and (2) that defendant filed a verified answer to be used as an affidavit.

When the cause came on for hearing Judge Nettles entered an order in which, after reciting that he had considered at length the affidavits and evidence in the matter and arguments of counsel, he made findings of fact in pertinent part substantially as follows:

"1. That the defendant is a non-stock corporation acting in the capacity of a tobacco board of trade in the City of Asheville, in which burley leaf tobacco is sold in warehouses at auction, with such power as is granted by law, including the authority granted by G.S. 106-465, and the plaintiff C. T. Day is and at the times hereinafter mentioned was a member of that Association.

"2. That the Asheville Tobacco Market's selling season for the sale of burley tobacco normally runs five or six weeks, and the 1954-55 selling season began on November 30, and will probably consist of five or six weeks.

"3. That during the selling season of 1953-54, and for some years prior thereto, there were eleven warehouses operating in the City of Asheville, with a total warehouse floor space of 475,182 square feet, and that during the 1953-54 season there was sold on the Asheville Market 9,550,016 pounds of tobacco; that the floor space of the warehouses

mentioned in this paragraph will accommodate 24,722 baskets of tobacco.

"4. That two sets of buyers have been assigned to the market and the total permitted selling time for the Asheville Market for the 1954-55 selling season is allotted by the Burley Tobacco Warehouse Association, which comprises the burley tobacco belt in the southeastern section of the United States, such selling time will consist of a total of 8 hours selling time per day, and the total allotted baskets per day for the Asheville Market has been allotted at 2880 baskets.

"5. That during the 1953-54 selling season, and for some years prior thereto, the warehouses of the Asheville Market had unanimously agreed upon the allotment among themselves of the total allotted selling time and the total allotted number of baskets to be sold per day.

"6. That on November 13, 1953, and prior to the time when the plaintiff had given information that he intended to build a new warehouse, the defendant passed the following resolution relative to new warehouses which might be built in Asheville, namely: 'For a warehouse to be eligible for a sale the following season, the owner or operator should give written notice, with specifications of his warehouse, to the Supervisor before April 1st.'

"7. That the resolution mentioned in the preceding paragraph was reasonable under all the circumstances then and there existing, and in order for the warehousemen on the Asheville Market to make proper and suitable arrangements for the succeeding season.

"8. That on the 2nd day of January, 1954, all of the warehousemen operating in Asheville at said time, entered into an unanimous agreement for the allotment of the total selling time and the total number of baskets per day allotted for the Asheville Market; which agreement, however, contained the following provision: 'Should an outside firm come into the Asheville tobacco market as a new operator, this agreement would be null and void.' and said agreement, together with said proviso, was incorporated into the minutes of the defendant at its meeting on January 2, 1954."

9. That on January 14, 1954, the Asheville Tobacco Board of Trade met in session, and, at request of all the operators of tobacco warehouses on the Asheville Tobacco Market, amended its by-laws in respect to method of allocating selling time,—and making provision for warehouses erected thereafter to participate in the allocation of selling time, and the extent of such participation in so far as floor space is a factor in the allocation of selling time.

And the findings of fact continued:

"10. That in March, 1954, the plaintiff purchased a tract of land and sometime thereafter began the erection of a tobacco warehouse in

Asheville, which had not been completed at the time of the institution of this action, and which contains, or will contain, approximately 125,000 square feet of floor space, which said warehouse has a fire wall dividing floor space.

"11. The plaintiff has not at any time complied with the provisions or regulations passed by the defendant on November 13, 1953, hereinbefore quoted, nor of the regulation of January 14, 1954, hereinbefore quoted, not having given written notice with specifications of his warehouse to the Supervisor before April 1, 1954, or at any time up to the hearing of this cause, and not having applied in writing to the Sales Committee or the Secretary of the defendant for inclusion of said warehouse in any schedule of sales on or prior to the 1st day of March preceding the opening of the marketing season in which the applicant desires to participate, or at any time prior to October 2, 1954.

"12. That the building by the plaintiff of a new warehouse adding an additional 125,000 square feet of floor space had no relation to the normal needs of the tobacco market in Asheville and was for the purpose of securing approximately one-fourth of all the selling time and of the number of baskets for sale per day, which had been allotted to the Asheville market.

"13. That under date of September 20, 1954, the plaintiff received a registered letter from Jeter P. Ramsey, Secretary-Treasurer of the Asheville Tobacco Board of Trade, reading as following: (Deleting immaterial matter)

" 'Mr. C. T. Day
Greenville, N. C.

" 'Dear Sir:

" 'The Asheville Tobacco Board of Trade, Inc., will hold an important meeting Saturday morning, October 2, 1954, commencing at 9:00 A. M. in the Vanderbilt Room in the George Vanderbilt Hotel, at Asheville, North Carolina, for the transaction of important business, as well as such business as may come before the members.

" 'This is your notice and request that you be present.

Respectfully
(s) Jeter P. Ramsey
Secretary and Treasurer.

" 'P.S. If you cannot come, I would appreciate you filling out the enclosed proxy and returning same to me. J. P. R.'

"A similar notice was sent to all of the members of the defendant.

"14. That pursuant to the call of the special meeting of the defendant, plaintiff attended the same, and in addition to plaintiff those attending such meeting were . . . operators of warehouses in Asheville, . . . the same individuals who petitioned the defendant in January, 1954, to amend the then existing by-laws, . . . The following members were represented at said meeting by proxies duly executed and filed with the Secretary: (Six named).

"15. That a meeting of the members of the defendant was held on October 2, 1954, at which time by-laws which had been in the process of preparation by Mr. S. G. Bernard, attorney for the defendant, for a long period prior thereto, were enacted, which by-laws, among other things, contained the following: (a) All warehouses selling leaf tobacco on the Asheville Market for any given year may agree unanimously in writing upon the allocation of selling time among such warehouses and, if so, such agreement shall be recognized and observed by the Asheville Tobacco Board of Trade and said warehouses shall be bound by said agreement for the selling season to which said agreement relates. (b) In the event no unanimous agreements of all such warehouses shall be entered into far enough in advance of any selling season for the Asheville Tobacco Board of Trade to put such agreement into effect by allocating selling time in accordance with such agreement, selling time of the warehouses on the Asheville Market shall be allocated according to a schedule prepared and adopted by the Board of Trade in accordance with the following requirements, to wit: selling time shall be allotted to each warehouse on the Asheville Market in such proportion as the sales of tobacco of producers thereof in such warehouses were to the total sales of producers on the Asheville Market for the year preceding the allocation; provided, however, regular selling time in each warehouse shall not vary more than three and one-half per cent from the selling time allocated to a warehouse for the preceding season.

" 'Provided that in the event of a new warehouse and/or a warehouse which did not operate on the Asheville Tobacco Market during the preceding season claiming selling time, then the selling time allotted to such new warehouse or warehouses not operating the preceding season claiming selling time shall be allotted on an average and in proportion with the amount of selling time available to all warehouses operating on the Asheville Tobacco Market; provided further each such new warehouse and/or warehouses which did not operate the preceding season is smaller in size than the average of all warehouses comprising the Asheville Tobacco Market, then the said selling time shall be allocated according to the proportion of its size in relation to all other warehouses; provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the

average of all warehouses operating on the Asheville Tobacco Market, such warehouse or warehouses shall not receive any consideration and be allocated selling time for the size thereof in excess of the average of all warehouses and shall in no event be allocated more than its equal pro rate share of selling time as is determined by the number of warehouses operating on the Asheville Tobacco Market.' (c) The total remaining selling time allotted to the market after selling time has been allotted to a new warehouse and/or warehouses which did not operate on the market during the preceding season shall be allocated to the remaining houses which did operate the preceding season in accordance with the provisions of the first paragraph of subsection (b) above.

" 'Section 2. Any individual, firm or corporation being a member of the Board of Trade and desiring to operate a warehouse on the Asheville Tobacco Market for the auction sale of leaf tobacco must give notice in writing to the Sales Supervisor of his, their or its intention to do so on or before the first Saturday in April prior to the opening of the Asheville Tobacco Market for such selling season, or such person, firm or corporation failing to give such notice will not be allotted a space on the sales cards for such selling season and will not be permitted to operate such warehouse under the rules and regulations of the Asheville Tobacco Board of Trade.

" 'Section 3. The Sales Committee with the aid of the warehousemen comprising membership in the Board of Trade and of the Supervisor of Sales shall annually not later than the first Saturday in April prior to the opening of the selling season on Asheville Tobacco Market prepare and draft a sales card or schedule of the order of sales for each selling season and shall furnish each member with a copy of same; provided the sales cards and schedules of the order of sales for the 1954-55 selling season shall be prepared immediately following the adoption of these By-Laws. The plan of the order of sales shall be arranged so that each operating warehouse shall be allotted their selling time. Any person or firm operating more than one warehouse may allot his selling time to one or more of his warehouses. The minimum speed of selling shall be maintained at 360 piles or baskets of tobacco per hour. If any warehouse conducting a sale shall fall behind in the time prescribed and allotted as above stated as much as thirty minutes, such warehouse shall automatically lose its sale. The sale and the order of sales as herein provided for shall be regulated in all respects by the Supervisor.' and that at the same meeting the defendant made the allotment of selling time and baskets to warehouses which appears on the following list, in compliance with said by-laws, which included the new warehouse built by the plaintiff: The floor space of each warehouse as found by the court appears in the last column—

	Number of Baskets	*Percentage of Selling Time*	*Square Footage*
Carolina	317	11.01	55,072
Bernard Walker #1	501	17.40	91,941
Dixie #2	95	3.30	17,275
Planters #1	388	13.47	67,450
Walker	251	8.72	46,124
Bernard Walker #2	167	5.76	31,157
Dixie #1	184	6.39	33,484
Bernard Walker #3	205	7.12	38,270
Planters #2	265	9.20	46,040
Liberty	46	1.60	8,640
Big Burley	221	7.70	39,729
Day	240	8.33	125,000
	2880	100.00	600,182

"16. That the plaintiff C. T. Day was present at the said meeting of October 2, 1954, and participated therein and made certain suggestions relative to changes in said by-laws, some of which changes were accepted and approved, and was informed during the meeting that he would have an opportunity to consult with an attorney if he so desired, and for that purpose the meeting would be adjourned, and the plaintiff in reply stated for the meeting to proceed, and the plaintiff did not make any protest as to the regularity or validity of the meeting, or the regularity or validity of the notice of said meeting. He did, however, object and protest to the by-laws and voted 'No' thereon.

"17. That during the pendency of this action and before the signing of the judgment as appears herein, a regular stated meeting of the defendant was held on Saturday, November 27, 1954 at 2 o'clock P. M., at the time and place provided in the by-laws of the corporation, which were in existence at all times, and that at said regular stated meeting the following resolution was unanimously adopted by all members present at said meeting and voting, namely: 'RESOLVED: That the By-Laws of the Asheville Tobacco Board of Trade, Inc. adopted at a special meeting of the corporation October 2, 1954, appearing in the minutes of said meeting be, and the same are hereby approved, ratified and in all things confirmed.' Mr. Cannon, bookkeeper for and representative of the plaintiff, was present at said meeting and did not vote for or against the above resolution.

"18. That at the time of the hearing of this action the warehousemen operating warehouses in the City of Asheville had made many commitments to many farmers, giving them assurances of the time when they

could depend upon their tobacco being sold, and had made their schedules of sales so as to carry out these commitments and that the carrying out of these commitments to the farmers and the prearranged schedules of sales are important business functions, beneficial to the producers of tobacco, as well as to the Asheville Market generally, and important for the orderly conduct of the Asheville Tobacco Market.

"19. That the inconvenience and damage that will result to the other members of the defendant, as well as to the producers of tobacco and the Asheville Tobacco Market generally will be much greater than the benefit which would accrue to the plaintiff from the issuance of an injunction at this time.

"And the court being further of the opinion that the defendant should not be restrained as prayed in the complaint,

"IT IS, THEREFORE, ORDERED AND ADJUDGED, in the discretion of the court, that the application of the plaintiff for a temporary injunction be, and the same is hereby denied."

To the signing of the foregoing order, plaintiff objects and excepts.

The record also shows (1) that plaintiff requested certain findings of fact, and conclusions of law, all of which, except such as are included in findings of fact and conclusions of law made by the Judge were denied—and that plaintiff excepted to each ruling. (2) That plaintiff objected to findings of fact numbers 7, 10, 11, 12, 17, 18 and 19, and excepted to the overruling of each, and (3) that plaintiff excepted to the signing of the judgment, and appeals to Supreme Court.

J. Y. Jordan, Jr., and Albion Dunn for plaintiff, appellant.

Williams & Williams for defendant, appellee.

WINBORNE, J. Is there error in the denial of plaintiff's prayer for injunctive relief? We hold there is not error.

Attention is directed to the case of *Cooperative Warehouse, Inc., v. Lumberton Tobacco Board of Trade, Inc., ante,* 123. While the particular method of allotting selling time in that case is not the same as here, the fundamental principles declared and applied there are determinative here.

In that case this Court in effect holds that the articles of association for the purposes expressed in the charter and by-laws of a tobacco board of trade, organized and existing under and by virtue of G.S. 106-465, constitute a contract between it and its members, which imposes certain obligation on the members among themselves and with respect to the corporation, and that, hence, as a consequence of membership in the corporation for mutual benefit, each member is deemed to have consented to all reasonable rules and regulations pertaining to the business

which have been properly determined and promulgated. This holding is applicable to case in hand. And plaintiff, as a member of the Asheville Tobacco Board of Trade, Inc., is deemed to have consented to all reasonable rules and regulations pertaining to the business of selling tobacco at auction on warehouse floors.

Also, in the *Cooperative case, supra,* this Court holds, in effect, that the authority granted to tobacco boards of trade, under and by virtue of the provisions of G.S. 106-465, as amended, to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the towns and cities in North Carolina in which an auction market is situated, is sufficiently broad to include the authority to make reasonable rules and regulations in respect to "allotment of sales time." What is said there relative thereto is applicable here. Therefore, this Court now holds in the case in hand that the by-laws of the Asheville Tobacco Board of Trade, Inc., adopted at, and pursuant to the meeting on 2 October, 1954, are within the power and authority so vested in it.

True, the act, G.S. 106-465, does not authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade, but the findings of fact do not reveal any invasion of this limitation.

Moreover, the court below finds as a fact that plaintiff was present at the meeting of 2 October, 1954, and participated therein, and did not make any protest as to the regularity or validity of the meeting, or of the notice thereof. This fact dispenses with notice to him. *Hill v. R. R.*, 143 N.C. 539, 55 S.E. 854.

And there is nothing in the findings of fact tending to show that the Asheville Tobacco Board of Trade, Inc., in considering subject of selling time was required to adopt any particular plan. It would seem to follow, therefore, that the standard of the rules and regulations adopted would be gauged by their reasonableness. And the rule by which the allotment was made to plaintiff by the Board appears fair and equitable. Indeed, it does not appear that there is any restraint of trade in the rule.

Hence, in the light of the facts found by the court below, the conclusion reached appears to be correct.

It is noted that defendant moved to dismiss the appeal for failure of plaintiff to comply with Rules 19 (3) and 28 of this Court in respect to assignments of error. But since the case is of public interest, the Court has of its own motion elected to treat the appeal on its merit, for which reason the motion to dismiss is not considered, and is denied.

The judgment below is

Affirmed.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

J. OWEN LINDLEY AND CHARLES LINDLEY v. GEORGINA YEATMAN AND MILDRED MULFORD.

(Filed 20 April, 1955.)

1. Pleadings § 15—

A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits only those facts which are properly pleaded, and the legal inferences and conclusions of the pleader therefrom should be disregarded.

2. Same—

A demurrer does not admit the legal effect of an instrument as asserted by the pleader when the instrument itself is incorporated in the pleading and the construction alleged is repugnant to the language of the instrument.

3. Pleadings § 19c—

Where a complaint stating a single cause of action contains two repugnant statements of fact, the repugnant allegations destroy and neutralize each other, and where the remaining averments are insufficient to state a cause of action, a demurrer thereto is properly sustained.

4. Same: Pleadings § 22—

Where the complaint contains a defective statement of a good cause of action, the action should not be dismissed upon demurrer until the time for obtaining leave to amend has expired, G.S. 1-131; but where there is a statement of a defective cause of action, final judgment dismissing the action should be entered.

5. Partnership § 12—Complaint held insufficient to state cause of action for division of partnership profits.

The complaint alleged a joint enterprise for the improvement of lands of one defendant, the plaintiffs to contribute their labor and oversee and direct the work. Plaintiffs attached to the complaint a written instrument signed by the parties designating plaintiffs as managers of the farm to serve at the will of the owner, fixing their compensation, without reference to profits and without any formula for division of the profits among the parties. *Held:* The two repugnant statements of fact neutralize and destroy each other, and the complaint fails to state a cause of action to recover against defendant owner for division of profits from the enterprise, past or prospective, and constitutes nothing more than a statement of a defective cause of action as to the defendant named as business or office manager.

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

APPEAL by plaintiffs from *Parker, J.*, at December Term, 1954, of CARTERET.

Civil action for breach of contract, heard below on demurrers to the complaint.

These in pertinent part are the allegations of the complaint:

"2. That on or about the 11th day of September 1951 the plaintiffs wished to locate for purchase certain organic soils or 'pocosins' peculiar to parts of the East Coast of North Carolina, having theretofore made investigations, study and experiments concerning the commercial possibility of growing grass thereupon for raising beef cattle; . . .

"3. That in the course of locating for purchase a tract or tracts of organic soils or 'pocosins,' plaintiffs learned that the defendant Yeatman was the owner of a large tract of such soil, located in Carteret County, being a portion of the area known as the 'Open Grounds' . . .

"4. That . . . plaintiffs went to Asheville, North Carolina and conferred with the defendant Yeatman concerning the sale and purchase from her or development of the . . . 'Open Grounds'; . . .

"5. That . . . defendant Yeatman inquired as to the cost of developing her acreage, whereupon plaintiffs informed her . . . they felt that at least one million dollars would be required for a soundly-backed venture, whereupon said defendant stated that if it did not cost any more than that, 'We will keep the land and develop it ourselves,' or words to that effect.

"6. That plaintiffs and defendants . . . undertook an extensive course and plan of development of said lands under the terms of a contract; that part of said contract is set out in the memorandum drafted and written by the defendant Yeatman, which is hereto appended, marked Exhibit A, and asked to be taken as a part of this complaint . . ., and part of which came into being by and through the verbal representations and acts of the parties hereto, by the terms of which contract it was agreed that the plaintiffs would devote their full time and attention to the development of said lands for the production of grasses; . . . that the defendant Yeatman under the contract between the parties hereto agreed to furnish all capital for the development of the 'Open Grounds' project and that the plaintiffs and defendants would jointly undertake the development of the aforesaid 'Open Grounds.'

"7. That it was mutually agreed . . . that the plaintiffs were not being hired to undertake the venture . . . but that it was being undertaken by the four individuals for their mutual profit and benefit; . . . that the defendant Yeatman, in the course of furnishing all capital required as agreed, would pay for the living and other expenses incurred by plaintiffs in the course of their furtherance of the joint project, . . .

"8. That in pursuance of such contract . . ., Charles Lindley moved on January 1, 1952, or thereabouts, to the 'Open Grounds' and commenced devoting his full time to the clearing, draining, leveling, and

seeding of the soils to be put into production, supervising and managing said project, putting in roads and bridges, . . . and, generally, going forward with the plans agreed upon; that said Charles Lindley also spent considerable time conferring with J. Owen Lindley who was at that time still in Law School; that from the outset J. Owen Lindley devoted more than one-half of his time to the . . . project, making trips to obtain required farm and construction machinery, consulting with national and foreign experts upon the development of this . . . peculiar type of soil, purchasing cattle, . . . and otherwise performing his agreed duties consistent with the contract between the parties, it having been agreed at the beginning that he might complete his legal schooling.

"9. . . .; that on or about the 20th day of May 1952, defendant Yeatman communicated with . . . plaintiff (J. Owen Lindley), stating that she had determined that she would go on and develop the project alone and that plaintiff, J. Owen Lindley, should not come to the project in June of that year or in September upon completion of school as had been originally contemplated.

"10. That the . . . plaintiff, J. Owen Lindley, thereafter contacted the defendant Yeatman, indicating his willingness to go forward with the development of said project, in September 1952; that he contacted the defendant Mulford, who was connected with said joint adventure, as set forth in 'Exhibit A,' in September 1952, and . . . she confirmed the defendant Yeatman's previous exclusion of plaintiffs from the . . . 'Open Grounds' project . . . that both plaintiffs contacted the defendant Yeatman in March 1953, indicating their willingness to go forward with said project, or, if she refused to permit this, demanded their just share of the profits derived and to be derived from said joint adventure, but said defendant Yeatman . . . refused to permit them to continue the performance of the contract, . . . and . . . has excluded these plaintiffs from any further participation in the venture.

"11. That the plaintiff, J. Owen Lindley, expended from his own funds an amount in excess of $750.00 for travel and other expenses, attributable exclusively to the execution of the development of the 'Open Grounds' project, of which he has been reimbursed the amount of $500.00; that plaintiff, Charles Lindley, has received approximately $300.00 per month from January 1952, until some time in the latter part of May 1952 for living expenses, travel and other expenses connected with the project . . .

"12. That at the time the parties . . . entered into the joint adventure . . ., the defendant Yeatman was the owner of approximately 42,000 acres of land in Carteret County, of which . . . 36,000 acres was 'pocosins' or organic soil, which . . . excluding such timber as may

have been upon it, had a fair market value of about one dollar per acre, . . .; that approximately 2,000 acres of this . . . soil has been improved in accordance with the plans developed by the plaintiffs and put into grass and now has, . . . a fair market value of $300.00 per acre; that . . . it has cost approximately $100.00 per acre to improve and put such soil into grass production; that surrounding lands of the same original value not thus improved have, by virtue of the improvement of this particular soil, been enhanced in value to a present fair market value of approximately $10.00 per acre, . . .; that . . . said lands . . . have been enhanced in value over and above the costs of improvement in the sum of $704,000, by and through the plans and ideas initiated by said plaintiffs and jointly put into effect by the parties hereto as alleged.

"13. . . . that it was agreed from the beginning of the project that the parties hereto should share mutually in the profits therefrom; that said defendants, by their acts and conduct, jointly and severally, have excluded plaintiffs from the further development of said project and the defendant Yeatman continued the said development on her own . . . and has unjustly enriched the said defendant Yeatman; . . .

"14. That plaintiffs are entitled, . . . to one-half of the profits derived or to be derived from the 'Open Grounds' project, and to damages resulting from their wrongful exclusion as aforesaid, or both.

"WHEREFORE, plaintiffs pray the court that they have and recover of the defendants, or either of them, the sum of $352,000.00, plaintiffs' share of the accrued profits of the . . . project as alleged, and a sum to be computed as to the value of future profits," and for costs and general relief.

The written agreement, referred to in Paragraph 6 of the complaint, is in form a letter written by the defendant Yeatman to the plaintiffs, approved by all the parties to this action, as signified by their signatures at the end of the document. The memorandum is as follows:

"EXHIBIT 'A' February 13, 1952

"Mr. Charles F. Lindley
Mr. J. Owen Lindley

"Dear Charles and Owen:

"This letter is to outline a working agreement we have entered into for the purpose of developing the Open Grounds for agricultural use, and though we will undoubtedly have to amend our plans from time to time as the work proceeds, it should serve as a basis for our immediate plans and for future adjustments when necessary.

"As a preamble I will described what has been done at the Open Grounds since its acquisition and what led to my decision in the summer

of 1951 to start a large scale development of this land. (Then follows a six-paragraph narrative of Mrs. Yeatman's activities in connection with the development of these lands, consisting of about 42,000 acres, from 1936 until she left the premises and moved to Asheville in 1951. This narrative is omitted as not being pertinent to decision.)

"*Charles and Owen Lindley will act as General Managers of the Open Grounds Farm.* Though they have had only limited experience in either administration or business they have a knowledge of organic soils and farming methods, imagination, initiative, energy, and a high standard of ethics. It is hoped that (they) will prove to be good managers in carrying out a program which not only has attractive financial prospects for us all but is one in which we all have a profound belief and interest. *Should the owner decide that either Charles or Owen does not fit for the job of General Manager, the owner will try to work out a reorganization whereby both will continue as part of the enterprise in some other capacity for which they may prove better fitted by inclination and aptitude.* (Italics added.)

"*As Business Manager we will have Mildred W. Mulford who has taken part in the operation and kept the accounts of the Open Grounds since 1936.* Our plan is for the business affairs of the Open Grounds to be handled in Asheville, N. C. under her direction. All policies concerning the operation of the project are to be decided in conference with Charles and Owen Lindley, Mildred Mulford and myself. Charles and Owen Lindley at the Open Grounds shall have charge of the execution of these policies including laying out of work, the employment and direction of personnel, experimental work and the keeping of records and reports which shall be transmitted regularly to the Asheville office. (Italics added.)

"As the most convenient and efficient way to handle our finances, the following method is proposed:

"A checking account in the name of the Open Grounds Farm will be maintained at the First Citizens Bank & Trust Company in Beaufort, N. C., and can be drawn on by the Farm Managers for traveling, telephone calls, emergencies and miscellaneous minor expenses, including pay for day labor. Itemized accounts should be sent to the Asheville office monthly.

"Bills for feed, fuel, and oil, hardware, repairs and other items which can be charged, should be approved by the Farm Managers and sent to Asheville for payment. Salary checks also will be sent from the office.

"Orders for equipment, except hand tools or other items, and orders for supplies such as lime or fertilizer will be issued by the Asheville office on recommendation of the Farm Managers.

"Beginning January 1, 1952 Charles Lindley is to receive as compensation $250.00 monthly. He will provide his own board and lodging. For the time being he is welcome to use part of the house on South River, but it may prove more advantageous for him to live nearer Beaufort where room, board, and telephone service are available. He will have the use of the Gray Jeep Station Wagon and will be reimbursed for traveling expenses, telephone and other business expenses in connection with his work. *When Owen joins the project at Open Grounds he will receive the same compensation as Charles* and will also be reimbursed for all expenses in connection with the Open Grounds project incurred prior to his coming. (Italics added.)

"Our goal is the development of 20,000 to 25,000 acres of land in grasses and clovers for hay or pasturage of cattle, or in any other crops which appear promising. We hope to accomplish all this in ten years, and plan to prepare and plant a minimum of 1,000 acres in each of the three years 1952 to 1954.

"If this venture turns out as we hope, it is my intent that Charles and Owen Lindley, and Mildred Mulford shall each have a stake in its success. For the protection of us all it is contemplated that by January 1, 1953 we will review our plans and decide whether or not we should continue on this same basis for another two years. By January 1, 1955 we will again review our plans and decide if and how we should proceed with the project and in what capacity each of us should serve, and also whether the project should be continued under individual ownership or as a partnership or corporation. (Italics added.)

"This entire agreement is of course based on mutual confidence and trust and it is with the greatest hope for a success satisfactory and rewarding to us all that this proposal is submitted for your approval and cooperation.

Sincerely,

GEORGINA P. YEATMAN.

"Approved:

C. F. LINDLEY
JESSE O. LINDLEY, JR.
MILDRED W. MULFORD
GEORGINA P. YEATMAN."

The defendants demurred separately to the complaint for failure to state facts sufficient to constitute a cause of action. Both demurrers were sustained by the trial court, with direction that the action be dismissed as to the defendant Mulford, and that the plaintiffs be allowed to amend as to the defendant Yeatman.

From judgments entered in accordance with the foregoing rulings, the plaintiffs appeal.

Lewis S. Pendleton, Jr., and Hughes & Hines for plaintiffs, appellants.
C. R. Wheatley, Jr., and J. F. Duncan for defendants, appellees.

JOHNSON, J. A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits the truth of every material fact properly alleged. *Gaines v. Long Mfg. Co.*, 234 N.C. 331, 67 S.E. 2d 355; *Bryant v. Ice Co.*, 233 N.C. 266, 63 S.E. 2d 547. See also *Scott v. Veneer Co.*, 240 N.C. 73, 81 S.E. 2d 146. However, it is to be noted that on demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded. *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193; *Bank v. Gahagan*, 210 N.C. 464, 187 S.E. 580; *Brick Co. v. Gentry*, 191 N.C. 636, 132 S.E. 800; *Bank v. Bank*, 183 N.C. 463, 112 S.E. 11.

Nor does a demurrer admit the alleged construction of an instrument when the instrument itself is incorporated in the pleading and the construction alleged is repugnant to the language of the instrument. *U. S. v. Ames*, 99 U.S. 35, 25 L. Ed. 295; 41 Am. Jur., Pleading, section 243, p. 462. See also Annotation: 97 Am. St. Rep. 833.

Moreover, where in stating a single cause of action the complaint alleges two repugnant statements of facts, the repugnant allegations destroy and neutralize each other, and where, with the repugnant allegations thus eliminated, the remaining averments are insufficient to state a cause of action, demurrer will lie. *Jacksonville, etc. Co. v. Thompson*, 34 Fla. 346, 16 So. 282; *Wood v. Security Petroleum Co.* (Tex. Civ. App.), 282 S.W. 943; 41 Am. Jur., Pleading, section 47. See also McIntosh, N. C. Practice and Procedure, section 353, p. 353; 41 Am. Jur., Pleading, section 221.

Where, on demurrer, there is a defective statement of a good cause of action, the complaint is subject to amendment and the cause should not be dismissed until the time for obtaining leave to amend has expired, G.S. 1-131; but where there is a statement of a defective cause of action, final judgment dismissing the action should be entered. *Mills v. Richardson*, 240 N.C. 187, 81 S.E. 2d 409; *Redic v. Bank*, 241 N.C. 152, 84 S.E. 2d 542.

Conceding, without deciding, that the allegations of the complaint, when considered without reference to the written contract incorporated in the complaint, are sufficient to set forth a cause of action for breach of contract, even so, it is manifest that material phases of such allegations are repugnant to the plain language of the written instrument and that under the terms of the instrument the plaintiffs are not entitled in any aspect of the case to recover against the defendants, or either of them, for loss of profits, past or prospective, on the theory of breach of contract. The plaintiffs in their allegations refer to the development

project as a joint adventure in which the parties were to share mutually in the profits; whereas the written contract specifies it is contemplated that the project shall be operated on an experimental basis for one year at least, with no reference being made to profits or to any formula for division of profits among the parties. Indeed, it is implicit in the recitals and stipulations of the written instrument that no profits were anticipated during the trial period. Moreover, the written instrument designates the plaintiffs as "managers of the Open Grounds Farm," to serve at will of the defendant Yeatman, and fixes their compensation. No part of the compensation so fixed is alleged to be in default or is sued for in this action.

Here, then, at most we have a situation wherein the complaint alleges two repugnant statements of facts, which neutralize and destroy each other, leaving insufficient allegations to state a cause of action. Therefore the demurrers were properly sustained. See *Scott v. Veneer Co., supra* (240 N.C. p. 77); *Sabine v. Gill, Commr. of Revenue,* 229 N.C. 599, top p. 603, 51 S.E. 2d 1, 3.

It is manifest that as against the defendant Mulford the averments of the complaint constitute nothing more than a statement of a defective cause of action. Hence as to her the action was properly dismissed. *Mills v. Richardson, supra.* And, clearly, no harm has come to the plaintiffs from the trial court's ruling that the complaint constitutes a defective statement of a good cause of action, rather than a statement of a defective cause of action, against the defendant Yeatman, thus entitling the plaintiffs to amend as to her.

The judgment below is

Affirmed.

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

IOLA G. NORWOOD v. DAVID CARTER AND WIFE, VIRGINIA CARTER.

(Filed 20 April, 1955.)

1. Deeds § 16c—

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of grantee's breach of covenant to support grantor for her lifetime, constituting the consideration of the grantor's conveyance to him.

2. Contracts § 25—

The measure of damages for breach of contract is the amount which will compensate the injured party for the loss which fulfillment of the promise could have prevented or the breach of it entailed, so that the parties may

be placed as near as may be in the same monetary condition they would have occupied had the contract not been breached.

3. Deeds § 16c—

The measure of damages for breach of covenant to support grantor for her lifetime, constituting the consideration of the grantor's conveyance, is the reasonable value of the services agreed to be rendered, with the burden on plaintiff to introduce evidence of facts, circumstances, and data as to the reasonable value of such services, and where the damages are predicated solely upon plaintiff's allegation that it would cost defendant as much as $100 a month to pay for such services, a new trial must be awarded, since no substantial recovery may be based on mere guesswork or inference.

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

APPEAL by defendants from *Grady, Emergency Judge,* November Term 1954 of WAKE.

This was an action to recover damages for breach of contract for services to be rendered as consideration for conveyance of land.

The plaintiff is a widow of sixty-two years of age, without children. On 22 March, 1951, she executed a deed to the defendant David Carter, her nephew, for a 53-acre tract of land in Wake County, reserving life estate therein to herself, reciting as consideration the defendant's agreement to provide for and support the plaintiff "whenever she is in need, or upon the request from her to do so, for the term of her natural life."

The plaintiff testified that the defendant agreed, if she would make him a deed for the land, he would "come there and stay there with me and be a companion to me and help me and look after me . . . if I got sick they (defendant and his wife) would wait on me and attend to me and look after my welfare;" that after the execution of the deed, defendant came to the farm, built a house near her house, and with his wife lived there (though he did not complete the house) from May until September 1951, when he left and went to Newport News, Virginia, to work, and has rendered no further service to her. "He has been down to my house about one time since."

Plaintiff further testified that she owned two other small farms in Wake County; that after defendant left she could not stay there and went to one of her farms on which her brother (since deceased) resided near Rolesville, several miles away, and built a house there, where she is now living. She testified: "My kin people are up there. When I have to have a doctor or medicine or groceries or wood, they look out for that, but with the understanding, of course, that I can take care of myself . . . I have got two nieces and a nephew that look after me."

Plaintiff also testified she did not know the value of the 53-acre tract; that she looked after her own farming arrangements, engaging tenants

and making settlements; that she rented out the 53 acres, that she gave the rent of the place where she now lives to her relatives "because they were taking care of me." She did not know how much these rents amounted to. "It is not amounting to much."

The deed which the plaintiff made to the defendant was drawn by her attorney who testified he drew it in accordance with what he understood the agreement to be; that no money was passed, and that the consideration was as stated in the deed, and he was to live there on the place.

No other evidence was offered by the plaintiff.

The defendant offered no evidence.

The following issues were submitted to the jury:

"1. Did the defendant fail and refuse to carry out the terms and conditions of the contract which formed the consideration for the deed executed by the plaintiff to defendant and referred to in the pleadings?

"2. If so, what was the reasonable value per month of the services which the defendant was to perform for the plaintiff?"

On the second issue the court charged the jury as follows:

"The complaint in this case, gentlemen, is based upon a monthly consideration, she alleging the services to her, the things that he promised to do and which he failed to do, cost her if he had to pay for them as much as $100 a month. However, gentlemen, that is a question for you to determine. The defendant contends that it was not worth anything like $100.00 a month and that, even though you should answer the first issue YES, that you ought to answer the second issue only in some small sum of money which you, in your good, sound judgment should find from the evidence that he ought to pay her now for his breach of contract. That is purely a question of fact for you gentlemen, and now you may retire and see how you find it."

The jury answered the first issue "Yes" and the second "$100.00."

Thereupon, it was adjudged that the plaintiff recover of defendant $3,800, that being the amount which would be due at $100 per month from October 1, 1951 to November 30, 1954 (date of trial).

It was also ordered that the land be sold, subject to plaintiff's life estate, to pay this judgment.

Defendant excepted and appealed.

Armistead J. Maupin for plaintiff, appellee.

Yarborough & Yarborough for defendant, appellants.

DEVIN, J. The evidence offered by the plaintiff was sufficient to support the verdict on the first issue, and to show that the defendant David Carter breached the terms of the covenant upon which the con-

veyance of the land was made to him. Hence the plaintiff was entitled at least to nominal damages.

But we think there was error in the court's charge to the jury on the second issue, the issue directed to the question of the value of the services defendant was obligated to perform. According to the record, the portion of the charge hereinbefore quoted constituted the entire charge of the court on this issue. The allegation in the complaint that "the services to her, the things that he promised to do and which he failed to do, cost her if he had to pay for them as much as $100 a month" seems to have been submitted to the jury and apparently understood by them as affording the only basis for determining the amount of recovery. No evidence was offered as to the value of the services which defendant had contracted to furnish and had failed to render, or what loss or expense the plaintiff has been caused to suffer in order to obtain services substantially equal to those the defendant had obligated himself to perform. *Lunsford v. Marshall,* 230 N.C. 610, 55 S.E. 2d 194; *In re Atkinson,* 225 N.C. 526, 35 S.E. 2d 638. No rule or standard for the admeasurement of damages was given.

Where breach of contract has been established, the general rule is that the measure of damages is the amount which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed. *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12; *Caldwell v. McCorkle,* 225 N.C. 171, 33 S.E. 2d 878; 50 A.J. 885.

The injured party is entitled to compensation for his loss and to be placed as near as this can be done in money in the same condition which he would have occupied had the contract not been breached. *Perkins v. Langdon,* 237 N.C. 159 (169), 74 S.E. 2d 634; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; *Chesson v. Container Corp.,* 216 N.C. 337, 4 S.E. 2d 886.

The damages for failure to furnish services in accordance with the contract therefor are measured by the actual loss sustained as a natural and proximate consequence. And when the contract is to perform specific services, this ordinarily means the reasonable cost of securing performance by other means. And where the contract for support has been breached, the injured party would be entitled to recover as damages the value of the services agreed to be rendered. 25 C.J.S. 580, 582.

A covenant for future services as consideration for a deed imposes a legal obligation on the grantee, and the remedy for breach is an action for damages. *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285. "The proper measure of damages in such action is the value of the promised support lost by the grantor." *Minor v. Minor,* 232 N.C. 669, 62 S.E. 2d 60.

"However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered." 25 C.J.S. 496.

The other exceptions noted by defendants and brought forward in their assignments of error need not be considered as we think there should be a

New trial.

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

RODNEY TAYLOR AND CALVERT FIRE INSURANCE COMPANY v. SUSIE B. GREEN.

(Filed 20 April, 1955.)

1. Insurance § 51—

Where insurer pays the entire damages to the automobile of insured, it must sue in its own name to enforce its right of subrogation against the tort-feasor, G.S. 1-57, but when insurer pays only a part of the loss and is thus subrogated only *pro tanto* to the rights of the insured against the tort-feasor, insurer is not a necessary party to the action against the tort-feasor, but is a proper party and may be joined as an additional party in the discretion of the court upon motion of the tort-feasor.

2. Insurance § 48—

A liability or indemnity policy voluntarily taken out by the owner of an automobile constitutes a contract solely between the owner and insurer for the protection of the owner alone in the absence of provision in the policy to the contrary, and therefore in an action by the injured third party to recover for loss sustained by reason of the negligence of the owner, the insurer is not a proper party defendant, and its joinder is properly denied. Ordinarily evidence of the existence of the liability insurance is incompetent and any reference thereto in the presence of the jury is prejudicial. As to the effect of the provisions of the Motor Vehicle Safety and Financial Responsibility Act upon joinder of insurer, *quaere.*

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

APPEAL by plaintiff Calvert Fire Insurance Company from *Hall, Special Judge,* January Term, 1955, of WAKE.

This action was instituted by Rodney Taylor against the defendant Susie B. Green to recover damages which the plaintiff alleged he sustained when the automobile of the defendant was negligently and care-

lessly driven into the automobile of the plaintiff while it was parked on Smithfield Street in the City of Raleigh on 14 March, 1954.

The defendant filed her answer in which she denied the material allegations of the complaint and alleged, upon information and belief, that the Calvert Fire Insurance Company (hereinafter called Calvert) had issued prior to the collision, a policy of insurance which was in full force and effect on the above date and in which policy Calvert had agreed to pay the plaintiff for all direct and accidental damages to his automobile caused by a collision of the automobile with another object; that said company had paid the plaintiff all or a substantial part of said loss and thereby became subrogated to the plaintiff's rights under the terms of the policy, and moved to make said insurance company a party plaintiff. The motion was allowed and an order entered making Calvert a party plaintiff.

Calvert adopted the pleadings of its coplaintiff and thereafter filed a petition and motion to make the Ohio Farmer's Insurance Company a party defendant, alleging in its petition, upon information and belief, that at the time of the aforesaid collision, the defendant, Susie B. Green, had in full force and effect an automobile liability and property damage insurance policy issued by the Ohio Farmer's Insurance Company of Leroy, Ohio, in which policy the company agreed, among other things, "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, . . . arising out of the ownership, maintenance or use of the automobile" of Susie B. Green. The court denied the motion and the plaintiff Calvert appeals, assigning error.

Mordecai, Mills & Parker for appellant.

Ruark, Young & Moore and B. T. Henderson, II, for appellee.

DENNY, J. In this jurisdiction, when the owner of an insured automobile brings an action for damages to such automobile against one whose negligence allegedly caused the damage, the court may, in its discretion, on motion of the alleged *tort-feasor,* make the insurance company which has indemnified the owner for only a part of the damages to the automobile, an additional party plaintiff or defendant. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, and cited cases. See also *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659; *Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859; McIntosh, North Carolina Practice and Procedure, section 209, page 184, *et seq.* But such is not the established procedure in this jurisdiction with respect to making the insurance carrier of the alleged *tort-feasor* a party to the action.

When an insurance company pays a claim in full, it becomes the real party in interest and must sue in its own name to enforce its right of subrogation against the *tort-feasor.* G.S. 1-57. But, when it pays the insured in part only for the loss sustained, the insurance company is subrogated *pro tanto* in equity to the rights of the insured against the *tort-feasor* and by virtue of that fact it holds an equitable interest in the subject matter of the action and becomes a proper although not a necessary party to the litigation. *Burgess v. Trevathan, supra.*

On the other hand, this Court has held that in an action *ex delicto* for damages proximately caused by the alleged negligence of the defendant, his liability insurance carrier is not a proper party defendant. *Jordan v. Maynard,* 231 N.C. 101, 56 S.E. 2d 26; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756; *Johnson v. Transfer Co.,* 204 N.C. 420, 168 S.E. 495; *Clark v. Bonsal,* 157 N.C. 270, 72 S.E. 954, 48 L.R.A. (N.S.) 191. Ordinarily, in the absence of some special circumstance, it is not permissible under our decisions to introduce evidence of the existence of liability insurance or to make any reference thereto in the presence of the jury in the trial of such cases. *Jordan v. Maynard, supra; Scott v. Bryan, supra; Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726; *Bryant v. Furniture Co.,* 186 N.C. 441, 119 S.E. 823; *Stanley v. Lumber Co.,* 184 N.C. 302, 114 S.E. 385; *Hensley v. Furniture Co.,* 164 N.C. 148, 80 S.E. 154; *Featherstone v. Cotton Mills,* 159 N.C. 429, 74 S.E. 918; *Lytton v. Manufacturing Co.,* 157 N.C. 331, 72 S.E. 1055, Ann. Cas. 1913C 358.

The reasons why the liability insurer may not be made a party defendant in an action in *tort* against its insured is stated clearly and concisely in Anno.: Liability Insurer and Insured—Joinder, 20 A.L.R. 2d, page 1099, *et seq.,* as follows: "Ordinarily when a liability or indemnity policy is taken voluntarily, the contract is one by which the insurer undertakes to indemnify or save harmless the insured (and no one else) from any liability of the risks insured against. There is no privity of contract between the insurer and the third person injured or damaged by the acts of the insured to enable such person to sue the insurer either directly in a separate action or jointly in the same action with the insured. The insurance contract is procured by the insured for his own protection, and not for the protection of a third person who may sustain an injury. In the absence of an enabling statute, therefore, or a policy provision having that effect, the latter may not proceed against the insurer, at least not until he has secured a judgment against the insured with an execution thereon returned unsatisfied." See also 29 Am. Jur., Insurance, section 1080, page 810.

The appellant contends in its brief that the insurance policy issued by the Ohio Farmer's Insurance Company and held by the defendant

is subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act of 1953, being codified in G.S. Supplement 1953, sections 20-279.21 through 20-279.39. There is nothing in the pleadings to support this contention. Furthermore, the defendant states in her brief that she merely has an automobile liability policy which she voluntarily purchased. Therefore, since the record before us does not raise this question, we will neither discuss nor consider whether or not the plaintiff Calvert is entitled to have the defendant insurance carrier made a party defendant pursuant to the provisions of that act.

The ruling of the court below is

Affirmed.

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

HELEN GAYLE ELLINGTON, BY HER NEXT FRIEND, MYRTLE ELLINGTON, v. ORAN BRADFORD AND SANDERS MOTOR COMPANY.

(Filed 20 April, 1955.)

1. Infants § 9c: Parent and Child § 8—

Two causes of action arise when an unemancipated minor is injured through negligence, one in behalf of the parent for earnings of the child during its minority and expenses incurred for necessary medical treatment, the other in behalf of the child to recover damages for pain and suffering, for permanent injury, and for impairment of earning capacity after attaining majority.

2. Same: Pleadings § 31—

Where the complaint in a suit by an unemancipated minor to recover for negligent injury joins the separate and distinct actions for serious and permanent injuries, for which the infant may sue, with a cause of action to recover for medical expenses, recoverable solely by the parent, defendants' motion to strike the allegations relating to medical expenses should be allowed, since in the absence of waiver the two suits may not be joined, and defendants' objection at the first opportunity negates waiver of their right to require that the actions be separately brought.

3. Parent and Child §§ 5, 8: Damages § 15: Infants §§ 5, 9c—

The parent and not the unemancipated child is indebted for medical treatment of the child, although the child may be liable therefor if emancipated or as for necessities if the parent is financially unable to pay therefor, and therefore the provisions of G.S. 44-49 creating a lien upon recovery for negligent injury where the beneficiary is indebted for medical expenses incurred as a result of the injury does not authorize the minor in its suit by its next friend to recover for medical expenses.

4. Statutes § 5a—

Statutes in derogation of the common law must be strictly construed.

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

APPEAL by defendants from *Williams, J.*, February 1955 Civil Term, WAKE.

Civil action for the recovery of damages for personal injuries alleged to have been inflicted upon the plaintiff by the negligence of the defendants.

The complaint alleges that Helen Gayle Ellington is a minor of the age of five years; that the infant's mother, Myrtle Ellington, a widow, has been appointed next friend of the infant and as such has instituted this action. The complaint, in substance, further alleges that by reason of the actionable negligence of the defendant the plaintiff was run over by an automobile driven by the defendant Oran Bradford, agent and employee of the Sanders Motor Company, causing (1) serious and permanent injuries, and (2) large expenditures for hospital, doctors' and nurses' bills.

The defendants, before time to answer expired, moved to strike from the complaint certain designated portions thereof, including the allegations with respect to hospital, doctors' and nurses' bills. The court, after hearing, overruled, among others, the motion to strike from the complaint the allegations with respect to the medical expenses, and entered an order accordingly. The defendants excepted and appealed.

Bunn & Bunn, by Thomas D. Bunn, for plaintiff, appellee.

Lassiter, Leager & Walker, by Wm. C. Lassiter, for defendants, appellants.

HIGGINS, J. This appeal challenges the right of a minor child to recover medical bills as an element of damages in its action for personal injuries negligently inflicted. The mother instituted this action as next friend. The complaint alleges she is a widow but is silent as to whether the father died before or after the child received the injuries, in the treatment of which the bills were incurred.

In case of injury to an infant by wrongful act, a cause of action in behalf of the parent (the mother if the father is dead) arises, permitting recovery for (1) the loss of earnings of the child during its minority if unemancipated, and (2) expenses incurred for necessary medical treatment. *Smith v. Hewett* and *O'Brien v. Hewett*, 235 N.C. 615, 70 S.E. 2d 825; *Gillis v. Transit Company*, 193 N.C. 346, 137 S.E. 153; *Shipp v. Stage Lines*, 192 N.C. 475, 135 S.E. 339. Likewise, another cause of action arises on behalf of the child to recover damages for pain and

suffering, for permanent injury, and for impairment of earning capacity after attaining majority. *White v. Holding,* 217 N.C. 329, 7 S.E. 2d 825. The two causes of action are different. The parties are different. And to combine the two in one action would be a misjoinder. Neither a parent nor a stranger who acts as next friend in bringing a suit for an infant becomes thereby a party to the cause. *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321.

The cases of *Pascal v. Burke Transit Co.,* 229 N.C. 435, 50 S.E. 2d 534, and *Shields v. McKay,* 241 N.C. 37, 84 S.E. 2d 286, are in harmony with the foregoing rules. In each of these cases it is held that a parent who as next friend brings and prosecutes an action for his infant child and claims as elements of damage the loss of earnings during minority and expenditures for the treatment of the injuries sustained, is deemed thereby to have waived his individual rights and is estopped to assert them. "In such a case the child is entitled to recover the full amount to which he and his parent would have been entitled if separate suits had been brought and the parent is estopped afterwards from bringing an action in his own right." *Shields v. McKay, supra.*

We have not overlooked the possible bearing of G.S. 44-49 on the question here presented. That section creates a lien upon any sums recovered as damages for personal injury in favor of any physician, dentist, trained nurse, or hospital for medical services rendered and for drugs or medical supplies furnished in the treatment of "the injury in compensation for which the said damages have been recovered." The section also provides, "Where damages are recovered for and in behalf of minors or persons *non compos mentis,* such liens shall attach to the sum recovered as fully and effectively as if the said person had been *sui juris.*"

Does the foregoing section change the common law rule and permit the recovery of expenses for medical treatment as a part of the minor's cause of action? We are of the opinion the section does not change the rule. The lien is created only in cases where the beneficiary *may be indebted* for the expenses incurred. In the case of an unemancipated minor, the parent and not the child is indebted for the medical treatment. Ordinarily, the liability is the liability of the parent and not the liability of the child. Of course, an emancipated minor, or one without parent, or one whose parent is financially unable to pay for the treatment, may be liable as for other necessities. The view that the rule is not changed is supported by the succeeding section, G.S. 44-50, which provides a like lien shall attach to funds paid in settlement for injuries whether in litigation or otherwise in cases where *evidence as to the amount of such charges would be competent in the trial of such action.*

We recognize the right of the parent to recover necessary expenses for medical treatment. Allegations with respect thereto are necessary in the parent's complaint, and evidence in support is competent. In a suit on behalf of the child in the absence of a waiver of the parent's right, such allegations are not proper in the complaint, and evidence with respect to such expenses is incompetent. In short, where the parent recovers either by judgment or by settlement for loss of earnings during minority of his unemancipated child, or for expenses incurred in its treatment for injuries inflicted by tortious act, the lien attaches to the fund recovered. In cases (1) where the parent waives his right, or (2) the child has no parent, or (3) the child is permitted to recover all elements of damage, the lien likewise attaches. The sections referred to provide rather extraordinary remedies in derogation of the common law, and, therefore, they must be strictly construed. *McKinney v. Deneen,* 231 N.C. 540, 58 S.E. 2d 107.

The decisions of this Court recognize the right of the defendant to require that the parent's cause of action and the infant's cause of action be separately brought, provided he makes objection to the joinder in apt time. Conceivably, the defendant might have a defense in an action brought by the parent which would not be available if the action is brought by the infant. In this case, by their motion to strike, the defendants objected to the joinder in the infant's cause of action the allegations with respect to medical expenses. The defendants, therefore, have done nothing to waive their right. They raised objection at the first opportunity. Paragraph Nine of the defendants' motion to strike should have been allowed. The court was correct in overruling the motion to strike other parts of the complaint. The ruling of the court below is

Modified and affirmed.

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

HARVEY JONES v. JAMES M. FOWLER.

(Filed 20 April, 1955.)

Bill of Discovery § 1b—

Where an affidavit for the examination of defendant is in substantial compliance with the requirements of the statute, and the court finds the facts to be as set out in the affidavit, plaintiff is entitled to an order for examination of the defendant as a matter of right, and notice to defendant prior to the entry of such order is not required. G.S. 1-568.10.

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

APPEAL by defendant from order of *Bickett, Resident Judge,* entered 18 December, 1954, in action pending in WAKE Superior Court.

Action by tenant against landlord for an accounting and amount due thereon for the year 1954.

On 10 December, 1954: summons was issued; application was filed and order entered extending time for filing complaint; and application in the form of an affidavit for examination of defendant under G.S. 1-568.10, addressed to the resident judge, was filed.

On 18 December, 1954, the resident judge, finding the facts to be as set out in plaintiff's affidavit, ordered that defendant appear before a designated commissioner at specified time and place for such examination by plaintiff.

Defendant excepted and appealed, assigning as error (1) the insufficiency of the affidavit upon which the order was based, and (2) the entry of the order without notice to defendant.

J. C. Keeter and Ellis Nassif for plaintiff, appellee.

John F. Matthews for defendant, appellant.

PER CURIAM. Plaintiff's affidavit is in substantial compliance with the requirements of G.S. 1-568.10 (b), subsections (1) through (6). Upon the finding that the facts were as set out in the affidavit, plaintiff was entitled to the order as a matter of right. G.S. 1-568.10 (c), subsections (1) through (4). In such case, no notice to defendant, prior to the entry of such order, was required. G.S. 1-568.10 (a). Hence, the order of 18 December, 1954, is affirmed.

In view of disposition made, we refrain from considering, *ex mero motu,* whether defendant's appeal was subject to dismissal as an appeal from an interlocutory order.

Affirmed.

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

STATE OF NORTH CAROLINA v. BERNICE LEE BURNETTE.

(Filed 4 May, 1955.)

1. Criminal Law § 6a—

Where the criminal intent and design originates in the mind of a person other than defendant, and defendant is incited and induced to commit the crime in order that he might be prosecuted for it, such entrapment is a valid defense.

2. Same—

Where a defendant commits all the essential elements of an offense pursuant to an intent and design originating in his own mind, and the act is an offense regardless of consent, the fact that an officer or another waits passively and affords defendant an opportunity to commit the criminal act, or facilitates its commission, in order to secure evidence against defendant, does not amount to an entrapment constituting a defense.

3. Same—

Even in those offenses in which want of consent is an essential element, a person who knows that a crime is contemplated against his person or property, may wait passively and permit matters to go on, or create conditions under which the crime against himself may be committed, for the purpose of apprehending the criminal, without having assented to the act, and the defense of entrapment is not available to the person committing the crime when the intent and design to commit the act originates in his own mind.

4. Rape § 24—

In order to convict defendant of an assault with intent to commit rape, the State must prove not only an assault, but that defendant committed the assault with intent to gratify his passion on the person of his victim at all events, notwithstanding any resistance on her part.

5. Rape § 25: Criminal Law § 6a—In this prosecution for assault with intent to commit rape, evidence held not to show consent for purpose of entrapment.

The evidence favorable to the State tended to show that defendant called prosecutrix by telephone several times at night, and by obscene language and threats expressed his intent to satisfy his passion on her person at all events, even if he had to go to her home and get her or kill her, that defendant demanded that she meet him, that prosecutrix was afraid to stay at home that night unless the anonymous telephone caller was apprehended, that she was a woman of good character, and reluctantly consented upon request of officers of the law to go and meet defendant with an officer concealed in the back of the car, that she made several attempts to meet him in accordance with directions given in repeated telephone calls, that on the last occasion she stopped at the place designated and defendant drove up and begged to get into the car, that she directed him to go to the other side of the car and unlocked the door, and that defendant opened the door, and "lunged across the seat" at her, grabbing her cloak, and raising up to put his hands around her throat, when she screamed. *Held:* The evidence does not show assent to the assault by prosecutrix, but only that prosecu-

trix and the officers created the conditions under which defendant might commit the crime for the purpose of apprehending him, and nonsuit was correctly denied, since the evidence discloses an assault committed by defendant with intent to commit rape notwithstanding any resistance on the part of the prosecutrix, pursuant to a plan or design originating in defendant's own mind.

6. Criminal Law § 53o—

In order for defendant to be entitled to have the defense of entrapment submitted to the jury, there must be credible evidence tending to support defendant's contention that he was a victim of entrapment as that term is known to the law.

7. Same—

An instruction to the effect that if a person does not induce, encourage, aid or solicit the commission of a crime against himself or his property, he may wait for the purpose of obtaining evidence for a prosecution, *is held* without error.

8. Same—

An instruction on the defense of entrapment to the effect that if prosecutrix aided, encouraged or consented to an assault upon her by defendant for the purpose of apprehending defendant in the commission of the assault, pursuant to an intent not originating with defendant, defendant would not be guilty, *is held* without error.

9. Same—

An instruction to the effect that if prosecutrix arranged for an assault to be committed against her person by the defendant for the purpose of helping law enforcement officers in the apprehension of defendant in the commission of the assault, and consented thereto for the purpose of entrapment, defendant would not be guilty, but that if prosecutrix merely created conditions under which defendant could commit the offense and the intent and design to commit the offense originated with defendant, defendant would be guilty, notwithstanding that the prosecutrix waited in order that the law enforcement officers might apprehend defendant in the commission of the act, *is held* not prejudicial to defendant.

10. Criminal Law § 81c (2)—

Where, construing the charge as a whole, it is apparent that considering the part of the charge immediately before and immediately after the portion excepted to, the jury could not have been misled thereby, error in such portion is not sufficiently prejudicial to warrant a new trial.

11. Criminal Law § 53k—

A statement of a valid contention supported by competent evidence cannot be held for error.

12. Criminal Law § 53o—

An instruction on the defense of entrapment that there is a difference between inducing a person to commit an unlawful act and setting a trap to catch him in the act of committing a criminal offense of his own conception, and that if the criminal intent originates in the mind of the defendant

and the offense is completed because of an opportunity furnished in order to secure evidence against defendant, such circumstances are not a defense, *is held* not prejudicial.

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

HIGGINS, J., dissents.

BOBBITT, J., concurring.

APPEAL by defendant from *Martin, Special Judge,* December Criminal Term 1954 of WAKE.

Criminal prosecution on indictment charging the defendant with an assault with intent to commit rape.

This is a synopsis of what the evidence for the State tends to show: Mrs. Frances Buffaloe and her husband, Joe Buffaloe, who have been married 10 years, live in the Town of Garner. Mrs. Buffaloe is a lady of excellent character, and is an active worker in her church and club.

At 8:00 p.m. on 29 November 1954 the telephone bell in her home rang. She answered it, and a person whose conversation was vulgar, which she did not repeat, demanded that he wanted her, and was going to have her. She told him to go to the devil, and if she knew who and where he was, he would be shot for saying such things to a lady, and hung up the receiver.

As a result of this telephone call Joe Buffaloe telephoned W. P. Pearce, a member of the Wake County Sheriff's Department, who went immediately to the Buffaloe Home. About ten minutes after Pearce's arrival, which was then about 8:30 p.m., the telephone bell rang again.

Frances Buffaloe answered and held the receiver so that Pearce could listen in to every word said. Frances Buffaloe testified that it was the voice that called her thirty minutes earlier. This voice said over the telephone: "He wanted her to meet him at the Toot & Tell Drive-In in 15 minutes, that he had seen her on Saturday afternoon prior to that and had watched her walk from her husband's store to the house on the previous Saturday and that since that time that he had wanted her and intended having her before day, even if he had to come to her home and get her or kill her or shoot all the lights out of the house. He further stated that he would be at this point in 15 minutes and for her to come alone and that he knew that she could drive a car. He also said that he knew the kind of car which she had and for her to be sure to come alone, and that he would be there."

After this statement over the telephone ended, Pearce told Frances Buffaloe that if she would take her automobile, and go to Toot & Tell Drive-In, they could see if the person who had called would be there. She did not want to go, but finally consented. At that time Joe and Frances Buffaloe and Pearce were the only persons present.

Whereupon Frances Buffaloe, with Pearce lying in the back seat of her car, drove to the Toot & Tell Drive-In, which is about a quarter of a mile from her home, and stopped. Shortly after their arrival an automobile came down old No. 70 Highway in front of Toot & Tell Drive-In, and turned to the right down No. 50 Highway a few feet. It turned, and came slowly up to the front of the parked Buffaloe automobile throwing its lights into it, and then slowly backed out, and left. About ten minutes later Frances Buffaloe drove back to her home.

After their return State Patrolmen D. R. Emory, Kirby and Philpott arrived. This plan was made to meet the telephone caller if the person called again. An officer would get in the back of Frances Buffaloe's car, and she would drive to the place suggested by the caller, and the other officers would be concealed nearby. Frances Buffaloe said she was scared for her life, she had been threatened, she was scared to go to bed, she was scared to go to meet the caller, she didn't want to do it, but she would do it, because with those officers present or nearby she felt she would be protected, that she couldn't stay home if the caller wasn't caught that night. She did not go along with the plan wholeheartedly, but she was afraid not to. She consented to go. In a short time the telephone rang again. Frances Buffaloe answered, and again Pearce heard every word the caller said. The person began talking, and Frances Buffaloe asked who he was. He refused to give his name, but said he knew her, had seen her around the store, and going from the store to her home. He said: "I saw you just a few minutes ago in your car up at the Toot & Tell It, but it was too light and too public a place for me to stop. I did come down there in my car, and turned around at your car and left. But this time I want you to get in your car, and drive up to the railroad crossing which is up west of the Garner city limits a quarter of a mile or so, about a quarter of a mile. I'm going to come this time, and you be sure and come on there." Pursuant to the advice of the officers Frances Buffaloe consented to go.

Pearce got into the back of the automobile, and Frances Buffaloe drove to the suggested railroad crossing, and parked. In about ten minutes an automobile slowly passed by going East. This automobile turned and came slowly back pulling off on the shoulder of the road where the Buffaloe automobile was: it was barely moving, and then it was pulled back into the road and left. This automobile turned, and came back by the Buffaloe automobile barely moving and barely missing hitting it. When the automobile passed by Pearce raised up, and got the first three digits on the license plate: it was a 1941 two-door black Chevrolet automobile. The defendant owns such a car. The car left. The Buffaloe car returned home.

Before midnight the telephone rang again. Frances Buffaloe answered, and Patrolman Emory listened in. The caller asked Frances Buffaloe to meet him in 15 minutes at the railroad crossing, saying he would definitely meet her this time: this was repeated several times. Frances Buffaloe consented to meet him. The back seat was taken out of her car, and Emory concealed himself in the back.

Frances Buffaloe drove to the crossing and parked. Her lights were on full; the doors of the car were locked. In about ten minutes the defendant Bernice Lee Burnette came up to the car, and knocked on the glass. She lowered the glass of the door enough to hear him speak. He said: "Lady, are you in trouble?" She replied: "No, I am not in trouble." He said: "I want to get in the car with you." She told him she had had a telephone call to meet a man there, and asked if he was the man, saying "if you are not the man, you better be going because this man told me that he would be here in 15 minutes and you're going to be in danger if you're found here." He did not leave, but kept pulling at the window, begging to get in. She recognized the defendant's voice as the voice of the person who had been calling her over the telephone. She told him, if he wanted to get in the car, to go to the other side. He did. Emory had told her to let him in the car. She unlocked the door. The defendant opened it, and "lunged across the seat" at her, grabbing her cloak, and raising up to put his hands around her throat. She screamed, Emory raised up and shouted, and the defendant fled.

Emory chased the defendant about a quarter of a mile, and gave out before catching him. In the chase the defendant's cap fell off. The other officers concealed nearby caught the defendant, and carried him to the Town Hall of Garner. The defendant admitted that it was his cap, and that he was the man who came up to the Buffaloe car. He said he didn't know what made him go to the car, and do what he did. He admitted passing the locations where the Buffaloe car was parked, when Pearce was in it. He said, if he made the telephone calls, he was drunk. The defendant had the odor of intoxicating liquor on his breath when caught, but he was not under its influence.

Frances Buffaloe at the Town Hall that night asked the defendant why he chose her. He neither looked at her nor replied. From hearing him talk there, she identified his voice as the voice of the person who had made the calls to her earlier that night.

The defendant offered no evidence.

Plea: Not Guilty. Verdict: Guilty as charged in the indictment.

Judgment of imprisonment was pronounced upon the verdict.

The defendant appeals, assigning error.

Harry McMullan, Attorney General, and Ralph Moody, Assistant Attorney General, for the State.

Taylor & Mitchell for Defendant, Appellant.

PARKER, J. We have here for determination (1) the sufficiency of the evidence to carry the case to the jury, and (2) the adequacy and correctness of the charge.

The defendant assigns as error the failure of the court to sustain his motion for judgment of nonsuit made at the close of the State's case, the defendant offered no evidence, on the charge of assault with intent to commit rape; and also assigns as error a similar ruling of the Court on the charge of assault on a female. His argument in support of these motions is based on two grounds: one, no assault was committed, and two, consent of Frances Buffaloe.

The defendant contends that the State's evidence shows that he is the victim of an entrapment, and that the case should have been nonsuited. Before discussing this contention, we advert to certain relevant principles of law.

It is the general rule that where the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements, these circumstances constitute entrapment and a valid defense. *S. v. Marquardt,* 139 Conn. 1, 89 A. 2d 219, 31 A.L.R. 2d 1206 and Anno. p. 1212; *Butts v. U. S.,* 273 Fed. 35, 18 A.L.R. 143 and Anno. p. 149; *Robinson v. U. S.,* 32 Fed. 2d 505, 66 A.L.R. 468 and Anno. p. 482; *Sorrells v. U. S.,* 287 U.S. 435, 77 L. Ed. 413, 86 A.L.R. 249 and Anno. 265; *People v. Finkelstin,* 98 Cal. App. 2d 545, 553, 220 P. 2d 934; *Falden v. Commonwealth,* 167 Va. 549, 555, 189 S.E. 329; *S. v. Jarvis,* 105 W. Va. 499, 500, 143 S.E. 235; 22 C.J.S., Criminal Law, pp. 99-100; 15 Am. Jur., Criminal Law, Sec. 336. See also *S. v. Love; S. v. West,* 229 N.C. 99, 47 S.E. 2d 712; *S. v. Godwin,* 227 N.C. 449, 42 S.E. 2d 617.

In the leading case of *Butts v. U. S., supra, Sanborn, C. J.,* said for the Court: "The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. *S. v. Jarvis, supra; S. v. Mantis,* 32 Idaho 724, 187 P. 268; 15 Am. Jur., Criminal Law, p. 24; 22 C.J.S., Crim. Law, pp. 100-101.

It seems to be the general rule in those cases where the doing of a particular act is a crime regardless of the consent of anyone, that entrapment is not available as a defense to a person, who has the intent and design to commit a crime originating in his own mind, and who does in fact commit all the essential elements constituting it, merely because an officer of the law, or another, in his effort to secure evidence against him for a prosecution, affords him an opportunity to commit the criminal act, or purposely places facilities in his way or aids and encourages him in the perpetration of the crime which had its genesis in his own mind. *S. v. Hughes,* 208 N.C. 542, 181 S.E. 737; *S. v. Adams,* 115 N.C. 775, 20 S.E. 722; *Sorrells v. U. S., supra; Grimm v. U. S.,* 156 U.S. 604, 39 L. Ed. 550; *S. v. Marquadt, supra, Butts v. U. S., supra; Robinson v. U. S., supra; Falden v. Commonwealth, supra;* Annotations 18 A.L.R. 149, 66 A.L.R. 482, 86 A.L.R. 265; 15 Am. Jur., Criminal Law, pp. 24-25; 22 C.J.S., Criminal Law, pp. 100-101.

This Court said in *S. v. Ice Co.,* 166 N.C. 366, 81 S.E. 737: "A very similar case is *S. v. Smith,* 152 N.C. 798, for selling whiskey contrary to the statute, in which case a police officer, suspecting the defendant, employed one to buy whiskey from the defendant and furnished the money. The defendant, like all victims caught in a trap, viciously assailed the trap. He said he ought not to be punished, because the prosecutor had 'connived' at his offense. This Court said: 'It is not the motive of the buyer, but the conduct of the seller, which is to be considered,' and held that the defendant was properly convicted."

In *People v. Conrad,* 102 App. Div. 566, 92 N. Y. Supp. 606, affirmed in 182 N.Y. 529, 74 N.E. 1122, in a Memorandum Decision, the defendant was convicted of an attempt to commit the crime of an abortion. The Appellate Division of the Supreme Court said: "The conviction of the defendant was brought about by means of a trap arranged by the officers of the County Medical Society. It is claimed that, as the defendant was lured into the commission of the claimed overt acts, he cannot be punished therefor. This contention has recently been the subject of examination by this court and by the Court of Appeals, and decided adversely to the contention of the defendant. He was not a passive instrument in the hands of the entrapping parties. He did the act with which he was charged voluntarily, with full knowledge of the subject, and of the consequences which would flow therefrom. Under such circumstances, setting a trap by which he was caught is not a defense."

In certain crimes consent to the criminal act by the person injured eliminates an essential element of the offense, and is, therefore, a good defense. Where a person arranges for a crime to be committed against

himself or his property and aids, encourages or solicits the commission thereof, such facts are a good defense to the accused. However, if a person knows a crime is contemplated against his person or property, he may wait passively and permit matters to go on, or create the conditions under which the crime against himself may be committed, for the purpose of apprehending the criminal without being held to have assented to the act. *S. v. Adams, supra; S. v. Hughes, supra; S. v. Nelson,* 232 N.C. 602, 61 S.E. 2d 626; *S. v. Abley,* 109 Iowa 61, 80 N.W. 225, 46 L.R.A. 862, 77 Am. St. Rep. 520; *People v. Hartford L. Ins. Co.,* 252 Ill. 398, 96 N.E. 1049, 37 L.R.A. (N.S.) 778; *S. v. Currie,* 13 N.D. 655, 102 N.W. 875, 69 L.R.A. 405, 112 Am. St. Rep. 687; Annotations 18 A.L.R. 149 *et seq.,* 66 A.L.R. 482 *et seq.,* 86 A.L.R. 265 *et seq.;* 15 Am. Jur., Criminal Law, Sec. 334; 22 C.J.S., Criminal Law, Sec. 42.

In *People v. Hartford L. Ins. Co., supra,* the Illinois Supreme Court said: "One cannot arrange for a crime to be committed against himself or his property, and aid, encourage, or solicit the commission of the crime (*Love v. People,* 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710), but if he does not induce or advise the commission of the crime, and merely creates the condition under which an offense against the public may be committed, the rule does not apply (*People v. Smith,* 251 Ill. 185, 95 N.E. 1041)."

In *S. v. Hughes, supra,* the defendants were charged with feloniously breaking into a store to commit larceny. The State's evidence showed that the two defendants broke into and robbed the store. Defendants offered evidence which tended to show that one defendant went to an employee of the store and suggested that the employee give him the safe combination and, if so, the loot would be divided with him; the employee reported the conversation to his superior officer, who instructed him to give the defendant a purported combination to the safe; thereafter the employee gave the defendant a combination and advised him how to break into the store and when the safe would contain a large sum of money; and that the officers seized them in the execution of their offense. The defendants contended that the owner had consented to the offense, and therefore they were not guilty. The lower court excluded this evidence of the defendants, and this Court held it properly did so, saying "if it had been admitted, we do not think it would be a defense for the defendants."

S. v. Goffney, 157 N.C. 624, 73 S.E. 162, is a case where consent to the crime was a defense. In that case the evidence was that the owner of the building entered, *directed his servant Farmer to induce the defendant to break in his store;* that the servant obeyed his orders, and the

servant and the defendant entered the store together; and that the owner was present watching them and arrested defendant after he entered.

In *S. v. Decker,* 326 Mo. 946, 33 S.W. 2d 958, the defendant was convicted of bank robbery. The Supreme Court of Missouri held this instruction on the issue of entrapment properly declared the law on the case: "It informs the jury that, where the criminal intent to commit a crime originates in the mind of the defendant on trial and the offense is accomplished, it constitutes no defense that an opportunity is furnished or that an officer aided the accused in the commission of the crime in order to obtain evidence upon which to prosecute him. It then informs the jury that, if they find from the evidence that the criminal intent, if any, to rob the bank originated in the mind of defendant, and the robbery was accomplished, it is no defense to said robbery that an opportunity was furnished or that an officer aided."

This is the sixth headnote in *S. v. Snider,* 111 Mont. 310, 111 P. 2d 1047: "Where evidence showed that criminal intent to steal sheep originated in mind of accused and that at most owner and sheepherder who placed sheep in shed from which 56 lambs were loaded at night by accused remained silent and failed to place obstacles in way of accused and afforded him facilities whereby he could carry out his own criminal design without giving consent to taking, evidence warranted conviction of grand larceny as against defense of 'entrapment.' "

The facts in *S. v. Nelson, supra,* are quite different from those in the instant case. In the *Nelson Case* there was no evidence that the prosecutrix knew that a crime was contemplated against her person by the defendant.

To convict a defendant on the charge of an assault with intent to commit rape, the State must show by evidence "not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part." *S. v. Massey,* 86 N.C. 658; approved and followed in *S. v. Hill,* 181 N.C. 558, 107 S.E. 140; *S. v. Jones,* 222 N.C. 37, 21 S.E. 2d 812; *S. v. Heater,* 229 N.C. 540, 50 S.E. 2d 309. An assault is essential to constitute the crime. *S. v. Overcash,* 226 N.C. 632, 39 S.E. 2d 810.

The evidence offered by the State, considered in the light most favorable to it on the motion for judgment of nonsuit, tends to show these facts: One, the defendant saw Frances Buffaloe the Saturday before the 29th of November, watched her walk from her husband's store to her home, *and then and there an intent and design originated in his mind to satisfy his unlawful sexual lust upon her person by force and*

against her will. In defendant's second telephone message to her on the night of 29 November he said, "he had seen her on Saturday afternoon prior to that and had watched her walk from her husband's store to the house on the previous Saturday *and that since that time that he had wanted her and intended having her before day, even if he had to come to her home and get her or kill her.*" Two, the defendant called her by telephone four times that night demanding that she meet him. Three, Frances Buffaloe knew that the defendant contemplated against her person the crime of rape. Four, Frances Buffaloe was afraid to stay at home that night, that she was scared for her life, unless this anonymous telephone caller was apprehended. Five, she is a woman of good character, active in her church, and her consent to meet this unknown caller, and her unlocking the automobile door, were words and acts merely creating the conditions under which the crime against herself, which had its genesis in the defendant's own mind, and which she knew the defendant contemplated against her, might be committed, for the purpose of apprehending the defendant, and that she did not assent to the defendant's assault with intent to commit rape upon her body. Six, that when the defendant opened the door, and "lunged across the seat" at her, grabbing her cloak and raising up to put his hands around her throat, an assault was committed upon her, and she was in a situation of immediate present danger, and that the defendant then and there intended to gratify his unlawful sexual passion on her person by force, notwithstanding any resistance on her part, and would have done so but for the presence of the patrolman in the back of her automobile. Seven, that Frances Buffaloe and the officers set a trap to catch the defendant, and caught him *in the execution of a crime of his own conception.* Eight, that the defendant committed every essential element of the crime of an assault with intent to commit rape forcibly and against her will on the body of Frances Buffaloe. The Trial Court correctly overruled the motion for judgment of nonsuit.

The defendant has five assignments of error to the charge: all relate to what the Trial Court charged the jury as to entrapment.

Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law. *Sorrells v. U. S., supra; S. v. Marquardt, supra;* 53 Am. Jur., Trial, Sec. 291.

The evidence in this case as to what Frances Buffaloe and the officers did is not as strong as what the employee of the store did in *S. v. Hughes, supra,* and we held that what the employee did was not a defense for the defendants. In our opinion, and we so hold, there is no

evidence in the instant case tending to show that the defendant was entrapped, and such a defense should not have been submitted to the jury by the Trial Court.

However, in spite of the fact that there was no evidence to support the defendant's contention of entrapment, the Trial Judge submitted such a defense to the jury in its charge.

The Court instructed the jury that entrapment is a plan to catch by trap or trick or artifice, or to ensnare a person. No offense is committed where a person arranges for a crime to be committed against himself or his property, and aids, encourages or solicits the commission thereof. If a person induces another to commit a crime against the moving party to catch him in the act which he would not have done otherwise, then the person so apprehended may set up entrapment as a defense, and is entitled to an acquittal. The defendant assigns as error the sentence in the charge immediately following the above part of the charge, to wit: "If the person does not induce, encourage, aid or solicit the commission of a crime against himself or his property, he may wait, for it would be criminal to perpetrate an offense or create a condition under which an offense against the public may be committed." This assignment of error is without merit. Annotations: 18 A.L.R. 146; 66 A.L.R. 478; 86 A.L.R. 263.

The defendant has two assignments of error, based upon Exceptions 16 and 23, to this part of the charge: "The Court charges you that the charges laid in the bill of indictment against the defendant and upon which he is being tried, are individual rights of a person to which want of consent is an element and to which the law just given you applies. If you find from the evidence that the prosecuting witness met the defendant at the location where she was allegedly assaulted pursuant to an appointment which she and the defendant had made in a telephone conversation; that prior to her actual meeting of the defendant that the prosecuting witness had kept two previous appointments to meet the defendant, at which time the defendant did not approach the prosecuting witness, that all of the appointments which the prosecuting witness made with the defendant were at night, that at the time of the actual meeting the prosecuting witness was seated in her car under the steering wheel with only her parking lights and dash lights on; that when the defendant arrived and did approach the prosecuting witness, that she told him that she was waiting to meet someone, that on all occasions when the prosecuting witness kept appointments to meet the defendant she appeared to be alone and so appeared at the time and place of their actual meeting; that she informed the defendant as to how he might enter her automobile by going around to another side of it; that when he had gone around to another side of her automobile, she

unlocked the automobile door through which the defendant entered her automobile, in which automobile a law enforcement officer was concealed, and even if you further find from the evidence that the prosecuting witness did these things for the purpose of helping the law enforcement officers in the apprehension of the defendant in the commission of an assault against her person, and which plan to assault did not originate with the defendant, or for the purpose of identifying the defendant as the party with whom she had made the appointment, then the Court instructs you that the prosecuting witness aided or encouraged such conduct as you find from the evidence that he exhibited toward her at their meeting, and that she arranged for an assault to be committed against her person by the defendant. If you further find beyond a reasonable doubt that she did know or had reason to believe that the defendant was going to commit an assault upon her, if you find from the evidence that the prosecuting witness aided the defendant in such conduct toward her at their meeting." Immediately following this part of the charge assigned as error, the Court charged as follows: "If you find from the evidence that the prosecuting witness aided or encouraged the defendant in such conduct toward her at their meeting as you find that conduct to have been from the evidence; if you find from the evidence that the prosecuting witness arranged for an assault to be committed against her person by the defendant; and if you further find that she so arranged for an assault to be committed against her person by the defendant and so aided or encouraged the defendant for the purpose of helping law enforcement officers in the apprehension of the defendant in the commission of an assault against her person for the purpose of identifying the defendant as the party with whom she had made the appointment, then the Court instructs you that the prosecuting witness consented to such conduct toward her as you find from the evidence that the defendant exhibited and you must find the defendant not guilty of any crime charged or included in this bill of indictment."

The defendant contends particularly that the use of the words "and which plan to assault did not originate with the defendant" is reversible error. To sustain such contention would necessitate the overruling of the overwhelming weight of authority. Annotations: 18 A.L.R. 146; 66 A.L.R. 478; 86 A.L.R. 263.

The defendant also contends that the use of the words: "If you further find beyond a reasonable doubt that she did know or had reason to believe that the defendant was going to commit an assault upon her, if you find from the evidence that the prosecuting witness aided the defendant in such conduct toward her at their meeting," put the burden of proof upon the defendant beyond a reasonable doubt. It seems to

us that in this sentence the Court started out to charge the State's position that if a person knows a crime is contemplated against his person, he may create the conditions under which the crime against himself may be committed for the purpose of apprehending the criminal without being held to have assented to the act, but did not finish the sentence. However that may be, the charge of the Court immediately before and immediately after this sentence was most favorable to the defendant because there was no evidence to support this part of the charge as to entrapment, as that term is known to the law. Reading the charge as a whole, it does not seem that this incomplete sentence could have misled the jury. Certainly it is not sufficiently prejudicial to cause a new trial.

The next assignment of error to the charge relates to a statement of the State's contentions. These contentions are amply supported by competent evidence. This assignment of error is overruled.

The last assignment of error to the charge is to this part of it: "Now, there is a difference between inducing a person to commit an unlawful act and setting a trap to catch him in the execution of the criminal offense of his own conception. No offense is committed where a person arranges for a crime to be committed against him or his property and aids and encourages and solicits the commission thereof. If the criminal intent originates in the mind of the accused and the criminal offense is completed because of the fact that an opportunity is furnished or that the accused is aided in the commission of the crime in order to secure evidence against him constitutes no defense on the part of the defendant." This assignment of error is without merit. *S. v. Jarvis, supra; S. v. Mantis, supra;* 15 Am. Jur., Criminal Law, p. 24; 22 C.J.S., Criminal Law, pp. 100-101; Annotations: 18 A.L.R. 146; 66 A.L.R., 478; 86 A.L.R. 263.

There are no assignments of error to the evidence. The other assignment of error is formal.

The defendant has been found guilty as charged in the bill of indictment by a jury under a charge highly favorable to himself. Reversible error is not made to appear. The defendant must abide by the judgment of the Trial Court.

No error.

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

HIGGINS, J., dissents.

BOBBITT, J., concurring: The evidence, considered in the light most favorable to the State, is sufficient to support the finding by the jury

that defendant, a male person over eighteen years of age, unlawfully assaulted the prosecutrix.

In the court below, defendant's counsel submitted elaborate prayers for instructions bearing upon the subject of entrapment. I agree that error, if any, in the instructions given was in defendant's favor.

Furthermore, I agree that the defense of entrapment, as understood and defined in the criminal law, was not available to the defendant under the evidence. Everything prosecutrix did was done under threat or peremptory demand of defendant.

The evidence is clear that the primary purpose, if not the sole purpose, of the alleged entrapment was to identify the man who had called prosecutrix over the telephone. The plan was to contact this man and to draw him into conversation whereby he would expressly or by implication identify himself as the person who had telephoned.

The court below rightly analyzed the case. The evidence as to the appointments and meetings, and as to what occurred immediately preceding the assault, was relevant on the question of defendant's intent at the time of the assault, *i.e.*, whether he then intended to have sexual intercourse with the prosecutrix at all events, notwithstanding any resistance she might make. On this phase of the case, after correct instructions as to the elements of the crime, the court instructed the jury as follows: "As I have already stated to you, if you are not satisfied from the evidence and beyond a reasonable doubt that the defendant assaulted Mrs. Buffaloe with the then present intent to commit rape upon her, it is your duty to return a verdict of not guilty as to that."

Included in the court's review of defendant's contentions are the following: The defendant "contends that, if you find from the evidence and beyond a reasonable doubt that he was there and did open the door of the car and get in the automobile, the circumstances, the testimony in this case, could not lead you to the conclusion that he intended to rape her; says and contends that human experience, your common sense and experience is contrary to that, because he says the most the State's evidence could possibly satisfy you beyond a reasonable doubt was that he went there by appointment, and the State so contends he went there by appointment; that on two occasions, at least one at the drive-in and one at the railroad crossing before that time, the very person that the State says was to be there, and the State contends that it was he, the defendant; that the State's own evidence tends to show that he had reason to believe that he was being met by a woman agreeing to his proposition; that she had gone twice to meet him and, having done so the third time, and having unlocked the door and invited him into the automobile, that it is contrary to human experience, contrary to common sense that he would have then, after all the arrangements were

made and after the appointment was made and plans made and he was invited into the automobile, that it would have then been foolish for him to attempt to rape her there; that with all arrangements made he would have proceeded at his leisure to accomplish his purposes; therefore, he says and contends the State's own evidence negatives the idea of any attempt to rape her or to assault her with intent to commit rape when he had a right to assume, if the State's evidence is true, that he could accomplish his purpose of sexual intercourse with the woman meeting him at his leisure and in his own time, and that therefore there was no reason, and that you ought not to be satisfied beyond a reasonable doubt that he intended to rape her there; contends that he could have accomplished his purpose at any time, and the defendant says and contends you ought not to consider that charge seriously against him and that in any event you ought to acquit him of the charge of intent to commit rape." These contentions were rejected by the jury.

In my opinion the court, by the instructions quoted above and similar instructions, gave to defendant the full benefit of the circumstances bearing upon what he calls entrapment as related to the only issue on which such evidence was germane.

KATHERINE GOINS DOUGLASS v. NOLAN BROOKS; HAZELINE B. CHAMBERS AND HUSBAND, OSBIA CHAMBERS.

(Filed 4 May, 1955.)

1. Trial § 21—

Objection based on material variance between allegation and proof should be presented by exception to refusal of motion for judgment for involuntary nonsuit, and not by exception to the charge. Prejudicial error in the charge results in a new trial rather than reversal of the judgment.

2. Vendor and Purchaser § 3½—

Where plaintiff alleges a contract of sale and purchase and attaches to the complaint correspondence between the parties together with an agreement, alleging that the writings together with verbal agreements constituted the contract, *held*, the submission of the case to the jury on the theory of the written agreement is not a material variance when the written agreement modifies the agreement as set forth in the prior correspondence only in vendor's favor by making the deed deliverable upon completion of payment of the purchase price rather than upon the down payment.

3. Evidence § 39—

Stipulations contained in correspondence prior to execution of the agreement are superseded by the written agreement executed by the parties, but such prior correspondence may be competent to identify the subject matter

of the contract and throw light upon certain of its provisions when it does not vary the terms of the written agreement, and correspondence subsequent to the agreement may be relevant as bearing upon the rights of the parties to declare an abandonment of the agreement but not to establish or vary the terms of the contract.

4. Vendor and Purchaser § 5b—

Where a contract respecting realty creates bilateral obligations, on the one hand the obligation to purchase and on the other hand the obligation to sell, as reciprocal considerations, the contract is one of sale and purchase and not an option.

5. Vendor and Purchaser § 5a—

An option creates a unilateral obligation upon the vendor to sell upon the stipulations agreed, but creates no obligation on the purchaser to buy, but gives him the right to exercise the option or not at his election. If he fails to exercise the option, he loses only the consideration given for it.

6. Vendor and Purchaser § 18—

In the absence of special circumstances, time is of the essence of an option to purchase land, but is not of the essence of a contract of sale and purchase.

7. Same—

Where under the provisions of a contract of sale and purchase, the purchase price is to be paid in monthly installments, and the vendor accepts payments in arrears, the vendor may not thereafter treat the contract as abandoned for delinquency in payment until notice and demand for strict compliance with the terms of the agreement have been given the purchaser and the purchaser has failed to comply therewith within a reasonable time.

8. Vendor and Purchaser § 19a—

The vendor's renunciation of the contract relieves the purchaser of any necessity of thereafter tendering the purchase price.

9. Appeal and Error § 8—

Where, in an action on a contract of sale and purchase, defendants defend solely on the theory that the agreement was an option and that plaintiff had forfeited her rights thereunder by failing to make payments on the purchase price on the dates stipulated, and admit that the land belonged to one defendant although title was registered in the name of another, and that the first defendant had authority to sell, *held*, the parties are bound by the theory of trial, and may not contend on appeal that the defendant having the registered title had not signed the agreement or authorized her signature thereto.

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

APPEAL by defendants from *McSwain, Special Judge,* November Term, 1954, of GASTON.

Action to compel specific performance of a contract to convey a described tract of land in Gaston County, containing 40 acres, more or less.

Plaintiff alleged that defendants contracted to sell the land to her for $1,800.00, payable $500.00 cash upon delivery of deed and $1,300.00 at the rate of $40.00 per month, the deferred portion to be secured by deed of trust and to bear interest at the rate of 5% per annum; that she paid the $500.00 on 11 February, 1953, and thereafter paid additional amounts on account of the deferred balance; that in February, 1954, when defendants first indicated dissatisfaction because she was in arrears as to monthly payments, she tendered payment of the entire amount then in arrears and thereafter tendered monthly payments as they became due; that she has been and is now ready, able and willing to pay the purchase price in full but defendants refuse to comply with their obligation to convey the land to plaintiff.

Answering, the defendants say, in substance, that no contract of sale and purchase was made; that they gave plaintiff an option to buy the land at the price of $1,800.00 upon making a cash payment of $500.00, which option plaintiff was at liberty to renew from month to month upon payment of $40.00 per month; that failure to make any such renewal payment voided the option automatically, thereby forfeiting the payments theretofore made as liquidated damages; that time was of the essence of the contract; and that plaintiff, by her failure to renew the option in the manner provided, has no right in law or in equity to compel specific performance.

The evidence, consisting largely of writings, is summarized below.

Plaintiff is the niece of defendant Nolan Brooks, hereinafter called Brooks. Brooks resides in Gaston County. Defendant Osbia Chambers and defendant Hazeline B. Chambers, his wife, reside in New York. Mrs. Chambers is the daughter of Brooks.

Plaintiff became interested in the land in July, 1952, when visiting her relatives in Gaston County, because "of the relationship of this land to the old home place." Brooks, the owner thereof, discussed with her the price and terms upon which she might purchase the land. Further discussion was by correspondence.

Under date of 5 February, 1953, Brooks wrote plaintiff, in part, as follows: "If you will pay $500.00 down and the balance of $1,300.00 on installments of $40.00 per month or more if you can at the rate of 5% interest from date annually, the place is yours. To save a little money have papers drawn I will make out a note to that effect and mail you one copy and I'll have one. I will go ahead and have the deed drawn as you wish after receiving the down payment. Please state just how you want the deed drawn." Plaintiff, by her letter of 11 February, 1953, accepted Brooks' offer, sent him her check for $500.00 and advised him how to draw the deed. She also requested Brooks not to permit any timber to be cut off the property. She also requested information

about the title and the number of acres in the tract. Defendant, by his letter of 18 February, 1953, acknowledged the receipt of the $500.00 down payment and assured plaintiff that no timber had been or would be cut. He also furnished, over his signature, a particular description of the land, being the description set forth in the complaint. As to the title, he had this to say: "When I bought that property from Reece, Leola didn't want me to buy it and to save confusion in making the deed I had Reece to make the deed to my daughter, Hazeline B. Chambers, so when I transferred it I would not have any hitch. So you can consider yourself the owner of the property. I will have the deed made to you whenever you prefer, but the best way is to save a little money for me to make you and myself an agreement and hold till paid for and then deliver the deed."

In April, 1953, Brooks sent to plaintiff a paper entitled, CONTRACTUAL AGREEMENT, in words and figures as follows:

"Gastonia, N. C.
February 14, 1953.

"This is to certify that NOLAN BROOKS and HAZELINE B. CHAMBERS have sold to KATHERINE GOINS DOUGLASS one tract of land lying in Crowders Mountain Township, containing 40 acres more or less for the sum of $1800.00 for which the said parties have paid $500.00 in initial payment, the balance of $1300.00, she agrees to pay in installments of $40.00 or more per month until the balance is paid in full and at rate of 5% per annum. Deeds are to be delivered to payee (*sic*) at the completion of the final payment.

"Signees: (*sic*)

"KATHERINE GOINS DOUGLASS
"NOLAN BROOKS
"HAZELINE B. CHAMBERS"

The said Contractual Agreement, according to plaintiff's testimony, was signed by Nolan Brooks and Hazeline B. Chambers when plaintiff received it. She signed it and forwarded it to Brooks with her letter to him of 17 April, 1953. In this letter, plaintiff advised Brooks that her plans for changing jobs accounted for her failure to begin making the monthly payments for the land.

When the above letters were written, plaintiff's address was Walwyn's Clinic, Haynes Infirmary, Box 81, Ruston, Louisiana. The tone of these letters reflects an affectionate relationship between the correspondents. From May to October, 1953, plaintiff worked in Houston, Texas. In October or November, 1953, she went to California, where she now resides.

While plaintiff made payments to Brooks from time to time, she did not pay regularly at the rate of $40.00 per month and became in arrears. Brooks testified: "I made no complaint about monthly payments not being made each month until I wrote her the letter she read in Court dated February 8, 1954."

By his letter of 8 February, 1954, Brooks advised plaintiff that she had paid a total of $720.00. (Of this amount, $500.00 was the down payment. The remainder, $220.00, consisted of several items, only three of which are clearly identified by date and amount, namely, an $80.00 check dated 8 June, 1953, a $40.00 check dated 16 July, 1953, and an $80.00 check dated 14 January, 1954.) After acknowledging receipt of the $80.00 check dated 14 January, 1954, Brooks then stated that the payments were in arrears in the amount of $220.00. Excerpts from this letter are as follows: "If you have the slightest doubt that you cannot make these payments, please notify me so I will (know) just where you stand and what to do." Again: "If you think that I will cause too much burden on you, I will resell again for cash and am willing to refund your money all but expenses. Of course I don't want to do that, but a contract is a contract and agreement between two parties. Of course you know that. Think this over and give it your consideration."

On 18 February, 1954, Brooks sent plaintiff a telegram worded as follows: "Have not heard from you yet will refund your money on land. Wire collect immediately." On 18 February, 1954, plaintiff sent Brooks a night letter worded as follows: "Letter of Feb. 8th received also wire. Will comply with request of letter. Payments will be brought to date am forwarding check. Am positioned now to keep payments in advance."

On 19 February, 1954, Brooks sent a telegram to plaintiff worded as follows: "Sending you $800 payment on land. Answer at my expense. Wire immediately."

On 23 February, 1954, Brooks telephoned plaintiff. Testimony of plaintiff is that Brooks told her to send the $220.00 but if she got behind again they were going to have to close the deal. Brooks' testimony was that he advised plaintiff that she had forfeited the contract by falling behind in the payments and that he had a sale for the place and would refund her $800.00. He denied having said anything about her paying the amount then in arrears.

On 25 February, 1954, plaintiff sent a telegram to Brooks, worded as follows: "Confirming telephonic conversation of February 23rd, am wiring $220.00 representing $19.50 interest, and $200.50 principal thereby bringing payments to February 28, 1954. Balance $838.80." On

the same date, plaintiff sent to Brooks a postal money order for $220.00 which was received by him in due course.

On 27 February, 1954, Brooks wrote plaintiff as follows: "Your letter and telegrams and also check received but sorry to say I have already negotiated with some other parties for cash as you have failed to come up to your contract and agreement. I have worked on this for some time, thinking and wondering what is best and right to do, so I just finally decided to close out our deal as you failed and not me. I have had our agreement analized (*sic*) by my lawyer and they say I have a perfect right to sell the property, don't have to refund your money when you broke the agreement as promised, but for peace sake I am returning your check and $900.00 addition not saying anything of interest, way more than you have invested in the property. That is as fair as I can do. You have a copy of our contract and our agreement and our signature thereon as of Feb. 14-53 and as me giving deed and taking mortgage I wont do that. That is out of the picture. Let me repeat, have already negotiated."

Plaintiff did not accept the $900.00 check tendered by Brooks. Brooks did not accept the $220.00 check sent by plaintiff. Thereafter, plaintiff sent to Brooks monthly checks for $40.00 each, which Brooks refused to accept. This action was commenced 13 March, 1954. The court submitted, and the jury answered, two issues, *viz.:*

"Did the defendant contract to sell the lands described to the plaintiff, as alleged in the Complaint? Answer: Yes.

"Is the plaintiff entitled to have said lands conveyed to her, as alleged in the Complaint, provided the plaintiff pays to the defendants the full balance of the purchase price, with interest, before the execution of said deed? Answer: Yes."

Judgment was entered that the land be conveyed to plaintiff upon her payment, within a prescribed time, of the specified balance due on purchase price. Defendants excepted and appealed, assigning errors.

Henry L. Kiser for plaintiff appellee.

L. B. Hollowell and J. L. Hamme for defendant appellants.

BOBBITT, J. Appellants do not assign as error the denial of their motions for judgment of involuntary nonsuit. However, they seek indirectly to avail themselves of the accepted rule that a motion for judgment of involuntary nonsuit will be allowed when there is a material variance between allegation and proof. *Andrews v. Bruton, ante,* 93, 86 S.E. 2d 786, and cases cited. Their contention is that the judgment should be reversed because the trial judge submitted the case to the jury on a theory at variance with the cause of action alleged by

plaintiff. In passing, it is noted that a new trial, rather than a reversal of judgment, would result if there is prejudicial error in the trial judge's instructions to the jury.

The complaint, in paragraph 4, alleges the contract as stated above. However, appellants emphasize the following allegations of paragraph 3: "That said contract was several months in the making and is in part verbal and partially in writing, same being composed of various verbal understandings and agreements, letters, which, taken together, constitute a definite and binding contract between the parties," copies of these writings, marked Exhibits 1-19, both inclusive, being attached to and by reference made a part of the complaint. It is argued that the contract on which the case was tried was the Contractual Agreement bearing date of 14 February, 1953; and that this was a departure or variance from the contract as alleged.

Appellants' position is untenable. The correspondence indicates the relationship of the parties before and after the Contractual Agreement was signed. The correspondence, in some respects, throws light on certain provisions of the Contractual Agreement but does not vary plaintiff's obligations. For example, Brooks' letter of 18 February, 1953, gives the description of the land referred to in Brooks' letter of 5 February, 1953, and in plaintiff's letter of 11 February, 1953. The two letters last mentioned set forth the contract as alleged. True, when Brooks prepared or had prepared the Contractual Agreement he modified the original agreement by inserting a new provision at variance therewith, to wit: "Deeds are to be delivered to payee (*sic*) at the completion of the final payment." Since the only effect of this modification was to relieve Brooks of his obligation under the original agreement to deliver the deed when plaintiff made the down payment, defendants have no ground for complaint on account thereof. The Contractual Agreement was not signed until April, 1953. However, it appears that Brooks considered the contract as made in February, 1953, for upon that basis he makes the calculation that $220.00 was in arrears in February, 1954. The Contractual Agreement, a copy of which was attached to the complaint and by reference made a part thereof, was the instrument by which they defined formally and finally the terms of their agreement. Correspondence prior thereto, while relevant to identify and describe the land, was superseded by the Contractual Agreement. This appears plainly from the complaint and attached exhibits. Correspondence subsequent thereto was relevant, as bearing upon the defendants' alleged right to declare an abandonment of the contract by plaintiff rather than upon the terms of the contract. The court below correctly considered and tried plaintiff's case on this basis. Indeed,

Brooks testified, referring to the Contractual Agreement: "That is our agreement; that is it."

Appellants contend that the court was in error in instructing the jury that the Contractual Agreement was a contract of sale and purchase, as contended by plaintiff, rather than an option, as contended by defendants. This contention is without merit. By its terms, both parties were bound, one to sell and the other to purchase.

The consideration for an option is executed (paid) when the contract is made. The unilateral obligation arising therefrom binds the prospective seller; but the prospective purchaser may or may not exercise his right to purchase upon the terms stated. If he fails to do so, the only result is the loss of the consideration given *for the option.* In a contract of sale and purchase, bilateral obligations arise, the purchaser's obligation to pay the purchase price and the seller's obligation to sell and convey constituting reciprocal considerations. This distinction has been pointed out in many decisions including *Trogden v. Williams,* 144 N.C. 192, 56 S.E. 865; *Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687. Also, see 55 Am. Jur. 496, Vendor and Purchaser, sec. 29.

Two well-settled rules rest, at least in part, upon the distinction noted above, *viz.:* In the absence of special circumstances, (1) time is of the essence of a mere option to purchase land, *Bateman v. Lumber Co.,* 154 N.C. 248, 70 S.E. 474; *Winders v. Kenan, supra;* and (2) time is not of the essence of a contract of sale and purchase, *Falls v. Carpenter,* 21 N.C. 237; *Davis v. Martin,* 146 N.C. 281, 59 S.E. 700; *Howell v. Pate,* 181 N.C. 117, 106 S.E. 454; *Crawford v. Allen,* 189 N.C. 434, 127 S.E. 521. As stated by *Brown, J.,* in *Davis v. Martin, supra:* "There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and, therefore, time is not of the essence of the contract; but where the contract is merely an option, generally without consideration, of course time is of the essence."

Plaintiff made the $500.00 down payment. She made additional payments as stated which, although plaintiff was in arrears, were accepted by defendants without objection. The last such payment was plaintiff's check of 14 January, 1954, for $80.00. No word of dissatisfaction was expressed by Brooks prior to his letter of 8 February, 1954. Plaintiff did nothing to indicate any intention on her part to abandon the contract. Both plaintiff and Brooks treated the contract as subsisting. That Brooks so regarded it appears plainly from the following excerpts from his testimony. "The latter part of February, 1954, I wired her

twice and called her over the telephone to get her to give up the property, call off the deal. So I could sell to this other party for cash." Again: "I had accepted a deposit of $800.00 from one party offering to buy the land on a 30-day basis, provided I could clear with my niece Katherine."

Chief Justice Ruffin, in *Falls v. Carpenter, supra,* discusses at length the principles of equity applicable in such cases. In that case the purchaser was in arrears, but even so the seller continued to receive and accept from the purchaser payments on account of the balance of purchase price. The seller, for reasons not material here, sold and conveyed the land to another party. The contention that the purchaser's failure to meet payments when due constituted an abandonment by him of the contract was soundly rejected. The conclusion reached is compressed in this sentence: "Having allowed it (the contract) to subsist after the default he (seller) cannot put an end to it by an action which, supposing it to subsist, is in violation of it; but to that end there must be a previous, formal and reasonable notice that if the purchaser does not fulfill it, the other party will not hold himself bound."

In *Scarlett v. Hunter,* 56 N.C. 84; *White v. Butcher,* 59 N.C. 231; *Faw v. Whittington,* 72 N.C. 321, the principles declared by *Chief Justice Ruffin* are approved and applied. In *Scarlett v. Hunter, supra, Pearson, J.* (later *C. J.*), says: "Where there is a contract for the sale of land, the vendee is considered in equity as the owner, and the vendor retains the title as security for the purchase-money. He may rest satisfied with this security as long as he chooses, and when he wants the money he has the same right to compel payment by a bill for specific performance as the vendee has to call for title. The right to have a specific performance is mutual, and when the vendee is let into possession, and continues in possession, as in our case, it is taken for granted that the parties are content to allow matters to remain *in statu quo* until a movement is made by one side or the other. These principles are fully discussed in *Falls v. Carpenter,* 21 N.C. 237, which is decisive of this case."

And in *Faw v. Whittington, supra, Bynum, J.,* says: "Assuming the law to be that a vendee can abandon by matter *in pais* his contract of purchase, it is clear that the acts and conduct constituting such abandonment must be positive, unequivocal and inconsistent with the contract. The mere lapse of time or other delay in asserting his claim, unaccompanied by acts inconsistent with his rights, will not amount to a waiver or abandonment."

It appears that the above principles, as stated by this Court, are in accord with rulings in like cases in other jurisdictions. 49 Am. Jur., 55,

Specific Performance sec. 42; 81 C.J.S. 638, Specific Performance sec. 110; Williston on Contracts, Rev. Ed., sec. 852.

The parties, having recognized the contract as subsisting, notwithstanding the arrears in payments, defendants had no right to treat the contract as abandoned unless plaintiff failed to comply with its strict terms within a reasonable time after definite notice from defendants that they would treat the contract as abandoned unless such strict compliance was made. Such demand and notice are prerequisite to placing the purchaser in default under circumstances such as those that existed here.

It is noted that the Contractual Agreement contains no provision that the entire unpaid balance of purchase price shall become due upon failure of plaintiff to pay when due any one or more of the monthly installments. It is noted further that defendants' attempted renunciation of the contract eliminated any necessity for a tender of the full purchase price if such were otherwise necessary, *Bateman v. Hopkins,* 157 N.C. 470, 73 S.E. 133; *Lennon v. Habit,* 216 N.C. 141, 4 S.E. 2d 339.

Appellants contend that the court in effect gave a peremptory instruction to the jury in plaintiff's favor on the first issue. It does not appear that this was done. However, upon the admitted documentary evidence and Brooks' testimony it would appear that such peremptory instruction would have been appropriate.

Appellants make the further contention that the trial judge predicated his instructions relating to the Contractual Agreement upon the finding by the jury by the greater weight of the evidence "that these parties signed this agreement." They call attention to Brooks' testimony to the effect that he (Brooks) signed it and "signed it for Hazeline." As to Hazeline B. Chambers, a sufficient answer to this contention is that plaintiff testified that Hazeline B. Chambers and Brooks had signed the contract before plaintiff received it. However, for reasons stated below, the failure of Osbia Chambers to sign it and whether Hazeline B. Chambers signed it or Brooks signed her name are immaterial under the circumstances of this case.

In this Court defendants demurred *ore tenus* to the complaint for that it fails to allege facts sufficient to constitute a cause of action. The demurrer is overruled. While each ground assigned has been considered, none of the points raised require further discussion other than those relating to defendants Chambers. In this connection, the demurrer is predicated upon the failure of the complaint to allege that Hazeline B. Chambers executed any power of attorney or other instrument authorizing Brooks to sell her land and upon the failure to allege the execution of the contract of sale by Osbia Chambers.

This action was brought against Brooks and process was served only on him. The defendants Chambers entered the case by voluntary general appearances. They adopted the answer of Brooks, which in turn speaks time after time of "the defendants." The answer is signed by counsel "for Defendants." In his voluntary general appearance, defendant Osbia Chambers "hereby agrees that he will fully comply with any judgment which may be rendered in the action entitled as above." Paragraph 16 of the complaint alleges that defendant Hazeline B. Chambers holds legal title to the land and that she is legally bound by the actions of Brooks. Defendants' answer to paragraph 16 admits in effect that Brooks had authority to execute the contract he made with plaintiff, but defendants characterize such contract as an option rather than as a contract of sale. The Statute of Frauds G.S. 22-2, is not pleaded. In the trial below, defendants Chambers raised no question concerning their obligation to perform whatever agreement Brooks may have made concerning the land. Neither of them testified at the trial. It may be fairly implied that neither was present at the trial. The conclusion is inescapable from a study of the records that the land, as Brooks stated to plaintiff in his letter of 18 February, 1953, belonged to him and he caused the record title to be put in the name of Hazeline B. Chambers for purposes of his own. Although parties, neither Hazeline B. Chambers nor Osbia Chambers has asserted ownership of the land.

Defendants' position in the trial below, as stated in the agreed statement of case on appeal, was as follows:

"The defendants contended that all of said writings and oral statements constituted an option to purchase the realty involved in which time was the essence of the agreement and failure to pay promptly forfeited all of the plaintiff's rights and that defendant (*sic*) breached said contract and thereby lost all of her rights."

No error prejudicial to defendants has been made to appear. Indeed, under the undisputed evidence, the result could hardly have been otherwise.

No error.

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

CHARLOTTE LUMBER & MANUFACTURING COMPANY v. CITY OF CHARLOTTE.

(Filed 4 May, 1955.)

1. Municipal Corporations § 15a—Plaintiff held entitled to recover upon quantum meruit for sewer system constructed in reliance on unenforceable contract.

The facts stipulated were to the effect that plaintiff contractor contemplated installing septic tanks for residences to be built in a certain development, that upon learning that the land would be taken into the city limits, the contractor entered into an agreement with the city engineering department under which the contractor was to construct at his own expense a sewer system for houses in the development in accordance with specifications agreed upon, in lieu of the septic tanks, and the city, upon incorporation of such system into its general sanitary sewer system, would compensate the contractor therefor. The amount of compensation was later agreed upon in a written contract between the contractor and the engineering department of the city. The city later took over plaintiff's sewer system as contemplated in the agreement. *Held:* Since the municipality had the authority to purchase sewer systems under the provisions of its charter, the city will not be allowed to escape liability on the ground that the contract was not signed by its mayor in accordance with the requirements of the city charter for the execution of a valid contract, but plaintiff is entitled to recover upon *quantum meruit* for the reasonable value of the sewer system appropriated.

2. Same—

Where a municipality appropriates sewer systems constructed by a private corporation at its own expense, the city may not contend that the corporation gave the sewer systems to the city by connecting its sewer line to the city's system without a valid contract, when the facts stipulated show that the city itself made the connection at the city's expense pursuant to authority of the city council.

3. Evidence § 46d—

A municipal engineer may testify as to the value of the sewer system appropriated by the city, when his testimony is based upon his personal knowledge and observation and a map prepared by him which fairly represents the sewer lines in controversy.

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

APPEAL by plaintiff from *Patton, S. J.*, at 29 November, 1954 Extra Civil Term of MECKLENBURG.

Civil action to recover, as stated in case on appeal, (a) In *quantum meruit* the reasonable and just value of a sewerage system constructed by plaintiff for defendant municipality, in reliance upon an oral contract, or (b) the reasonable value of a sewerage system taken by defendant municipality, for a public purpose without compensating plaintiff, the owner, therefor.

The parties hereto waived trial by jury and agreed that the presiding judge might sit as a jury and find all facts, and determine issues of fact, subject to the usual rights of appeal by either party.

Thereupon, for the purpose of the trial, counsel for the parties stipulated in minute detail and at great length the true facts, which may be narrated in this manner:

In 1946 Morebilt Homes, Inc., and Greystone Homes, Inc., owned a tract of land located outside the 1928 city limits of defendant City of Charlotte, and described in the complaint. Pursuant to a common plan of said corporations to effect the subdivision of said land into residential lots and streets, and to improve same, Morebilt applied to Federal Housing Administration in November 1946, for permanent loan commitments for 71 housing units to be erected in the residential area, for which, in view of the fact that there was no sewer system within any part of said land, the application contained specifications requiring disposal of sewerage by means of individual septic tanks. The Federal Housing Administration approved the application in December 1946.

And plaintiff, Charlotte Lumber & Manufacturing Company, entered into a contract with Morebilt for the construction of the 71 housing units, and entered into contracts with Morebilt and Greystone for the ultimate construction of approximately 212 housing units within the general subdivisional area in each of which it was contemplated that sewerage disposal would be effected by use of individual septic tanks. But because of weather conditions in the winter of 1946-47, construction of the said 71 housing units was postponed and not begun until sometime in April 1947.

In the meantime, under authority of "An Act to Amend Chapter 366 Public-Local Laws of 1939, The Same Being The Charter of the City of Charlotte, So as To Provide For The Extension of the Boundaries of said City," P.L. 1947 Chapter 227, a referendum was called and held 28 April, 1947, for the City of Charlotte and the affected areas by virtue of which the city limits were extended effective 1 January, 1949.

Having learned of the proposed extension of the city limits so as to incorporate substantially all of the property described in the complaint, plaintiff began a series of conferences with the Engineering Department of the City of Charlotte for the purpose of determining whether or not a sewer system throughout the area could be installed in lieu of individual septic tanks for the purpose of serving the proposed 212 housing units.

"9. As a result of said conferences the following factors were developed:

"(a) That it would be desirable from the point of view of the City of Charlotte that initially a sewer system be constructed to serve the

said area; that if individual septic tanks were initially installed within said area the pending incorporation of said area within the city limits would in the near future necessitate the abandonment of such individual septic tanks and the construction of a sewer system; that a delayed construction of such a system would result in the tearing up of the paved streets planned for the area;

"(b) That the nearest sewer line to which such a sewer system could be connected was located within Marsh Road lying to the north of the said area described in paragraph 1; that however the natural gravity flow through such a sewer system would be southward away from Marsh Road; that there was no existing connection south of the location of such a sewer system southward to the City's main outfall line.

"(c) That the most satisfactory plan for sewerage disposal throughout the said area from the standpoint of the City, looking toward the eventual incorporation of such proposed sewer system as an integral part of the general sanitary sewer system of the City of Charlotte, would be the construction of a gravity system throughout the said area whereby the sewerage would flow southward to a point located at or near the newly proposed city limits from which point the sewerage would be pressure pumped back northward through a specially constructed line to the sewer line lying in Marsh Road.

"10. As a result of said conferences it was agreed, in so far as it could be agreed, by and between the Engineering Department of the City of Charlotte and Charlotte Lumber & Manufacturing Company as follows:

"(a) That Charlotte Lumber & Manufacturing Company would, at its own expense, construct and install a sewer system and pumping system throughout the said area all as described in paragraph 9 (c) above, which system would be installed and constructed under the supervision and with the approval of said City;

"(b) That Charlotte Lumber & Manufacturing Company would operate and maintain said sewer system and said pumping station until such time as the City constructed a connection from the southmost end of said sewer system southeasterly to the Sugar Creek outfall line, at which time the pumping station and pressure line would be abandoned and the sewer system would then be incorporated within the gravity sewer system of the City of Charlotte, N. C.;

"(c) That after the construction of the connecting line referred to in said paragraph (b) above the sewerage system would become the property of the City of Charlotte, N. C. and the City of Charlotte would compensate Charlotte Lumber & Manufacturing Company for such appropriation in accordance with the customary method of basis followed by said City for calculating the purchase price of sewer systems so acquired."

The agreement thus reached between the Engineering Department of the City of Charlotte and plaintiff was submitted to and approved by Federal Housing Administration in May 1947, provided, however, plaintiff "would assume full responsibility and operation of said pump and maintenance of the system until such time as it be incorporated and become a part of the composite gravity sewer system of the City of Charlotte, and provided further that pending the city's appropriation of such system and assumption of the operation and maintenance thereof, that the owner of each housing unit constructed within said area pay Charlotte Lumber & Manufacturing Company 50 cents per month toward the operation and maintenance of such system; that neither the amounts of said Federal Housing Administration's permanent loan commitments nor any applicable ceiling prices were effected by the said change in sewerage disposal plan."

Thereafter the agreements between plaintiff and the two corporations as owners of the property were amended to the effect that in lieu of septic tanks "the contractor, at its own expense, would construct a sewer system throughout said area and a pumping station and pressure pipe in connection therewith and would under the terms of its agreement with the City Engineering Department look to the City of Charlotte for the cost of such construction at the time of the eventual incorporation of such system into the composite gravity sewer system of said city," and "that pending the appropriation of such sewer system by the City of Charlotte and the assumption by said city of the operation and maintenance thereof" plaintiff "would assume full responsibility for the operation and maintenance of such sewer and pumping system."

Plaintiff, Charlotte Lumber & Manufacturing Company, then proceeded to construct and install such sewer system, and the pumping station in connection therewith, serving a total of 208 housing units; "that such system was constructed and installed under the supervision of and was approved by the city of Charlotte," and plaintiff "paid the City of Charlotte inspection fees for such inspection and approval." And plaintiff operated and maintained said system until its appropriation by the City of Charlotte and the city's assumption of such operation and maintenance.

The Council of the City of Charlotte, on 7 March, 1951, authorized the letting of bids for the construction at the expense of the city a connecting line between the southernmost tip of the sewer system owned by plaintiff southeasterly to the Sugar Creek outfall sewer line, and shortly thereafter "the Engineering Department of the City of Charlotte calculated the exact price it had agreed, in so far as it could have been agreed, to pay plaintiff in accordance with the customary formula of compensation and the resulting figure of $17,760 was submitted" to

plaintiff and verbally acknowledged by it to be in accordance with the aforesaid agreement.

Subsequently the construction by the city of such supplemental sewer line just referred to was begun, and was completed on or about 8 February, 1952, at which time the City of Charlotte connected such supplemental system to the southern terminus of the sewer system of plaintiff, and appropriated the latter system and assumed maintenance and operation thereof. In the meantime, plaintiff had operated and maintained its sewer system and pumping station at its own expense and with funds made available by the owners of housing units within the area at the rate of 50 cents per month; and at the time of the connection made by the city, plaintiff discontinued and abandoned the pumping station, as well as the 50 cents monthly charge.

Later on 5 September, 1952, the Engineering Department of the City of Charlotte reduced to writing its agreement with plaintiff, and prepared a form of bill of sale from plaintiff to the city for use in effecting the conveyance of said sewer system to the city, wherein it was recited that the compensation for such appropriation was to be $17,760; $15,000 of which was to be paid upon execution of said instrument of conveyance with a final payment of $2,760 to be made upon the completion of 14 additional housing units within the area served.

The parties further stipulated that those sections of Chapter 366, Public-Local Laws of 1939 General Assembly of North Carolina, being the Charter of the City of Charlotte referred to in defendant's answer, are in words and figures as set forth in the answer; that Section 31 (25) of the Charter grants to the City of Charlotte the power "To establish systems of sewerage and works for sewage disposal, and to extend and build the same beyond the corporate limits when deemed necessary, to permit owners of residences or industrial plants outside the limits of the City of Charlotte to connect to the sewerage system of said City of Charlotte and to remove said sewage through its system as is now done for residents of said city"; and that all of such sections were in force and effect on the dates referred to, and need not be otherwise proved.

It is also stipulated that plaintiff is a corporation duly organized and existing under the laws of North Carolina; that the defendant is a municipal corporation, duly created and existing under the laws of the State of North Carolina, having all the powers of a municipal corporation, including the authority to authorize the construction of, and to purchase and maintain, sewer lines and systems, and its Charter is set forth in Chapter 366 of the Public-Local Laws of the General Assembly of 1939, as amended; and that plaintiff made demand upon defendant in accordance with letter of plaintiff's attorneys, dated 5 March, 1953, a copy of which is attached to the answer herein.

And the parties further stipulated that either party may introduce further evidence not in conflict with the above stipulations of fact.

Plaintiff offered the testimony of Lloyd G. Richey, Engineer of the City of Charlotte, stipulated to be an expert witness and permitted as an adverse witness, to the effect: That in his opinion the just and reasonable value of the sewer system concerned in this action in February 1952 was $17,760, which amount he testified he figured in 1952 at the time the line went into the city system by gravity. And that no part of this sewer system could be torn up or removed without inconvenience of property owners in the subdivision.

At the conclusion of all the evidence, motion of defendant for judgment as of nonsuit was allowed, and from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

Lassiter, Moore & Van Allen for plaintiff, appellant.

John D. Shaw for defendant, appellee.

WINBORNE, J. Appellant plaintiff states this as question involved on this appeal: Did the trial court err (1) in allowing defendant's motion for judgment as of nonsuit?, and (2) in the exclusion of certain evidence of value?

In connection with the first division of the question, the defendant in its answer to the allegation of the complaint in respect to an agreement between it and the Engineering Department of the City of Charlotte averred that the Engineering Department of the City of Charlotte had no authority to enter into any agreement, and specifically pleaded provisions of the City Charter in these respects: "The mayor shall sign all written contracts or obligations of the city and no contract of the city required to be in writing shall be binding upon the city until signed by the mayor . . ." and that "all contracts shall be signed by the mayor or mayor *pro tem*, and attested by the city clerk and approved as to form by the city attorney and certified by the city accountant, as provided by law, before becoming effective."

However, it is not contended that the City of Charlotte was without power to enter into contracts in respect to sewerage systems. Quite to the contrary, it is provided in the City Charter, Section 65, "that the City of Charlotte may enter into contracts, when duly authorized by a majority of the City Council, with any person, firm or corporation whereby sewer or water lines may be laid within or without the city and connected to the system of said city under such terms as may be agreed upon."

Conceding, therefore, that plaintiff had no written contract with the City of Charlotte, signed by the mayor, as required by the City Charter,

P.L.L. 1939, Chapter 366, and, hence, has no enforceable contract with the city for the sewer system which the city took over on 8 February, 1952, and incorporated into the gravity sewer system of the city, decisions of this Court hold that in such case plaintiff is not without a remedy—it may recover on basis of *quantum meruit* for the reasonable and just value of the sewer system. *McPhail v. Commrs.*, 119 N.C. 330, 25 S.E. 958; *Abbott Realty Co. v. City of Charlotte*, 198 N.C. 564, 152 S.E. 686; *Board of Commrs. v. Inman*, 203 N.C. 542, 166 S.E. 519; *Moore v. Lambeth*, 207 N.C. 23, 175 S.E. 714; *Hawkins v. Dallas*, 229 N.C. 561, 50 S.E. 2d 561.

Indeed the case of *Abbott Realty Co. v. City of Charlotte, supra,* is similar in factual situation to that of case in hand. This Court, while holding that plaintiff had failed to sustain its contention that defendant was liable to it on the contract alleged in the complaint, the defendant should be and is liable for the reasonable and just value of the sewers, if the jury should find that after their construction, defendant took them over and incorporated them into its municipal sewerage system. In the instant case that the city has taken over and incorporated the plaintiff's sewer system into its composite gravity sewer system, is stipulated as a fact.

But appellees contend "that when the plaintiff attached its sewer line without a valid contract as provided in Section 65 of the City Charter of the defendant it is within the purview of such legislative enactment that it gave it to the city." This is a *non sequitur.* There is nothing in the record tending to show any intention on the part of plaintiff to give the sewerage system to the city. And the facts stipulated fail to show that plaintiff made the connection. On the other hand, the stipulated facts do show that the construction of a connecting line was made by authority of the city council at the city's expense, and that on 8 February, 1952, after it was completed, the City of Charlotte made the connection, and appropriated plaintiff's system of sewerage and assumed the maintenance and operation of it.

Appellee cites and relies upon the case of *Spaugh v. Winston-Salem,* 234 N.C. 708, 68 S.E. 2d 838. The facts in that case differ in material aspects from those in the present case. Hence it is not controlling here.

As to the competency of the testimony of the witness Richey: He testified that he prepared the map which was attached to and made a part of the stipulations of fact, and that the map fairly represented the sewer lines about which this case is concerned; and that in his opinion the just and reasonable value of the sewer system in February 1952 was $17,760, which amount he testified he figured in 1952 at the time the line went into the city system by gravity. Thus it is apparent that the

witness was testifying from personal observation and knowledge. See *S. v. Hightower,* 187 N.C. 300, 121 S.E. 616.

For reasons stated the judgment as of nonsuit is

Reversed.

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

FANNIE ELLIS GREEN, WIDOW: HATTIE GREEN YOUNG, MOTHER; TOM GREEN, BROTHER, OF THAD GREEN, DECEASED, EMPLOYEE, v. H. L. BRILEY, EMPLOYER; FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY, CARRIER.

(Filed 4 May, 1955.)

1. Master and Servant § 53e—When compensation is paid in good faith to person adjudicated entitled thereto, liability of carrier is discharged.

Claim for compensation for the death of deceased employee was duly filed by the employee's mother. The evidence disclosed that upon the investigation made by the insurance carrier shortly after the accident, and upon the hearing before the Commission, the mother and brother of the deceased employee made statements that the employee was not married and had no children, and that his mother had been partially dependent upon him. Upon the hearing before the Industrial Commission, it was judicially determined that the mother was next of kin entitled to all benefits, and compensation was paid to her under the judgment. *Held:* The record sustains the findings and conclusion of the Industrial Commission that the payment of compensation to the mother was made in good faith within the purview of G.S. 97-48 (c), so as to discharge the obligations of the employer and the insurance carrier notwithstanding that the employee left a widow legally entitled to the compensation.

2. Master and Servant §§ 45, 53d—

Where it appears that compensation had been paid in good faith to the mother of the deceased employee upon judicial determination that she was the next of kin entitled to all benefits, the Industrial Commission is without jurisdiction upon its later adjudication that the employee left a widow entitled to the compensation, to enter judgment that the widow recover against the mother the amount of compensation paid to the mother. Modification of the judgment accordingly does not interfere with the widow's right to pursue her remedies against the mother by independent action in the Superior Court.

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

APPEAL by plaintiff Fannie Ellis Green from *Parker, J.,* at September Term, 1954, of PITT.

Proceeding under Workmen's Compensation Act for compensation on account of the death of Thad Green.

At the time of his death on 4 June, 1951, Thad Green, age 38, was working a few miles from Bethel, the home of his mother, Hattie Green Young, in Pitt County. It was admitted he died as a result of an injury by accident which arose out of and in the course of his employment by the defendant Briley. The North Carolina Industrial Commission was requested to set a date for a hearing for the purpose of determining the dependents or next of kin of the deceased.

On 11 September, 1951, the case was heard before Deputy Commissioner W. Scott Buck in Greenville. At the hearing the mother and brother of the deceased were present, as were counsel representing them and also counsel for the defendant Briley and his insurance carrier. Counsel for the brother, Tom Green, announced it was his intention to assign or turn over to his mother any compensation he might be entitled to receive. Deputy Commissioner Buck rendered an opinion in which he concluded upon stipulations entered at the hearing that the mother, Hattie Green Young, was entitled under the provisions of G.S. 97-38 and 97-40 to receive compensation for the death of her son and that no other person was entitled to participate therein. By formal award of the Industrial Commission entered 29 October, 1951, it was directed, pursuant to the provisions of G.S. 97-40, that the commuted value of the award, to wit: $5,359.79, be paid to the mother in a lump sum. Payment was made by the defendant insurance carrier as directed.

Thereafter, the Commission received a letter from Sigmund Meyer, Esq., of the Durham Bar, dated 13 February, 1952, to the effect that Thad Green was married to Fannie Ellis Green, the appellant in the case. Following this, she was made a party to the proceeding and hearings were held before Deputy Commissioner Buck, first in Durham and later in Greenville, with all parties being present or represented by counsel. At these hearings evidence *pro* and *con* was offered on these questions: (1) whether Fannie Ellis Green was the lawful wife of Thad Green at the time of his death and entitled to the workmen's compensation benefits, and (2) whether the defendant insurance carrier acted in good faith in making the previous lump-sum settlement with the mother of the deceased.

Following the final hearing in Greenville Deputy Commissioner Buck rendered a supplemental opinion finding in substance these facts:

1. On 1 January, 1944, Thad Green was lawfully married to Fannie Ellis Green in Bennettsville, South Carolina. They lived together as husband and wife in Durham, North Carolina, for a short time and then moved to Norfolk, Virginia, where they resided for about two years, and then returned to Durham and made their home at 819 Ger-

rard Street from 1946 until the early part of 1951, during all of which time Thad Green was gainfully employed and his wife was dependent upon him for her support, with no other person being wholly dependent upon him for support.

2. Between 1946 and through 1950, Thad Green's mother visited in his home in Durham on three occasions, and spent the night once. On the first visit she was introduced to Thad's wife as his mother, and the wife was introduced to the mother as his wife. The last visit was in 1950.

3. In January, 1951, he told his wife he was in trouble in Durham about some checks and that he was going to have to get out of town for a while. He also told his wife that since his mother lived at Bethel he was going down there. Whereupon he went to his mother's home, leaving his wife in Durham. He never returned to Durham after his departure in January, 1951, and his wife did not join him in Pitt County. From January, 1951, to the time of his death on 4 June, 1951, the widow was not in fact living with Thad Green. Nor was she dependent for her support upon his earnings. But she was living apart from him during this period for justifiable cause, he having deserted her in January, 1951, and left her in a state of abandonment until the date of his death.

4. For about three months before his death Thad Green resided at the home of Henry and Vivian Wooten in Pitt County near the job on which he was employed, and it was under these circumstances that he was living and working at the time of his injury and death.

5. Upon the first hearing of this cause in Greenville on 11 September, 1951, the mother of deceased and also his brother Tom appeared and testified in substance: that Thad was never married; that during the three months he was employed by the defendant Briley he regularly contributed to his mother's support the sum of $10.00 per week or more; that he contributed to her support while working on other jobs prior to his last employment; that the mother was partially dependent upon Thad to the extent of his contributions; and that no other person was dependent upon him, either in whole or in part, for support. At the time this testimony was given, the same was false, and Hattie Green Young and Tom Green knew it was false.

6. Prior to the date of the first hearing, the defendant insurance carrier made an investigation in Pitt County concerning the death of Thad Green and also concerning his dependents. The information obtained was substantially the same as that disclosed by the false testimony later given at the hearing by his mother and brother.

7. That the defendants herein and the Industrial Commission at all times acted in good faith and upon the information at hand; and that

the Commission's award of compensation and the payment thereof by the defendant carrier to Hattie Green Young were made in good faith.

8. The first knowledge Fannie Ellis Green had of the death of her husband was in December, 1951, when she received a Christmas card over the printed signature of "Mr. and Mrs. Willie Young," postmarked "Bethel, N. C., December 5, 1951," containing the information that Thad was dead. The married name of Hattie Green Young is Mrs. Willie Young.

9. During the early part of 1952, Fannie Ellis Green called at the home of Willie and Hattie Green Young in Bethel and sought information concerning the death of her husband. Willie Young was present and would not allow Hattie to give Fannie the details concerning Thad's death.

10. From the proceeds of the compensation paid to Hattie Green Young she bought a house and lot in Bethel at a cost of $2,550.00 and spent approximately $1,000.00 in repairing the house, the title to which is in her name and is unencumbered. She gave Tom Green a total of $1,000.00. The balance of $600.00 is being held for her by a Mrs. Burton in Bethel. Hattie Green Young refuses to turn this sum or the property purchased with the compensation money over to Fannie Ellis Green, and refuses to make any payment whatsoever to her by way of reparation.

Based upon the foregoing findings of fact, Deputy Commissioner Buck made these conclusions of law:

1. That on 4 June, 1951, Fannie Ellis Green was "the lawful widow" of the deceased Thad Green.

2. That the widow was rightly entitled to all the compensation benefits, and that the mother, Hattie Green Young, was not entitled to any part thereof. Nevertheless, the defendants paid the compensation to Hattie Green Young in good faith and the payment so made shall protect and discharge the defendant Briley and his insurance carrier from any further liability for compensation or other benefits as a result of the death of Thad Green.

3. That Hattie Green Young is indebted to Fannie Ellis Green for the amount of compensation unlawfully received in the amount of $5,359.79, and that Fannie Ellis Green is entitled to recover that sum from Hattie Green Young.

The award of Deputy Commissioner Buck adjudges that the claim of Fannie Ellis Green, widow, as against the defendant Briley and his insurance carrier is denied and dismissed. However, the award directs that Hattie Green Young shall pay Fannie Ellis Green the sum of $5,359.79, representing the total amount of compensation received by Hattie Green Young from the defendant insurance carrier.

On appeal, first to the Full Commission and later to the Superior Court, the foregoing findings, conclusions, and award were affirmed. From the judgment of the Superior Court, affirming the decision and award of the Industrial Commission, the plaintiff Fannie Ellis Green appeals, assigning errors.

Henry Bane and Sigmund Meyer for plaintiff Fannie Ellis Green, appellant.

James & Speight for defendants, appellees.

JOHNSON, J. Decision here is controlled by the provisions of G.S. 97-48 (c), which reads: "Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims."

True, under the provisions of G.S. 97-47 the Industrial Commission may review an award, but this statute expressly provides that no such review shall affect an award as regards money previously paid.

The evidence taken and the stipulations entered at the first hearing before Deputy Commissioner Buck in Greenville sustain the award made in favor of Hattie Green Young, and the evidence adduced at the later hearings sustains the findings and conclusions that the defendants acted in good faith. The evidence discloses that the request for a hearing was made by the defendant carrier after it had made an investigation to ascertain the dependents or next of kin of the deceased Thad Green. The record discloses that in the course of the investigation a representative of the carrier interviewed Thad's mother and also a member of the family with whom he was living at the time of his death and obtained statements to the effect that he was not married and had no children, and that his mother and brother were his next of kin, and that the mother had been partially dependent on him. Further, it is to be noted that the mother's claim was duly filed with the Industrial Commission, the regularly constituted tribunal for hearing claims of this kind, and that after a hearing regularly held it was judicially determined that the mother of the deceased was the next of kin entitled to all benefits. Whereupon the Commission, pursuant to G.S. 97-38 and 97-40, entered an award directing that payment be made to the mother. Following this, the defendant insurance carrier made payment as directed.

Manifestly the record sustains the finding and conclusion of the tribunal below to the effect that the payment was made in good faith, within the purview of G.S. 97-48 (c).

While the law, acting in response to the demands of a humane public policy, requires employers and insurance carriers to settle these workmen compensation claims promptly and with a minimum of formality, nevertheless, for those who pay them in good faith a modicum of legal protection against recurring demands is rightly provided. Within the framework of the legal protection so provided the defendants in this case have fulfilled their obligations and discharged their liability.

It has ever been so that the universal application of just principles of law produces occasional hardships. But even so, it is noted that the appellant here is not entirely blameless. The record discloses her husband was separated from her for more than five months before his death, and that when he left her she knew he was returning to Pitt County where he had formerly lived. Yet she never visited that county or made inquiry there of his whereabouts for more than a year after his separation from her, and when she did make inquiry he had been dead more than six months.

The decision of the Industrial Commission, as sustained by the court below, so far as it relieves the defendants of further liability, will be upheld.

However, the award and judgment over against Hattie Green Young in favor of Fannie Ellis Green will be stricken out as being beyond the jurisdictional power of the Industrial Commission to grant relief. This modification will not interfere with the appellant's right to pursue her remedies against Hattie Green Young, if so advised, by independent action in the Superior Court.

Let the cause be remanded for the modification herein directed, and as so modified the award and judgment below will be affirmed.

Modified and affirmed.

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

MRS. MAYO TILLMAN v. JIMMY SHELTON BELLAMY.

(Filed 4 May, 1955.)

1. Negligence § 6—

When the negligence on the part of two or more persons, operating independently of each other, join and concur in proximately producing the injury complained of, each author of negligence is liable for the damages inflicted, and the person injured may bring action against any one or all of them as joint tort-feasors.

2. Automobiles §§ 18d, 18i—Instruction held for error in failing to charge upon liability for concurring negligence.

Plaintiff, a guest passenger in a car, sought to recover for alleged negligence of the driver of the car which collided with the rear of the car in which plaintiff was riding when it stopped because of the exigencies of traffic. Defendant denied negligence on his part and alleged that negligence on the part of the driver of the car in which plaintiff was riding was the sole proximate cause of the injury. *Held:* An instruction upon defendant's liability if his negligence was the proximate cause of the injury and upon the principle that defendant would not be liable if the negligence of the driver of the other car was the sole proximate cause of the collision, must be held for error in failing to charge upon defendant's liability to plaintiff if defendant's negligence concurred with the negligence of the other driver in proximately causing the injury, since the pleadings and evidence raise the issue of negligence of the driver of the car in which plaintiff was riding, even though only for the purpose of showing that his negligence was the sole proximate cause of the injury.

3. Trial § 31b—

It is incumbent upon the trial judge to charge the jury upon each substantive feature of the case arising upon the evidence even in the absence of a request for special instructions.

4. Automobiles § 18i—

It is not necessary for the court to charge on the question of maximum speed fixed by statute for business districts when the evidence is insufficient to bring the locale of the collision within the definition of business districts. G.S. 20-141 (b).

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

APPEAL by plaintiff from *Patton, Special Judge,* December Extra Term 1954 of MECKLENBURG.

Plaintiff instituted this action to recover damages for personal injury sustained, consequent upon a collision of automobiles, alleged to have been caused by the negligence of the defendant.

The material facts were these:

On the afternoon of 5 December, 1953, plaintiff was riding as a guest passenger in an automobile being driven by B. G. Lindsay eastwardly on Rozzell's Ferry Road in the city of Charlotte. There were several automobiles in line in front of the one in which plaintiff was riding. As they approached the intersection of Zebulon Street the line including the Lindsay automobile slowed down, with rear lights showing red. Lindsay's automobile was barely moving when it was struck from the rear by an automobile driven by the defendant Bellamy who was driving from the west through Charlotte. The force of the impact impelled the Lindsay automobile into the automobile next in front, causing injury to the plaintiff.

The plaintiff alleged negligence on the part of defendant in failing to observe the traffic in his front, failing to maintain proper distance, and speed in excess of the statute, G.S. 20-141 (b). The defendant denied negligence on his part and alleged that Lindsay was negligent in stopping without warning, and that Lindsay's negligence was the sole proximate cause of plaintiff's injury.

In his testimony defendant Bellamy admitted that just before the collision he was driving at a speed of thirty-five miles per hour.

In response to the issue submitted, "Was the plaintiff injured by the negligence of the defendant as alleged in the complaint?," the jury answered "No."

Judgment was rendered in favor of the defendant and the plaintiff appealed.

Warren G. Stack for plaintiff, appellant.

Kennedy, Kennedy & Hickman and Frank H. Kennedy for defendant, appellee.

DEVIN, J. The only errors assigned and brought forward in plaintiff's appeal relate to the court's charge to the jury, in that the court failed to present certain material phases of the evidence to the jury and declare and explain the law relating thereto as required by the statute, G.S. 1-180.

The plaintiff points out that the court failed to declare and explain the law as to a material phase of the law of negligence applicable to and inherent in the evidence in this case.

The court properly explained the law of negligence as it related to the defendant's conduct under the allegations of the complaint and as shown by the testimony, and also as to defendant's contention that the negligence of B. G. Lindsay, the driver of the automobile in which plaintiff was riding, was the sole proximate cause of the collision and of the injury complained of. But plaintiff contends there was error in failing to call the jury's attention to the question of the concurring negligence of Lindsay and defendant Bellamy, a substantive feature of the case arising on the evidence.

The principle seems firmly established by the decisions of this Court that if Lindsay, the driver of the automobile in which plaintiff was riding, was guilty of negligence in stopping without warning, and the defendant Bellamy was also guilty of negligence in relation to the same transaction, and the negligence of each contributed proximately to plaintiff's injury, the defendant would not be relieved of liability therefor, unless the negligence of Lindsay, plaintiff's driver, was the sole proximate cause of the injury. The negligence of Lindsay was called

to the attention of the jury but only in connection with defendant's allegation that Lindsay's negligence in the respects alleged was the sole proximate cause of the collision. Plaintiff would not be barred by the negligence of Lindsay unless it was the sole efficient cause of her injury.

In the language of *Stacy, C. J.*, in *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690:

"There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors. *White v. Carolina Realty Co.,* 182 N.C. 536, 109 S.E. 564."

To the same effect are the decisions in *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63; *Price v. Monroe,* 234 N.C. 666 (669), 68 S.E. 2d 283; *Smith v. Sink,* 210 N.C. 815, 188 S.E. 631; *Cunningham v. Haynes,* 214 N.C. 456, 199 S.E. 627; *Crampton v. Ivie,* 126 N.C. 894.

This principle is applicable when the facts are such as to justify the view that the several acts of negligence on the part of two different persons concur in contributing proximately to the injury complained of. *Smith v. Grubb,* 238 N.C. 665, 78 S.E. 2d 598; *Cunningham v. Haynes, supra.*

In the case at bar we have examined the court's charge in the light of the plaintiff's exception, and note that, after calling the jury's attention to the duty of the defendant to observe the speed laws and to maintain safe interval between automobiles, and to the duty of Lindsay to give a proper signal on stopping, the court on the first issue, charged the jury if they found from the evidence and by its greater weight that the defendant in the operation of his automobile on this occasion was negligent in any of the respects alleged in the complaint, setting these out separately and accurately, and such negligence was the proximate cause of the injury, they should answer the issue yes; otherwise, no. Immediately following, the court added: "Or if, after taking into consideration all the evidence in the case, you find that the sole proximate cause, the producing cause of the collision, was the negligence of Lindsay, the operator of the vehicle in which the plaintiff was riding, then it would be your duty to answer issue number 1, no."

Inadvertently the court failed to charge the jury that if they should find from the evidence that both Lindsay and defendant Bellamy were negligent in the operation of their respective automobiles on this occasion, and that the negligence of each was a concurring and contributing proximate cause of the collision and consequent injury to the plaintiff, they should nevertheless answer the issue in favor of the plaintiff, who

was a nonoperating passenger in one of the automobiles; unless they should find that the negligence of Lindsay was the sole proximate cause of the injury.

There was no request for instruction on this point, but none was necessary as this was a substantive feature of the case arising on the evidence. *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53; *Moss v. Brown,* 199 N.C. 189, 154 S.E. 48; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435.

In *Smith v. Bonney,* 215 N.C. 183, 1 S.E. 2d 371, where the facts were somewhat similar, this Court declined to grant a new trial on the exception that the court had failed to submit the question of the concurring negligence of plaintiff's driver. But the decision of the Court in that case was stated in a *per curiam* opinion, to be for the reason the court had charged the jury if the negligence of the defendant was the proximate cause of the injury to answer the issue in plaintiff's favor, and that the issue of the negligence of plaintiff's driver had not been raised, only the issue of the negligence of the defendant having been tried below. It was thought the appeal should follow the theory of the trial.

In our case the negligence of Lindsay, plaintiff's driver, was put in issue in defendant's pleading and the evidence which was offered pursuant thereto. True this was done in the effort to show that Lindsay's negligence as alleged was the sole proximate cause of plaintiff's injury, but the evidence was equally available in support of the applicable principle of the concurring negligence of both drivers. As this constituted a substantial and material phase of the case arising on the evidence, it was incumbent on the trial judge to submit it to the jury with appropriate instructions. Plaintiff did not see fit to sue Lindsay, as she might have done, nor did the defendant ask that he be made party defendant for the purpose of determining his contingent liability for contribution as joint tort-feasor, but the question of his negligence is raised both by pleading and evidence.

The plaintiff also excepted to the failure of the court to submit to the jury the question of the maximum speed limit fixed by statute for business districts. G.S. 20-141 (b), G.S. 20-38. But we do not think the evidence sufficiently clear to bring the locale of the collision within the statutory definition of a business district, and this exception is not sustained. See *Hinson v. Dawson,* 241 N.C. 714, where in an opinion written for the Court by *Bobbitt, J.,* these statutes are considered and their provisions construed.

We think the plaintiff is entitled to another hearing. As there must be a new trial, no further discussion of the evidence is necessary.

New trial.

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

This opinion was written in accordance with the Court's decision and filed by order of the Court after expiration of period of active service of *Devin, J.*, upon recall to serve temporarily as provided by law.

ILA MAE RHODES; CLIFFORD RAXTER AND WIFE, SUSIE RAXTER, AZILEE RAY AND HUSBAND, CARL RAY, v. FAYETTE RAXTER AND WIFE, FLOSSIE RAXTER.

(Filed 4 May, 1955.)

1. Trusts § 4a—

Where defendants' evidence is insufficient to show what part, if any, of the purchase price he advanced at or before the time legal title passed to the alleged trustee, the evidence is insufficient to establish a resulting trust in defendants' favor, since consideration advanced after the passing of the legal title is ineffectual to create a resulting trust.

2. Trusts § 2a—

Allegation and proof to the effect that after his parents acquired legal title to the premises, they entered into a verbal agreement with defendant under which defendant was to have that portion of the land which would include the dwelling house, barn and other improvements which defendant assisted in placing on the land, *held* insufficient to establish a parol trust in defendant's favor, since an agreement relied upon to create a parol trust must ordinarily be made prior to, or contemporaneously with, the passing of the legal title.

3. Appeal and Error § 39c—

Where the record fails to show what the testimony excluded would have been if the witness had been permitted to answer the questions propounded, the exclusion of the testimony cannot be held prejudicial.

4. Trusts § 4c—

Upon the issue of a resulting trust, evidence of the furnishing of consideration after legal title had passed to the alleged trustee, is properly excluded, since such evidence is irrelevant to the issue.

5. Trial § 29—

Where all the evidence points in the same direction with but one inference to be drawn from it, a peremptory instruction to answer the issue accordingly if the evidence is found to be true, is proper and will be upheld.

6. Trial § 28—

A peremptory instruction that if the jury believes the facts to be as all the evidence tends to show, to answer the issue in the affirmative, will not

be held for prejudicial error, certainly when the court in giving the peremptory instruction in another part of the charge, adds that if the jury does not so find, to answer the issue in the negative.

6. Appeal and Error § 29—

Exceptions not brought forward in the brief and supported by argument or citation of authority are deemed abandoned.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Nettles, J.*, and a jury, at July-August Term, 1954, of TRANSYLVANIA.

Ramsey & Hill for plaintiffs, appellees.

Lewis P. Hamlin, Jr., and Thomas R. Eller, Jr., for defendants, appellants.

JOHNSON, J. This proceeding was instituted as a petition for partition of land among tenants in common.

The record title was held as an estate by the entirety by J. H. Raxter and wife, Sarah Raxter, both of whom died intestate prior to the commencement of this proceeding, Sarah Raxter having died last. She was survived by the following named children, her only heirs at law: Ila Mae Rhodes, Clifford Raxter, Azilee Ray, and Fayette Raxter.

The plaintiffs, upon allegations that each of the four children owns a one-fourth interest in the land, pray the court for actual partition.

The defendants deny that the shares of the four owners are equal, and by further defense allege that by virtue of a resulting trust or a parol trust, or both, the defendant Fayette Raxter owns, in addition to the share to which he is entitled by inheritance, an interest in the land to the extent of about one-third its value.

After the proceeding was instituted, Clifford Raxter and wife conveyed whatever interest they had in the lands to Fayette Raxter.

At the close of the evidence in the trial below, the defendant Fayette Raxter's trust pleas were disposed of by involuntary nonsuit.

The verdict of the jury established and the judgment below decrees that the plaintiffs Ila Mae Rhodes and Azilee Ray each owns a one-fourth undivided interest in the land, and that the defendant Fayette Raxter owns the remaining one-half undivided interest.

Decision here turns on whether the evidence adduced below is sufficient to raise a trust in favor of the defendant Fayette Raxter. The evidence discloses that about 1912 J. H. Raxter and wife, Sarah Raxter, purchased and took title to a tract of land known as the Clark place. It was paid for on the installment plan. During the early 1920's this

tract was sold, and the proceeds were applied as part payment of the purchase price of the 45-acre Elzie Raxter place now in controversy. The deferred balance due on the purchase price was paid in installments over a period of years. Fayette Raxter made contributions to his parents from time to time to assist them in paying for both tracts of land. However, the evidence fails to disclose that he advanced any definite fractional portion of the purchase money, for any distinct interest in the land, when each tract was purchased. On the contrary, the evidence discloses that Fayette Raxter simply made general contributions, as for example of from $10 to $50 each, toward the purchase of the lands. Moreover, the evidence which fixes with any degree of certainty the time relationship between the contributions made by Fayette Raxter and the acquisition of title by his parents indicates that practically all the contributions were made after title passed for the purpose of assisting in paying installments due on the deferred balance of the purchase price. In this state of the record, with the evidence being insufficient to afford a basis for determining what proportionate part, if any, of the purchase money was advanced by Fayette Raxter at or before the time legal title passed to his parents, the court below properly concluded there was no evidential basis for establishing in favor of Fayette Raxter any ascertainable trust interest in either tract of land based on *pro tanto* payment of the purchase money. It is elemental that a resulting trust arises, if at all, in the same transaction in which the legal title passes, and by virtue of consideration advanced before or at the time the legal title passes, and not from consideration thereafter paid. *Beam v. Bridgers,* 108 N.C. 276, 13 S.E. 112; 54 Am. Jur., Trusts, section 204. See also *Olcott v. Bynum,* 84 U.S. (17 Wall.) 44, 21 L. Ed. 570; *McWhirter v. McWhirter,* 155 N.C. 145, 71 S.E. 59; *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289; 54 Am. Jur., Trusts, section 216; Annotation, 42 A.L.R. 10, 54; Annotation, 34 L. Ed. 1091.

Equally untenable is the defendant Fayette Raxter's alternate contention that he is entitled to a portion of the land in fee-simple by virtue of a parol agreement with his parents. As to this, it is alleged, and his evidence tends to show, that J. H. Raxter and wife, Sarah Raxter, entered into a verbal agreement with Fayette Raxter by which the latter was to have a designated portion of the 45-acre tract which would include the dwelling house, barn, and other improvements he assisted in placing on the land. However, it is noted that the defendants' pleading, as well as their proofs, fix the time of the alleged parol agreement as being after the legal title to the land passed to J. H. Raxter and wife, Sarah Raxter. This being so, the alleged agreement was ineffectual to raise a trust. Ordinarily, in order to raise a trust in land the parol agreement relied on must be made prior to or con-

temporaneously with the passing of the legal title. *Frey v. Ramsour,* 66 N.C. 466; Mordecai's Law Lectures, Second Edition, Vol. II, pp. 991 and 992. The rule is that "where the legal estate is not conveyed, a trust cannot be raised by a parol declaration even though founded upon a valuable consideration and followed by actual occupancy and the erection of valuable improvements." *Cobb v. Edwards,* 117 N.C. 245, 247, 23 S.E. 241. See also *Hamilton v. Buchanan,* 112 N.C. 463, 17 S.E. 159; *Taylor v. Addington,* 222 N.C. 393, 23 S.E. 2d 318; *McCorkle v. Beatty,* 225 N.C. 178, 33 S.E. 2d 753; G.S. 22-2.

It necessarily follows that the evidence was insufficient to raise a trust in favor of the defendant Fayette Raxter, upon either the theory of a resulting trust or of a parol trust. These pleas were properly dismissed on plaintiffs' demurrer to the evidence.

Also untenable are the defendants' assignments of error relating to the exclusion of evidence. Within this group the defendants have brought forward more than thirty exceptions. Practically all these are without merit for the reason the record fails to show what the testimony would have been if the witnesses had been permitted to answer the questions propounded. The rule is that the exclusion of testimony cannot be held prejudicial on appeal unless the appellant shows what the witness would have testified if permitted to do so. *Peek v. Trust Co., ante,* 1; *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778.

Exception No. 26 relates to the ruling of the court in striking out the testimony of the witness Jobe Hamet to the effect that J. H. Raxter and wife told him that "Fayette Raxter paid a part of the purchase price" of the land, and that the witness "saw him pay J. H. Raxter money to pay on it." The exclusion of this testimony was not prejudicial to the defendants since it was not made to appear that the "part of the purchase price" paid by Fayette Raxter was contributed prior to or contemporaneously with the passing of the legal title. Indeed, the further testimony of the witness Hamet tends to show that the contribution referred to was made after the legal title passed, the further statement of the witness being: "When I saw him pay Mr. Raxter money, Mr. Raxter told me that it was to make a payment on the land—what they lacked of having it paid for."

The remaining exceptions brought forward in the brief have been examined and found to be without merit. Included among these are Exceptions Nos. 71 and 72 which challenge the peremptory instructions given the jury in favor of the plaintiffs. After the defendants' trust pleas were disposed of by nonsuit, the single issue to be determined by the jury, under the theory of the trial, was whether the plaintiffs Ila Mae Rhodes and Azilee Ray and the defendant Fayette Raxter were the owners of the land as tenants in common. All the relevant evidence

bearing on this issue pointed to an affirmative answer. There was no evidence *contra.* Hence, a peremptory instruction in favor of the plaintiffs was proper. The rule is that where all the evidence points in the same direction, with but one inference to be drawn from it, an instruction to find in support of such inference if the evidence is found to be true, is proper and will be upheld. *Mercantile Co. v. Ins. Co.,* 176 N.C. 545, 97 S.E. 476; *Holt v. Maddox,* 207 N.C. 147, 176 S.E. 261; *Davis v. Warren,* 208 N.C. 174, 179 S.E. 329. The instruction to which Exception No. 71 relates is as follows: ". . . if you believe the facts to be as testified to by the witnesses in the case, and the other evidence and testimony, you will answer the issue YES; *otherwise you will answer it NO.*" (Italics added.) After some time had elapsed, the presiding Judge recalled the jury to the court room and gave a further instruction. Exception No. 72 relates to the further instruction. It is substantially the same as the first one, with this exception: the portion of the first instruction shown in italics above was omitted from the second instruction. While this omission may be technically inexact under the rule applied in *Reynolds v. Earley,* 241 N.C. 521, 85 S.E. 2d 904, the instruction as given may not be held for error on this record. Compare *Commercial Solvents v. Johnson,* 235 N.C. 237, and cases cited on page 243, 69 S.E. 2d 716. See also *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757. Here prejudice has not been made to appear. Indeed, the instruction is not challenged as to form. Moreover, the exceptions relating to the peremptory instructions as brought forward in the brief are unsupported by argument or citation of authority. Therefore, both exceptions may be treated as abandoned under Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563; *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

It is noted that in the oral argument here the appellants abandoned their contention that the court below erred in ordering actual partition, rather than a sale therefor.

The trial and judgment below will be upheld.

No error.

BARNHILL, C. J., and DEVIN, J., took no part in the consideration or decision of this case.

BRYANT J. PARKER v. MILDRED S. HENSEL AND ROBERT A. HENSEL, BY HIS GUARDIAN AD LITEM, MILDRED S. HENSEL, AND ALLSTATE INSURANCE COMPANY, A CORPORATION.

(Filed 4 May, 1955.)

1. Torts § 8a—Allegations held insufficient to allege fraud vitiating release.

Allegations to the effect that plaintiff executed a release from liability for negligent injury upon consideration of the payment of a stipulated sum to him, plus the payment of doctor and hospital bills in a specified amount, and that unknown to plaintiff, plaintiff's accident and health insurance benefits were applied in reduction of the bills, thus leaving plaintiff without further coverage under the accident and health policy for the remainder of the policy year, without allegation that defendants had anything to do with the application of the benefits under that policy or the circumstances under which they were applied, *is held* insufficient to allege fraud vitiating the release, it appearing that the doctor and hospital bills were in the amount stipulated after the application of the benefits under the policy, and there being no allegation of loss to plaintiff resulting from want of further coverage under that policy for the remainder of the policy year.

2. Fraud § 1—

The essential elements of fraud are a misrepresentation of a material fact, false within the knowledge of the party making it, made with intent to deceive, which misrepresentation does in fact deceive the other party to his damage.

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

APPEAL by defendants from *Patton, Special Judge,* January Term, 1955, of MECKLENBURG.

The plaintiff instituted this action on 18 March, 1954, against the original defendants, Mildred S. Hensel and Robert A. Hensel, to recover damages for personal injuries allegedly sustained by the plaintiff when the automobile of the defendant Mildred S. Hensel (actually the automobile of Allen F. Hensel), which was being driven by the defendant Robert A. Hensel (son of Allen F. and Mildred S. Hensel) on 25 September, 1953, collided with the plaintiff while he was walking across West Trade Street at the intersection of said street with Cedar Street, in the City of Charlotte.

The original defendants filed an answer to the complaint denying the material allegations therein and as a further answer and defense pleaded a release executed by the plaintiff as a bar to his cause of action, which in pertinent part reads as follows:

"THIS INDENTURE WITNESSETH that, in consideration of the sum of ONE THOUSAND AND No/100 DOLLARS, and payment of bills of Charlotte Memorial Hospital of $315.00 & Dr. F. Wayne Lee bill (of) $150.00,

receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge ALLEN F. HENSEL and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs, representatives and assigns, from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, loss or damages of any kind already sustained or that I may hereafter sustain in consequence of an accident that occurred on or about the 25 day of September 1953, at or near Charlotte, N. C. . . ."

The plaintiff filed a reply alleging that the purported release pleaded by the original defendants was obtained by fraud (perpetrated in the manner hereinafter set out) of the defendants acting through their agent, a claims adjuster of the original defendants' insurance carrier, and a further reply to the defendants' answer and further answer and defense.

The original defendants moved to strike all reference to their insurance carrier in the reply and all of the further reply. The motion was allowed and the plaintiff granted thirty days to file an amended reply.

Thereafter, the plaintiff obtained an *ex parte* order, entered by the Clerk of the Superior Court of Mecklenburg County, making Allstate Insurance Company a party defendant. The plaintiff then filed an amended complaint and an amended reply.

Mildred S. Hensel and Robert A. Hensel filed a demurrer to the amended complaint for that the same does not state facts sufficient to constitute a cause of action against these defendants, in that: (1) the amended complaint attempts to set up a second cause of action against these defendants and the Allstate Insurance Company, which alleged cause of action is to set aside the release described and set out in the answer of these defendants on the ground that said release was obtained by fraud of an agent of Allstate Insurance Company, who was acting as agent of these defendants; and (2) that the allegations in the amended complaint do not set forth facts which constitute actionable fraud or which if proved would permit an issue of fraud to be submitted, or which would sustain an affirmative answer to such issue. The Allstate Insurance Company likewise interposed a demurrer on similar grounds.

The defendants Mildred S. Hensel and Robert A. Hensel also moved to strike from the amended reply all allegations with respect to their insurance carrier, which allegations were substantially the same as those stricken previously and from which ruling there was no appeal.

The court below denied the motion to strike and overruled the demurrers. The defendants appeal and assign error.

Welling & Welling for plaintiff, appellee.
Jones & Small for defendants, appellants.

DENNY, J. The allegations of the plaintiff with respect to fraud and upon which he is relying in his effort to have the release executed by him set aside, are in substance as follows:

That, after long negotiations, the plaintiff agreed to accept the offer made by the claims adjuster of Allstate Insurance Company; that the offer was to pay the plaintiff $1,000 and to pay all the hospital and doctor bills incurred by the plaintiff as a result of the said accident and injuries. That after reaching the above agreement, the claims adjuster left and returned on 6 November, 1953, and represented to plaintiff that his "bill at Charlotte Memorial Hospital was $315.00 and his bill with Dr. F. Wayne Lee was $150.00." Whereupon, the release was executed and plaintiff received a draft payable to him in the sum of $1,000, and drafts in the sum of $315.00 and $150.00 were delivered to the hospital and to Dr. Lee, respectively. That the claims adjuster of the defendant Allstate Insurance Company, on 6 November, 1953, knew that the plaintiff's hospital bill was $607.11 and that Dr. Lee's bill was $190.00; that without the plaintiff's knowledge, his own insurance had been applied to his hospital bill in the sum of $292.11 and to his doctor bill in the sum of $40.00. That as a direct and proximate result of the fraudulent misrepresentations of the insurance adjuster, "the maximum benefits of the plaintiff's accident and health insurance policy were used and applied to the plaintiff's hospital and doctor bills without the plaintiff's knowledge and consent; and that the plaintiff's maximum benefits for the policy year of his accident and health insurance policy were used thereby leaving the plaintiff without accident and health coverage for the remainder of the policy year."

The circumstances under which the hospital and Dr. Lee were paid the maximum benefits available under the provisions of the plaintiff's accident and health insurance policy, are not disclosed by the plaintiff's pleadings. Neither do the pleadings disclose when such payments were made. Likewise, there is nothing in the pleadings to indicate that the claims adjuster, representing the defendants, had anything to do with the application of these benefits. It does appear from the plaintiff's pleadings, however, that after such application was made, the outstanding bills of Charlotte Memorial Hospital, incurred by the plaintiff, on 6 November, 1953, amounted to $315.00, and that the bill of Dr. Lee was $150.00. The release states explicitly that it was executed in con-

sideration of the payment of $1,000 to the plaintiff and payment of $315.00 to Charlotte Memorial Hospital and $150.00 to Dr. F. Wayne Lee. Hence, in our opinion the allegations in the amended complaint are insufficient to constitute actionable fraud.

In order to establish actionable fraud, certain essential facts must appear. These are (1) the misrepresentation of a material fact, false within the knowledge of the party making it; (2) made with the intent to deceive; and (3) which in fact does deceive the other party to his injury. McIntosh on the Law of Contracts, Synopsis, Page XXXI; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138; *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131; *Lillian Knitting Mills v. Earle,* 237 N.C. 97, 74 S.E. 2d 351; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5.

Moreover, if it be conceded, for the purpose of argument, that the claims adjuster knowingly and falsely misrepresented the facts with respect to the bills in controversy, in order to reduce the liability of his company, what damage or injury has the plaintiff suffered? When the plaintiff's pleadings are analyzed with respect to the allegations of fraud, the injury allegedly sustained as a result of such alleged fraud is limited exclusively to the fact that the plaintiff by reason of the application of the maximum benefits under his accident and health policy to the payment of his hospital and doctor bills, was left without accident and health coverage for the remainder of the policy year. The pleadings are silent as to when the policy year ended. Furthermore, there is no allegation to the effect that as a result of the lack of such coverage the plaintiff has suffered any pecuniary loss.

In view of the conclusion we have reached, we deem it unnecessary to consider the defendants' exception to the refusal of the court below to allow their motion to strike certain allegations from the plaintiff's amended reply.

The demurrers should have been sustained and the ruling of the court below to the contrary is

Reversed.

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

M. LEE HEATH v. KRESKY MANUFACTURING COMPANY, INC., A CORPORATION, AND SOUTHERN APPLIANCES, INC., A CORPORATION.

(Filed 4 May, 1955.)

1. Appeal and Error § 6c (3)—

Exceptions to the findings of fact which neither point out which of the findings made, or refused, are objected to, and fail to designate what the objection is, are insufficient to bring up for review either the findings of fact or the evidence upon which they are based.

2. Appeal and Error § 6c (2)—

An exception to the judgment presents the sole question of whether the findings of fact are sufficient to support the judgment.

3. Appeal and Error § 40d—

Even though the findings of fact be conclusive on appeal, the Supreme Court is not bound by the conclusions or inferences the trial court draws from the findings.

4. Process § 8c—

In order for a foreign corporation to be subject to service of process by service on its resident agent, such agent must have some degree of control over the corporate functions and be empowered to exercise some discretion with respect to the corporate business, and the extent and nature of his authority rather than his designation is controlling.

5. Same—

Findings of fact to the effect that a foreign corporation sold equipment manufactured by it to local distributors or wholesalers, and that the resident upon whom process was served was a sales and factory representative of the corporation, are insufficient to support the court's conclusion that such agent was a managing or local agent of the foreign corporation through whom it was doing business in this State, since a salesman or broker who takes orders and submits them to the home office of a foreign corporation for acceptance is not a local agent for service of process, and therefore the motion of the corporation to set aside the service should have been allowed.

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

APPEAL by defendant Kresky Manufacturing Company, Inc., from *Patton, S. J.*, Extra 15 November, 1954 Civil Term, MECKLENBURG.

This civil action was instituted by the plaintiff, a resident of Mecklenburg County, against the defendants Kresky Manufacturing Company, Inc., a California corporation, and Southern Appliances, Inc., a North Carolina corporation. Summons and order extending time for filing complaint were duly served on the North Carolina corporation. The Sheriff of Mecklenburg County served, or attempted to serve summons and order upon the California corporation by delivering copies

to W. T. Simmons, a resident of Mecklenburg County. Kresky Manufacturing Company entered a special appearance in the Superior Court and moved "to strike out, cancel and declare null and void the attemped service of process" upon the grounds (1) that Kresky Manufacturing Company is a foreign corporation; and (2) that W. T. Simmons was not and never had been an officer, managing or local agent of the defendant; and (3) that the defendant is not now and never has been engaged in business in North Carolina. The defendant submitted affidavits of its officers and agents in support of the motion.

In opposition to the motion to dismiss, the plaintiff filed an affidavit to which he attached three letters received by him through the United States mails, all signed in the name of Kresky Manufacturing Company by B. Clyde Watts, Jr., Chief Engineer. These letters contain the only reference to W. T. Simmons or his duties. The material parts of the letters are here quoted:

"February 19, 1953. Dear Mr. Heath: A copy of your letter directed to the attention of Mr. Calvin Mitchell of Southern Appliances, Inc., has been forwarded to this office for consideration . . . It is obvious from your letter of February 5, 1953, that something is askew in your ten-unit project on Pecan Avenue. Please rest assured, as above stated, this difficulty is not with the Kresky wall furnace. We are asking our representative, Mr. W. T. Simmons, to check your installation and give us all the details so that proper recommendations can be made to you . . . Yours very truly, . . ."

"March 2, 1953. We have been advised by our sales representative, Mr. W. T. Simmons, that you have received our letter concerning the wall furnaces, Model WF, installed in your building project. Yours truly . . ."

"March 24, 1953. Dear Mr. Heath: With this letter we would like to acknowledge receipt of your letter of March 18, 1953. Prior to sending you this letter, we are awaiting receipt of information from Southern Appliances, Inc., your Kresky distributor, and from Mr. W. T. Simmons, our factory representative. Yours truly, . . ."

The appellant made request for extensive findings of fact and conclusions of law based on the affidavits of its officers to the effect that the appellant is a corporation chartered by the State of California, engaged in the manufacture of heating appliances and equipment which it sells to distributors throughout the United States; that the company has never domesticated or transacted business in North Carolina except that a sales representative calls on dealers, secures orders and transmits them to the defendant's office in California for acceptance; that as salesman the defendant employs Mr. A. F. Davis, of St. Petersburg, Florida, who has charge of the southeastern states; that

Mr. Davis employed Mr. W. T. Simmons to travel the territory of North and South Carolina for him; that Simmons is not and never has been an employee of the defendant, but is an employee and has been at all times an employee of Mr. Davis, and paid by him exclusively.

The court refused to find as requested by the defendant, but did incorporate in its judgment the following findings:

"1. The Kresky Manufacturing Company, Inc., is a corporation organized, existing, and doing business under the laws of the State of California and is engaged in the business of manufacturing and selling furnaces and similar heating equipment.

"2. Kresky Manufacturing Company, Inc., sells the heating equipment manufactured by it to local distributors or wholesale dealers located throughout the United States and including the co-defendant, Southern Appliances, Inc., a North Carolina corporation with its principal office and place of business in the City of Charlotte, Mecklenburg County, North Carolina.

"3. The Sheriff of Mecklenburg County, through his Deputy, served process upon the defendant, Kresky Manufacturing Company, Inc., by delivering a copy of the summons, a copy of the complaint, a copy of the order extending the time for filing complaint, and a copy of the order for the service of the complaint upon W. T. Simmons as agent for Kresky Manufacturing Company, Inc.

"4. W. T. Simmons is and was at the time service of process was made upon him, a resident of Mecklenburg County, North Carolina, and is and was at said time employed by the defendant, Kresky Manufacturing Company, Inc., *as a sales and factory representative.*

"5. Through its agent, W. T. Simmons, the defendant, Kresky Manufacturing Company, Inc., was at the time of service of the process present and doing business in the State of North Carolina.

"6. At the time of service of process said W. T. Simmons was a managing or local agent of the defendant, Kresky Manufacturing Company, Inc., and was such an agent as would reasonably be expected to give his principal notice of the service of process upon him.

"7. The court holds as a matter of law that valid service of process has been had upon the defendant, Kresky Manufacturing Company, Inc., and therefore its motion to strike out and set aside the service of process upon it as filed by said defendant should be denied."

The following are the appeal entries:

"The defendant Kresky Manufacturing Company, Inc., excepts to the denial of its motion and request for findings of fact, and to the findings of fact and conclusions of the court, and to the judgment entered."

The defendant appealed.

Warren C. Stack and David J. Craig, Jr., for plaintiff, appellee.

McDougle, Ervin, Horack & Snepp, By: Benj. S. Horack, for defendant, appellant.

HIGGINS, J. The defendant Kresky Manufacturing Company, Inc., excepted to the action of the court (1) in refusing to find facts as requested, (2) in finding facts as heretofore set out, and (3) in entering judgment holding the service of process valid. The exceptions neither point out which of the findings made, or refused, are objected to, nor designate what the objection is. Such exceptions, therefore, are insufficient to bring up for review either the findings of fact or the evidence upon which they are based. *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609; *Efird v. Smith*, 208 N.C. 394, 180 S.E. 581; *In re Will of Beard*, 202 N.C. 661, 163 S.E. 748. The exception to the judgment, however, does raise this question of law: Are the findings of fact made by the court sufficient to support the judgment? *Wilson v. Charlotte*, 206 N.C. 856, 175 S.E. 306; *Manufacturing Co. v. Lumber Co.*, 178 N.C. 571, 101 S.E. 214.

The findings of fact in summary are: The defendant is a California corporation engaged in the manufacture of heating equipment which it sells to local distributors, including the co-defendant. The Sheriff of Mecklenburg County served, or attempted to serve process on the defendant Kresky Manufacturing Company, Inc., by delivering copies to W. T. Simmons as agent for defendant. Simmons, a resident of Mecklenburg County, was employed at the time as a sales and factory representative and, through him, the defendant was present and doing business in North Carolina. At the time of service of process Simmons was the managing or local agent "and would reasonably be expected to give his principal notice of the service of process upon him."

While this Court cannot question the facts found, it is not bound by the conclusions or inferences the trial court draws from them. The crucial findings in this case are that Simmons is a resident of Charlotte and at the time of the service *was employed by the defendant as a sales and factory representative.* The trial court then concludes that, through him, the defendant was present and doing business in this State. The court further concludes that he was a managing or local agent. The findings fail to disclose what Simmons did or was authorized to do as sales and factory representative, what his duties were, or what he did to carry them out. This finding fails to qualify him as a managing or local agent, and fails to show that he was authorized to, or did do any business for appellant in this State. "It is not the name employed, but the nature of the business and the extent of the authority given and

exercised which is determinative." *Whitehurst v. Kerr,* 153 N.C. 76, 68 S.E. 913. In these important particulars the findings are silent.

Before a foreign corporation can be subjected to the jurisdiction of our State court, two requirements must be met: (1) The corporation must be doing business in this State; and (2) it must be present in the person of an authorized officer or agent who carries on the business. *Lambert v. Schell,* 235 N.C. 21, 69 S.E. 2d 11. The officer or agent through whom the business is done must be one who exercises some degree of control over the corporate functions of the company. He must be empowered to exercise some discretion with respect to the business for which the company was organized and in which it is engaged. *Lambert v. Schell, supra.* The term "agent" means more than subordinate employee without authority or discretion. To be an agent one must have some charge or measure of control over his principal's business. *Whitehurst v. Kerr, supra.* A salesman or broker who takes orders and submits them to the home office of the foreign corporation for acceptance is not a managing or local agent, and the foreign corporation by reason thereof is not doing business in this State. *Service Co. v. Bank,* 218 N.C. 533, 11 S.E. 2d 556. The court's findings that the Kresky Manufacturing Company, through W. T. Simmons, was present doing business in this State and that Simmons was a managing or local agent, are conclusions or inferences not justified by the specific finding merely that Simmons is sales and factory representative. *Radio Station v. Eitel-McCullough,* 232 N.C. 287, 59 S.E. 2d 779. The facts found in that case, when placed "long side" those in the case at bar, will serve to emphasize the insufficiency of the findings that Simmons was a managing agent and that through him the Kresky Manufacturing Company, Inc., was present and doing business in North Carolina. The opinion in the *Radio Station case* settles the question of law presented by this appeal.

The service of process on Kresky Manufacturing Company, Inc., cannot be sustained as valid. The judgment, therefore, is

Reversed.

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

STATE v. CHARLES OUTLAW.

(Filed 4 May, 1955.)

1. Indictment and Warrant § 10—

Where defendant's name appears in the warrant and the warrant expressly refers to the affidavit upon which it is based, the fact that defendant's name does not appear in the affidavit is not fatal.

2. Husband and Wife § 20: Criminal Law § 56—

A warrant charging that defendant willfully failed to provide adequate support for his wife and children, but failing to charge that he willfully abandoned either the wife or the children, is insufficient under G.S. 14-322, and motion in arrest of judgment is allowed.

3. Same—

A warrant charging that defendant willfully neglected and refused to provide adequate support for his wife and children, without alleging that defendant committed the offense "while living with his wife," is insufficient under G.S. 14-325, and motion in arrest of judgment is allowed.

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

APPEAL by defendant from *Sink, E. J.*, at special February Criminal Term 1955, of GASTON.

Criminal prosecution upon warrant issued out of Domestic Relations Court of Gaston County, as the record on this appeal shows, in words and figures following:

"WARRANT

"NORTH CAROLINA, GASTON COUNTY

IN THE DOMESTIC RELATIONS COURT

Before William J. Allran, Jr., Judge

"THE STATE

v.

CHARLES OUTLAW

"Dorothy Outlaw, being duly sworn, complains and says that on or about the 18th day of July, 1954, with force and arms, at and in the County aforesaid, did willfully, maliciously, unlawfully and feloniously fail to provide adequate support for his wife and his two children against the Statute in such cases made and provided, against the peace and dignity of the State.

"x Dorothy Outlaw (s) Complainant.

"Sworn to and subscribed before me, this the 18th day of July, 1954.

"E. H. Heafner, DC (s)

J. P. (Seal) or Clerk.

"State of North Carolina: To the Sheriff, Chief of City or Rural Police, or other lawful officer of Gaston County, Greetings: These are to command you to apprehend the said Charles Outlaw and him have before Judge Allran, the Judge, in the Domestic Relations Court, at Gastonia, North Carolina, on the ..... day of Next Term, 19....., then and there to answer the above complaint and be dealt with according to law.

"Given under my hand and seal this the 18th day of July, 1954.

"E. H. Heafner, DC (s) J. P.
(Seal) or Clerk."

The record and case on appeal show:

1. The above warrant was served on defendant on 18 July, 1954, and he gave bond for his personal appearance at a session of said Domestic Relations Court to be held in Gastonia, N. C., on 20 July, 1954, "and answer the above charge and not depart the court without leave," etc.

2. That Judgment D#54-743 of said court shows as of 16 November, 1954, these entries: "Defendant, Charles Outlaw, now present in court, represented by Honorable Max Childers, is charged with abandonment and non-support of his wife and two minor children. Defendant submitted a plea of Not Guilty. The court entered a verdict of Guilty. Prayer for judgment continued for a period of two years" upon conditions stated.

3. That on 14 January, 1955, the Clerk of said Domestic Relations and Juvenile Court issued a capias for Charles Outlaw to have him before the Judge of said court at stated time and place "then and there to answer the charge of non-support."

4. That under date 1 February, 1955, the Judge of said Domestic Relations and Juvenile Court of the city of Gastonia and Gaston County entered judgment, in which after reciting the continuance of prayer for judgment, on the conditions stated, as hereinabove set forth, "and it appearing to the court and the court finding as a fact that the conditions under which said prayer for judgment was rendered have been violated, and the Counselor having prayed judgment against this defendant, . . . that the defendant Charles Outlaw be confined in the common jail of Gaston County for a term of six months, to be assigned to work . . . Commitment to issue this date." From this judgment defendant appealed to Superior Court of Gaston County.

That at the call of the case in Superior Court, defendant, through his counsel, "made a motion for a trial *de novo* upon the theory that no final judgment was entered on the 16th day of November, 1954, and that the judgment and proceedings of February 1, 1955, were merely a consummation upon the continued prayer for judgment . . ." Motion denied. Exception No. 1.

6. That then "as to the charge of failing to provide adequate support for his wife and two children, the defendant, Charles Outlaw, entered a plea of not guilty. No jury was chosen. The court entered a verdict of Guilty of willfully failing and refusing to comply with the terms and conditions of the judgment entered by the Domestic Relations Court." That thereupon and therefore on 14 February, 1955, the Judge of Superior Court in all respects confirmed the judgment pronounced by the Domestic Relations Court as aforesaid, and directed that the defendant be placed in custody and commitment to issue for the enforcement of the sentence under said judgment. Exception No. 2. Defendant appeals therefrom to Supreme Court, and assigns error.

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

Max L. Childers and Hugh W. Johnston for defendant, appellant.

WINBORNE, J. While on this appeal no point is made of the fact that the name of defendant is not mentioned in the affidavit upon which the warrant on which he stands charged is based, it appears upon the face of the record that his name does appear in the warrant and that the warrant expressly refers to the affidavit. Therefore, in the light of the holdings of this Court in the case of *S. v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, such defect would not be fatal.

However, defendant moves in this Court in arrest of judgment chiefly upon this ground: That upon the face of the record a fatal defect appears in that the warrant fails to charge defendant with the commission of any criminal offense either under G.S. 14-322 or G.S. 14-325.

In this connection G.S. 14-322, as it is now amended, declares in pertinent part that: "If any husband shall willfully abandon his wife without providing her with adequate support, or if any father . . . shall willfully abandon his . . . child or children, whether natural or adopted, without providing adequate support for such child or children, he . . . shall be guilty of a misdemeanor."

This Court, recently considering the provisions of G.S. 14-322, as above quoted, in the case of *S. v. Lucas, ante,* 84, opinion by *Bobbitt, J.,* restated the principle therein that in a prosecution thereunder "the State must establish (1) a willful abandonment, and (2) a willful failure to provide adequate support," citing cases. And in the *Lucas case* the Court went on to declare that "G.S. 14-322 now defines clearly two separate and distinct offenses, and that if the State desires to prosecute for both offenses, each offense should be fully charged in a separate bill of indictment or as a separate count in the bill of indictment."

Testing the warrant in present case by these principles interpretive of the provisions of G.S. 14-322 it appears that the warrant fails to charge willful abandonment of either the wife or the children. Hence defendant was found guilty of an offense with which he is not charged.

Moreover, G.S. 14-325 declares in pertinent part: "If any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor . . ."

Testing the warrant here under consideration by the provision of G.S. 14-325, as just quoted, it is seen that there is a failure to allege that defendant committed the offense charged "while living with his wife." And the verdict rendered by the Judge of the Domestic Relations Court does not purport to be accordant with or pursuant to the provisions of G.S. 14-325.

In the light of the factual situation thus portrayed, the warrant is not sufficient to support the conviction of defendant as shown in the record, and the judgment pursuant thereto.

Nevertheless if it be deemed advisable, a new prosecution may be instituted.

In the light of this opinion the motion in arrest of judgment is allowed.

Judgment arrested.

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

NORA HUCHERSON AYLOR, MOTHER; ODELL AYLOR, DECEASED EMPLOYEE, v. L. R. BARNES, TRADING AS BARNES-TAYLOR COMPANY; N. C. PINE LUMBER COMPANY, EMPLOYER; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER.

(Filed 4 May, 1955.)

1. Master and Servant § 38—

The Industrial Commission has jurisdiction only if the contract of employment is made in this State, the employer's place of business is here and the injured employee is a resident. G.S. 97-36.

2. Master and Servant § 50—

Claimant has the burden of proving that his or her claim is compensable under the Workmen's Compensation Act.

3. Master and Servant § 55d—

Jurisdictional findings of the Industrial Commission are not conclusive on appeal, and when the award of the Industrial Commission is attacked

on the ground that the deceased employee was not a resident of this State, the Superior Court has the power and duty to find the jurisdictional facts without regard to the findings of the Industrial Commission, and the action of the Superior Court in merely overruling the exceptions to the findings of fact and conclusions of law of the Commission, is insufficient, necessitating that the cause be remanded.

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

APPEAL by defendants from *Parker, Joseph W., J.*, at October Civil Term 1954, of CRAVEN.

Proceeding under the North Carolina Workmen's Compensation Act for compensation as a result of the death of Odell Aylor, allegedly from injury by accident sustained at Midway Island, on U. S. Highway 1, approximately 17 miles north of Fredericksburg, in the State of Virginia, while operating a truck loaded with lumber en route from place of business of defendants, Employers, in New Bern, North Carolina, to a destination in the State of Maryland.

The record proper reveals the following: (1) A hearing was had before Commissioner Bean in New Bern, North Carolina, on 13 October, 1953, when and where testimony of witnesses was taken relating in the main to jurisdictional questions in respect to provisions of G.S. 97-36 pertinent portion of which reads: "When an accident happens while the employee is employed elsewhere than in the State which would entitle him or his dependents to compensation if it had happened in this State, the employer or his dependents shall be entitled to compensation if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; . . ."

(2) On 30 October, 1953 Commissioner Bean filed an opinion for the North Carolina Industrial Commission in which he found facts, and made conclusions of law thereupon sufficient for an award in favor of the mother and next of kin of Odell Aylor, the deceased employee, and such an award was made.

(3) Thereafter on 5 November, 1953, defendants filed exceptions to the findings of fact, and conclusions of law, and the award so made by Commissioner Bean, and appealed to the full North Carolina Industrial Commission, and applied for a review of the case.

(4) Thereafter on 1 June, 1954, an opinion and award for the full Commission was filed by Commissioner Scott, in which this recital appears: "The defendants have alleged as error substantially all of the findings of fact and conclusions of law by the Hearing Commissioner. Having heard the arguments of counsel and having reviewed the record,

the full Commission is of the opinion that the findings of fact by the Hearing Commissioner are substantially correct, and that the proper legal result has been reached. However, in the interest of clarity, and to the end that the issues raised may be clearly presented, the full Commission strikes out the opinion and award of the Hearing Commissioner and substitutes therefor the following:"

Then follows findings of fact and conclusions of law on which an award was made in favor of the mother and next of kin of Odell Aylor, the deceased employee.

Chairman Huskins, of the N. C. Industrial Commission, dissented from the majority decision. He gave it as his opinion that "the evidence in this case does not support the finding and conclusion that the residence of Odell Aylor, the deceased employee, was in North Carolina," adding—"In a compensation case, as in an ordinary civil action, the burden of proof is on the plaintiff, and I think she has failed to make out her case in this respect," citing G.S. 97-36, and *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90.

(5) Defendants excepted to all material findings of fact, particularly that deceased employee was a resident of North Carolina, and to all of the conclusions of law and award of the N. C. Industrial Commission in respect thereto, as contained in the opinion of 1 June, 1954, and appealed to the Superior Court of Craven County for the reason that the Findings of Fact, Conclusions of Law and Award of the N. C. Industrial Commission are not supported by competent evidence, and are in error as a matter of law upon the facts as found and upon the facts appearing from the record.

(6) When the appeal came on for hearing at the October Civil Term, 1954, of Craven County Superior Court, the court, having heard argument of counsel, and examined and considered briefs filed by them, and examined and considered the entire record in the case, and particularly the defendants' exceptions to the findings of fact and conclusions of law and the award of the N. C. Industrial Commission, and assignments of error filed by defendants, and being of opinion that each and every of said exceptions and assignments of error made by defendants to the award should be overruled and denied, and that all of the findings of fact and conclusions of law and the award should be in all respects confirmed, so ordered by judgment dated 7 October, 1954, to which defendants except and appeal to the Supreme Court.

Raymond E. Sumrell, Lee & Hancock, and Nottingham & Somerville for plaintiff, appellee.

Barden, Stith & McCotter for defendants, appellants.

WINBORNE, J. Appellants, by their assignments of error presented on this appeal, challenge the jurisdiction of the North Carolina Industrial Commission in the premises on the grounds, among others, that at the time of his death, the employee, Odell Aylor, was not a resident of this State within the meaning of the statute G.S. 97-36.

In this connection, this Court, in interpreting and applying the provisions of G.S. 97-36 in the case of *Reaves v. Mill Co.*, 216 N.C. 462, 5 S.E. 2d 305, opinion by *Seawell, J.*, declared that "in so far as it depends upon the statute alone, the jurisdiction of the Industrial Commission attaches only (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. All these circumstances must combine to give jurisdiction."

And it is a well settled rule in respect to proceedings under the North Carolina Workmen's Compensation Act, that the claimant has the burden of proving that his or her claim is compensable under the Act. See *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760, and cases cited.

Moreover, while ordinarily findings of fact made by the North Carolina Industrial Commission in respect to liability for compensation under the North Carolina Workmen's Compensation Act are conclusive upon appeal when supported by competent evidence, *Francis v. Wood Turning Co.*, 204 N.C. 701, 169 S.E. 654, and numerous other cases, yet when the jurisdiction of the Commission to allow a claim for compensation is challenged by an employer, "the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the findings of fact by the Commission." So declared this Court in opinion by *Connor, J.*, in the case of *Aycock v. Cooper*, 202 N.C. 500, 163 S.E. 569; and the rule is recognized in these cases: *Francis v. Wood Turning Co., supra; Miller v. Roberts*, 212 N.C. 126, 193 S.E. 286; *Young v. Mica Co.*, 212 N.C. 243, 193 S.E. 285; *Buchanan v. Highway Com.*, 217 N.C. 173, 7 S.E. 2d 382; *Smith v. Paper Co.*, 226 N.C. 47, 36 S.E. 2d 730.

In the light of this principle it is not enough that the Judge of Superior Court overrule the exceptions to the findings of fact and conclusions of law, and affirm the findings of fact and conclusions of law made by the Industrial Commission. Hence in so doing in the case in hand, there is error.

Therefore, the judgment of the Superior Court from which the appeal is taken must be, and it is set aside and the case remanded to the Superior Court to the end that the appeal from the Industrial Commission

be heard anew on the exceptions filed by defendants, and that jurisdictional facts be found in accordance with this opinion.

Error and remanded.

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

W. HARRELSON YANCEY v. DAVID E. GILLESPIE AND SPINDALE CITY PUBLISHING COMPANY, INC.

(Filed 4 May, 1955.)

1. Libel and Slander § 4—

An article in a newspaper criticizing the amount paid by the city for a certain lot as "a wasteful and non-arbitrated use of public money," characterizing the lot as "shabby" and the deal as one that "smells," and, upon information, that a majority of the city council voted for the purchase with the verbal backing of the mayor, *is held* to charge bad judgment in a critical and sarcastic manner, but not to charge conversion, embezzlement or misconduct in office on the part of the council or the mayor.

2. Libel and Slander § 7b—

A newspaper enjoys a qualified privilege in commenting upon public affairs and the manner in which public officials carry on the public business, and such comments and criticisms are not libelous, however severe or sarcastic, unless they are written maliciously. Constitution of N. C. Article I, Sec. 20.

3. Libel and Slander § 4—

A published article must be read and considered in its setting in determining whether it is libelous.

4. Libel and Slander § 7b—

In cases of qualified privilege, the falsity of the charge is not sufficient to establish malice, for there is a presumption that the publication was made *bona fide*.

5. Libel and Slander § 7a—

Whether a publication is privileged is a question of law to be determined by the court.

6. Libel and Slander § 7b—

A complaint alleging in effect that a newspaper published an article criticizing the purchase of a lot by a municipality in a sarcastic vein not amounting to a charge of conversion, embezzlement, or misconduct in office on the part of the officials, fails to state a cause of action for libel, since such publication comes within the qualified privilege of the newspaper as a matter of law, and is not actionable in the absence of actual malice.

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

APPEAL by plaintiff from *Armstrong, J.*, 16 December, 1954 Regular Term, GASTON.

Civil action for damages on account of an allegedly libelous article written by the defendant Gillespie and carried on the editorial page of the *Gaston Citizen,* a tri-weekly newspaper of wide circulation published in the City of Gastonia. The plaintiff at the time of publication was the mayor of the city. The defendant Gillespie was the editor of the newspaper, in the 8 January, 1954, issue of which appeared the following article:

"HARDLY A BARGAIN AT $30 A FRONT FOOT.

"While the purchase of a shabby piece of property by the City of Gastonia for the sum of $3,000 may have been expedient on the part of the city council, there appears to be no evidence to show that it was a bargain at that price.

"We doubt that this particular lot, located on the northwest corner of Avon at Long, was worth $30 a front foot, regardless of whether the city had a sewage line beneath it and a 'pop-off' valve atop it.

"We are informed that four members of the council voted to pay this amount to the owner, with the verbal backing of the mayor. Two members of the Board, Ed Adams and R. A. Ferguson, indicated that they would not vote for the purchase at that price.

"The owner of the property had asked $6,000 damages because of the line crossing his lot. This was the asking price, probably in the knowledge that in asking this amount the final purchase would not look so bad.

"We may be a lone voice speaking out against such wasteful and non-arbitrated use of the taxpayers' money but we still believe—with or without the sewage line—that this deal smells."

The plaintiff, in substance, alleges that the editorial is malicious and false as it relates to the plaintiff; that the statements amount to a charge that the plaintiff conspired with the four other members of the governing body of the city, and was guilty of misconduct and malfeasance in office; that the publication was recklessly and carelessly published, and wantonly calculated to, and did, humiliate and disgrace the plaintiff; that the defendants were called on to publish a *retraxit,* correction, and apology. This they refused to do. The plaintiff was greatly damaged in the amount of $75,000 actual damages, and that punitive damages in a substantial amount should also be assessed.

The defendants filed a demurrer on the ground the complaint failed to state a cause of action. The court entered judgment sustaining the

demurrer, from which the plaintiff appealed. The only assignment of error is based on the exception to the judgment.

G. T. Carswell and Robert G. Sanders, for plaintiff, appellant.

Mullen, Holland & Cooke, By: J. Mack Holland, Jr., for defendants, appellees.

HIGGINS, J. Boiled down to its essence, the article complained of says the editor is informed the city council, by a vote of four to two, *with the verbal backing of the mayor,* has purchased a "shabby" lot in Gastonia for $3,000; "that the purchase is not a bargain," but is a "wasteful and non-arbitrated use of public money"; that the editor of the paper believes the deal smells. The clause underscored is the only reference to the plaintiff. The article charges that a majority of the council had the verbal backing of the mayor; that is, that he approved the action of the council in making the purchase. There is no allegation the article had any hidden or undisclosed meaning, or that the language used had any special or unusual significance. The article does not charge, and the complaint does not allege, that the mayor exerted, or attempted to exert, any influence, improper or otherwise, upon the council, or that he did, or intended to do anything more than to give his verbal support to their decision. The article, when fairly and impartially construed, does not have the meaning the plaintiff seeks to give it. The editor of the paper charges the wasteful, not corrupt, use of public money. The expenditure of public money is a matter of judgment, and to charge the council with bad judgment is not libelous. One of the functions of a newspaper is to give information about public affairs and how public officials are carrying on the public business. So long as that qualified privilege is not abused, an action for libel cannot be maintained.

Article I, Sec. 20, of the Constitution of North Carolina provides: "FREEDOM OF THE PRESS. The Freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same."

The question then is: Does it appear from the article and the complaint that the editor of the paper abused the privilege granted by the Constitution?

"Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously." *Hoeffner v. Dunkirk Printing Co.,* 294 N.Y. 95, 172 N.E. 139. "Anything connected with the plaintiff's official duties was a proper subject of discussion which, if made

without malice, was not libelous." *Swearingen v. Parkersburg Tribunal Co.*, 226 S.E. 2d 209 (W. Va.).

In determining whether a published article is libelous it must be read and considered in its setting. Here, the city paper, by the article complained of, called attention in a critical and sarcastic vein to the manner in which the council had expended the city's money. Conversion, embezzlement, misconduct in office are not charged against the council and *a fortiori* not against the mayor. Publication of the official acts of public men and bodies is in the public interest. On a similar question, *Chief Justice Clark*, in the case of *Lewis v. Carr*, 178 N.C. 578, 101 S.E. 97, said: "It was qualifiedly privileged, because, though the defendant was under no legal obligation to act, it was a publication required by the public good if the charge were true. In cases of qualified privilege the falsehood of the charge will not of itself be sufficient to establish malice, for there is a presumption that the publication was made *bona fide*." *Fields v. Bynum*, 156 N.C. 416, 72 S.E. 449; *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775. Whether a publication is privileged is a question of law to be determined by the court. *Hartsfield v. Hines*, 200 N.C. 356, 157 S.E. 16. When the correct tests are applied, it becomes manifest the article is not libelous. *Gattis v. Kilgo*, 128 N.C. 402, 38 S.E. 931; *Newberry v. Willis*, 195 N.C. 302, 142 S.E. 10; *Fields v. Page Trust Co.*, 195 N.C. 304, 142 S.E. 7; *Stevenson v. Northington*, 204 N.C. 690, 169 S.E. 622; *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616.

The complaint alleges a defective cause of action. The judgment sustaining the demurrer is

Affirmed.

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

STATE v. WALTER CHURCH.

(Filed 4 May, 1955.)

1. Impersonating an Officer § 1—

The elements of the offense defined by G.S. 14-277 are a false representation by a person that he is a duly authorized peace officer, and some overt act committed by him upon such representation in usurpation of the authority delegated to duly authorized peace officers.

2. Impersonating an Officer § 2—

The State's evidence tended to show that defendant made no oral representation that he was a peace officer, but exhibited a sheriff's association

courtesy card to the prosecuting witness, and stopped his car in such a position as to prevent the prosecuting witness, for a few minutes, from proceeding as he had intended. *Held:* The evidence is insufficient to be submitted to the jury in a prosecution for violation of G.S. 14-277, there being no evidence that the witness was misled or that the defendant used words or took any action which would indicate he intended or attempted to arrest the witness.

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

APPEAL by defendant from *Sink, Emergency J.*, February Special Term 1955 of GASTON.

The defendant was indicted for impersonating a peace officer, in violation of G.S. 14-277.

The material allegations of the bill of indictment were that the defendant unlawfully and willfully represented to one H. B. Chavis that he was a peace officer and that while acting under such representation undertook to arrest Chavis.

The testimony of H. B. Chavis on the trial, tended to show that on the afternoon of 6 January, 1955 while he was driving with his wife in an automobile along the road near the Sparrow Springs Road he saw the defendant parked on the side of the road looking at some lots; that he passed him and was intending to make a left turn when defendant drove up on witness' left. Witness had to stop as he could not then make the turn due to the position of defendant's car. Defendant got out of his car and showed witness a sheriff's association courtesy card and said he wanted to see his driver's license. The witness said he read the card; that he did not take out his driver's license as it was attached to the steering wheel; that defendant looked in the car, but did not open the door. The witness was detained about ten minutes.

Chavis further testified that he had known defendant since they were in the third grade in 1928; that defendant was drinking, though he would not say he was drunk; that he saw a bottle on the front seat of defendant's car; that defendant did not have a badge, uniform, or weapon. Witness knew defendant had never been on the police force.

The courtesy card referred to had been issued by the North Carolina Sheriffs' Association and printed thereon were these words: "This is to certify that Walter Church, Gastonia, N. C., is entitled to courtesies from all peace officers. (signed) John R. Morris, Sec. Treas., Wilmington, N. C."

Another witness for the State, Edward Groves, testified defendant was under the influence of liquor when he arrested him at his home some eight hours later; that defendant told him he did not attempt to arrest Chavis or to search him but that he told him he was an officer—did not say what kind of an officer; that he found no badges or guns.

The defendant offered no evidence.

The jury returned verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

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

Max L. Childers and Hugh W. Johnston for defendant, appellant.

DEVIN, J. The statute under which this defendant was indicted designates the acts constituting the criminal offense as follows:

"It shall be unlawful for any person other than duly authorized peace officers or officers of the court to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers."

The offense defined by the statute consists of two material elements, both of which must be made to appear before the person charged can be convicted. He must have made a false representation that he is a duly authorized peace officer, and acting upon such representation he must have arrested some person, searched a building, or done some act in accordance with the authority delegated to duly authorized officers.

The charge in the bill of indictment in this instance was that the defendant falsely represented to the witness Chavis that he was a peace officer and that acting upon such representation he attempted to arrest Chavis.

To constitute the offense there must be an intentionally false impersonation of the officer designated in the statute, and the offense must be consummated in accordance with the terms and meaning of the statute. To constitute the offense requires something beyond the false pretense. There must be some overt act in furtherance of the false personation. 35 C.J.S. 629, 630. And it would not be sufficient if the person charged represented himself merely as an officer but not as the particular officer specified in the statute. *Walker v. State* (Tex.), 229 S.W. 853.

After examining the evidence set out in the record in the light of the specific language of the statute, we reach the conclusion that, while the conduct of the defendant on this occasion was reprehensible, the evidence was insufficient to show a violation of the statute under which he was indicted.

The defendant made no oral representation that he was a peace officer. The only evidence offered by the State on this point was that

he exhibited the courtesy card referred to, but the witness examined the card and was not misled by it.

While the defendant stopped his car in such a position as to prevent the witness Chavis, for a few minutes, from proceeding as he had intended, the defendant used no words or action which would indicate he intended or attempted to arrest him.

We think the motion for judgment as of nonsuit should have been allowed.

Reversed.

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

This opinion was written in accordance with the Court's decision and filed by order of the Court after expiration of period of active service of *Devin, J.*, upon recall to serve temporarily as provided by law.

MARY DAVIS v. SOUTHEASTERN FINANCE COMPANY, G. H. BALL, R. H. NICHOLS AND S. W. PORTER.

(Filed 4 May, 1955.)

Master and Servant § 22—

Evidence in this case *held* sufficient to be submitted to the jury under the principle of *respondeat superior* on the issue of the liability of the employer for an assault committed by the employee.

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

APPEAL by plaintiff from *Hubbard, S. J.*, at October Civil Term 1954, of WAKE.

Civil action to recover damages, punitive and compensatory, arising out of alleged assaults, false arrest and false imprisonment.

Plaintiff alleges in her complaint, summarily stated, substantially these facts: That on 20 August, 1953, defendants Ball and Nichols assaulted her and falsely imprisoned her, while attempting to collect from her a debt which she owed defendant Southeastern Finance Company, and that these alleged wrongs were done while Ball was acting for, and in the course and scope of his employment by Southeastern Finance Company, to her great damage.

And upon trial in Superior Court, plaintiff offered evidence which she contends tends to support the allegations of her complaint, and sufficient to take the case to the jury. But at the close of plaintiff's evidence

motion of defendant Southeastern Finance Company for judgment as of nonsuit was sustained, to which ruling plaintiff objected and excepted. The case was submitted to the jury only as to defendants Ball and Nichols. The jury, having failed to agree upon a verdict, the court withdrew a juror and declared a mistrial.

From the judgment as of nonsuit as to defendant Southeastern Finance Company, plaintiff appeals to Supreme Court and assigns error.

Taylor & Mitchell for plaintiff, appellant.
Dupree & Weaver for defendant Finance Company, appellee.

PER CURIAM. Considering the evidence offered by plaintiff upon the trial in Superior Court, in the light most favorable to her, and giving to her the benefit of every reasonable inference, as must be done in considering a motion for judgment as of nonsuit, it would seem that the evidence is sufficient to take the case to the jury as against defendant Southeastern Finance Company in respect to the alleged assault, under the principle of *respondeat superior.*

Therefore the judgment from which appeal is taken must be reversed. In view of this decision the Court refrains from a discussion of the evidence shown in the case on appeal.

Reversed.

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

JOSEPH C. DUNN AND WIFE, MOZENE DUNN, NANNIE SNELLINGS AND HUSBAND, THORNTON SNELLINGS, SEATON DUNN, JR., AND WIFE, DORIS DUNN, PEARLENA McMICHAEL AND HUSBAND, OTIS McMICHAEL, ESTHER DOZIER AND HUSBAND, ELBERT DOZIER, ALBERT DUNN, UNMARRIED, ALTON DUNN AND WIFE, MAMIE DUNN, v. ALFONSO DUNN AND WIFE, SURENA MEDLIN DUNN.

(Filed 11 May, 1955.)

1. Pleadings § 31—

If new matter set up in the answer does not constitute a defense, plaintiff may challenge it by motion to strike, which will be treated as a demurrer *ore tenus*, but such motion should not be granted if the allegations contain any fact or combination of facts which, if true, entitle defendant to some relief.

2. Pleadings §§ 7, 31—

In an action to set aside a deed on the ground that it was not under seal and was not supported by consideration, defendants' general denial of plaintiffs' allegations entitles them to offer evidence in support of the denial, and therefore action of the court in striking, on the ground of pro-

lixity, allegations in a further defense alleging that the deed was under seal and was supported by valuable consideration will not be held for error in the absence of a showing of prejudice.

3. Pleadings § 31—

Upon a motion to strike a further defense, considered as a demurrer *ore tenus*, legal inferences and conclusions of the pleader are to be disregarded, and therefore, where a further defense alleges estoppel and laches without alleging facts constituting estoppel or justifying the application of the doctrine of laches, such further defense is properly stricken.

4. Limitation of Actions § 15—

A plea of the statute of limitations, although perfect in form, is demurrable where the plea is irrelevant and constitutes no defense.

5. Pleadings § 31—

Where the defendant pleads the three-year statute of limitations as a further defense, but fails to show that the statute of limitations pleaded is relevant as a defense, the striking of the further defense may not be held for prejudicial error.

6. Same—

Where plaintiffs attack a deed solely on the ground that it is void for want of a seal, G.S. 22-2, and for failure of consideration, a further defense based upon the assumption that plaintiffs were attempting to create a resulting trust in their favor, is properly stricken as irrelevant.

7. Trusts § 4c—

Allegations that the wife furnished the consideration for land conveyed to the husband, and that she was the real and beneficial owner of the land, are sufficient to show a resulting trust in her favor.

8. Reformation of Instruments § 1—

Equity will not reform a deed when it is not supported by a valuable or meritorious consideration, since in such event any mistake or defect is a mere failure in a bounty which the grantor was not required to make and hence cannot be required to perfect.

9. Same—

This action was instituted to set aside a deed between tenants in common, plaintiff grantors contending that the deed was not under seal. Defendant grantees sought reformation on the ground that the seal was omitted through inadvertence and mistake, and allege, *inter alia*, that the male grantee had a valid claim against the estate of the common ancestor for payment of the expenses of her last sickness and the cost of her funeral, and that the plaintiffs executed the deed to him, partially at least, in satisfaction of this claim. *Held:* The answer alleges a valuable consideration sufficient to support reformation.

10. Pleadings § 31—

Where a further defense, *inter alia*, pleads facts sufficient to disclose a valuable consideration for the execution of a deed as a basis for reformation for inadvertence and mutual mistake, motion to strike such further defense is improperly allowed.

11. Appeal and Error § 40f—

On appeal from order allowing motion to strike, the Supreme Court will not attempt to chart the course of the trial in advance of the hearing.

12. Vendor and Purchaser § 2: Deeds § 5: Specific Performance § 1a—

An instrument ineffectual as a deed because not under seal may nevertheless be enforceable as a contract to convey when it is supported by a valuable consideration.

13. Pleadings § 31—

In an action to set aside a deed for want of a seal, a further defense containing allegations to the effect that the instrument was supported by valuable consideration, and seeking specific performance on the theory that it constituted an enforceable contract to convey, states a defense, and motion to strike in the nature of a demurrer *ore tenus*, should be denied.

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

APPEAL by defendants from *Frizzelle, J.*, at November Civil Term, 1954, of WAKE.

Civil action to set aside a deed, heard below on motion to strike further defenses set up by the defendants.

The plaintiffs in their complaint allege in substance: that the plaintiffs, Joseph C. Dunn, Nannie Snellings, Seaton Dunn, Jr., Pearlena McMichael, Esther Dozier, Albert Dunn, and Alton Dunn and the defendant Alfonso Dunn are the owners as tenants in common of a 15.25-acre tract of land described in the complaint; that in the Public Registry of Wake County there appears the recorded entry of a purported quitclaim deed embracing this tract of land, made by the plaintiffs and their spouses to Alfonso Dunn under date of 12 October, 1949; that the original deed is in the possession of the defendant Alfonso Dunn; that the deed was and is of no legal effect, for that it is not under seal and was made without consideration; that the record of the deed constitutes a cloud on the title of the plaintiffs, and they pray judgment that the deed be declared void and that the record thereof be canceled.

The defendants by answer deny the alleged defects and aver that the deed is in all respects valid. The defendants also by answer set up six separate further defenses.

The plaintiffs moved to strike all the further defenses on the ground that each is irrelevant and redundant and presents no defense to the action.

At the hearing, the original quitclaim deed was exhibited to the presiding Judge, and counsel for the defendants admitted in open court the instrument is without seal.

Thereafter the court allowed the motion and judgment was entered striking all six further defenses.

From the judgment so entered, the defendants appeal, assigning errors.

Mordecai, Mills & Parker for plaintiffs, appellees.

Dupree & Weaver and Nancy Fields Fadum for defendants, appellants.

JOHNSON, J. The plaintiff's motion to strike was treated as a demurrer *ore tenus* and was allowed on the ground that the new matter set up in each of the further defenses alleges no valid defense. The procedure followed has the sanction of this Court. *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908; *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662; *Bank v. Hill,* 169 N.C. 235, 85 S.E. 209. However, the rule is that a motion to strike allegations of an answer for failure to state a defense should not be granted if the allegations state any fact, or combination of facts, which, if true, entitle the defendant to some relief. *Jenkins v. Fields, supra.* See also *Byers v. Byers,* 223 N.C. 85, bot. p. 91 and top of p. 92, 25 S.E. 2d 466, mid. p. 470; *Batchelor v. Mitchell,* 238 N.C. 351, 78 S.E. 2d 240.

We discuss the stricken defenses *seriatim.*

1. *First defense.*—Here the defendants allege that the recorded entry of the deed as it appears in the Public Registry of Wake County shows on its face "that it is under seal" and is "supported by a consideration." It is not perceived that the defendants are prejudiced by the elimination of these allegations. The general denial of the plaintiffs' allegation that the deed is not under seal permits the defendants to offer evidence to the effect that the deed is in fact under seal (McIntosh, N. C. Practice and Procedure, 473; 41 Am. Jur., Pleading, section 366), unless perforce their judicial admission to the effect that the deed is not under seal precludes them from offering such evidence. See *Clapp v. Clapp,* 241 N.C. 281, 85 S.E. 2d 153; *Barnwell v. Barnwell,* 241 N.C. 565, 85 S.E. 2d 916. Moreover, the defendants' general denial of the plaintiffs' allegations of want of consideration suffices to make competent evidence to the effect that the deed is supported by adequate consideration. Hence the elimination of the first defense may be sustained on the grounds of prolixity (*Chandler v. Mashburn,* 233 N.C. 277, 63 S.E. 2d 553) and failure to show prejudice. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660; G.S. 1-153.

2. *Second defense.*—Here the defendants allege that the deed has been of record more than four years. This lapse of time they plead as an estoppel and as laches, but they do so by mere conclusions of the pleader without alleging facts constituting estoppel or justifying the application of the doctrine of laches. See 19 Am. Jur., Estoppel, Sec.

193, and 19 Am. Jur., Equity, Sections 498, 509, 510, and 515. The rule is that on motion to strike used as a demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded. *Smith v. Smith,* 225 N.C. 189, 34 S.E. 2d 148. See also *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193; *Bank v. Bank,* 183 N.C. 463, 112 S.E. 11. Since the second defense alleges no ultimate facts constituting a defense, the ruling of the court below in striking this defense is free of error.

3. *Third defense.*—Here the defendants plead generally the three-year statute of limitations. However, in their brief it is nowhere pointed out how or wherein the three-year statute is applicable in any aspect as a defense to the plaintiffs' cause of action, and we perceive no ground upon which it may be relevant as a defense. A plea of the statute of limitations, although perfect in form, is demurrable where the plea is irrelevant and constitutes no defense. *Chesapeake & D. Canal Co. v. United States* (C.C.A. 3d), 223 F. 926, L.R.A., 1916B, 734; *Chicago and N. W. R. Co. v. Gillison,* 173 Ill. 264, 50 N.E. 657, 64 Am. St. Rep. 117. See also 34 Am. Jur., Limitation of Actions, Sec. 446. In the absence of a showing, by statement of reason or argument or citation of authority, that the statute of limitations pleaded is relevant as a defense, error in striking this defense has not been made to appear. See Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 554, p. 563; *S. v. Cole,* 241 N.C. 576, p. 581, 86 S.E. 2d 203.

4. *Fourth defense.*—Here the defendants allege that the plaintiffs' attempt to have the deed set aside is in effect an attempt "to create a resulting trust in favor of the grantors . . ." This plea seems to be based on a misconception of the nature of the plaintiffs' cause of action. The plaintiffs nowhere allege or ask for relief on the ground of a trust. On the contrary, they allege that for want of a seal the deed is void. They seek to invoke the established rule that a seal is absolutely indispensable to the validity of a deed in which is conveyed a greater estate in land than a term of three years. G.S. 22-2; *Strain v. Fitzgerald,* 128 N.C. 396, 38 S.E. 929; *Willis v. Anderson,* 188 N.C. 479, 124 S.E. 834. The decision in *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028, cited and relied on by the defendants, is factually distinguishable. The plea set out in the defendants' fourth defense is irrelevant as a defense and was properly stricken.

5. *Fifth defense.*—Here the defendants allege that if the deed is not under seal, it was intended so to be by all parties thereto, and that the omission of the seals was due to the inadvertence of the attorney who prepared the deed and to the mutual mistake and inadvertence of the parties, and the defendants pray judgment for reformation in this respect.

Decision as to the ruling of the court below in striking this defense turns on whether the defendants have alleged that the deed is supported by a valuable or meritorious consideration. This is so for the reason that ordinarily equity will not reform a purely voluntary conveyance, the general rule with us being that equity will not assume jurisdiction to reform a deed unless it be shown that the transaction was based on a valuable or meritorious consideration. *Dawson v. Dawson,* 16 N.C. 93, 99; *Hunt v. Frazier,* 59 N.C. 90, 93; *Powell v. Morisey,* 98 N.C. 426, 4 S.E. 185. See also 45 Am. Jur., Reformation of Instruments, Sec. 28. This rule is based on the proposition that in respect to a voluntary conveyance the grantee has no claim on the grantor, and that any mistake or defect is a mere failure in a bounty which the grantor was not bound to make and hence is not required to perfect. Thus, a volunteer must take the gift as he finds it. In short, one who accepts another's bounty ordinarily will not be heard to say something else should have been given. Annotation: 69 A.L.R. 423, 426.

The plaintiffs contend that the allegations of the Fifth defense show nothing more than a voluntary conveyance. Whereas the defendants urge they have alleged a valuable or meritorious consideration, or both. These contentions, *pro* and *con,* bring into focus the language used in making the plea. While the plea as stated may support other theories of defense, we glean from it this thread of allegation:

1. In 1912 a 30.50-acre tract of land, of which the 15.25-acre tract in suit is a part, was conveyed to Atlas J. Chavis, who was married to Nannie J. Chavis. Atlas died in 1920, being survived by two children, one of whom was Josephine Dunn, who later died intestate, being survived by eight children, her heirs at law, who are parties—plaintiffs and defendant—to this action. The funds with which the "property was originally purchased were provided by . . . Nannie J. Chavis from her income as a colored school teacher; and that she was the real, beneficial owner of said property and was so regarded by all of the members of the family." Following the death of Atlas J. Chavis, the defendant Alfonso Dunn "lived with his grandmother (Nannie J. Chavis) on said property and worked and supported himself and his grandmother; that he paid the taxes against said property as the same became due; and that following the year 1934 when his grandmother became completely disabled to do any work at all, Alfonso Dunn was her sole source of support and livelihood until he was drafted into the Army in the year 1942; that thereafter he made out an allotment in favor of his grandmother which she received during the 36 months he was in the Army until his discharge on December 15, 1945." Thereafter he "lived with his grandmother at the home of her daughter, Dicie Copeland, in Raleigh, . . . and provided her with such support as he was able to

furnish; that he continued to pay the taxes against said property; and that in the year 1947 his grandmother, Nannie J. Chavis, died." Alfonso Dunn also "personally paid all of the funeral expenses and expenses incurred during the last illness of his grandmother . . . and that she left no personal estate out of which he could seek reimbursemnt."

2. That based on the foregoing facts, it was the desire of Nannie J. Chavis and Josephine Davis Dunn, grandmother and mother, respectively, of the defendant Alfonso Dunn, prior to their deaths that the title to the "property should be vested in the defendant Alfonso Dunn, following the death of his grandmother," and these facts were known to the brothers and sisters of Alfonso Dunn.

3. "That it was for the purpose, and the sole purpose of giving effect to the intention of their mother and grandmother as aforesaid and in consideration of the fact that Alfonso Dunn had lived with his grandmother, Nannie J. Chavis, all of his life and had supported and cared for her to the day of her death; the fact that he had paid the taxes against said property and had paid all the moneys necessary to keep it up; and the fact that he had furnished all the money for his grandmother's funeral expenses that the plaintiffs knowingly and voluntarily executed and delivered to Alfonso Dunn the said deed of October 12, 1949 . . .; that said deed, although not requiring for its validity a consideration as between the parties thereto, was in fact supported by a good and valuable consideration; and that it was, and by all parties thereto was intended to be a good and sufficient deed for the purposes therein expressed and for all other purposes."

The foregoing allegations when liberally construed in favor of the pleader, as is the rule on motion to strike used as a demurrer, are sufficient to show: (1) that Nannie J. Chavis was the owner of the lands in controversy by virtue of a resulting trust (*Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289; *Rhodes v. Raxter, ante,* 206; 54 Am. Jur., Trusts, Sections 204, 216, and 217); (2) that the defendant Alfonso Dunn, aside from other possible claims, had a valid claim against the estate of Nannie J. Chavis for his payment of the expenses of her last sickness and the costs of her funeral; and (3) that the deed was made, partially at least, in satisfaction of this claim, which was a valuable consideration (*Trust Co. v. Anagnos,* 196 N.C. 327, 145 S.E. 619; *Bank v. Harrington,* 205 N.C. 244, 170 S.E. 916; Thompson on Real Property, Permanent Edition, Vol. 6, Sec. 3205; 16 Am. Jur., Deeds, Sec. 60) sufficient to support the equitable remedy of reformation. 45 Am. Jur., Reformation of Instruments, Sec. 32; Annotation: 69 A.L.R. 423.

It necessarily follows that the motion to strike the Fifth defense should have been overruled under application of the rule that a plea, if good in any respect or to any extent, will not be overthrown by motion

to strike used as a general demurrer. *Jenkins v. Fields, supra* (240 N.C. 776); *Perry v. Doub,* 238 N.C. 233, 77 S.E. 2d 711; *Batchelor v. Mitchell, supra* (238 N.C. 351).

In this view of the case we do not reach for decision the question whether the allegations of the Fifth defense are sufficient to support reformation based on valuable or meritorious consideration otherwise shown by the pleading. It is not the province of an appeal from a ruling on a motion to strike "to have this Court chart the course of the trial in advance of the hearing." *Terry v. Coal Co.,* 231 N.C. 103, 55 S.E. 2d 926.

6. *Sixth defense.*—Here the defendants allege in gist that if the deed is not under seal, in any event the instrument constitutes an enforceable contract by the plaintiffs to convey the lands to the defendant Alfonso Dunn, the "said contract being based upon a good and valuable consideration," and that the defendants are entitled to a decree of specific performance.

The allegation that the contract is based on a valuable consideration when considered with the remaining averments suffices to make good the defendants' plea for equitable relief by way of specific performance. *Willis v. Anderson, supra* (188 N.C. 479); *Chandler v. Cameron,* 227 N.C. 233, 41 S.E. 2d 753. See 49 Am. Jur., Specific Performance, Sec. 17. The rule applicable here is epitomized in the first headnote to *Willis v. Anderson, supra:* "While a deed to lands executed without the seals affixed to the signature of the makers is void, equity will compel its proper execution when the writing itself is sufficient for the purpose and the consideration has been paid by the grantee." It necessarily follows that this plea was erroneously stricken.

The cause will be remanded to the court below for entry of judgment in accord with this opinion.

Error and remanded.

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

C. A. EMERSON v. GEORGE A. MUNFORD.

(Filed 11 May, 1955.)

1. Automobiles §§ 8i, 18h (2), 18h (3)—Plaintiff's evidence held to show negligence on part of defendant causing collision at intersection, and not to disclose contributory negligence as a matter of law.

Plaintiff's evidence tended to show that he was traveling east in the extreme right lane on a six-lane street, to the right of a truck with a box-type solid body, that he saw the traffic stopped in the west lanes of traffic

in response to the traffic light, without any driver giving a left turn signal, that as he neared the intersection, the traffic light turned from red to green, and the vehicles to his left started moving forward, so that plaintiff continued on into the intersection with his view to the left blocked by the truck, that after he had gone into the intersection 10 or 12 feet, the truck suddenly stopped, that plaintiff then ascertained that defendant's car, which had been traveling in the opposite direction, was making a left turn across the three lanes of east-bound traffic, traveling 18 to 20 miles per hour without any attempt to stop, and that plaintiff applied his brakes, but skidded from 12 to 13 feet straight down the lane in which he was traveling, and struck defendant's car. *Held:* Plaintiff's evidence makes out a *prima facie* case of negligence against defendant in violating the provisions of G.S. 20-154, defendant's evidence in conflict being disregarded, and fails to establish contributory negligence on the part of plaintiff as a matter of law, so that motion for judgment as of nonsuit was properly denied.

2. Negligence § 19c—

A motion for nonsuit on the ground of contributory negligence will be allowed only when plaintiff's evidence establishes this defense and is so clear that no other reasonable inference is deducible therefrom, and when the evidence is susceptible of diverse inferences, the motion should be denied.

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

APPEAL by defendant from *Armstrong, J.*, and a jury, at 6 September, 1954, Regular Civil Term of MECKLENBURG.

Civil action to recover for personal injuries resulting from a collision of two motor vehicles in a street intersection.

The collision occurred in the daytime, at the intersection of Independence Boulevard and Baldwin Circle in the City of Charlotte. Independence Boulevard runs east and west. It is about 70 feet wide, and is divided into six lanes, with three marked lanes for eastbound traffic and three for westbound traffic. Baldwin Circle, approximately 42 feet wide, joins Independence Boulevard on the south side but does not cross it. The dead-end junction thus formed is in the shape of a "T." Traffic at the intersection was controlled at the time of the collision on 24 April, 1953, by a single overhead electric signal device, alternately exhibiting red and green lights.

The vehicles involved were a pick-up truck and an Oldsmobile passenger car. Both vehicles were on Independence Boulevard as they approached the intersection. The pick-up was being driven by the plaintiff in an easterly direction; the Oldsmobile by the defendant in a westerly direction. Hence, the two drivers approached the intersection meeting each other. The plaintiff was in the extreme right-hand lane for eastbound traffic, next to the curb; the defendant was in the extreme lefthand lane for westbound traffic, next to the center of

the street. For statutory speed limit purposes it was stipulated that the intersection is in a residential district.

According to the plaintiff's evidence, as he approached the intersection going east, and when he was 200 feet or more away, he observed the traffic light was red for traffic moving on Independence Boulevard and that there were vehicles stopped and waiting for it to change in all three westbound lanes, but with no signal being given for any turn. He also observed that there were vehicles stopped and waiting in both the other eastbound lanes on his left. The outside eastbound lane in which he was approaching was open ahead of him. The vehicle stopped for the light in the eastbound lane on his immediate left was a truck approximately 35 or 40 feet long, with a large, box-type solid body. The plaintiff intended to pull up and stop beside the truck, but when he was still a few feet from the rear of the truck he observed the traffic light turn from red to green for traffic on Independence Boulevard. Both vehicles to his left in the other eastbound lanes started moving forward; so the plaintiff continued on into the intersection, moving alongside the large truck on his left. After having gone into the intersection 10 or 12 feet, the driver of the large truck on his left stopped suddenly. At that time the plaintiff saw the defendant's Oldsmobile car making a left turn and coming across in front of the three lanes of eastbound traffic, "in a 45-degree angle," to enter Baldwin Circle. The plaintiff, then traveling about 25 miles per hour, applied his brakes, and his pick-up truck skidded some 12 or 13 feet, straight down the lane in which he was traveling. That was the first time he had been able to see the defendant's Oldsmobile after it started turning, since his view to the left had been blocked by the big truck next to him. The defendant made no attempt to stop. He was "gunning his car" to get across the intersection. The defendant's speed was estimated by the plaintiff at from 18 to 20 miles per hour. The collision took place in the middle of the plaintiff's eastbound traffic lane 10 or 12 feet inside the intersection—that distance beyond the white line where cars stop on Independence Boulevard "in the case of a red light." The front of the plaintiff's pick-up came into contact with the right side of the defendant's Oldsmobile, between the two doors. The plaintiff sustained substantial personal injuries.

The defendant testified that when the light changed to green he moved forward to the center of the intersection, paused briefly with his left arm still out signaling his intention to turn left, and seeing the car in the nearest lane for eastbound traffic was yielding to him—in fact, backing up—he went into his left turn intending to enter Baldwin Circle; that the large truck in the middle eastbound lane was standing still when he started the left turn; that the truck moved forward a few

feet and then stopped. Whereupon the defendant proceeded on in low gear, not "over one or two miles an hour," and was hit by the plaintiff's pickup.

Issues of negligence, contributory negligence, and damages were answered by the jury in favor of the plaintiff, and he was awarded damages in a substantial amount.

From judgment based on the verdict, the defendant appeals, bringing forward only the assignments of error which relate to the refusal of the court to allow his motion for judgment as of nonsuit.

G. T. Carswell and Henry E. Fisher for plaintiff, appellee.

Campbell, Craighill, Rendleman & Kennedy for defendant, appellant.

JOHNSON, J. This case involves no new question requiring an extended discussion of the controlling principles of law.

The evidence on which the plaintiff relies is sufficient to support the inference of negligence on the part of the defendant as the proximate cause of the collision, for failure to observe the requirements of G.S. 20-154 in making his left turn from Independence Boulevard into Baldwin Circle. It may be conceded also that the evidence on which the defendant relies, largely omitted from the statement of facts 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 actionable negligence or upon the theory that the plaintiff was contributorily negligent by reason of the manner in which he approached and entered the intersection wherein the defendant was in the act of making a left turn. Nevertheless, a study of the record leaves the impression that the plaintiff's evidence made out a *prima facie* case of actionable negligence against the defendant, free of contributory negligence as a matter of law. It is well established by the decisions of this Court that a motion for nonsuit on the ground of contributory negligence shown by the plaintiff's evidence will be allowed only when the evidence is so clear that no other reasonable inference is deducible therefrom. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Fowler v. Atlantic Co.*, 234 N.C. 542, 67 S.E. 2d 496; *Donlop v. Snyder*, 234 N.C. 627, 68 S.E. 2d 316. Here the evidence was susceptible of diverse inferences. Hence the issues of negligence and contributory negligence were properly submitted to the jury.

The verdict and judgment below will be upheld.

No error.

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

WILLIAM McKINLEY v. WADDELL HINNANT, J. KENNETH LEE AND WIFE, NANCY Y. LEE.

(Filed 25 May, 1955.)

1. Pleadings § 19c—

If the complaint in any portion, or to any extent, presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading cannot be overthrown by demurrer for failure to state a cause of action.

2. Pleadings § 15—

A demurrer admits the truth of the allegations of fact contained in the complaint, but does not admit conclusions or inferences of law.

3. Mortgages § 2c—

Whether a deed and option to repurchase constitute a mortgage is to be determined in accordance with the intention of the parties which must be established by evidence *dehors* the instruments on the basis of whether, from a consideration of the entire transaction, the deed was given to secure a debt existing at the inception of the transaction, in which instance equity will declare it a mortgage notwithstanding its form.

4. Same—

In determining whether a deed and option to repurchase constitute a mortgage, the fact that the value of the property is much greater than the consideration for the deed is a factor tending to show that the instrument was intended to operate as a mortgage.

5. Same—

Doubt as to whether a deed and option to repurchase were executed solely as security for a debt will be resolved by equity in favor of declaring the transaction a mortgage.

6. Same—

Allegations to the effect that the mortgagee sought to borrow money, and that the mortgagor procured a loan to the mortgagee by a third person upon the mortgagee's transfer of the note secured by the mortgage to such third person by deed of bargain and sale with option to the mortgagee to repurchase the note upon payment of the amount borrowed plus an increment, *is held* sufficient to allege a cause of action to have the sale of the note with option to repurchase declared in equity a mortgage, in which event it is subject to all the incidents and qualities of a mortgage and is not defeated, as an option would be, by failure to make payment strictly in accordance with its terms.

7. Same—

The equitable principle upon which a deed and option to repurchase will be declared a mortgage applies to the sale of a note secured by a deed of trust with option to repurchase the note upon the repayment of the amount borrowed, plus an increment.

8. Frauds, Statute of, § 3—

The defense of the Statute of Frauds cannot be raised by demurrer.

9. Frauds, Statute of, § 4—

In proper cases, an estoppel based upon grounds of fraud may override the Statute of Frauds.

10. Pleadings § 17—

A demurrer *ore tenus* for failure of the complaint to state a cause of action of any kind against one of defendants, without specifying the grounds of objection, will be disregarded. G.S. 1-128.

11. Mortgages § 2f—

Plaintiff alleged that in the sale of certain property to husband and wife the purchasers executed a deed of trust on other property as security, and agreed to execute a deed of trust on the property conveyed after they had obtained a first mortgage loan thereon. *Held:* A demurrer by the wife on the ground that no cause of action was stated against her is properly overruled, there being no plea of the Statute of Frauds nor demurrer by the husband on the ground that the complaint fails to state a cause of action against him.

12. Pleadings § 17—

A written demurrer on the ground that other persons should have been made parties defendant, without specifying what other persons should have been joined and on what grounds, is defective and may be disregarded. G.S. 1-128.

13. Pleadings § 20½—

Upon demurrer on the ground of misjoinder of causes, as distinguished from a demurrer for misjoinder of parties and causes, the court properly refuses to dismiss the action, but should sever the causes improperly joined for separate trials. G.S. 1-132.

14. Pleadings § 2—

There is material difference between the consolidation of cases for convenience in trial and the joinder of several causes of action in the complaint, and ordinarily only those causes may be joined which affect all the parties to the action. G.S. 1-123.

15. Pleadings § 19b—Demurrer for misjoinder of causes should have been sustained, and the actions divided for separate trials.

Plaintiff sold certain realty to husband and wife, taking a deed of trust on other property as security. Plaintiff thereafter borrowed money and transferred the note to the lender and took an option to repurchase the note upon payment of the amount loaned, plus an increment. Plaintiff alleged that the husband and wife agreed to execute to him at a later date a mortgage on the property conveyed and failed to do so, and alleged a cause of action to have the transfer of the note and option to repurchase declared a mortgage, and alleged the unlawful and fraudulent cancellation of the deed of trust given him by the husband and wife on the other property. *Held:* The cause of action to have the transaction declared a mort-

gage and the cause of action for fraudulent and unlawful cancellation of the deed of trust were improperly joined with the cause of action for breach by the husband and wife of their agreement to execute a mortgage on the property conveyed, since the purchaser of the note secured by the deed of trust was not affected by that cause of action, and upon demurrer for misjoinder of causes, the trial court should have divided the causes of action for separate trials.

16. Mortgages § 29—

In an action to set aside the cancellation of a deed of trust the trustee is at least a proper party and should be made a party defendant.

APPEAL by defendants from *Gwyn, J.*, November Term 1954 of GUILFORD (Greensboro Division).

Civil action heard upon a written demurrer that several causes of action have been improperly united and that there is a defect of parties defendant, and upon a demurrer *ore tenus* that the complaint does not state facts sufficient to constitute a cause of action. Both demurrers were overruled, and the defendants excepted, and appealed.

Alexander & Parks for Plaintiff, Appellee.

J. Kenneth Lee for Defendants, Appellants.

PARKER, J. This is a summary of the material allegations of the complaint:

One. On 15 July 1952, plaintiff executed and delivered to the defendants J. Kenneth Lee and wife, Nancy Y. Lee, a deed to a tract of land situated on East Market Street in the City of Greensboro. The deed contains a specific description of the land, and is properly recorded. The purchase price of said land was $3,350.00 to be paid as follows: $500.00 cash, $900.00 in land, which the defendants Lee were to convey to plaintiff, and $1,950.00 payable in $50.00 monthly installments with interest—said balance to be evidenced by a note in such amount secured by a deed of trust, subject to a prior deed of trust, on a dwelling house of the defendants Lee on Lindsay Street in Greensboro, and by a deed of trust on the said East Market Street property, as soon as the Lees could obtain a first mortgage loan on the property for construction thereon of a building.

Two. Pursuant to the agreement the Lees paid plaintiff $173.44 in cash and assumed obligations of plaintiff in the amount of $326.66, conveyed to him $900.00 worth of land, executed and delivered to him their promissory note in the sum of $1,950.00 payable in monthly installments of $50.00 beginning on 15 August 1952, and secured their note by a deed of trust properly recorded on their house on Lindsay Street.

Three. The Lees have defaulted in the payment of monthly installments on their note, and owe upon it more than $1,400.00 principal with interest. Further, the Lees have refused plaintiff's demand that they execute and deliver to plaintiff a mortgage on the East Market Street land he conveyed them.

Four. Plaintiff made frequent demands upon the Lees for payment of their note, and threatened to foreclose the deed of trust on their house on Lindsay Street. That the defendant J. Kenneth Lee, with knowledge of plaintiff's financial condition, told him if he needed money he would arrange a loan for him. On or about 1 June 1953 plaintiff went to the office of the defendant J. Kenneth Lee, who is a practicing lawyer, to obtain a $100.00 loan. J. Kenneth Lee filled in a cheque for $110.00 over the signature of the defendant Waddell Hinnant, and delivered it to plaintiff. Plaintiff promised to repay the loan in 30 days. About 20 June 1953 plaintiff returned to Lee's office to secure a loan of $200.00. Lee informed plaintiff he would have to give security for that amount because he owed money. Lee called the defendant Hinnant to his office. Lee suggested that plaintiff put up as security the unpaid note of his wife and himself secured by a deed of trust on the house on Lindsay Street. Plaintiff agreed to put up the note and deed of trust with the understanding that the $110.00 loan and the proposed $200.00 loan were combined, with a right of renewal of the note. Lee drew up and the plaintiff executed a deed of bargain and sale conveying to the defendant Hinnant the note of Lee and his wife to plaintiff and the deed of trust securing the same. Lee also at the same time and place drew up and the defendant Hinnant executed the following option:

"I hereby agree to sell and convey to William McKinley all my right, title and interest in and to that certain note and deed of trust bearing date of July 15, 1952, and recorded in book 1477, at page 52, in the office of the Register of Deeds of Guilford County, upon the following terms and conditions:

"That if the said option be exercised on or before the 20th day of July 1953, I hereby agree to sell the same for the sum of $325.00

"That if the said option be exercised on or before the 20th day of August 1953, I hereby agree to sell the same for the sum of $355.00.

"That if the said option be exercised on or before the 20th day of September 1953, I hereby agree to sell the same for the sum of $385.00.

"This option shall be binding upon the aforesaid conditions for a period of ninety days."

Five. It was understood and agreed that the deed and option drawn up by Lee in his office and executed by plaintiff and Hinnant should constitute in law and equity a mortgage of the note and the deed of

trust securing it to secure plaintiff's indebtedness of $110.00 and $200.00. Pursuant to that understanding plaintiff delivered the deed, note and deed of trust to Lee and Hinnant.

Six. At the time plaintiff borrowed the $310.00 there was due on the note of the Lees to him about $1,400.00. Plaintiff made repeated efforts to pay back the $310.00 with interest and redeem the Lee note and the deed of trust securing it, but without success. Plaintiff is ready, able and willing to pay back the $310.00 with interest and redeem the note and deed of trust, but J. Kenneth Lee and Hinnant will not agree to it.

Seven. The defendants J. Kenneth Lee and Hinnant on or about 25 September 1953 deliberately, unlawfully, wilfully, fraudulently and in utter disregard of plaintiff's rights caused the deed of trust on the Lee's house on Lindsay Street, which was the rightful property of plaintiff, to be cancelled of record, when they knew there was still due and owing to plaintiff a balance on the note secured by the deed of trust greatly in excess of the amount for which plaintiff had pledged the note and deed of trust. That Lee and his wife refused to pay plaintiff any amount on their note and to give him a deed of trust on the property he sold them on East Market Street.

Eight. That the Lees paid no monetary consideration to Hinnant to cancel their deed of trust. That J. Kenneth Lee and Hinnant have sold a part of the East Market Street property, and have agreed to sell the remainder, and after paying $310.00 to Hinnant, to divide the sale price between them.

Nine. That the equity owned by Lee and his wife in the Lindsay Street house is too small to pay their note, and that unless a purchase money mortgage is declared upon the East Market Street property, plaintiff will be deprived of his equity therein.

Ten. Plaintiff has no adequate remedy at law.

Eleven. Plaintiff has suffered actual damages in the amount of $1,000.00, and is entitled to recover punitive damages of $2,000.00.

WHEREFORE, plaintiff prays:

First. That the deed from him to Hinnant and the option from Hinnant to him be adjudged a mortgage to secure a loan of money, for an accounting and that he be permitted to pay the mortgage.

Second. That the cancellation of the deed of trust be declared void, and the deed of trust be declared a valid lien upon the property therein described.

Third. That a purchase money mortgage be declared on the East Market Street property.

Fourth. That plaintiff recover $1,000.00 actual damages, $2,000.00 punitive damages and the costs.

At the time of commencement of this action plaintiff filed a Notice of *Lis Pendens* on the East Market Street property and the house on Lindsay Street.

The rule is well settled with us that if the complaint in any portion of it, or to any extent, presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading cannot be overthrown by a demurrer *ore tenus* for failure to state a cause of action. *Batchelor v. Mitchell,* 238 N.C. 351, 78 S.E. 2d 240; *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807. It is said in *Brewer v. Wynne,* 154 N.C. 467, 70 S.E. 947: ". . . a complaint cannot be overthrown by a demurrer, unless it be wholly insufficient."

Numerous cases in this State hold that a demurrer admits the truth of the allegations of fact contained in a complaint, but does not admit conclusions or inferences of law. *Daniels v. Yelverton,* 239 N.C. 54, 79 S.E. 2d 311; *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915; *Ferrell v. Worthington,* 226 N.C. 609, 39 S.E. 2d 812; *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761.

The written demurrer and the demurrer *ore tenus* were filed in behalf of all the defendants by their counsel, J. Kenneth Lee, who is a defendant. In support of their demurrer *ore tenus* the defendants make two contentions: one, no cause of action of any kind is alleged against the defendant Nancy Y. Lee, and two, the complaint fails to allege sufficient facts to have an absolute conveyance of the Lee note and the deed of trust securing same declared a mortgage.

We may as well state at the beginning that the plaintiff, according to the allegations of his complaint, is not seeking to correct or reform his deed to Hinnant. The allegations in respect to this deed and Hinnant's option to plaintiff present this question: When plaintiff conveyed by deed the Lee note on which was due about $1,400.00, and the deed of trust securing the same to Hinnant, and as a part of the same transaction, Hinnant gave back to plaintiff an option agreeing to sell and convey to plaintiff the Lee note and deed of trust securing it, provided the option shall be exercised in 90 days, and when it was understood at the time of the inception of the transaction and at the time of the execution and delivery of the deed and option by the parties thereto that these instruments should constitute a mortgage securing an indebtedness of plaintiff to Hinnant in the amount of $310.00, are the deed and option taken together a mere sale with an option to buy, or do they constitute a mortgage?

If the transaction is a sale and an option to buy, the option must be exercised according to its terms. If the transaction is a mortgage all

the incidents and qualities of a mortgage attach, whatever its external form. *O'Briant v. Lee,* 214 N.C. 723, 200 S.E. 865.

We have discussed the principles of law as to whether a deed for realty absolute on its face, with a contemporaneous agreement or option for repurchase is a mortgage or a mere sale and agreement or option to purchase in the cases of *O'Briant v. Lee,* 212 N.C. 793, 195 S.E. 15; *Same Case,* 214 N.C. 723, 200 S.E. 865; *Ferguson v. Blanchard,* 220 N.C. 1, 16 S.E. 2d 414; and *Ricks v. Batchelor,* 225 N.C. 8, 33 S.E. 2d 68. See also Annos.: 79 A.L.R. 937 and 155 A.L.R. 1104.

It seems to be elemental learning that a conveyance cannot be a mortgage unless given to secure the performance of an obligation. Conversely, if intended to secure an obligation at the inception of the transaction, it will be considered in equity as a mortgage, and nothing else. The question is one of intention to be decided from a consideration of the whole transaction, and not from any particular feature of it. Anno.: 90 A.L.R. 953.

"The real character of the transaction and the true intention of the parties may be inquired into, and shall govern, notwithstanding they may have adopted the form of an absolute conveyance and bond for resale. And if such transaction was really a loan, and these instruments were executed to secure it, it is a mortgage . . ." *O'Briant v. Lee,* 214 N.C. 723, 200 S.E. 865.

We said in *Ricks v. Batchelor, supra:* "Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction is whether the debt existing prior to the conveyance is still subsisting, or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a method of securing a debt—and hence a mortgage."

In *Waters v. Crabtree,* 105 N.C. 394, 11 S.E. 240, it is held that a deed absolute on its face may be treated as a mortgage when it was agreed at the time of its execution that such should be its purpose.

The rule seems to be generally recognized that in determining whether a deed was intended as a mortgage, the fact that the value of the property conveyed was much greater than the consideration for the deed is a factor tending to show that the deed was intended to operate as a mortgage. Anno.: 90 A.L.R. 954, where the North Carolina cases are cited.

"The intention of the parties that the deed with option to repurchase shall constitute a mortgage or security for a debt must be established by proof of facts and circumstances *dehors* the deed inconsistent with an absolute conveyance." *Ricks v. Batchelor, ibid.*

Whenever an application of the relevant principles of law to such a transaction still leaves a doubt, it seems that the American Courts have generally leaned in favor of the mortgage. *O'Briant v. Lee,* 214 N.C. 723, p. 726, 200 S.E. 865.

Applying these principles to the allegations of the complaint as to whether the transaction was a mortgage or a mere sale with an option to buy, we think that the question presented which we have stated above, should be answered that the allegations of fact, which on a demurrer we accept as true, state a case that the deed of plaintiff to Hinnant absolute on its face with a contemporaneous option to repurchase from Hinnant to plaintiff is a mortgage. While the authorities we have cited deal with conveyances of land, we think the relevant principles of law are applicable to the transaction here. The appellants in their brief contend that the above principles of law do not apply to the conveyance of a note, but they cite no authority to support their contention.

The defendants contend in support of their demurrer *ore tenus* that the complaint alleges no cause of action against the defendant Nancy Y. Lee. In support of their argument, they cite no authority.

The complaint alleges that Nancy Y. Lee and J. Kenneth Lee were purchasers from plaintiff of the East Market Street property, that in payment therefor they gave to plaintiff cash, assumed obligations of his, executed and delivered to him their note for $1,950.00 secured by a deed of trust on their house on Lindsay Street, and it was understood and agreed by the parties "that the plaintiff's security for the said balance of the purchase price should cover the said East Market Street property as soon as the defendants" (J. Kenneth Lee and Nancy Y. Lee) "could obtain a first mortgage on said property for the construction of a business building thereon," and that the defendants Lee have failed to give plaintiff a mortgage on this property, and have failed to pay their note in full. The demurrer *ore tenus* does not state that these allegations of fact fail to state a cause of action against J. Kenneth Lee, and no such contention is made in defendants' brief.

Whether the oral agreement to secure the $1,950.00 note by a mortgage on the East Market Street property is void by reason of the Statute of Frauds cannot be raised by demurrer. *McCampbell v. Building & Loan Ass'n.,* 231 N.C. 647, 58 S.E. 2d 617; *Embler v. Embler,* 224 N.C. 811, 32 S.E. 2d 619.

In proper cases an estoppel based upon grounds of fraud may override the Statute of Frauds. *Callaham v. Arenson,* 239 N.C. 619, p. 626, 80 S.E. 2d 619; 19 Am. Jur., Estoppel, Sec. 92; Anno.: 50 A.L.R. 668 *et seq.* As *Lord Justice James* said in *Haigh v. Kaye,* 7 Chancery Appeal Cases, 469: "I apprehend it is clear that the Statute of Frauds

was never intended to prevent the court of equity from giving relief in the case of a plain, clear, and deliberate fraud." Such is the law with us. *McNinch v. Trust Co.*, 183 N.C. 33, 110 S.E. 663.

As to the defendant Nancy Y. Lee, the demurrer *ore tenus* merely states that no cause of action of any kind is alleged against her. It does not specify the grounds of objection to the complaint, and will be disregarded. G.S. 1-128; *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750; *Oldham v. McPheeters,* 201 N.C. 35, 158 S.E. 702; *Love v. Comrs.,* 64 N.C. 706. In addition, since the defense of the Statute of Frauds to an oral agreement to give a mortgage cannot be raised by a demurrer, and as J. Kenneth Lee, a defendant, who appears as counsel here for all the defendants, has not demurred on the ground that the complaint does not state a cause of action against him for failure to give a mortgage as agreed, we think that the alleged cause of action that the defendants Lee agreed to give the plaintiff a mortgage on the East Market Street property to secure their $1,950.00 note, which was part of the purchase price, and that they failed to do so, cannot be overthrown by a demurrer. 59 C.J.S., Mortgages, Sec. 15; and 36 Am. Jur., Mortgages, Sec. 14. It must be distinctly understood that we are not deciding, but leaving completely open, the question of law that may be presented, if the Statute of Frauds is pleaded in the answer as a defense.

The trial judge properly overruled the demurrer *ore tenus.*

The written demurrer states there is a defect of parties defendant appearing on the face of the complaint. The demurrer fails to state what persons should be made defendants and on what grounds, and on this point may be disregarded. G.S. 1-128; *Duke v. Campbell, supra.* The defendants in their brief contend that the complaint alleges that the defendants Lee "have sold a portion of the East Market Street property" and that the purchaser or purchasers of this part should be made parties defendant. As to the question of law which the defendants have attempted to present, see *Ricks v. Batchelor, supra.*

It is to be noted that the defendants have demurred on the ground of a misjoinder of causes, and not on the ground of a misjoinder of causes and parties. When a misjoinder of causes exists, the action will not be dismissed: the court will sever the causes, and divide the actions. G.S. 1-132; *Mills v. Cemetery Park Corp., ante,* 20, 86 S.E. 2d 893; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382. A misjoinder of parties and causes is fatal, and causes a dismissal of the action. *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *Mills v. Bank,* 208 N.C. 674, 182 S.E. 336.

The demurrer states that the plaintiff "has undertaken improperly to join in one action two causes of action that do not arise out of the same

transaction, or out of a transaction connected with the same subject of action, for that he undertakes to allege under one cause of action that the defendant J. Kenneth Lee breached an oral contract to execute a mortgage on certain property described in a deed recorded in book 1453, page 532, office of the Register of Deeds of Guilford County, and as a further cause of action, undertakes to allege that an absolute conveyance of an interest in another parcel of land from the plaintiff to the defendant Waddell Hinnant was in fact a conveyance for security purposes only."

The complaint alleges that J. Kenneth Lee and Nancy Y. Lee breached their oral agreement to execute and deliver to plaintiff a mortgage on the East Market Street property.

G.S. 1-123 classifies the causes of action that may be joined, and concludes: "But the causes of action so united must all belong to one of these classes, and except in actions for the foreclosure of mortgages, must affect all the parties to the action. . . ." This Court said in *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232: "Ordinarily only those matters germane to the cause of action asserted in the complaint and in which all the parties have a community of interest may be litigated in the same action." There is a material difference between the consolidation of cases for convenience of trial and the joinder in a complaint of several causes of action by virtue of G.S. 1-123.

Applying these principles it seems clear that there is a misjoinder of causes of action. There are three defendants and at least three causes of action are set out, which do not affect all the parties to the action as required by the Statute.

The plaintiff alleges first, a failure of J. Kenneth Lee and Nancy Y. Lee to give him a mortgage as they had agreed to do on the East Market Street property. That cause of action does not affect the defendant Hinnant. Next, that the deed from him to Hinnant and the option from Hinnant to him constitutes a mortgage, and then that there was an unlawful and fraudulent cancellation of the deed of trust given by the Lees to him on the Lindsay Street property. It would seem that all three defendants are affected by the last two causes of action which arise out of transactions connected with the same subject of action.

The demurrer should have been sustained on the ground that several causes of action have been improperly united, G.S. 1-127; *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104. Even so, the action need not be dismissed: the lower court will divide the first cause of action from the other two on the docket for separate trials. G.S. 1-132; *Smith v. Gibbons,* 230 N.C. 600, 54 S.E. 2d 924.

The complaint does not state the name of the trustee in the deed of trust on the Lindsay Street property. It would seem that he should be

made a party defendant in the last two causes of action, if not as a necessary, at least as a proper, party that he may be bound by the judgment entered.

In accordance with this opinion:

The part of the judgment overruling the demurrer *ore tenus* and overruling the demurrer for defect of parties is *Affirmed.*

The part of the judgment overruling the demurrer on the ground of misjoinder of causes is *Reversed.*

ROBERT McNEILL v. A. G. McDOUGALD, JR.

(Filed 25 May, 1955.)

1. Appeal and Error § 40b: Trial § 51—

An appeal will lie from the action of the trial court in setting aside the verdict and granting a new trial for error of law in failing to charge the jury on a substantive feature of the case.

2. Trial § 31b—

It is the duty of the trial judge to declare and explain the statutory law as well as the common law on the substantial features of the case arising on the evidence, even though there be no special request for instructions, and the court's failure to do so is prejudicial error.

3. Agriculture § 5a—Right of lienholder to seize crop prior to maturity of lien under G.S. 44-63 held substantial feature of this case.

Plaintiff landlord instituted this suit to recover for the wrongful seizure of his tobacco and conversion thereof by the holder of agricultural liens executed by plaintiff's wife and their tenant. Defendant contended that plaintiff was estopped to deny that the tobacco belonged to his wife and that defendant had the right to seize the tobacco before the maturity of the liens executed by the wife and the tenant under the provisions of G.S. 44-63. *Held:* The jury's finding that defendant wrongfully seized and converted the tobacco to his own use under instructions as to estoppel does not necessarily determine that defendant had no lien on the tobacco, since even though plaintiff were estopped to deny his wife's title, defendant would not have the right to seize the tobacco prior to the maturity of the liens except under the provisions of G.S. 44-63, and therefore the failure of the court to charge the provisions of the statute is prejudicial error which is not rendered immaterial by the jury's answer to the issue.

4. Appeal and Error § 8—

An appeal *ex necessitate* follows the theory of the trial in the court below.

BOBBITT, J., dissents.

APPEAL by plaintiff from *Hubbard, Special Judge,* January Term 1955 of COLUMBUS.

Civil action to recover actual and punitive damages for the alleged unlawful and malicious seizure and conversion of plaintiff's tobacco crop.

This is a summary of the allegations of plaintiff's complaint: In the year 1951 plaintiff raised and owned a tobacco crop grown on 2.6 acres of land: that neither his wife nor any other person owned or claimed any interest therein. That during the period of harvesting his tobacco crop, he suffered the loss of a leg, and was unable temporarily to attend to his tobacco. That most of his tobacco had been cured, and placed in a packhouse. That the defendant, who knew plaintiff's physical condition, came to plaintiff's land, and, claiming that he had an account against plaintiff's wife, unlawfully and maliciously seized plaintiff's entire tobacco crop, and converted it to his own use.

Plaintiff's evidence, material for decision of this case, tends to show these facts: In 1951 he had a tobacco allotment of 2.6 acres. He furnished the fertilizer; one Henry "Bully" Burney was to do the work and the money from the sale of the tobacco crop was to be equally divided between them. The Johnson Cotton Company furnished him fertilizer and material, and had a paper on the crop. He made no purchases from the defendant, and owed the defendant nothing. His wife had a tobacco allotment of .4 of an acre on other land, a separate crop. In 1951 Burney did the work on the 2.6 acres of tobacco, and gave the defendant an agricultural lien on his half of the crop. In the early part of 1951 plaintiff refused Burney's and also the defendant's request to release his landlord's lien on Burney's half of the tobacco in favor of the defendant. Josephine McNeill also gave the defendant an agricultural lien on this same 2.6 acres of tobacco as well as on other security. This lien stated it was for advances made by defendant to plaintiff and his wife, that both were indebted to him therefor, but Josephine McNeill alone signed it. Defendant requested plaintiff to sign this lien. He refused to do so. He did not tell defendant to let his wife have anything, that she was in charge of the crop. He did not say he would be responsible for any advances to her. Both liens were due and payable on 15 August 1951.

On 6 August 1951, A. G. McDougald, Jr., the defendant here, instituted a civil action against Henry Burney and Josephine McNeill to enforce the liens they gave him. Plaintiff is not a party to this action. At the time of issuance of the summons, McDougald claimed the delivery of the tobacco grown on the 2.6 acres of land, as well as the other security, and in his affidavit for delivery stated, he "believes that unless possession is taken that his security will vanish." In the affidavit he

did not state that the obligations of Burney and Josephine McNeill were due and unpaid. The Clerk of the Superior Court issued claim and delivery papers. Plaintiff's evidence does not show when the tobacco was taken, except that it was taken in August. Part of plaintiff's evidence tends to show that the tobacco was taken by the Sheriff and delivered to McDougald: other parts of plaintiff's evidence tends to show that McDougald and his agents took the tobacco. Three barns of tobacco were taken, two belonging to plaintiff and Burney, and one to Josephine McNeill.

McDougald was granted by the Clerk of the Superior Court an extension of time to file his complaint. He filed it on 25 August 1951, and alleged that the obligations of Burney and Josephine McNeill were due and unpaid, and that Burney was farming lands owned or controlled by Josephine McNeill.

During the trial plaintiff admitted that one-half of the tobacco taken belonged to Burney. Defendant sold the tobacco taken at the Banner Warehouse, and has kept the proceeds of sale.

The defendant alleged, and offered evidence tending to show these facts: That the plaintiff represented to him that the crops involved in this action were owned by his wife, Josephine McNeill, that she was going to run the farm in 1951, and that he was going to have nothing to do with it, that his wife was in charge and his signature was not needed, and that she had full power and authority to make arrangements for advances and supplies to make the crops and to execute any agricultural liens upon the crops. That plaintiff was on crutches at his home. That prior to 1951 defendant had a delinquent account against Henry Burney, and had instituted action against him. That plaintiff and his wife wanted to secure Burney's unpaid account to the defendant and to secure advances and supplies to make the 1951 crop. That the defendant, relying upon the representations of plaintiff that all the crops were the property of Josephine McNeill and that she was in charge, made advances to her and Burney, and that she and Burney executed and delivered to him agricultural liens upon their interests in all the crops, securing the advances and Burney's past account. That he asked plaintiff to sign the lien, and plaintiff replied, deal with his wife, she is the one.

In July defendant saw the tobacco burning up in the field for two or three weeks, and it was not being gathered for curing. About the first of August defendant saw the tobacco was out of the field, except for suckers. He went to a barn. "You could throw cats through the logs." There was a handful of fire. The tobacco was black and rotten. The defendant alleged in his further answer, "said parties were doing away with the tobacco crops or causing them to deteriorate." He instituted

action on 6 August 1951 against Burney and Josephine McNeill, and seized the tobacco crop under claim and delivery. Josephine McNeill gave defendant the tobacco allotment cards of plaintiff and herself. Upon these cards defendant sold the tobacco he seized upon the floor of the Banner Warehouse for $281.31, and credited one-half of it to plaintiff's account and one-half to his wife's.

These are the issues submitted to the jury, with the answers thereto:

"1. Did the defendant wrongfully seize and convert to his own use the tobacco of the plaintiff, Robert McNeill? Answer: Yes.

"2. If so, was the action of the defendant wilful and malicious, or in a wanton and reckless disregard of Robert McNeill's rights? Answer: Yes.

"3. What amount, if any, in actual damages is the plaintiff entitled to recover? Answer: $140.65.

"4. What amount, if any, in punitive damages is the plaintiff entitled to recover? Answer: $500.00."

Prior to the charge the defendant requested an instruction upon equitable estoppel. The request was granted by the Trial Court, which gave an elaborate charge on equitable estoppel in dealing with the first issue, saying in substance that if the jury found, by the greater weight of the evidence, the burden being upon the defendant, that the facts in respect to estoppel were as contended by defendant, they would answer the first issue No.

On the 4th issue of punitive damages the Trial Court charged: "McNeill contends that under all the facts and circumstances in the case you should take into consideration the fact, if it was a fact, that the Claim and Delivery Proceeding was taken out before the lien was due . . ."

At the end of the charge the defendant requested the court to charge the jury that "a mortgagee may seize a chattel even before the obligation becomes due under circumstances showing an impairment of security." The request was refused.

Upon the coming in of the verdict the defendant moved to set the verdict aside and for a new trial on the ground that the verdict was contrary to the greater weight of the evidence, was excessive and for errors in the charge.

Whereupon, the Trial Court entered an order setting the verdict aside and granting a new trial upon the ground that it inadvertently failed to charge the law as contained in G.S. 44-63.

Plaintiff appealed, assigning error.

Powell & Powell for Plaintiff, Appellant.

Oliver Carter and Hewlett & Williams for Defendant, Appellee.

PARKER, J. When a verdict is set aside for error in law, and not as a matter of discretion, the aggrieved party may appeal, provided the error is specifically designated. *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518; *Powers v. City of Wilmington,* 177 N.C. 361, 99 S.E. 102. Here, the Trial Judge stated that he set the verdict aside, and granted a new trial on the ground that he inadvertently failed to charge the law as contained in G.S. 44-63. This suffices for the appeal.

G.S. 44-63 reads: "If any person in the counties mentioned in the preceding section,"—the county where the tobacco crop here was raised and taken is named in the preceding section—"after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days' notice published at the courthouse door and three other public places in said county."

A failure of the court to charge the law on the substantial features of the case arising on the evidence is prejudicial error, even though there be no request for special instructions to that effect. *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898; *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530; G.S. 1-180. This is a substantial legal right. *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630.

It is the duty of the judge to declare and explain the statutory law as well as the common law on the substantial features of a case arising on the evidence. *Barnes v. Teer,* 219 N.C. 823, 15 S.E. 2d 379; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915; *Bowen v. Schnibben,* 184 N.C. 248, 114 S.E. 170.

Where a judge's charge eliminates from the case a substantial part of it, which would necessarily prejudice one of the parties, it is prejudicial error. *Bowen v. Schnibben, supra; Matthews v. Myatt,* 172 N.C. 230, 90 S.E. 150.

We said in the recent case of *Hall v. Odom,* 240 N.C. 66, p. 70, 81 S.E. 2d 129: "It is not to be understood that a landlord cannot by agreement, express or implied, waive his lien, or by his acts and conduct be estopped from asserting his lien." See also *Adams v. Warehouse,* 230

N.C. 704, 55 S.E. 2d 331; 52 C.J.S., Landlord and Tenant, Sections 650 and 819.

The essence of McDougald's defense is that the plaintiff by his acts, words and conduct is estopped to deny that the tobacco crop was the property of his wife, Josephine McNeill; that McDougald had liens on it for supplies and advances executed by her and Burney upon their respective interests therein, in conformity with G.S. 44-62; that Josephine McNeill and Burney by permitting the tobacco to burn up in the field and by improper curing of it, did acts impairing the security of his liens, and thereby pursuant to G.S. 44-63 their debts secured by these liens became due and collectible at once, and he had the right to take possession of and sell the tobacco crop.

It is plain that the provisions of G.S. 44-63 providing that the lien shall become due and collectible at once, if the person executing the lien does any act calculated to impair the security therein given, has no application, unless there is a valid lien. It is also plain, that if the plaintiff is estopped to deny that defendant had valid liens, that fact alone would not make the liens due and collectible prior to their maturity date.

The judge charged the jury, that if they found by the greater weight of the evidence, the burden being upon the defendant, that the facts in respect to estoppel were as contended by the defendant, they would answer the issue: "Did the defendant wrongfully seize and convert to his own use the tobacco crop of the plaintiff Robert McNeill," No.

Does the answer to the first issue establish the fact that defendant had no valid liens on the tobacco crop, and make the judge's failure to charge the provisions of G.S. 44-63 as to when a lien could become due and collectible at once under certain circumstances immaterial?

The first issue does not squarely present to the jury the sole question as to whether plaintiff was estopped to deny that the defendant had valid liens—it presents the question as to whether or not there was a wrongful seizure and conversion. It seems clear that in the trial below the plaintiff contended that the defendant wrongfully seized the tobacco crop before the liens were due, because the judge in charging on the issue of punitive damages so stated, and because at the end of the charge the defendant requested the judge to charge, "that a mortgagee may seize a chattel even before the obligation becomes due under circumstances showing an impairment of security," which request was refused. If the defendant had valid liens, and seized the tobacco crop before the liens were due, it was a wrongful seizure.

It seems that one of the essential theories of the trial below in respect to the first issue was this: the plaintiff contended that there was a wrongful seizure before the liens were due; the defendant contended

that the liens were due and collectible under the provisions of G.S. 44-63. This theory is as deeply imbedded in the first issue as the theory of estoppel. The judge eliminated from the case this substantial part of the defendant's defense supported by his evidence that his liens were due and collectible when he seized the tobacco crop, by failing to charge the provisions of G.S. 44-63. Such failure in our opinion was prejudicial, for the jury could well have found from the evidence and the charge that plaintiff was estopped, but that the defendant, according to plaintiff's contention, wrongfully seized and converted the tobacco crop before the liens were due, and have answered the first issue Yes, in the absence of any charge by the court that plaintiff's liens had become due and collectible at once if the security given in the liens was being impaired. The able judge below was apparently of the same opinion for he set the verdict aside as a matter of law because he failed to charge the provisions of G.S. 44-63. An appeal *ex necessitate* follows the theory of the trial in the court below. *Lyda v. Marion*, 239 N.C. 265, 79 S.E. 2d 726.

When the case is tried again it would seem preferable to submit issues of estoppel, and as to whether the liens had become due and collectible when the tobacco crop was seized.

It must not be understood that we are expressing any opinion upon the evidence, or deciding that an issue on punitive damages should or should not be submitted to the jury. We are concerned with this one question of law: Was G.S. 44-63 a substantial feature of the case arising on the defendant's evidence? In our opinion, it was on the evidence before us, and we think that the controversy should be submitted to another jury with specific instructions on G.S. 44-63.

Affirmed.

BOBBITT, J., dissenting: A verdict is interpreted by reference to the pleadings, the evidence and the judge's charge. *Jernigan v. Jernigan*, 226 N.C. 204, 37 S.E. 2d 493.

Defendant claimed the tobacco seized by him by virtue of a chattel mortgage executed by plaintiff's wife. Defendant had no chattel mortgage executed by plaintiff.

The complaint contains no allegation that the defendant's seizure of plaintiff's tobacco was wrongful because it occurred before the debt became due. The sole theory of the complaint, as I read it, is that the defendant had no lien *at all* on plaintiff's tobacco. Evidently this was plaintiff's contention at the trial. This excerpt from the charge epitomizes the instructions given by the court relating to the first issue: "If you find from the evidence and by its greater weight that the tobacco in question that was taken belonged to Robert McNeill, then the first

issue should be answered in Robert McNeill's favor, unless you find that Robert McNeill is estopped now to claim that tobacco, or the proceeds of that tobacco, or its value." The jury having answered the first issue "no," the only conclusion that I can reach is that the jury found that the defendant had no lien on the plaintiff's tobacco. On this first issue, the crucial question for the jury arose on the defendant's plea of estoppel.

Furthermore, on the second issue the judge charged the jury: "If you find from the evidence and by its greater weight that Mr. McDougald knew that the tobacco in question was the property of Robert McNeill, *and knew that he had no claim to it,* but took the tobacco in an effort to force Robert McNeill to assume and pay for the debts of his wife, or Henry Burney, or otherwise acted in a wanton and reckless disregard of the rights of Robert McNeill, then you should answer the second issue yes." (Italics added.) On the second issue the crucial question was whether the defendant knew that he had no lien on the plaintiff's tobacco.

The court made no reference *at all* in his instructions bearing on the first and second issues to whether plaintiff's wife's debt had matured when the defendant seized the plaintiff's tobacco.

The only reference I can find in the charge to the fact that the seizure of the plaintiff's tobacco occurred before plaintiff's wife's debt matured is included in this summary of the court of plaintiff's contentions in relation to the fourth (punitive damage) issue. "McNeill contends that under all the facts and circumstances in the case you should take into consideration *the fact, if it was a fact, that the Claim and Delivery Proceeding was taken out before the lien was due,* and that Mr. McDougald had no legal right to take it out; that you should further take into consideration what he contends to be a fact that he, Robert McNeill, had refused to sign the mortgage, or lien, and that Mr. McDougald knew that, and that he still took his, McNeill's, property under process of the Court without any proper cause or right." (Italics added.)

If the defendant knew the tobacco belonged to the plaintiff, and seized it under color of claim and delivery proceedings against the plaintiff's wife, without making the plaintiff a party to such proceedings, it would seem that the fact that her debt was not even due was a circumstance properly to be considered, along with the other circumstances relevant to the fourth issue.

In my opinion, G.S. 44-63, which presupposes the existence of a valid lien, had no bearing on the issues raised by the pleadings and answered by the jury under the instructions of the court.

JOHN TEEMAN DENNIS v. THE CITY OF ALBEMARLE, RAY SNUGGS, AND D. A. HOLBROOK, CONTRACTOR.

(Filed 25 May, 1955.)

1. Electricity §§ 6, 7—

A person maintaining an overhead wire across a public road at a height that will not clear vehicles which do not exceed the maximum legal height of 12 feet, 6 inches (G.S. 20-116 (c)), is liable under the general law of negligence for injury to a motor vehicle or its occupants resulting from the maintenance of such wire.

2. Same: Municipal Corporations § 14h—

Evidence that defendant municipality maintained a wire of its electric power system over a highway at a height less than 12 feet, 6 inches, and that plaintiff, standing at the rear of a truck loaded with hay with his head above the main load, was struck in the mouth by the wire as the truck passed under the wire, and was thereby thrown from the truck to his injury, *is held* sufficient to be submitted to the jury on the issue of the negligence of the municipality in the maintenance of the wire.

3. Negligence § 19c—

Judgment of nonsuit on the ground of contributory negligence should not be entered unless the evidence, taken in the light most favorable to plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom.

4. Negligence § 11—

A person will not be held contributorily negligent as a matter of law for forgetfulness or inattention to a known danger when under the exigencies and circumstances of the particular situation a person of ordinary prudence would have forgotten or would have been inattentive to the danger because of the diversion of his attention by conditions suddenly arising, or when the situation is such as to require him to give undivided attention to other matters.

5. Electricity § 10—Evidence held not to show contributory negligence as matter of law on part of plaintiff in failing to see overhead wire.

The evidence tended to show that plaintiff was aware of the maintenance by defendant of a low wire across a highway near his home, that plaintiff, standing at the rear of a truck loaded with hay with his head above the main load, was on the lookout for the wire, but that he did not know the exact height of the wire, that the wire was difficult to see because of trees along the side of the highway, and that as the truck was driven under the wire, plaintiff's attention was diverted by a workman calling to him from a steeple of a church along the highway. *Held:* Plaintiff was not guilty of contributory negligence as a matter of law in failing to see the wire under the existing conditions, since diverse inferences may be drawn from the evidence as to whether a person of ordinary prudence would have seen the wire under the exigencies of the situation.

6. Trial § 31c—Instruction in this case held sufficient to conform to pleadings and evidence.

The basis of this action was the maintenance by defendant of a wire across a highway at a negligently low height. Plaintiff alleged that the defendant was negligent in the construction of the wire and that the wire had been torn down when struck by a truck on a previous occasion and thereafter repaired and replaced in the same position, that defendant had knowledge of the location and condition of the wire, and, by implication, that defendant had at all times maintained the line. *Held:* The failure of plaintiff to allege specifically that appealing defendant replaced the wire does not preclude an instruction supported by the evidence that defendant would be liable if the wire had remained as originally constructed or, if not, that defendant had knowledge and notice that it had been restored in the same location, there being no contention by defendant that injury was caused by the intervening act of a third party.

7. Pleadings § 24—

In determining the question of variance, a pleading will be liberally construed with a view to substantial justice, and a party may not complain of an immaterial variance which does not take him by surprise and which in no way prejudices him. G.S. 1-168.

8. Municipal Corporations § 46—

G.S. 1-53 does not apply to actions against a municipality based on tort.

9. Same—

Evidence tending to show that claimant delivered to the city clerk his claim for damages against the municipality, that the claim was addressed to the mayor and board of commissioners, and that the original notice was in the municipality's custody and voluntarily produced by it in open court at the trial, discloses a substantial compliance with the charter provisions of the city requiring that such claim should be presented to the board of commissioners.

APPEAL by defendant City of Albemarle from *Gwyn, J.*, February Term, 1955, of STANLY.

Action commenced 8 April, 1953, to recover damages for personal injuries.

Plaintiff, John Teeman Dennis, sued the City of Albemarle, a municipal corporation, and Ray Snuggs, its employee, and D. A. Holbrook, a general contractor. Judgment of nonsuit was entered as to defendant Holbrook. The record does not show a judgment of nonsuit as to defendant Snuggs. However, the case was submitted to the jury only as between plaintiff and defendant City of Albemarle, hereafter called defendant.

Plaintiff based his action on defendant's negligence. Defendant denied that it was negligent; and pleaded, as further defenses, (1) contributory negligence, (2) the 2-year and 3-year statutes of limitations,

and (3) its special charter provision relating to the presentation of claim prior to suit.

The evidence tends to show that plaintiff was injured on 21 September, 1950, about 3 p.m., under the circumstances set out below.

The Anderson Grove Church road, hereafter called church road, located about three miles east of the City of Albemarle, extended north from Highway 27 to the Albemarle-Badin highway. It was some twenty feet wide, unpaved. There were eight houses along this road, including that of plaintiff. The road derived its name from the fact that the Anderson Grove Baptist Church was located thereon, some two hundred yards north of Highway 27.

In the Spring of 1950, Holbrook, as general contractor, began construction of a new church building on the original site. The old building was moved from the west to the east side of the church road. Holbrook placed a tool house on the west side of the church road, for use at the site of the new building. In his work, he needed power to operate saws and other electrical equipment.

In May, 1950, defendant, in the operation of its electric power system, constructed "a secondary line" from the old church building across the road to Holbrook's tool house. Copper wire, 8-gauge, was used. It was covered by black, waterproof insulation. The diameter of wire and insulation was from ¼ inch to ⅜ inch.

Plaintiff had known of this power line for at least two and a half months. He had passed under it some fifty times, about twenty when in an automobile or truck and the rest when in a 2-horse wagon. While he had observed it, he had not measured its height above the road.

On 21 September, 1950, plaintiff, by means of a borrowed truck, provided and operated by neighbors, was hauling hay from his farm on Highway 27 to his home on the church road. He had passed along the church road on the day he was injured, at least twice, and had seen the power line. In loading the truck, shortly before plaintiff's injury, some 65-70 bales of hay were placed thereon. The driver and another got in the cab. The tailgate was out of the truck. Bales were placed along the back of the truck. These bales were fourteen inches higher than the bed of the truck. Plaintiff and Greene stood thereon, the main load being between them and the cab. The main load was higher than the top of the cab and was "neck-high" to plaintiff and Greene. They rode in this position so they could watch and steady the main load.

In making this trip, the truck turned from Highway 27 into the church road. In approaching the overhead power line, the road curved slightly to the left. The road passed through a grove of oak trees, in full leaf, in the vicinity of the church. Some trees and limbs had been cut at the location where the old church building had been moved across the road.

A witness (Morton) was seated on a school bus, traveling approximately fifty yards behind the truck. He saw the power line when he was about thirty feet from it. He testified: "You could see the wire both to the right and left of the road for a distance of about thirty feet at that time of day. I could not see it straight ahead very well. I saw it when it came from the old Church building and I saw it where it was attached to the tool house."

Plaintiff was watching for the wire but did not see it. He knew the wire was there but did not know its height. He attributed his inability to see it, in part, to the presence of the trees, some fifty to seventy-five feet high.

When he was within ten feet of the power line, a workman called to him from the church steeple: "Hello, Old Man Teeman." (Plaintiff was then fifty-seven years old.) Instinctively, he looked in that direction and answered: "Good morning, son." When he turned back, he looked for the wire but didn't see it. The wire came "sliding right over the top" of the main load of hay. Neither the cab nor the hay was struck. Greene saw the wire coming near the top of the hay. He called, "Duck," and laid his head on the hay. Just then, the wire struck plaintiff in the mouth, threw him from the truck and caused him to suffer injuries.

A witness (Shaver) offered by plaintiff testified that on 11 September, 1950, when driving his transfer truck along the church road at night, he had knocked down the wire; and that the same thing occurred about four days later. The height of his truck was eleven feet, three inches.

Plaintiff's evidence tended to show that on 21 September, 1950, the wire was located, as to height and all other respects, as when originally constructed.

Defendant's evidence tended to show that it had constructed the power line; that it had furnished power to Holbrook from the time it was constructed until plaintiff was injured; and that since its construction the power line had been under its inspection and supervision.

Plaintiff's injury was caused by contact with the wire itself, not by electric current.

Evidence of plaintiff and of defendant as to the height of the power line, crossing the church road, was sharply in conflict.

Issues arising on the pleadings were answered by the jury as follows:

"1. Was the plaintiff's claim duly presented to the City Council of the City of Albemarle? Answer: YES.

"2. Is the plaintiff barred by the statutes of limitations? Answer: No.

"3. Was the plaintiff injured by the negligence of the defendant City of Albemarle, as alleged in the Complaint? Answer: YES.

"4. Did the plaintiff by his own negligence contribute to his injury, as alleged in the Answer? Answer: No.

"5. What amount, if anything, is the plaintiff entitled to recover? Answer: $4,400.00."

Plaintiff was awarded judgment against defendant, in accordance with the verdict. Defendant appealed, assigning errors.

C. M. Llewellyn and M. B. Sherrin for plaintiff, appellee.

R. L. Smith & Son and Henry C. Doby, Jr., for defendant City of Albemarle, appellant.

BOBBITT, J. When the evidence is considered in the light most favorable to plaintiff, the case presented was one for submission to the jury. Hence, defendant's assignments of error, based on the denial of its motions for judgment of nonsuit, are overruled.

The facts as to the purpose and location of the power line are stated above. Plaintiff's evidence tends to show that the height of the wires, over the church road, was nine feet, nine inches.

In some states, the minimum height at which wires may be placed, or permitted to remain, above any traveled portion of a highway, is fixed by statute. *Eaton v. Consumers' Power Co.*, 256 Mich. 549, 240 N.W. 24. In the absence of such statute, it has been held that a person maintaining an overhead wire across a public road has no legal duty to maintain it at height greater than that necessary to clear vehicles within the maximum legal height. *Osborne v. Chesapeake & Potomac Telephone Co.*, 121 W. Va. 357, 3 S.E. 2d 527. Our statute, G.S. 20-116 (c), in pertinent part, provides that "no vehicle, unladen or with load, shall exceed a height of twelve feet, six inches, . . ." When the height of the vehicle, unladen or with load, does not exceed twelve feet, six inches, it may be lawfully operated upon any public road. The liability of one responsible for a wire stretched across a road at a height less than twelve feet, six inches, which causes injury to a motor vehicle or its occupants, rests on the general law of negligence. 60 C.J.S. 550, Motor Vehicles sec. 205. The court properly submitted the issue of negligence under appropriate instructions of law as related to evidence.

Even so, defendant insists that the evidence discloses that plaintiff was contributorily negligent, as a matter of law. In this connection, the applicable rule, as stated often in our decisions, is that judgment of nonsuit will not be entered unless the evidence, taken in the light most favorable to plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. *Horton v. Peterson*, 238 N.C. 446, 78 S.E. 2d 181. "The court is not at liberty to withhold the question from the jury, simply because it is

fully convinced that a certain inference should be drawn, so long as persons of fair and sound minds might possibly come to a different conclusion." Negligence, Shearman and Redfield, Revised Edition, sec. 129.

The general rule, applicable here, is well stated in 65 C.J.S. 726, Negligence sec. 120, as follows: "When a person has exercised the care and caution which an ordinarily prudent person would have exercised under the same or similar circumstances, he is not negligent merely because he temporarily forgot or was inattentive to a known danger. To forget or to be inattentive is not negligence unless it amounts to a failure to exercise ordinary care for one's safety. Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion. Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as where the situation requires one to give undivided attention to other matters, or is such as to produce hurry or confusion, or where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger. In order to excuse forgetfulness of, or inattention to, a known danger, some fact, condition, or circumstance must exist which would divert the mind or attention of an ordinarily prudent person; mere lapse of memory is not sufficient, and, if, under the same or similar circumstances, an ordinarily prudent person would not have forgotten or have been inattentive to the danger, such conduct constitutes negligence." See also: 25 Am. Jur. 760, Highways sec. 468; 40 C.J.S. 319, Highways sec. 270.

The issue of contributory negligence was held for the jury, when plaintiff's attention was momentarily and involuntarily diverted when accosted by another person, in the following cases: *City of Valparaiso v. Schwerdt,* 40 Ind. App. 608, 82 N.E. 923; *Gigoux v. Yamhill County,* 73 Ore. 212, 144 Pac. 437; *Kenyon v. City of Mondovi,* 98 Wis. 40, 73 N.W. 314; *Lyon v. City of Grand Rapids,* 121 Wis. 609, 99 N.W. 311.

Upon the evidence here presented, the inference is permissible that plaintiff responded involuntarily when accosted by one calling from the steeple of the church. It can hardly be said that, when plaintiff's attention was momentarily diverted by this rather unusual greeting, the only permissible inference is that he failed to act as an ordinarily prudent person would have acted under the circumstances then existing.

Difficulty in observing the wire, on account of its size, color and location; inability to gauge the height of the wire on this and prior occasions and lack of knowledge of its height; and the momentary and involuntary diversion of attention when accosted from the church steeple; these circumstances, when considered together, are such that more than

one reasonable inference may be drawn therefrom. Hence, the court properly submitted the issue of contributory negligence under appropriate instructions of law as related to the evidence.

Defendant further contends that the court, in its charge, erroneously submitted the negligence issue on a theory of liability unsupported by appropriate allegation.

Plaintiff alleged that "the City of Albemarle and Ray Snuggs" were negligent in their construction and location of the power line. He alleged further that the wires had been torn down when struck by a truck and thereafter repaired and replaced by "the defendants," in the same position.

There was ample evidence to support the first of these allegations and to support the proposition that the wires remained as originally located until plaintiff's injury. The testimony of Shaver stands alone. His is the only evidence tending to show the wires were knocked down by a truck. Defendant's evidence tends to show no such incident occurred. If the wires were knocked down and replaced, there is no evidence as to who replaced the wires between 11 September, 1950, and 21 September, 1950. Yet there is ample evidence that the wires on 21 September, 1950, were in their original location.

In this situation, the court submitted plaintiff's case on two theories of liability: (1) that the power line had remained as originally constructed; and, if not, (2) that defendant had knowledge or notice that it had been restored and was in use at the same location. Under principles of law underlying the decision in *Kiser v. Power Company,* 216 N.C. 698, 6 S.E. 2d 713, the second theory of liability was a possibility arising upon the evidence then before the court and jury. The crucial issue in controversy was whether the wires on 21 September, 1950, were located and maintained at such height over the church road as to constitute negligence.

Was plaintiff precluded from having his case properly submitted to the jury by variance between his pleading and the evidence? It is noted that plaintiff did not specifically allege that the City of Albemarle, one of three original defendants, replaced the wires. Plaintiff did allege generally that the defendants had knowledge of the location and condition of the wires. Plaintiff did not allege specifically that defendant at all times "maintained" the power line. Yet this may be implied from other allegations and is clearly shown by defendant's evidence. "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." G.S. 1-151.

Conceding that the complaint should have been amended to conform more closely to the alternative theories of liability, dependent upon the

jury's findings of fact, we cannot see that the defendant, who neither alleged nor offered evidence that plaintiff's injury was caused by the intervening negligent act of a third party, has been taken by surprise or is in any way prejudiced. Hence, such variance as may exist is deemed immaterial. G.S. 1-168. The case is readily distinguishable from *Harton v. Telephone Co.*, 146 N.C. 430, 59 S.E. 1022, upon which defendant relies.

Defendant assigns as error the peremptory instructions given in plaintiff's favor on the first and second issues.

At the trial, plaintiff was permitted to amend his complaint so as to allege that he presented to the Mayor and governing body of the City of Albemarle within two years from its occurrence his claim for injuries sustained by him on 21 September, 1950; and defendant was permitted to amend its answer so as to plead the special charter provision set out below, and plaintiff's failure to present claim as required thereby, as a further defense to plaintiff's action.

The charter provision, offered by defendant, provides: "That all persons having claims against the town of Albemarle of whatever nature or kind, shall first present the same to the board of commissioners . . . for payment at least sixty days before any suit shall be entered or maintained upon said claim."

Defendant's contention is that the evidence is insufficient to show that plaintiff presented his claim to the Board of Commissioners as required by this charter provision and also by G.S. 1-53.

G.S. 1-53, presently codified as a statute of limitation, provides, in part, as follows: "All *claims* against counties, cities and towns of this State shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the *maturity* of such claims, or the *holders* shall be forever barred from a recovery thereon, . . ." (Emphasis added.) An interesting discussion of the history of G.S. 1-53 appears in 27 N.C.L.R. 145 *et seq.* The words emphasized in the portion quoted, as well as the further provisions thereof, and the history of said statute, impel the conclusion that G.S. 1-53 does not apply to actions for damages based on torts. This answers the query posed in *Rivers v. Wilson*, 233 N.C. 272, 63 S.E. 2d 544. It is noted that a like construction has been placed upon G.S. 153-64. *Nevins v. Lexington*, 212 N.C. 616, 194 S.E. 293; *Sugg v. Greenville*, 169 N.C. 606, 86 S.E. 695.

The facts relating to the presentation of plaintiff's claim are as follows: Formal notice of plaintiff's claim was prepared by attorneys acting for plaintiff, in which full particulars of plaintiff's injury on 21 September, 1950, were set out, and demand was made for damages in the amount of $10,000.00. This was addressed to the Mayor and Board

of Commissioners of Albemarle and delivered by plaintiff's counsel to the City Clerk. The attorney then acting for plaintiff testified to these facts. He was shown a carbon copy of such formal notice and asked to identify it. Thereupon, as shown by the record: "Defendant's counsel supplied plaintiff's counsel with original instrument." The original, so produced by defendant, was then identified and offered in evidence.

Defendant contends that delivery to the City Clerk was not presentation to the Board of Commissioners, citing *Nevins v. Lexington, supra.* We need not consider whether this, standing alone, would be sufficient. Substantial compliance with the charter provision was required. *Ivester v. Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88; *Perry v. High Point,* 218 N.C. 714, 12 S.E. 2d 275. Here the original notice, more than three years after it had been delivered to the City Clerk, was produced by defendant voluntarily in open court for use as an exhibit in lieu of plaintiff's carbon copy thereof. The original notice had been and was in defendant's custody. Under these circumstances, nothing else appearing, it must be held that plaintiff's demand was presented to the Board of Commissioners in substantial compliance with the charter requirements.

Other assignments of error do not require analysis or discussion. The case was well tried and in it we find no prejudicial error.

No error.

PAUL L. MUILENBURG AND WIFE, MARTHA D. MUILENBURG, v. D. O. BLEVINS, JR.

(Filed 25 May, 1955.)

1. Appeal and Error § 6c (2)—

A sole exception to the judgment presents the one question as to whether the findings of fact are sufficient in law to support the judgment.

2. Deeds § 16b—

The findings of fact in this case to the effect that the neighborhood in which plaintiffs' property is situated had undergone such a radical, substantial and fundamental change in character from residential to business purposes as to render the property no longer suitable or valuable for residential purposes, that the property had been zoned by the municipality for business, and that a residential restriction of the same character imposed on a lot in the same neighborhood had theretofore been declared unenforceable, *are held* to support the judgment declaring the residential restrictions null and void.

3. Same—

Ordinarily, in an action to declare residential restrictions unenforceable and void because of change in conditions, it should be made to appear

whether or not the subdivision in which the property is situated was originally developed and sold under a uniform scheme or plan of development in order to determine whether or not the covenants are enforceable *inter se* by the owners of lots in the subdivision, and all persons who may have a right to enforce the covenants *inter se* or otherwise, should be made parties.

APPEAL by defendant from *Patton, Special Judge,* March Term, 1955, of MECKLENBURG.

This is an action for specific performance. An agreement, entered into by and between the parties, provided for the payment to the plaintiffs by the defendant of $1,000 upon its execution and for the payment of the balance of the agreed purchase price upon the execution and delivery of a deed to the *locus in quo,* such deed to be in fee simple and free and clear of all encumbrances as well as free from any enforceable restrictions or zoning regulations of the City of Charlotte which would prevent the property from being used for commercial purposes.

The cause came on for hearing at the March 21st Extra Civil Term of the Superior Court of Mecklenburg County. The parties waived a jury trial and agreed that his Honor, George B. Patton, holding said court, should hear the matter, find the facts, make his conclusions of law and enter judgment accordingly.

"FINDINGS OF FACT

"1. That the plaintiffs are the owners of a lot on the southeast corner of Providence Road and Circle Avenue, as shown in and described in book 1740, page 97, in the office of the Register of Deeds for Mecklenburg County.

"2. That by deed of the Elizabeth Realty Company dated March 3, 1911, recorded in book 269, page 686, in the office of the Register of Deeds for Mecklenburg County, certain restrictions were imposed on the said lot as follows:

" 'This deed is executed and the lot herein described is conveyed upon the following conditions, to-wit: First, that the said lot shall never be owned or occupied by any person or persons of the Negro race or with Negro blood. Second, that no house shall be built upon the said lot nearer than 25 feet to the line of the said Circle Avenue. Third, that the said lot shall be used only for residence purposes. Fourth, that no house built on said lot shall cost less than $2,000 Dollars, except the necessary outhouses used in connection with the main dwelling-house.'

"That after *mesne* conveyances, the said lot was conveyed to plaintiffs by the heirs of Daisy Tickle (deceased) by deed containing the said restrictions.

"3. That approximately 44 years ago, namely in 1911, when the said restriction of the lot to usage for residential purposes was imposed, a substantial portion of the subdivision in which plaintiffs' lot was situated was outside the city limits of Charlotte; nearly two miles from downtown Charlotte, and the area, though sparsely settled, was then residential in character.

"4. That with the great growth of the City of Charlotte in the past 15 or 20 years and the extension of the city limits, Providence Road, on which the *locus in quo* is situated, became and now is one of the most heavily traveled thoroughfares in the city by buses, trucks and other vehicles; that the city limits are now from two to three miles beyond the *locus in quo* and the large population in the Myers Park, Eastover and suburban areas use the Providence Road as a principal means of ingress and egress to the Providence Road shopping area of which plaintiffs' property became and now is a part, and as a thoroughfare to the downtown business and commercial area.

"5. That within a maximum radius of 800 feet to a minimum of 50 feet but generally within a radius of 300 feet plaintiffs' property is surrounded by and adjacent to filling stations, a liquor store, barber shop, beer and soda shop, an office building, a funeral home, restaurant, a heating business, and numerous apartment houses on all sides; that beyond the 800 feet radius southerly, the Providence Road shopping area extends in a practically unbroken line for a half mile to Queens Road containing supermarkets, restaurants, offices, drug stores, beauty parlors, filling stations, etc., much like the business area of a small or medium sized town, all as set forth in detail in a map of the area attached to the complaint.

"6. That while the neighborhood in which the plaintiffs' property is situated was many years ago a residential area, because of the said great influx of business, the said neighborhood adjacent to plaintiffs' lot has undergone a radical, substantial and fundamental change in character from residential to a business character; that the plaintiffs' property is no longer suitable, useful or valuable for residential purposes but is more suitably employed and valuable for business purposes; that the value of the property for business purposes is more than twice the value for residential purposes.

"7. That plaintiffs' lot is situated in the same subdivision, neighborhood and vicinity and subject to the same general restrictions as those imposed on the lot in the case of *Elrod v. Phillips,* 214 N.C. 472, in which case the said restrictions were determined null and void and unenforceable; that since the decision in that case in 1938, the said adjacent neighborhood and the entire Providence shopping area has greatly increased in the development of many new businesses.

"8. That the City of Charlotte Zoning Board more than eight years ago, namely, in January of 1947, zoned the general area within which plaintiffs' property is situated, and more particularly the property itself, for general business purposes under the zoning classification of 'B-1.'

"9. That the plaintiffs and defendant have entered into a valid, enforceable, and binding contract for valuable consideration whereby plaintiffs agreed to sell and the defendant to purchase the said property; that the plaintiffs have made proper tender of a deed to defendant and defendant refuses to accept said deed and pay the purchase price; that the said contract is one that may be enforced and that the plaintiffs are entitled to specific performance thereof and that unless said contract is performed by defendant the plaintiffs will suffer irreparable loss and damage."

"CONCLUSIONS OF LAW

"1. That the neighborhood and vicinity within which plaintiffs' property is situated has undergone such a fundamental, radical and substantial change as to render said property wholly unfit and unsuitable for residential purposes and that to continue said restrictions would work a great hardship upon plaintiffs and be of no benefit to other adjoining owners similarly situated.

"2. That the restrictions placed on plaintiffs' lot more than 44 years ago no longer serve the purpose for which they were imposed but are detrimental and injurious to the said property and if permitted to remain thereon will frustrate and retard the necessary development of the Providence Road business area and deny to plaintiffs the proper use and benefit of said property.

"3. That the contract between the plaintiffs and defendant is a valid and binding agreement in writing, having been entered into for valuable consideration and is enforceable at law by specific performance.

"NOW, THEREFORE, upon motion of Porter B. Byrum, attorney for the plaintiffs, it is CONSIDERED, ORDERED AND ADJUDGED:

"1. That the restrictions heretofore existing upon plaintiffs' lot as set forth herein and appearing of record in the chain of title be, and said restrictions are hereby declared null and void, and the said lot may henceforth be used for any lawful purpose.

"2. That defendant be and he is hereby required to specifically perform the contract of purchase described in, and a copy of which was attached to, the complaint.

"3. That defendant be taxed with the costs of this action.

"This 29th day of March 1955."

From the judgment entered the defendant appeals, assigning error.

Porter B. Byrum for appellees.
Charles B. Caudle for appellant.

DENNY, J. The only assignment of error on this appeal is based on an exception to the judgment. Therefore, since no exceptions were taken to the findings of fact or the conclusions of law, the only question presented is whether the findings are sufficient in law to support the judgment. *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609; *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869; *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467; *Stewart v. Duncan*, 239 N.C. 640, 80 S.E. 2d 764; *Wyatt v. Sharp*, 239 N.C. 655, 80 S.E. 2d 762; *Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759. The findings of fact on this record are sufficient to support the judgment entered below, and the exception thereto must be overruled.

We think, however, it might be well to make some observations with respect to actions instituted for the purpose of striking down restrictive covenants. In the instant case there would seem to be no doubt of the character of the community in which the plaintiffs' property lies having changed radically and fundamentally from a residential to a business community since the restrictive covenants were imposed 44 years ago. This is so evident that the Zoning Board of the City of Charlotte in January 1947 zoned all the property in this immediate area, fronting on Providence Road, including the property of the plaintiffs, for business. It is said in 14 Am. Jur., Covenants, Conditions and Restrictions, section 302, page 646, *et seq.*: "A change in the character of the neighborhood which was intended to be created by restrictions has generally been held to prevent their enforcement in equity, where it is no longer possible to accomplish the purpose intended by such covenant, . . . and, owing to the changed conditions, the enforcement of the covenant would be of no benefit to the party seeking an injunction, but, on the other hand, would result in an increased value of his premises by a departure from the restrictions, or where enforcement would be inequitable," citing *Starkey v. Gardner*, 194 N.C. 74, 138 S.E. 408, 54 A.L.R. 806.

According to the affidavits submitted in the hearing below, the neighborhood in which the property of the plaintiffs is located has changed to the extent that plaintiffs' property is relatively valueless as residential property and, on the contrary, has become useful and very valuable for business purposes. An apartment house is located on the lot adjacent to the plaintiffs' property to the east on Circle Avenue. In this same block at the corner of Circle Avenue and Willoughby Street, according to the record, is a plumbing and heating establishment. Adjacent to the property of the plaintiffs on the south is an apartment house,

while on the west side of Providence Road opposite plaintiffs' property the entire block is occupied by an apartment house, an office building and a filling station. Also to the south of the block in which plaintiffs' property is located and on the same side of Providence Road, 21 business establishments are located within the next five blocks. On the west side of Providence Road and within the two blocks immediately to the north of plaintiffs' property, an ABC store, a beer and soda shop, a barber shop and four apartment houses are located. A filling station is located within the subdivision in the block immediately south of plaintiffs' property on the east side of Providence Road, and a restaurant and funeral home on the opposite side of the Road.

While it is true that under our decisions the construction of an apartment house is permissible under restrictions limiting the use of property for residential purposes only, *De Laney v. Van Ness,* 193 N.C. 721, 138 S.E. 28, 57 A.L.R. 238, it is becoming a rather general practice to exclude apartment houses from restricted residential areas.

In light of the facts found by the court below, which findings are supported by ample evidence, and our decision in *Elrod v. Phillips,* 214 N.C. 472, 199 S.E. 722, it would seem these litigants are entitled to the relief granted. Even so, in an action brought for the purpose of having restrictive covenants in a deed declared null and void, it should be made to appear in the hearing in the Superior Court whether or not the subdivision in which the property involved is a part, was originally developed and sold under a uniform scheme or plan of development which required the restrictive covenants to be inserted in all deeds for the benefit of all owners of property within the development. This information is necessary in order to determine whether or not such covenants are enforceable *inter se. Maples v. Horton,* 239 N.C. 394, 80 S.E. 2d 38; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Vernon v. Realty Co.,* 226 N.C. 58, 36 S.E. 2d 710; *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184; *Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233. Ordinarily, unless it affirmatively appears that the property involved was not sold pursuant to a general scheme or plan of development, and the restrictive covenants were not inserted in all the deeds for the benefit of the owners of property within the development, *Maples v. Horton, supra; Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918; *Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697; *Snyder v. Heath,* 185 N.C. 362, 117 S.E. 294, the cause will be remanded to the end that those parties who may have the right to enforce the covenants *inter se* or otherwise, may be made parties to the action. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344. But in view of the facts found herein and our former decision in *Elrod v. Phillips, supra,* in which this

Court approved the nullification of similar restrictions to property in this subdivision, the judgment of the court below will be upheld.

Affirmed.

T. S. MEMORY v. W. G. WELLS AND WIFE, VICTORIA MARRAN WELLS.

(Filed 25 May, 1955.)

1. Adverse Possession § 17—

There is a rebuttable presumption of fact that possession is in him who has the true title.

2. Same—

Where plaintiff shows a common source of title and title to the disputed area in himself from that source, and defendants assert title to the disputed area by adverse possession, the burden on the issue of adverse possession is upon defendants.

3. Adverse Possession § 19—

Where defendants assert title to the *locus in quo* by adverse possession, and the evidence is conflicting as to whether they had been in the exclusive possession for the statutory period, the issue is for the jury, and the defendants' motion to nonsuit is properly denied upon plaintiff's evidence establishing a common source of title and legal title from that source.

4. Adverse Possession § 18—

A witness may testify as to the acts of ownership exercised over the property, but is not entitled to testify to the conclusion that she or her predecessors in title had been in the adverse, open and notorious possession of the land, this being the question for the determination of the jury under correct instructions.

5. Same—

Testimony as to statements made by predecessors in title as to their acts of dominion and ownership over the *locus in quo* are incompetent as self-serving and hearsay.

6. Ejectment § 16—

In an action for the possession of realty, plaintiff may introduce in evidence a deed referred to in defendants' answer for the limited purpose of attacking it.

7. Boundaries § 5e—

A map made by a civil engineer appointed by the court and acting under court order for both parties is competent in evidence not only for the purpose of illustrating the testimony, but also as evidence of the contentions of the parties, and the court surveyor may testify with reference to the beginning points of his survey, and how he located them, and the course and distance of the lines shown on the map.

APPEAL by defendants from *Paul, S. J.*, December 1954 Term, BRUNSWICK.

Civil action: (1) To have the plaintiff declared the owner and entitled to possession of a certain specifically described lot in the Town of Southport; and (2) to require the defendants to remove an archway and fence constructed by them upon the plaintiff's lot.

The defendants denied plaintiff's ownership and right to possession of the land upon which the archway and fence were constructed, and allege they are the owners by virtue of having held the same adversely under known and visible lines and boundaries for more than 20 years, and under color of title for more than seven years.

The parties own adjoining lots. Their houses front on Lord Street, have been built for many years, and are about 12 feet apart. The land in dispute consists of a driveway 7.78 feet wide, beginning at Lord Street and extends between the two houses to plaintiff's garage located at the back of his house. This driveway provides the only means of access by vehicle from the street to the plaintiff's garage and the back of his lot.

The plaintiff offered in evidence a warranty deed to himself from H. A. Jones and wife, dated 6 July, 1951, conveying the lot described in his complaint. He then offered recorded deeds in the inverse order of their date and registration, connecting his title with that of Joseph Keen who conveyed to Catherine Price for life, and upon her death to her children by her husband, Jacob A. F. Price. The Keen deed is dated 10 November, 1868. The parties stipulated: "That so far as the record title is concerned, Catherine Price and her children by Jacob A. F. Price are the ancestors in title of the plaintiff and the defendants."

The plaintiff called as a witness John Davis, licensed civil engineer who "was appointed and acted as court surveyor in this matter." Mr. Davis testified he established for the purpose of his survey two stone monuments, one at the intersection of Davis and Nash Streets, and the other at the intersection of Caswell and Nash Streets, established a base line between the monuments, and therefrom surveyed the lots of the parties and their respective contentions as to the boundary line between them. The disputed area is shown on the court map as included in A-B-C-D-A. The disputed driveway is covered by the plaintiff's deed.

The plaintiff called as a witness Mr. J. I. Davis, who testified in substance that he is 73 years old and has lived in Southport with the exception of two years. He lived across the street from the property for 32 years. At this time there is a short fence near the bay window of the Memory house. It was put there in 1946. Prior to that time no fence was there, but there was a fence about 18 inches from the side of the Wells house. That fence was there 32 years ago. Between the

fence (18 inches from the Wells house) and the fence put there in 1946 (near the bay window of the Memory house) there was grass, which was tended and cut by Mr. O'Brian who lived in the Memory house.

The defendants introduced a number of witnesses who testified the fence had been located for as much as 40 years near (within about one foot) of the Memory house, and that the defendants and their predecessors in title had been in the peaceful possession of the disputed land for as long as 40 years. One of the defendants' witnesses testified she once owned the Memory lot and lived there from 1921 to 1938. A fence separated the two lots and the driveway was on the defendants' side of the fence. The witness built a garage back of her house and used the driveway to and from the garage. A number of defendants' other witnesses testified that the defendants and their predecessors in title had been in possession of the disputed driveway for more than 20 years. Some of them, however, testified that the driveway had been used by the predecessors in title of both parties. At the close of all the evidence the defendants renewed their motion for judgment of nonsuit, which had first been interposed at the close of the plaintiff's evidence, both of which were overruled by the court.

The parties stipulated two issues should be submitted as determinative of the matters in dispute:

1. Is the plaintiff the owner of and entitled to the possession of that certain lot of land shown upon the court map by the letters A-B-C-D-A?

2. Have the defendants, Wiley G. Wells and wife, Victoria Marren Wells, and their ancestors in title been in the continuous, open, notorious and adverse possession of the lands shown upon the court map by the letters A-B-C-D-A under known and visible lines and boundaries for a period of 20 years prior to the commencement of this action?

The parties stipulated, further, the court should submit only the second issue to the jury and if the jury answered the second issue, yes, the court should answer the first issue, no; but if the jury answered the second issue, no, the court should answer the first issue, yes.

The jury answered the second issue, "No." The court then answered the first issue, "Yes," and rendered judgment for the plaintiff, from which the defendants appealed.

Ray H. Walton for plaintiff, appellee.
Isaac C. Wright and R. I. Mintz for defendants, appellants.

HIGGINS, J. The plaintiff alleges he is the owner and entitled to the possession of a specifically described lot in the Town of Southport, and that the defendants have trespassed on a portion of that lot by erecting

an archway and fence thereon. The answer denies the plaintiff's ownership and asserts the defendants are owners of that portion of the lot in dispute by reason of title acquired by adverse possession. By stipulation the disputed area is designated by the letters A-B-C-D-A, on the surveyor's map. The stipulations do little more than pinpoint the main issue raised by the pleadings—the defendants' title by adverse possession.

The issue before the jury was: Did the defendants carry the burden of showing by the greater weight of the evidence that they and their predecessors in title had been in the open, notorious, exclusive and hostile possession of the disputed driveway under known and visible boundaries for 20 years?

At the outset the defendants are confronted with the presumption that possession is in him who has the true title. *Gibson v. Dudley,* 233 N.C. 255, 63 S.E. 2d 630; *Vanderbilt v. Chapman,* 175 N.C. 11, 94 S.E. 703. The presumption, of course, is one of fact and may be rebutted. The pleadings and the stipulations, construed together, place the record title in the plaintiff, and his right to the disputed area can be defeated only by a finding defendants have acquired title by adverse possession. According to defendants' evidence, the hostile flag was raised over the disputed driveway by the construction of the fence which blocked the plaintiff and his predecessors in title from using it. Plaintiff's evidence fixes 1946 as the date the fence was erected. Defendants' witnesses fix a much earlier date, as much as 40 years ago, though some of them say the former owners of both lots used the driveway. The evidence of adverse possession was conflicting. The burden of the issue was upon the defendants. The jury's verdict says they failed to carry that burden.

Unless reversible error appears in the court's ruling on the admissibility of evidence on the issue of adverse possession, or in the charge on that issue, the judgment must be affirmed. Twenty assignments of error based on 44 exceptions appear in the record. The exceptions were taken by counsel who were careful to see the defendants' rights were protected. All have been examined. Only a few require discussion. Mrs. Wells, one of the defendants, would have testified, if permitted, that she, her mother and grandmother had been in the open, notorious and adverse possession of the land in dispute for more than 20 years. The evidence offered is a conclusion which the jury may draw from competent evidence, but the witness is not permitted to do so. A witness may tell what use has been made—what acts of ownership have been exercised over the property. Then it is for the jury to say, under proper instructions, whether that constitutes open, notorious and adverse possession. The evidence was properly excluded in the form offered. Mrs. Wells offered to testify also as to statements made to her

by her predecessors in title in respect to their acts of dominion and ownership over the *locus in quo*. They were properly excluded as being both self-serving and hearsay.

"For the purpose of attacking the contentions of the defendant as to the beginning clause of that deed of John E. Price set out in the answer and for that purpose only," the plaintiff offered a deed dated 6 March, 1880. The defendants objected to the limited purpose for which the deed was offered. The objection is without merit. A deed is frequently offered for the purpose of attacking it. This is true especially in actions to remove cloud upon title. It would be difficult to make out such a case otherwise. In this case the deed would have been harmless if offered generally. The only question before the jury was the defendants' adverse possession for 20 years. The stipulation eliminated all other issues.

The defendants objected to the introduction in evidence of the map made by Mr. Davis, surveyor appointed by the court under G.S. 38-4. Mr. Davis testified he is a licensed civil engineer and surveyor; that he made a survey and map of the lands belonging to the parties. He conferred with counsel for both parties and surveyed their respective contentions and designated them on his map. The map was properly received in evidence over objection. Ordinarily, a map or photograph is admissible only for the limited purpose of enabling witnesses to explain and illustrate their testimony. *S. v. Norris,* 242 N.C. 47. In the case of *Poole v. Gentry,* 229 N.C. 266, 49 S.E. 2d 464, this Court admitted a map of lands in dispute for the limited purpose of enabling the witnesses to explain their testimony. In that case, however, the map was made by the surveyor employed by one of the parties. In this case the map was made by a court-appointed civil engineer acting under court order and for both parties. The map was admissible not only for the purpose of illustrating the testimony, but also as evidence of the contentions of the parties.

The exceptions of the defendants to the testimony of the court surveyor with reference to the beginning points of his survey, how he located them, and the course and distance of the lines shown on the map cannot be sustained.

The court properly overruled the defendants' motion for judgment of nonsuit. The pleadings and stipulations placed upon them the burden of defeating plaintiff's claim by proving title in themselves by adverse possession for the statutory period. It is for the jury and not for the court to say whether the defendants have carried the burden. *Bryan v. Spivey,* 109 N.C. 57, 13 S.E. 766; *Power Co. v. Taylor,* 194 N.C. 231, 139 S.E. 381; *Bryant v. Murray,* 239 N.C. 18, 79 S.E. 2d 243. The case at bar is strikingly similar to the case of *Gibson v. Dudley, supra,* with

the parties reversed. In the *Gibson case* the plaintiff claimed the driveway by 20 years adverse possession and the defendant claimed by reason of superior paper title. The claim of adverse possession failed in the *Gibson case.* It fails here.

The numerous exceptions taken during the progress of the trial, including request for special instructions, have been examined. The charge, as given, presents the issue fully and fairly and is in substantial accord with established legal principles. Sufficient reason to disturb the verdict does not appear.

No error.

COMPETITOR LIAISON BUREAU OF NASCAR, INC., NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., JAMES F. CHESNUTT, DIXIELAND SPEEDWAYS, INC., AND J. & W. CORPORATION, AND WILLIAM H. G. FRANCE, v. REBECCA J. BLEVINS, VICKY A. BLEVINS, MINOR, REBECCA M. BLEVINS AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM W. BLEVINS, AND MRS. ELMA BLEVINS.

(Filed 25 May, 1955.)

1. Declaratory Judgment Act § 2b—

The Declaratory Judgment Act does not authorize the submission of a theoretical problem or a mere abstraction. G.S. 1-253.

2. Same—Facts held insufficient to present controversy cognizable under Declaratory Judgment Act.

This proceeding under the Declaratory Judgment Act was instituted to ascertain whether insurance issued in connection with auto racing sanctioned by the parent company precluded recovery for wrongful death against the promoters or managers of such sanctioned races. It was admitted that the insured was fatally injured in a collision in a sanctioned racemeet, and it appeared that the administratrix of insured had instituted action for wrongful death against the promoters and managers of that racemeet. *Held:* The question of negligence is a question incidental to the action by the administratrix, and in the absence of an admission in the action under the Declaratory Judgment Act that insured's death resulted from negligence, the facts are insufficient to present a controversy cognizable under the Declaratory Judgment Act, and the cause is remanded by the Supreme Court *ex mero motu.*

APPEAL by plaintiffs from *Stevens, J.,* at February Civil Term, 1955, of CUMBERLAND.

Civil action instituted under the provisions of the Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.*

The pleadings shown in the record on this appeal disclose these uncontroverted facts:

1. That on 7 June, 1953, William W. Blevins entered into a benefit plan conducted by Competitor Liaison Bureau of NASCAR, Inc., and made application for license to participate in NASCAR sanctioned stock car racemeets, and executed registration agreement for participation in such benefit plan. In the application Rebecca J. Blevins and Vicky A. Blevins are designated as death beneficiaries. And the application contains these provisions:

"I expressly understand and agree that upon issuance of NASCAR license to me, and upon payment of fees required by NASCAR, I will be entitled only to the benefits provided by the Benefit Plan of Competitor Liaison Bureau of NASCAR, Inc., for injuries (including death) I might sustain in NASCAR-sanctioned racemeets or other events pursuant to the contract between NASCAR and Competitor Liaison Bureau of NASCAR, Inc., and the insurance carrier and upon presentation of proofs required.

"It is further understood and agreed that the foregoing shall be and constitute the limit of liability for any injuries (including death) that I may incur, provided claim is filed within 30 days of accident.

"In consideration of the acceptance by NASCAR of my license application and issuance of license, and in consideration of the foregoing, I do hereby release, remise and forever discharge NASCAR, the promoters presenting races or other events under NASCAR sanction, and the owners and lessees of premises in which NASCAR sanctioned races or other events are presented, and the officers, directors, agents, employees and servants of all of them, of and from all liability, claims, actions and possible causes of action whatsoever that may accrue to me or to my heirs, next of kin and personal representatives, from every and any loss, damage and injury (including death) that may be sustained by my person and property while in, about, and en route into and out of premises where NASCAR sanctioned races or other events are presented."

2. That this action is instituted under the provisions of Article 26, Chapter 1 of the General Statutes of North Carolina, entitled "Declaratory Judgments," to have declared the rights, status and legal relations of the parties hereto as they are affected by the benefit plan contract just above mentioned.

3. That on 19 September, 1953, William W. Blevins suffered fatal injuries in a collision of race cars while participating in a licensed racemeet and while subject to the benefit plan registration agreement hereinabove mentioned.

4. That Rebecca M. Blevins, as administratrix of the estate of William W. Blevins, deceased, has made demand upon plaintiffs for damages on account of the alleged wrongful death of William W. Blevins.

5. "That plaintiffs have in good faith paid into the Superior Court of Cumberland County, North Carolina, death benefit proceeds under said benefit plan in the sum of $3,000, which sum is now being held by the Clerk of said court in escrow for disbursement in accordance with final judgment in this cause.

6. "That plaintiffs and each of them have a real interest in the said benefit plan registration agreement and the rights, status and legal relations of the parties hereto as they are affected by the provisions thereof, and that an actual controversy exists between the parties hereto which can be settled by a decree of this court and this court should determine the status and rights of parties to this cause under said contract and agreement to avoid injury or damage."

Upon hearing in Superior Court, parties agreed to facts, substantially in accord with the above.

But the record further shows that defendants, in further answer and defense, aver:

"1. That the benefit plan registration, . . . provides certain benefits, or refers to a plan which provides certain benefits, for injury or death, but that said benefit plan registration does not absolve, nor does it purport to absolve, the plaintiffs in this action from their liability for the death of William W. Blevins, as a result of the negligent acts of the plaintiffs in this action.

"2. That the benefit plan registration, . . . if it does have the legal effect of purporting to absolve any of the plaintiffs herein from liability for their negligent acts, should in that part be declared void, as being contrary to sound public policy.

"3. That prior to the filing of this complaint by the plaintiffs herein, the defendant, Rebecca M. Blevins, as Administratrix of the Estate of William W. Blevins, deceased, had filed in the Superior Court of Cumberland County, North Carolina, a complaint against all of the plaintiffs in this action except Competitor Liaison Bureau of NASCAR, Inc., demanding damages for the wrongful death of William W. Blevins, and alleging that such death was the sole and proximate result of certain negligent acts of William H. G. France, National Association for Stock Car Auto Racing, Inc., James F. Chesnutt, Dixieland Speedways, Inc., and J. & W. Corporation.

"4. That this present action brought by the plaintiffs against Rebecca M. Blevins, *et als.*, is not a proper action for the determination of the effect of the alleged negligence of said plaintiffs, as alleged in the said complaint of Rebecca M. Blevins, Administratrix; but rather said determination should be made at the trial of the action instituted by Rebecca M. Blevins, Administratrix.

"5. There is no privity between the defendants and the plaintiffs other than Liaison Bureau of NASCAR, Inc., and there was no consideration moving from the plaintiffs other than Liaison Bureau of NASCAR, Inc., and this action ought to be dismissed as to all plaintiffs except Liaison Bureau of NASCAR, Inc."

The cause coming on for hearing before the Judge presiding at February 1955 Civil Term of Superior Court of Cumberland County, and being heard on the pleadings and on agreed statement of facts submitted by the parties, the court finding: "(a) That this is a proper controversy for determination of the rights, status and legal relations of the parties under Article 26, Chapter 1, of the General Statutes of North Carolina;

"(b) That the defendants Rebecca J. Blevins and Vicky A. Blevins are entitled to the sum of $3,000.00, one-half to be paid to Rebecca J. Blevins and one-half to be paid to Rebecca M. Blevins as guardian for Vicky A. Blevins; and

"(c) That neither such payment nor the benefit plan registration agreement nor benefit plan under which it is paid constitutes a bar to any action or recovery in any action by the Administratrix of the Estate of William W. Blevins for wrongful death based on negligence of the plaintiffs in this action"; ordered, adjudged and decreed:

"1. That the Clerk of the Superior Court of Cumberland County shall pay to the defendant, Rebecca J. Blevins, individually, the sum of $1,500.00, and to Rebecca M. Blevins, as guardian for the defendant, Vicky A. Blevins, the sum of $1,500.00, deposited with said Clerk by the plaintiffs in this cause, under the terms of that certain benefit plan.

"2. That neither such payment nor said benefit plan registration agreement nor said benefit plan constitutes a bar to any action, or recovery in any action, by the Administratrix of the Estate of William W. Blevins for wrongful death of William W. Blevins based on negligence."

Plaintiffs excepted to findings of fact (b) and (c) respectively, and to the judgment, Exceptions 1, 2 and 3, and appeal to Supreme Court and assign error.

Long, Ridge, Harris & Walker and Tally, Tally & Brewer for plaintiffs, appellants.

Rose & Sanford and L. Stacy Weaver, Jr., for defendants, appellees.

WINBORNE, J. Appellants in their brief filed here state the following as the question involved on this appeal: "Do the release provisions of registration agreement executed by participant in stock car race prior to entering race event constitute a bar to claim for injury and death on

account of alleged negligence of plaintiffs during course of race?" Patently as here presented this is a moot question. In the first place, sufficient facts are not agreed to present a controversy cognizable under the Uniform Declaratory Judgment Act. It is not admitted that the death of William W. Blevins, participant in a stock car race, was the proximate result of negligence of anyone.

This Court has held that the scope of the Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.*, does not extend to the submission of a theoretical problem or a mere abstraction. *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532; *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E. 56.

Again, while it is set forth in the record that the administratrix of Blevins has made and now makes demand for damages on account of his alleged wrongful death, there is no agreement or fact found in respect to the averments in defendants' answer to the effect that before plaintiffs filed their complaint in this action, the defendant administratrix here, as plaintiff, had filed an action in Superior Court of Cumberland County against all of the plaintiffs in this action, defendants there, except NASCAR, demanding damages for the wrongful death of William W. Blevins,—alleging that his death was the sole and proximate result of certain negligent acts of defendants there. If such be true, an issue as to negligence of defendants in that action is necessarily involved. And the parties may not take time out in the prosecution of that action to ask this Court for an advisory opinion as to a question incidental to that action. See *Redmond v. Farthing,* 217 N.C. 678, 9 S.E. 2d 405.

For reasons stated, this Court, *ex mero motu,* remands the cause for further proceedings as right requires, and justice demands.

Error and remanded.

L. M. BABB v. CORDELL INDUSTRIES, INCORPORATED.

(Filed 25 May, 1955.)

1. Courts §§ 3a, 16—

The inclusion of one account for goods sold and delivered in this State with a large number of other accounts for sales outside the State cannot change the *loci contractus* of the out of state accounts, and when the value of the intra-state account is within the exclusive jurisdiction of a justice of the peace, it cannot be made the basis of an action in the Superior Court.

2. Process § 8a—

In order to bring a foreign corporation into court by service of process under G.S. 1-97, it is necessary that the corporation be doing business here or have property in this State, or that the cause of action arose here, and

that service be made personally upon an officer or agent designated by the statute.

3. Courts § 2—

Jurisdiction over the person of the defendant is a prerequisite to the rendition of a personal judgment against him.

4. Process § 8d: Courts § 16—

In an action between nonresidents upon a transitory cause of action *ex contractu*, the fact that the nonresident defendant corporation is doing business here does not justify service of process by service on the Secretary of State under G.S. 55-38 when the cause of action does not arise in this State, and a judgment rendered upon such service violates the due process clause of the Federal Constitution, and is void.

APPEAL by defendant from *Gwyn, J.*, 6 December, 1954 Civil Term, GUILFORD (High Point Division).

Civil action for the recovery of $6,048.33 alleged to be due for goods sold and delivered.

The plaintiff is a resident of the State of Georgia. The defendant is a New York corporation, neither domesticated nor represented by a designated process agent in the State of North Carolina. Summons was issued 22 July, 1954, first to Guilford County, later to Rowan County, and upon return without service, summons directed to the Sheriff of Wake County was served upon the Secretary of State.

The defendant, through counsel, entered "a special appearance and motion to quash purported service of process and to vacate return of service," upon the assigned reasons, among others, (1) neither the plaintiff nor the defendant is a resident of North Carolina; (2) the defendant is not domesticated in North Carolina and has no process agent in this State; (3) the defendant is not doing business in the State of North Carolina; (4) the defendant owns no property in this State; (5) the purported service on the Secretary of State is invalid.

From the affidavits filed both in support of and in opposition to the motion to dismiss, the trial judge made extensive findings of fact and concluded therefrom, (1) that the defendant was present doing business in North Carolina, and (2) that service of process on the Secretary of State constituted legal service and brought the defendant into court. The motion to vacate the service was denied. The defendant excepted and appealed, assigning errors.

D. A. Rendleman for plaintiff, appellee.
Harry Ganderson for defendant, appellant.

HIGGINS, J. The affidavits afford ample support for the court's findings the defendant was doing business in North Carolina during the

years 1952, 1953 and until July, 1954. Although the defendant took numerous exceptions to the findings of fact, it is doubtful whether the assignments of error based thereon are sufficiently specific to call them into question. However, assignment of error No. 3, based on exception No. 45, challenges the conclusions of law, the sufficiency of the findings to support them, and the validity of the order requiring the defendant to answer.

It appears by inference, and was conceded on the argument, (1) that the plaintiff is a resident of the State of Georgia; (2) that the cause of action except as to $43.70 arose outside the State of North Carolina; and (3) that the defendant has no property here.

The plaintiff is assignee of accounts alleged to have been due H. L. Whitaker, trading as Dalton Manufacturing Company, Dalton, Georgia, for goods purchased by the defendant corporation. Whether the cause of action arose in Georgia, where the seller resided, or in New York, where the purchasing corporation was organized, is immaterial. In either event the cause of action arose outside the State of North Carolina. Goods, however, of the value of $43.70 were sold and delivered to the defendant in High Point, in this State, and the account therefor was included in the assigned accounts. Assuming a cause of action in contract for $43.70 arose in this State, the amount involved is within the exclusive jurisdiction of a justice of the peace and cannot be made the basis of an action in the Superior Court. Its inclusion cannot change the *loci contractus* of the remaining accounts.

The question presented, therefore, is whether a suit by a nonresident against a foreign corporation on a cause of action arising outside this State can be maintained in North Carolina, and the defendant brought into court by a service of process on the Secretary of State. That a nonresident has access to the courts of this State is not debatable. That he can sue a foreign corporation is also beyond dispute. But to bring the foreign corporation into court the service of process must be made upon an officer or agent as defined in G.S. 1-97, and in the following cases only: (1) Where it has property in this State; or (2) where the cause of action arose in this State; or (3) where the service can be made personally upon some officer designated in G.S. 1-97. *McDonald v. McArthur Brothers Co.*, 154 N.C. 122, 69 S.E. 832; *Steele v. Telegraph Co.*, 206 N.C. 220, 173 S.E. 583. In the latter case the plaintiff was a nonresident, the defendant a foreign corporation, the cause of action (transitory) grew out of a transaction in the District of Columbia. However, the defendant *had property and was doing business in this State and the service was made upon the local agent of the defendant.* The service was held valid. The opinion by *Stacy, C. J.*, upholds the service upon the ground the defendant was doing business in North

Carolina and the service was made upon the defendant's local agent. To hold the defendant under the facts in the case did not offend against the due process clause of the Fourteenth Amendment to the Constitution of the United States. The decisions of this and many other jurisdictions are cited in support. In addition, the defendant cites the case of *International Shoe Co. v. Washington,* 326 U.S. 310, reviewing a decision of the Supreme Court of Washington: "Historically the jurisdiction of courts to render judgment *in personam* is founded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was a prerequisite to its rendition of a judgment personally binding on him. *Penoyer v. Neff,* 95 U.S. 714." The courts of the State of Washington had rendered judgment against the International Shoe Company, a foreign corporation, but in that case *the cause of action arose in Washington and process was served on the defendant's agent.*

In the case now before us the defendant did not have property in this jurisdiction. The cause of action did not arise here. The service of process was not made upon a person designated by the statute. Attempted service upon the Secretary of State was a nullity. A judgment rendered upon such service violates the due process clause of the Constitution of the United States. *Old Wayne Mut. Life Asso. v. McDonough,* 204 U.S. 8, quoting, "A corporation cannot 'migrate; but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place.' "

"As the suit in the Pennsylvania court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the insurance commissioner, without any legal notice to the defendant association, and without its having appeared in person or by attorney or by agent in the suit; and as the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which, by the Constitution, is required to be given to the public acts, records and judicial proceedings of the several states, and was void as wanting in due process."

In the case of *King v. Motor Lines,* 219 N.C. 223, 13 S.E. 2d 233, this Court, speaking through *Stacy, C. J.,* said: "Without undertaking to decide whether service of process on such agent (process agent designated by defendant) would suffice to bring the defendant into the courts of this State on a cause of action arising here, the case of *Old Wayne Mut. Life Asso. v. McDonough,* 204 U.S. 8, is authority for the position that such attempted service will not suffice in a cause of action arising in another jurisdiction."

Again, in *Simon v. Southern Railway Co.*, 236 U.S. 116, the Court held: "Service of process on the State officer designated by La. Acts, No. 54, for that purpose, was not effective to give the courts of Louisiana jurisdiction of a suit against a foreign corporation doing business in that State as to a cause of action arising in Alabama."

In the case of *Motor Lines v. Transportation Co.*, 225 N.C. 733, 36 S.E. 2d 271, this Court held: "But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made, relates to business and transactions within the jurisdiction of the state enacting the law."

Many cases bearing on the question here presented are cited and analyzed in *Old Wayne Mut. Life Asso. v. McDonough, supra,* and in *Motor Lines v. Transportation Co., supra.* To repeat here either the citations or the analyses would serve no useful purpose. We hold the service of process on the Secretary of State was insufficient to give the court jurisdiction over the defendant. The order of the Superior Court of Guilford County is

Reversed.

MABEL GERTRUDE POWERS v. ROBESON COUNTY MEMORIAL HOSPITAL, INC., AND BERNIE H. SMITH.

(Filed 25 May, 1955.)

1. Pleadings § 25½—

Where an allegation in the pleading is admitted by the adverse party, such judicial admission establishes the fact admitted, removes it from the issuable matters, and relieves the party making the allegation of the necessity of proving it at the trial.

2. Master and Servant § 47—

This action was instituted by a student nurse for injuries received in an automobile collision. Plaintiff in her reply admitted that the relationship between plaintiff and the hospital was that of employee and employer, that plaintiff was furnished transportation to and from the nurses' home as a part of the contract of employment, and that her injury arose out of and in the course of her employment by the hospital. The uncontradicted evidence at the trial tended to show that the hospital regularly employed more than five employees. *Held:* Nonsuit as to the defendant hospital on the ground that the claim against it was within the exclusive jurisdiction of the Industrial Commission, was proper.

3. Same—

Whether an employer has the required number of employees to bring their employment within the coverage of the Workman's Compensation Act is a jurisdictional fact to be found by the court.

4. Appeal and Error § 40d—

Where all the facts necessary to bring the claim within the jurisdiction of the Industrial Commission are admitted except as to the number of employees regularly employed by defendant, and the uncontradicted evidence discloses that defendant regularly employed more than five employees, it will be assumed, in the absence of a request for findings of fact, that the court, in allowing defendant's motion for judgment as of nonsuit on the ground of exclusive jurisdiction of the Industrial Commission, found this jurisdictional fact.

5. Automobiles § 18h (2)—

Evidence of negligence on the part of the individual defendant, proximately causing collision at an intersection *held* sufficient to overrule his motion to nonsuit.

APPEAL by plaintiff from *Bickett, J.*, at December 1954 Civil Term, of ROBESON.

Civil action to recover damages for personal injury allegedly resulting proximately from joint and concurrent negligence of defendants in a motor vehicle collision at a street intersection.

The admissions in the pleadings as shown in the record on this appeal disclose that the collision occurred between 11 and 12 o'clock on the 10th day of December, 1953, at the intersection of Fifteenth and Walnut Streets in the city of Lumberton, N. C.; that the collision was between a station wagon automobile owned and used by defendant Hospital, Inc., in connection with operation of its hospital, traveling westwardly on Fifteenth Street and operated by its agent, servant, employee and chauffeur, within the course and scope of his employment, and an automobile owned and operated by defendant Smith, northwardly along Walnut Street; that plaintiff was riding in the station wagon automobile as an employee of defendant Hospital, Inc., being transported from the "Nurses' Home" to the hospital of defendant Hospital, Inc.; and that plaintiff sustained injuries as result of the collision.

Plaintiff sets forth in her complaint the acts of negligence of the respective defendants which she alleges caused the injuries she sustained.

Defendants, in their respective answers, deny these allegations as they relate to each answering defendant.

Defendant Hospital, Inc., in its fourth further answer and defense pleads the provisions of the North Carolina Workmen's Compensation Act as set forth in Chapter 97, Article 1 of General Statutes of North Carolina, in bar of plaintiff's right to maintain this action against it,—defendant Hospital, Inc.

In this connection, defendant Hospital, Inc., averred therein, and plaintiff in her reply thereto admitted, the following, as of the time of the collision, summarily stated: That the relationship between plaintiff and defendant Hospital, Inc., was that of employee and employer,—

she being employed as a student nurse, receiving room and board and free instructions as a student in return for services as such nurse; that as a part of her employment plaintiff was furnished living quarters in the defendant's Nurses' Home, and transportation to and from the Nurses' Home and the defendant's hospital; that plaintiff was being furnished transportation by the defendant Hospital, Inc., from its Nurses' Home to its hospital as a part of the employer-employee relationship existing between them,—and plaintiff was riding in the station wagon of the defendant by reason of this relationship; and that plaintiff's injuries arose out of, and in the course of her employment by defendant Hospital, Inc.

Defendant Hospital, Inc., also averred in said fourth further answer and defense that at the time of the collision there were at least seven other employees of this defendant riding in the station wagon, and that this defendant had more than five employees regularly employed by it in the operation of the hospital.

Plaintiff replying thereto admits that there were at least seven persons riding in the station wagon, but for lack of sufficient information to form a belief, she denies the averment that defendant Hospital, Inc., had more than five employees regularly employed by it. And plaintiff, on information and belief, denies the averments of defendant Hospital, Inc., in respect to its plea of the North Carolina Workmen's Compensation Act, Chapter 97, Article 1 of the General Statutes in bar of this action.

There is no allegation that either plaintiff or Hospital, Inc., had rejected the provisions of the said Compensation Act.

At December 1954 Civil Term of said Superior Court the case came on for trial. The evidence offered by plaintiff tended to show that prior to and at the time of her injury, defendant Hospital, Inc., had many more than five employees in its employment; that plaintiff stayed at the Nurses' Home, where more than five nurses were staying; that she ate at the hospital in the dining room; that the hospital furnished her room and meals, and uniforms, and transportation from the Nurses' Home to the hospital and back; that she was furnished textbooks for use in her studies, and with instruction as to nursing and training; that when she was accepted she paid $25.00, and that was all the money she paid to the hospital; and that she had been in training from September 1952 until the date of her accident.

Plaintiff also called to the witness stand and examined defendant Bernie H. Smith as her witness. He gave his version of how the collision occurred.

At the close of plaintiff's evidence both defendants moved for judgment as of nonsuit. The court, being of opinion that the motion of

defendant, Hospital, Inc., should be allowed for that the court has no jurisdiction over this action so far as the Hospital, Inc., is concerned, in that the exclusive remedy of plaintiff against the Hospital, Inc., is under the Workmen's Compensation Act of North Carolina, so adjudged. And the court also allowed the motion of defendant Smith.

To judgment in accordance therewith plaintiff excepted and appeals to Supreme Court, and assigns error.

Hackett & Weinstein and Varser, McIntyre & Henry for plaintiff, appellant.

E. J. Britt, McLean & Stacy, and Carpenter & Webb for defendant Hospital, Inc., appellee.

I. Murchison Biggs for defendant Smith, appellee.

WINBORNE, J. This appeal challenges, in the main, the correctness of the rulings of the trial court in allowing motions of defendants, respectively, for judgment as of nonsuit.

I. *As to the ruling on motion of defendant Hospital, Inc.:*

At the outset let it be noted that the admissions made by plaintiff in her pleading are sufficient to bring plaintiff's employment by defendant Hospital, Inc., within the provisions of the North Carolina Workmen's Compensation Act, save and except as to the matter of the number of the employees regularly employed by defendant Hospital, Inc., in the operation of its hospital. G.S. 97-2 (a).

Such admissions are judicial in character, and binding on plaintiff. In Stansbury's North Carolina Evidence, at p. 352, the author states that a judicial admission is "a formal concession made by a party (usually through counsel) in the course of litigation, either in a pleading or by way of stipulation before or at the trial, for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence. It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact. In short, the subject matter of a judicial admission ceases to be an issue in the case . . ." See also *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16, and cases cited.

Moreover, the case on appeal shows that upon trial in Superior Court the uncontradicted evidence is that defendant Hospital, Inc., had not only as many as five, but had many more than five employees regularly employed by it in the operation of its hospital. If the evidence be true, all of the essential elements necessary to bring the employment of plaintiff by defendant Hospital, Inc., within the provisions of the North

Carolina Workmen's Compensation Act, and under the jurisdiction of the North Carolina Industrial Commission, are present. See *McNair v. Ward*, 240 N.C. 330, 82 S.E. 2d 85, and cases cited.

Whether the hospital had the required number of employees is a jurisdictional fact to be found by the court. See *Aycock v. Cooper*, 202 N.C. 500, 163 S.E. 569; *Aylor v. Barnes, ante*, 223, and cases cited. But in the absence of a request for such finding, it will be assumed that, in allowing the motion for judgment as of nonsuit on the ground stated, the court found the essential facts.

Therefore, error is not made to appear in the ruling allowing judgment as of nonsuit as to defendant Hospital, Inc.

II. *Now, as to ruling on motion of defendant Smith:*

Taking the evidence offered upon the trial in Superior Court in the light most favorable to plaintiff, giving to her the benefit of every reasonable inference, as must be done in considering a demurrer to the evidence pursuant to provisions of G.S. 1-183, this Court is of opinion and holds that as the issues relate to defendant Smith, a case is made for the jury. Hence, as there must be a new trial as to him, the Court refrains from recital of the evidence in detail.

III. The assignments of error based upon exceptions to matters of evidence do not materially affect the decision here reached.

As to defendant Hospital, Inc.—Affirmed.

As to defendant Smith—New trial.

STATE v. MAE ATKINS.

(Filed 25 May, 1955.)

1. Criminal Law § 79—

Exceptions not brought forward in the brief, and unsupported by reason, argument or authority, are deemed abandoned.

2. Criminal Law § 78g: Appeal and Error § 23—

An assignment of error must present a single question of law, and while more than one exception may be grouped under a single assignment of error, this may be done only when all the exceptions relate to but a single question of law.

3. Criminal Law § 78e (1): Appeal and Error § 6c (5)—

Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail.

4. Mayhem § 2—

In a prosecution under G.S. 14-30, an instruction that general malice is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief, *is held* without error.

5. Same—

In this prosecution of defendant for maliciously maiming her step-daughter by putting out her eye by the use of defendant's thumb, the evidence *is held* sufficient to make out a case for the jury, and defendant's motions to nonsuit were properly overruled.

6. Criminal Law § 61a—

In a prosecution for less than a capital felony, the failure of the judge to sign the judgment or the minute docket does not affect the validity of the judgment.

APPEAL by the defendant from *Burgwyn, Emergency Judge,* December Term 1954 of GUILFORD.

Criminal prosecution on indictment charging the defendant with unlawfully, wilfully, feloniously and with malice aforethought putting out the right eye of Sandra Lee "Judy" Atkins with her thumbs with intent to maim and disfigure Sandra Lee "Judy" Atkins.

Verdict: Guilty as charged in the bill of indictment.

Judgment of imprisonment was pronounced upon the verdict.

Defendant appeals, assigning error.

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

Henderson & Henderson and Cahoon & Alston for Defendant, Appellant.

PARKER, J. Sandra Lee "Judy" Atkins is a 12-year old step-daughter of the defendant. The indictment properly charges a violation of G.S. 14-30.

Defendant's assignment of error No. 1 is as to the admission and rejection of evidence. Under this assignment she groups 20 Exceptions. These Exceptions are not brought forward, and set out in defendant's brief: no reason or argument is stated or authority cited. These Exceptions are taken as abandoned by defendant. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 544; *Strickland v. Kornegay,* 240 N.C. 758, 83 S.E. 2d 903.

Defendant's assignment of error No. 3 relates to the charge of the court, and under this assignment of error she groups Exceptions 23 through 63, both inclusive. It is elementary learning that an assignment of error must present a single question of law for consideration by an appellate court. *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263;

Gwaltney v. Assurance Society, 132 N.C. 925, 44 S.E. 659; 4 C.J.S., Appeal and Error, Sec. 1254. But it is entirely proper to group more than one exception under one assignment, when all the exceptions relate to a single question of law. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. Here Exceptions Nos. 24, 25, 26 and 27 relate to the court's definition of malice; Exceptions Nos. 28 and 29 relate to the court's definition of intent; Exception 35 relates to the court's definition of trauma; Exception No. 46 relates to the court's definition of serious injury; Exceptions Nos. 30, 31, 33 and many others are to the statement by the court of the State's contentions.

Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail. *Buie v. Kennedy,* 164 N.C. 290, 80 S.E. 445; *Barefoot v. Lee,* 168 N.C. 89, 83 S.E. 247; *S. v. Herron,* 175 N.C. 754, p. 759, 94 S.E. 698; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *S. v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608; *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143.

Exception 25 assigns as error this part of the charge: "Now, general malice is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief." This part of the charge is a verbatim statement of law as expressed by *Pearson, J.,* speaking for the Court in *Brooks v. Jones,* 33 N.C. 260, and quoted since by us with approval, for instance, in *S. v. Long,* 117 N.C. 791, 23 S.E. 431; *S. v. Knotts,* 168 N.C. 173, p. 185, 83 S.E. 972. This exception is without merit. While the assignment of error No. 3 must fail, yet even so, after a careful reading of the charge as a whole, with particular attention to the portions of the charge excepted to, we find no prejudicial error therein.

Defendant assigns as error No. 2 the failure of the court to sustain her motion for judgment of nonsuit made at the close of the State's evidence, and renewed at the close of all the evidence. This assignment of error is overruled. Upon the evidence it was a case for the jury.

The defendant's assignment of error No. 5 is based upon Exceptions Nos. 65, 66 and 68. Exception No. 65 is to the judgment. Exception No. 66 is to the fact that while the judgment is set forth in the Minute Docket for criminal cases in the Office of the Clerk of the Superior Court of Guilford County, it is not signed by the Trial Judge. Exception No. 68 is to the refusal of the court to set the judgment aside.

In support of her exception that the Trial Judge did not sign the judgment, no argument is stated or authority cited. This exception is taken as abandoned by the defendant. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 544.

However, Exception No. 66 seems to be without merit. In this State judgment of death in capital cases by virtue of G.S. 15-189 must be in writing and signed by the Trial Judge. *S. v. Jackson,* 199 N.C. 321, 154 S.E. 402. In other criminal cases it seems to be the rule with us that the failure of the judge to sign the Minutes of the Court or the judgment does not affect the validity of the judgment. *McDonald v. Howe,* 178 N.C. 257, 100 S.E. 427; *LaBarbe v. Ingle,* 201 N.C. 814, 161 S.E. 486; 15 Am. Jur., Criminal Law, Sec. 444; 24 C.J.S., Criminal Law, Sec. 1602; Anno. 30 A.L.R. 715 *et seq.*

There is no irregularity on the face of the Record, except that the Minute Docket is not signed by the Trial Judge. Assignment of error No. 5 is overruled.

Assignment of error No. 4 is formal.

A study of the Record and the Briefs discloses no error that would justify a New Trial.

No Error.

STATE v. ERNEST (LAYBACK) SMITH.

(Filed 25 May, 1955.)

Criminal Law § 43: Searches and Seizures § 1—

Where an undercover officer knocks on defendant's door, enters upon invitation, and buys whiskey from defendant, his testimony as to what he saw is competent, since, in the absence of fraud or deceit on the part of the officer, his actions do not amount to an illegal entry so as to render his testimony incompetent under G.S. 15-27.

APPEAL by defendant from *Burgwyn, E. J.,* 6 December, 1954 Term, GUILFORD.

Criminal prosecution upon two bills of indictment, each charging "unlawful possession of spirituous liquors for the purpose of sale and unlawful sale of intoxicating liquors."

The State offered testimony of one witness, Charles H. Smith, employed by the Alcohol-Tobacco Tax Division, United States Treasury Department. The defendant objected to the evidence, moved to strike it out, and for judgment as of nonsuit. The motions were overruled and exceptions taken. Further facts are stated in the opinion. From the verdict of guilty and separate judgments pronounced thereon, the defendant appealed, assigning errors.

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

William A. Vaden for defendant, appellant.

HIGGINS, J. The State's witness, Charles H. Smith, was a regular employee of the United States Treasury Department, and on the occasions about which he testified he was acting as undercover man in cooperation with and under the direction of the chief enforcement officer of the Guilford County ABC Board. On 21 December, 1953, about nine o'clock a.m., the witness, accompanied by a friend (not identified), went to the home of the defendant in Greensboro. "We knocked on the door and were told to enter. We went on into the kitchen." The defendant, at the request of the witness, sold him and his friend each a drink of taxpaid whisky poured from a Kinsey bottle by the defendant, for which the witness paid the defendant $1.00.

On 11 January, 1954, the witness and his companion (still unidentified) again went to the defendant's house about 8:10 a.m., and "as he entered the house a little girl about eight or nine years old entered the house with her school books." Witness went into the kitchen where two or three other customers were drinking whisky. Witness again ordered two drinks of whisky and two soft drinks as chasers, for which he paid $1.20. The money was paid to the defendant who, on each occasion, poured the whisky into glasses from a bottle he took from a cabinet behind the sink.

The witness did not have a search warrant. He was not in uniform. There was nothing to indicate he was an officer. On the other hand, he went to defendant's house in the daytime. He knocked on the door and was admitted. He made no search. He asked for a drink of whisky for himself and his companion on each occasion, and the defendant sold the drinks without question. The presence of two or three customers at 8:10 a.m. in January seems to indicate the defendant was either continuing late or beginning early at his business.

Was the evidence in this case so tainted by an illegal search as to make it inadmissible? Under G.S. 15-27, evidence obtained by an illegal search without a search warrant is inadmissible. But here the officer knocked and was admitted. He entered into the dwelling house neither to search nor to arrest. He went to buy whisky which the defendant readily sold him. That he testified afterwards as to what he saw and what he bought does not make his entry unlawful. A peaceful entry by invitation does not become unlawful solely by reason of his telling the court and jury about it later. Mr. Smith, of course, did not volunteer the information that he was an officer. But the defendant at no time made inquiry. All the witness did was to buy whisky and drink it—the defendant did the rest.

In 79 C.J.S. 755, dealing with searches and seizures, it is said: "As used in this connection, the term (search) implies some exploratory investigation or an invasion or quest, a looking for, or seeking out. This

quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it has been held that a mere looking at that which is open to view is not a search."

In 47 Am. Jur., Sec. 12, the author said: "Again, the constitutional guaranties are applicable only to searches and seizures of material things, they do not apply to evidence secured merely by the use of the faculties of vision or sight."

In the case of *Crowell v. State,* 180 S.W. 2d 343 (Texas), the Court said: "The constitutional guarantee against unlawful searches and seizures is designed to protect the private security and sanctity of one's home, and to prevent unlawful invasion thereof. It is not a haven beyond which one may seek refuge against prosecutions for violation of the law committed in his home, the evidence of knowledge of which he himself makes no effort to conceal, but permits to be done in the view of the passersby."

In the case of *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912, opinion by *Justice Denny,* it is said: "It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether. (Citing cases.) Where an officer is where he has a right to be and becomes a witness to an offense which necessitates acting as such officer, he may make the incidental search and seizure, but where he observes the offense after he has made an unlawful entry, a subsequent search and seizure without a warrant may be illegal." It may be noted that a search followed the lawful entry into the premises.

In the case here, after a lawful entry there was no search. The witness bought and drank the liquor the defendant placed before him. If there had been fraud or deceit on the part of the officer—something that would take the place of forceful or unlawful entry—a more serious question would arise. Under the circumstances in this case, the evidence was competent.

No error.

COLE HENRY v. HOME FINANCE GROUP, INC., HOME FINANCE COMPANY OF CHARLOTTE, INC., MARSHALL F. FORD, AND PAUL BYRD.

(Filed 25 May, 1955.)

1. Appeal and Error § 40f—

The refusal of the trial court to strike certain allegations from the pleadings will not be disturbed on appeal, even though the allegations be irrelevant or redundant, when their retention in the pleadings will cause no harm or injury to the moving party.

2. Appeal and Error § 38—

The burden is on appellant not only to show error, but also that the alleged error is material and prejudicial.

3. Pleadings § 31: Libel and Slander § 15—

In an action for slander, allegations to the effect that as a result of the alleged slander a person to whom plaintiff had sold merchandise became afraid that some of it had been stolen, and burned it, fails to allege special damage to defendant, and is irrelevant, and the refusal of the court to strike such allegations is prejudicial.

APPEAL by defendants from *Clarkson, J.*, September Term, 1954, of ANSON.

This is an action in which the plaintiff alleges in his complaint that he was slandered by the individual defendants, acting in their capacity as agents of the corporate defendants, and that by reason thereof he is entitled to $25,000 actual damages, $25,000 special damages, and $25,000 punitive damages, and in his prayer for judgment the plaintiff asks for execution against the person of each of the individual defendants if they be unable to pay such judgment as the plaintiff may recover in the action.

In apt time the defendants filed a motion to strike certain allegations of the complaint. The motion was allowed in part and denied in part.

From the order denying the motion in part, the defendants appeal and assign error.

Bynum & Bynum for appellee.

G. T. Carswell, B. Irvin Boyle, and Taylor, Kitchin & Taylor for appellants.

DENNY, J. The defendants expressly waive and abandon their first two assignments of error.

The third assignment of error is bottomed on an exception to the failure of the court below to strike all of paragraph 11 of the complaint which reads as follows: "That prior to the matters hereinafter set forth

plaintiff enjoyed the confidence, friendship, esteem and high regard of many friends and acquaintances, both socially and in business relationship, that his credit was good, and that his prospects for a useful and successful career in business were good."

These allegations are sufficiently repetitious that they might have been stricken by the court below, but on appeal we will not strike allegations merely because they are irrelevant or redundant unless in our opinion their retention in the pleadings will cause harm or injustice to the moving party. The burden is on the appellant not only to show error but also that the alleged error is material and prejudicial. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660; *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410; *Ledford v. Transportation Co.,* 237 N.C. 317, 74 S.E. 2d 653; *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810; *Lambert v. Schell,* 235 N.C. 21, 69 S.E. 2d 11; *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551; *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185; *Teasley v. Teasley,* 205 N.C. 604, 172 S.E. 197. Certainly the defendants will suffer no prejudicial harm by allowing these allegations to remain in the complaint. Hence, this assignment of error is overruled.

The tenth assignment of error is to the refusal of the court below to strike all of paragraph 21 of the complaint, which contains allegations with respect to special damages. The plaintiff alleges in this paragraph that as a direct and proximate result of the wrongful acts and utterances of the defendants, *"a junked cars dealer who had purchased twenty (20) junked cars from plaintiff became afraid that some of the cars Cole Henry had been accused of stealing, as hereinbefore alleged, might be among those he purchased and he burned them,"* and, among other things, he alleges that as a result of the wrongful acts and utterances of the defendants, his credit was impaired, and sets out specific instances; that reports became rampant to the effect that he had embezzled funds from the defendants, etc. (Italics ours.)

In our opinion, that portion of paragraph 21 quoted above and italicized, is both irrelevant and prejudicial to the defendants and should be stricken, and it is so ordered.

We have carefully examined the remaining assignments of error and, under the doctrine or rule laid down in the decisions cited herein with respect to the denial of motions to strike, they are overruled.

Except as modified herein, the order below is affirmed.

Modified and affirmed.

CORA LANGLEY, MARY CREPPS, ALICE STAFFORD, EMSLEY PHIFER, AND G. E. BRYANT, EACH SUING INDIVIDUALLY AND AS TRUSTEES AND OFFICERS OF LOCAL 603, UNITED TEXTILE WORKERS OF AMERICA, A. F. OF L., AND AS REPRESENTATIVES OF ALL OTHER MEMBERS OF SAID LOCAL UNION AND OF THE UNITED TEXTILE WORKERS OF AMERICA, AND THE UNITED TEXTILE WORKERS OF AMERICA, A. F. OF L., v. LAWRENCE GORE AND ELSA HOGAN.

(Filed 25 May, 1955.)

1. Appeal and Error § 3—

Only the party aggrieved by the judgment may appeal therefrom to the Supreme Court. G.S. 1-271.

2. Same: Appeal and Error § 1—

Order was issued that funds in the custody of the court be turned over to plaintiffs. Defendants appealed therefrom on the ground that plaintiffs are not entitled to the funds, but defendants did not claim the funds personally, and failed to show in the record that they have any interest in or claim to the funds. *Held:* Defendants are not the parties aggrieved by the judgment, and their appeal therefrom is dismissed by the Supreme Court *ex mero motu* for want of jurisdiction.

APPEAL by defendants from *Clarkson, J.*, at 8 November, 1954 Regular Civil Term, of RICHMOND.

Civil action instituted 12 January, 1954, to restrain defendants, and all others acting in concert with them (1) "from withholding from plaintiffs access to and the possession and use of said Union Hall, and the key thereto, the books, records and possessions of Local Union 603, mentioned herein . . . and the monies received from Aleo Manufacturing Company as dues as mentioned in the complaint"; and (2) "from in any manner interfering with plaintiffs (a) in their use of the properties and facilities mentioned above" and (b) "in their management of the business and affairs of Local 603, including the administration of the current collective bargaining contract with the Aleo Manufacturing Company, and the handling and settling of collective bargaining grievances and disputes with said company." (Numbering supplied.)

In the summons defendants are named as individuals, and in the complaint they are named individually and referred to as former officers of the "local union."

A temporary restraining order was issued 13 January, 1954 returnable 1 February, 1954, before Patton, Judge presiding, who, on hearing pursuant thereto signed an order 12 February, 1954, continuing in substance the temporary order against defendants, and ordering that plaintiffs shall not dissipate or dispose of any of the real or personal property mentioned in the complaint, and shall deposit with the Clerk of Superior Court of Richmond County certain funds payable by Aleo Manu-

facturing Company to plaintiffs or to Local 603 UTWA AFL pursuant to collective bargaining contract and the check-off clause therein, etc.

Thereafter at 1 November, 1954 Civil Term of Superior Court of Scotland County, plaintiffs "indicated their desire, and moved to take a voluntary nonsuit, upon the grounds that the issues in the cause had been rendered moot through final determination in other legal proceedings binding upon the parties," and thereupon the motion was allowed "as to the plaintiffs' main cause of action," reciting that "it appearing that there are outstanding orders of court in this cause, same are hereby retained *in fieri*, until further order of this court."

And thereupon plaintiffs filed a motion that all funds "held by the court in this cause pursuant to order of February 12, 1954, be turned over to and released to Local 603, United Textile Workers of America, AFL," and the court, upon facts found, made an order in this respect, to which defendants object and except and appeal to Supreme Court and assign error.

Cahoon & Alston for plaintiffs, appellees.

Wm. H. Abernathy for defendants, appellants.

WINBORNE, J. This appeal is directed solely to the judgment of the court below in respect to disposition of the fund of money in the hands of the Clerk of Superior Court. But there is nothing in the record to show that defendants have any interest in, or claim to it. Indeed, defendants say in their brief, filed on this appeal, that they "did not claim the fund as theirs personally." They assert, however, reasons why they think plaintiffs are not entitled to the fund. Nevertheless, they are not the parties aggrieved.

Any party aggrieved may appeal in the cases prescribed in Chapter 1 of General Statutes entitled "Civil Procedure." G.S. 1-271. And this Court, in interpreting and applying this statute, has uniformly held that only the party aggrieved may appeal from the Superior Court to the Supreme Court. See *Watkins v. Grier,* 224 N.C. 339, 30 S.E. 2d 223, and numerous other cases.

Therefore, we are constrained to hold that by this appeal this Court has not acquired jurisdiction of any matter to which the action or proceeding may relate. Such being the case, the Court is impelled *ex mero motu* to dismiss the appeal for want of jurisdiction. See *Henderson County v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136, where prior cases are cited. See also *Baker v. Varser,* 239 N.C. 180, 79 S.E. 2d 757, and cases cited.

Appeal dismissed.

STATE v. MOLLIE BANKS, JR., SAMUEL PERRY AND OREN EVANS.

(Filed 25 May, 1955.)

1. Burglary § 11—

In this prosecution for unlawful and felonious breaking and entering, the evidence *is held* sufficient to take the case to the jury as to each defendant, and their motions to nonsuit were properly overruled.

2. Criminal Law § 8b—

An instruction that mere presence is enough to make one an aider and abettor where both or all of the defendants are friends, *is held* to constitute prejudicial error.

APPEAL by defendants from *Clarkson, J.*, at November Term, 1954, of STANLY.

Criminal prosecution upon a bill of indictment charging in substance that defendants, naming them, on 10 July, 1954, did unlawfully, willfully, and feloniously break and enter a certain building occupied by one Auten Motor Company, wherein merchandise, chattels, money, valuable securities of said company were being kept, with intent to steal, take and carry away the same.

Verdict: Guilty as to each of the three defendants.

Judgment: That each defendant be confined in Central Prison for a period of five to seven years.

Defendants, and each of them, appeal therefrom to Supreme Court and assign error.

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

Taylor & Mitchell and W. Frank Brower for defendants, appellants.

WINBORNE, J. Appellants contend, first that the trial court erred in refusing to allow their motions, aptly made, for judgment as of nonsuit.

Considering the evidence, shown in the record of case on appeal, in the light most favorable to the State, as is done when testing the sufficiency thereof to withstand the challenge of demurrer thereto, this Court is of opinion and holds that the evidence is sufficient to take the case to the jury as to each defendant, and to support a conviction as to each of them on the charge under which they stand indicted. Hence the exceptions to denial of their motion for judgment as of nonsuit were properly overruled. However, as there must be a new trial, for reasons hereinafter stated, the Court refrains from a discussion of the evidence in detail.

Appellants contend next, and properly so, that there is prejudicial error in the charge of the court in respect to the law relating to aiding and abetting. The court used this language: "Mere presence, the courts have held, is enough to make one an aider or abettor where both or all of the defendants are friends." True this portion of the charge appears within an extended declaration of the law, yet it is set apart as a complete sentence, without qualification. In appropriate connection this Court in *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272, opinion by *Johnson, J.,* declared that "it is settled law that all who are present, either actually or constructively, at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for that purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty . . . 'A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages, another to commit a crime,' " citing *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358. See also *S. v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5.

And in *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880, it is stated: "Though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting." *S. v. Holland, supra.*

However, it is not understood that this Court has gone so far as to hold that "mere presence . . . is enough to make one an aider or abettor where both or all of the defendants are friends." Compare *S. v. Birchfield, supra.*

There are other assignments of error based upon numerous exceptions,—none of which is of sufficient import to merit express consideration. They may not recur upon another trial.

For reasons stated, let there be a

New trial.

WILSON GRIFFIN AND NELL JOHNSON GRIFFIN, CO-PARTNERS, TRADING AS WILSON GRIFFIN DECORATORS, v. J. C. BARNES AND WIFE, HENRIETTA J. BARNES.

(Filed 25 May, 1955.)

1. Appeal and Error § 19—

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed.

2. Appeal and Error § 22—

The Supreme Court can judicially know only what properly appears on the record.

3. Process § 5a—

Under the rule that ministerial duties of the office of sheriff may be performed by a substitute or deputy, it would seem that a rural police officer who works under the supervision and direction of the sheriff by provision of local act and resolution of the county commissioners, may serve a summons for and on behalf of the sheriff.

APPEAL by defendants from *Huskins, S. J.*, at January Special Civil Term, 1955, of CUMBERLAND.

A purported civil action heard in Superior Court upon motion of defendants to dismiss same for that the court has not properly acquired jurisdiction over the persons of these defendants in that summons has not been served upon them by the Sheriff of Harnett County to whom it was addressed.

On such hearing the court found these facts:

"FIRST: That on March 8, 1954 summons was issued by C. W. Broadfoot, Clerk of the Superior Court of Cumberland County and directed, 'To the Sheriff of Harnett County' for service on the defendants, J. D. Barnes and Henrietta J. Barnes. That said summons was issued under the seal of the court.

"SECOND: That the summons, together with copies of summons and complaint were forwarded to the Sheriff of Harnett County where it was placed in the hands of B. E. Sturgill, a Rural Policeman of said County, who works under the supervision of and under the direction of the Sheriff of Harnett County under the provisions of a Public Local Act of the 1953 General Assembly of North Carolina and under a Resolution of the Board of Commissioners of Harnett County providing that said Rural Police Officer should 'serve under the direction and supervision of the Sheriff of Harnett County.' That this said Rural Police officer served said summons for the Sheriff of Harnett County according to the tenor of said process and made the following return: 'Served

3-9-1954. Served on the defendants, J. D. Barnes and Henrietta J. Barnes by reading the within summons to them and by leaving with each of them copies of summons and complaint.' Endorsed 'W. E. Salmon, Sheriff Harnett County, by B. E. Sturgill, R. P.'

"THIRD: That at the time of the service of this process on the defendants the said B. E. Sturgill by reason of his office as Rural Policeman had authority to serve a process of this type for and in behalf of the Sheriff of Harnett County, and the defendants are properly before the court."

Thereupon the court, in an order entered, adjudged that the motion of defendants that the action be dismissed be denied. Defendants excepted to the findings of fact and to the denial of their motion and to the entering of the order, and appeal to Supreme Court and assign error.

Nance & Barrington for plaintiffs, appellees.

J. A. McLeod and Max E. McLeod for defendants, appellants.

WINBORNE, J. It is noted at the threshold of this appeal that while in the record filed in this Court reference is made to a complaint in this purported action, no pleadings are contained therein. "The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed,"—headnote epitomizing this holding in *S. v. Lumber Co.*, 207 N.C. 47, 175 S.E. 713. Such is the uniform practice in this Court. See also Rule 19, Section 1 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at 553, and *Ericson v. Ericson*, 226 N.C. 474, 38 S.E. 2d 517, and cases cited. Judicial knowledge arises only from what properly appears on the record. *Goodman v. Goodman*, 208 N.C. 416, 181 S.E. 328; *Macon v. Murray*, 240 N.C. 116, 81 S.E. 2d 126.

And while it may be doubted whether any valid exceptive assignment of error has been made to appear, it is not amiss to say: The contents of a summons is specified in G.S. 1-89. "It must run in the name of the State . . . and be directed to the sheriff or other proper officers of the county or counties in which the defendants or any of them reside or may be found." And in the main the duties of the office of sheriff are prescribed by statute, *Commrs. v. Stedman*, 141 N.C. 448, 54 S.E. 269, and are ministerial in character, and, as to such ministerial duties, it is implied when not so provided by statute, that he may act by a substitute or deputy. *Yeargin v. Siler*, 83 N.C. 348; *R. R. v. Fisher*, 109 N.C. 1, 13 S.E. 698; *Borders v. Cline*, 212 N.C. 472, 193 S.E. 826. The findings of fact appear to be accordant with this principle.

Appeal dismissed.

IN RE WILL OF HIRAM BARFIELD.

(Filed 25 May, 1955.)

Trial § 49: Wills § 27—

The discretionary authority of the trial court to set aside the verdict as being contrary to the greater weight of the evidence extends to a verdict rendered in a caveat proceeding.

APPEAL by caveator from *McKeithen, S. J.*, September-October 1954 Term, CUMBERLAND.

The will of Hiram M. Barfield was probated in common form in Cumberland County, North Carolina, on 15 September, 1952. Thereafter, on 29 September, 1953, a caveat was filed, challenging the validity of the will upon two grounds: (1) Its execution was procured by undue influence and duress; and (2) the maker did not have sufficient mental capacity to make a will. Four issues were submitted and answered by the jury as follows:

1. Was the paper writing offered for probate as the last will and testament of Hiram M. Barfield signed and executed according to law? Answer: Yes.

2. If so, did the said Hiram M. Barfield have mental capacity to make a will? Answer: No.

3. If so, was the execution of said paper writing procured by undue influence? Answer: No.

4. Is the paper writing propounded by Lela Gladys Trogden and every part thereof the Last Will and Testament of Hiram M. Barfield, deceased? Answer: No.

The court entered the following judgment:

"And upon the coming in of the verdict, the propounder through her attorneys, Clark and Clark, having moved the Court in its discretion to set aside the second and fourth issues of the verdict as against the greater weight of the evidence, and parties litigant, through counsel, having agreed that the motion might be heard out of term in chambers, and upon such hearing the Court in his discretion having granted the said motion.

"IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the verdict rendered by the Jury in the above entitled action be and the same hereby is set aside in the discretion of the Court and a new trial is hereby ordered."

Seavy A. Carroll and Lemuel M. Williford, By Seavy A. Carroll, for caveator, appellant.

Clark & Clark for propounder, appellee.

PER CURIAM. The caveator challenges the authority of the trial court to set aside the verdict on the ground that in a caveat proceeding there are no parties, a nonsuit cannot be taken or directed, the issue must be passed on by the jury, and hence no discretionary power is lodged in the court to set the verdict aside. This Court has held the trial judge does have authority to set aside the verdict in his discretion when the verdict is against the greater weight of the evidence. On the authority of *In re Westfeldt,* 188 N.C. 702, 125 S.E. 531, and *In re Hargrove,* 207 N.C. 280, 176 S.E. 752, the order of the Superior Court of Cumberland County is

Affirmed.

CAMMIE M. MANUEL, EMPLOYEE, v. CONE MILLS CORPORATION, EMPLOYER AND SELF-INSURER.

(Filed 25 May, 1955.)

Master and Servant § 40e—

Findings of the Industrial Commission that claimant's disability was due to pre-existing physical infirmities, and that there is no causal connection between plaintiff's disability and her employment, *held* supported by competent evidence, and the judgment denying compensation is affirmed.

APPEAL by plaintiff from *Gwyn, J.,* at 22 November, 1954, Civil Term of GUILFORD (Greensboro Division).

Proceeding under Workmen's Compensation Act to determine liability of defendant, self-insurer, to plaintiff, employee.

The Industrial Commission found that there is no causal connection between the plaintiff's disability and her employment by the defendant, but rather that her disability "must be ascribed to pre-existing physical infirmities," not traceable to her employment. On these findings the Commission denied compensation.

On appeal to the Superior Court the findings and conclusions and the decision of the Commission denying compensation were affirmed. From judgment entered in accordance with such rulings, the plaintiff appeals.

Cahoon & Alston for plaintiff, appellant.

Smith, Moore, Smith & Pope for defendant, appellee.

PER CURIAM. Our examination of the record discloses that the crucial findings of fact of the Industrial Commission are supported by competent evidence. Since these findings support the rulings below

denying compensation, the decision of the Commission, as sustained by the court below, must be upheld.

Affirmed.

LILLIAN LOUISE BROOKS v. VIRGIL LEE MILLSAP, BEATRICE MORGAN AND JOHN DANIEL MORGAN.

(Filed 25 May, 1955.)

APPEAL by defendants from *Phillips, J.*, October Term, 1954, of GUILFORD (Greensboro Division).

This is an action to recover damages for personal injuries sustained by the plaintiff resulting from the alleged negligence of the defendants.

On 5 September, 1951, about 10:15 p.m., Harold F. Brooks was operating his Chevrolet automobile in an easterly direction over Pinecroft Road, approaching the intersection of said road with U. S. Highway 29. His wife, plaintiff in this action, was riding with him. At the same time, Virgil Lee Millsap was operating the Mercury automobile of defendant Beatrice Morgan in a northerly direction on U. S. Highway 29, approaching the aforesaid intersection. The defendant John Daniel Morgan and Millsap were business partners. John Daniel Morgan had driven the Mercury automobile over to Guilford County and Millsap was driving it back. The car of Harold F. Brooks and the automobile of Beatrice Morgan collided at the intersection, seriously injuring the plaintiff.

The jury answered the issues of negligence and damages in favor of the plaintiff. From the judgment entered on the verdict the defendants appeal and assign error.

Jordan & Wright for plaintiff, appellee.

Price & Osborne and J. C. Johnson, Jr., for defendants, appellants.

PER CURIAM. We have carefully examined the exceptions and assignments of error brought forward by the defendants on this appeal, and find them without sufficient merit to disturb the result of the trial below.

No error.

CHARLOTTE PARK AND RECREATION COMMISSION, A MUNICIPAL CORPORATION, V. OSMOND L. BARRINGER, ABBOTT REALTY COMPANY, A CORPORATION, AND CHARLES W. LEEPER, I. P. FARRAR, SADLER S. GLADDEN, ROBERT H. GREENE, JAMES HEATH, HENRY M. ISLEY, RUSSELL McLAUGHLIN, ANTHONY M. WALKER, HAROLD WALKER, EDWARD J. WEDDINGTON, JAMES J. WEDDINGTON, WILLIE LEE WEDDINGTON, L. A. WARNER, G. M. WILKINS, ROY S. WYNN AND RUDOLPH M. WYCHE, AND CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 30 June, 1955.)

1. Declaratory Judgment Act § 2—

A controversy between the parties as to whether the deeds in question created a fee upon special limitation and as to whether title would revert in grantors upon the threatened happening of the contingency, may be maintained under the Declaratory Judgment Act. G. S. 1-253, *et seq.*

2. Deeds § 13a: Wills § 33c—

A fee upon special limitation, which is a fee since it may last forever, but is not a fee absolute since it may terminate upon the happening of the contingencies specified, is recognized in North Carolina, and may be created by deed, will or other instrument in writing, which in expressed terms provides that upon the happening of named contingencies, title should revert to grantor or his successors. Upon the happening of such contingencies, the title reverts by operation of law.

3. Deeds § 13a: Constitutional Law §§ 16, 20—Deed conveying land for park upon special limitation that it be used by persons of white race only held valid and constitutional.

In the granting clause of the deed in question the land was conveyed to grantee upon the terms and conditions, and for the uses and purposes, "hereinafter fully set forth." The *habendum* provided that the land, together with other tracts specifically referred to, should be held, used and maintained by the grantee as a park to be used and enjoyed by persons of the white race only, with further provision that in the event all the lands referred to should not be maintained for this purpose, then in either one or more of said events, the land should revert to grantor, his heirs, and assigns upon the payment of a stipulated sum. *Held:* The deed conveys a fee upon special limitations, and if such limitations, or any of them, fail, the estate automatically reverts to the grantor by operation of law upon the payment of the stipulated sum, and such result does not violate the 14th Amendment to the Federal Constitution in regard to Negroes seeking the use of the park, but to the contrary a construction vitiating the possibility of reverter would deprive grantor of his property without adequate compensation and due process, in violation of the 5th Amendment to the Federal Constitution and Art. I, Sec. 17, of the Constitution of North Carolina.

4. Deeds § 13a: Wills § 33h—

The possibility of reverter in the grantor of lands conveyed upon special limitation is not void for remoteness and does not violate the rule against perpetuities.

5. Deeds § 13a—

Where the grantor conveys land for a park upon special limitations set out, but provision for reverter in the event the park is not maintained for use of the white race only is not included in the limitations inserted in the deed, the use of the park by persons of the negro race would not effectuate the reverter, which would become operative only upon violation of the limitations expressly incorporated therein.

6. Appeal and Error § 3—

Where neither the grantor nor the grantee appeals from a conclusion of law holding void, as being in violation of the 14th Amendment to the Federal Constitution, a conveyance of land by a municipality upon special limitation that the land be used for a park for white persons only, Negroes attacking the limitation are not the parties aggrieved by such conclusion of law, and their assignment of error thereto will be overruled.

APPEAL by all the defendants, except Osmond L. Barringer, Abbott Realty Company and the city of Charlotte, from *Patton,* Special Judge, Extra February Civil Term 1955 of MECKLENBURG.

Civil action to have determined questions of the construction or validity of provisions in certain deeds restricting the use of the lands conveyed, and requiring that the lands revert to the grantors if such restrictions are not carried out.

All parties to the action, by written stipulation filed with the court, waived a jury trial, and consented that the court find the facts. The facts found by the Judge necessary for a decision of the questions presented are summarized as follows:

One. Charlotte is a municipal corporation of the State of North Carolina. General control, management and authority over the parks and playgrounds of Charlotte are vested by law in the plaintiff, a public body corporate known as Charlotte Park and Recreation Commission.

Two. On 31 August 1927 W. T. Shore and T. C. Wilson, and the defendants Barringer and Abbott Realty Company, offered to give to the city of Charlotte through plaintiff for park and playground purposes certain lands free from encumbrance upon the following conditions:

1. "Said lands are to be used by the city of Charlotte through its Park and Recreation Commission for white people's parks and playgrounds, parkways and municipal golf courses only."

2. Provisions that the lands shall be beautified and maintained so as to keep them suitable for parks, etc., at a cost of not less than $5,000.00 annually for the first 8 years.

3. Provisions for construction of driveways.

4. Adjacent lands now owned by city of Charlotte shall be set aside by it as a part of this proposed park.

5. In the event the lands are not kept and maintained at an expenditure as aforesaid and are not used for parks and playgrounds only, the

"said lands shall revert in fee simple to the undersigned donors"; each donor to have reverted back to him the land he gave.

Three. On 18 February 1929 plaintiff approved said offer. On 21 February 1929 the city of Charlotte accepted said offer, and agreed to the terms thereof by ordinance duly passed and adopted.

Four. On 22 May 1929 the defendant Barringer, and wife, by deed properly recorded, conveyed as a gift certain lands therein described to plaintiff for use as a park, playground and recreational system of the city of Charlotte to be known as Revolution Park. This deed in the granting clause conveys the land to the plaintiff here "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The *habendum* clause is to have and to hold the land "upon the following terms and conditions, and for the following uses and purposes, and none other," which are set forth as follows: 1. The land conveyed by this deed, together with other lands conveyed to plaintiff by W. T. Shore, and wife, T. C. Wilson, and wife, Abbott Realty Co. and the city of Charlotte shall be maintained and operated by plaintiff as an integral part of a park, playground and recreational area, to be known as Revolution Park, "for the use of, and to be used and enjoyed by persons of the white race only." 2. Here follows the other conditions of the offer. Then the deed contains this language:

"In the event that the said lands comprising the said REVOLUTION PARK area as aforesaid, being all of the lands hereinbefore referred to, shall not be kept and maintained as a park, playground and/or recreational area, at an average expenditure of five thousand dollars ($5,000) per year, for the eight-year period as aforesaid, and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only, and if such disuse or non-maintenance continue for any period as long as one year, and/or should the party of the second part, or its successors, fail to construct or have constructed the roadway above referred to, within the time specified above, then and in either one or more of said events, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs or assigns; provided, however, that before said lands, in any such event, shall revert to the said Osmond L. Barringer and as a condition precedent to the reversion of the said lands in any such event, the said Osmond L. Barringer, his heirs or assigns, shall pay unto the party of the second part or its successors the sum of thirty-five hundred dollars ($3500)."

Five. On 22 May 1929 W. T. Shore, and wife, and T. C. Wilson, and wife, by deed properly recorded, conveyed as a gift certain lands therein described to plaintiff upon the terms and conditions and for the same uses and purposes as set forth in the defendant Barringer's deed. The

provisions in this deed as to the use of the land, and the language as to reversion to the donors, are similar to the Barringer deed, except there is no provision that as a condition precedent to a reversion the grantors shall pay any money to the grantee. A number of years later a controversy arose between W. T. Shore and T. C. Wilson on the one side and the plaintiff here on the other over this land they conveyed as a gift. Action was instituted by W. T. Shore and T. C. Wilson against the plaintiff here, which action was compromised and settled by the plaintiff here, the defendant in that case, paying to W. T. Shore $3,600.00 for all rights of reversion, forfeiture, re-entry and interest which Shore had, has, or might have in the lands he conveyed by gift, and paying to the heirs of Wilson $2,400.00 for the same rights. As a part of the compromise and settlement, W. T. Shore and the heirs of Wilson, by separate deeds, remised, released and forever quit-claimed unto the plaintiff here all rights of reversion, forfeiture, entry, re-entry, title, interest, equity and estate, and all other rights of every nature, kind and character, which they had, now have, or might have hereafter in the said lands.

Six. On 22 May 1929 Abbott Realty Company, by deed properly recorded, conveyed as a gift certain lands therein described to plaintiff upon the terms and conditions and for the same uses and purposes, and for use of the white race only, as set forth in the defendant Barringer's deed. This deed contains a reverter provision, but it does not provide that if the lands conveyed are used by members of a non-white race that the lands conveyed as a gift shall revert back to the grantor. Nor does it contain a provision that as a condition precedent to reversion Abbott Realty Company shall pay to the grantee any money.

Seven. On 22 May 1929 the city of Charlotte conveyed to plaintiff certain adjacent lands owned by it to form a part of Revolution Park. This park is composed of this land and the lands conveyed by Barringer, Shore, Wilson and Abbott Realty Company. The city's deed provides that should the lands conveyed by it and the lands conveyed by the other parties named above shall not at any time for 12 consecutive months be used for park, playground or recreational purposes for use by persons of the white race only, then the land conveyed by the city shall cease to be a park, playground, etc., and shall revert to the city of Charlotte.

Eight. Plaintiff has in Revolution Park a municipal swimming pool, municipal tennis courts and the Bonnie Brae Golf Course, which it operates and maintains as a part of the recreational system of Charlotte. Bonnie Brae Golf Course is situated on the lands given to plaintiff by Shore and Wilson, and conveyed to plaintiff by the city of Charlotte. This golf course is the only one operated and maintained by

plaintiff, and it and the other recreational features of Revolution Park are operated by plaintiff for the exclusive use of members of the white race. All negroes are denied the use of this golf course because of the restrictions in the above deeds.

Nine. In December 1951 all the defendants, except Barringer, Abbott Realty Company and the city of Charlotte presented to plaintiff a petition stating that they are negroes, and because they are negroes, they have been denied the right to use this golf course, in violation of their constitutional rights, and demanding that they be permitted to use this golf course.

Ten. Plaintiff by operation of law is charged with the duty of operating and maintaining recreational facilities for the citizens of Charlotte, and does not desire to deprive any of its citizens of their legal rights, nor does plaintiff desire to lose by reverter any of the properties entrusted to it for recreational purposes, nor does it desire to fail to comply with the terms of any gifts made to it by any of its citizens. Therefore, by reason of the aforesaid petition the plaintiff immediately instituted suit against the grantors of the lands composing Revolution Park to obtain a judicial determination of the effect of allowing negroes to use the golf course in said park, because of the reverter provisions and the restrictions as to use in their deeds. The appellants were made parties to the suit. Pending a final decision in such suit plaintiff refused petitioner's request.

Eleven. The defendant Barringer is ready, able and willing to pay the sum of $3,500.00 as a condition precedent to the reversion of the land to him as provided in his deed of gift to the plaintiff.

Upon these facts found the judge made the following conclusions of law and entered judgment accordingly:

1. The court has jurisdiction of the property and the parties, and is empowered to enter judgment under the Declaratory Judgment Act. G. S. N. C. 1-253 *et seq.*

2. The deeds from Osmond L. Barringer, and wife, and from Abbott Realty Company vested in plaintiff a valid determinable fee with the possibility of reverter in and to the lands described in the deeds.

3. In the event any of the reverter provisions in the Barringer deed or the Abbott Realty Company deed be violated, then and in such event title to the lands conveyed in said deeds will by operation of law immediately revert title in the grantors: and the admission of negroes on the Bonnie Brae Golf Course to play golf will cause the reverter provisions in said deeds immediately to become operative, and title to revert.

4. The deed from the city of Charlotte vested in plaintiff a valid determinable fee with the possibility of reverter. That the use of

Bonnie Brae Golf Course by negroes as players would not cause a reversion of the property conveyed by the city of Charlotte to plaintiff, for that the reversionary clause in the city's deed is, under such circumstances, void as being in violation of the 14th Amendment to the U. S. Constitution.

5. The plaintiff is the owner in fee, free of any conditions, reservations or reverter provisions of the lands conveyed to it by Shore and Wilson.

6. Revolution Park was created as an integral area of land, and to permit negroes to play golf on any part of said land will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective and result in the title of plaintiff terminating and the lands reverting to Barringer and Abbott Realty Company.

From the judgment entered the defendants, except Osmond L. Barringer, Abbott Realty Company and the city of Charlotte, appealed, assigning error.

T. H. Wyche and Spottswood W. Robinson, III, for Charles W. Leeper, I. P. Farrar, Sadler S. Gladden, Robert H. Greene, James Heath, Henry M. Isley, Russell McLaughlin, Anthony M. Walker, Harold Walker, Edward J. Weddington, James J. Weddington, Willie Lee Weddington, L. A. Warner, G. M. Wilkins, Roy S. Wynn, and Rudolph M. Wyche, Defendants, Appellants.

Cochran, McCleneghan & Miller and F. A. McCleneghan and Lelia M. Alexander for Osmond L. Barringer, Defendant, Appellee.

John D. Shaw for Charlotte Park and Recreation Commission, Plaintiff, Appellee.

PARKER, J. The decision of the Trial Judge that he had jurisdiction of the property and the parties, and was empowered to enter judgment under the Declaratory Judgment Act is correct. G. S. 1-253 *et seq.*, *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404.

There are no exceptions to the Judge's findings of fact.

We shall discuss first the Barringer Deed, which by reference, as well as all the other deeds mentioned in the statement of facts, is incorporated in the findings of fact, and made a part thereof. The first question presented is: Does the Barringer Deed create a fee determinable on special limitations, as decided by the Trial Judge?

This Court said in *Hall v. Turner*, 110 N.C. 292, 14 S.E. 791: "Whenever a fee is so qualified as to be made to determine, or liable to be defeated, upon the happening of some contingent event or act, the fee is said to be base, qualified or determinable."

"An estate in fee simple determinable, sometimes referred to as a base or a qualified fee, is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event . . . . No set formula is necessary for the creation of the limitation, any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event being sufficient . . . . So, when land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purposes only, and that, on the cessation of such use, the estate shall end, without any re-entry by the grantor, an estate of the kind now under consideration is created. It is necessary, it has been said, that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an essential characteristic of a fee that it may possibly endure forever." Tiffany: Law of Real Property, 3rd Ed., Sec. 220.

In *Connecticut Junior Republic Association v. Litchfield,* 119 Conn. 106, 174 A. 304, 95 A.L.R. 56, the real estate was devised by Mary T. Buell to the George Junior Republic Association of New York with a precatory provision that it be used as a home for children. The New York association by deed conveyed this land to plaintiff, "its successors and assigns, in trust, as long as it may obey the purposes expressed in . . . the will . . . and as long as the (grantee) shall continue its existence for the uses and purposes as outlined in the preamble of the Constitution of the National Association of Junior Republics, but if at any time it shall fail to so use said property for said purposes . . . then the property hereby conveyed shall revert to this grantor, or its successors." The Supreme Court of Connecticut said: "The effect of the deed was to vest in the plaintiff a determinable fee. Here, as in *First Universalist Society v. Boland,* 155 Mass. 171, 174, 29 N.E. 524, 15 L.R.A. 231, the terms of the deed 'do not grant an absolute fee, nor an estate or condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever it is a fee. Because it may end on the happening of the event it is what is usually called a determinable or qualified fee.' See, also *City National Bank v. Bridgeport,* 109 Conn. 529, 540, 147 A. 181; *Battistone v. Banulski,* 110 Conn. 267, 147 A. 820."

In *First Universalist Society v. Boland,* 155 Mass. 171, 29 N.E. 524, 15 L.R.A. 231, "the grant of the plaintiff was to have and to hold, etc., 'so long as said real estate shall by said society or its assigns be devoted to the uses, interests and support of those doctrines of the Christian religion' as specified; 'and when said real estate shall by said society or

its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons, etc.' " The Supreme Court of Connecticut in *Connecticut Junior Republic Association v. Litchfield, supra,* has quoted the language of this case holding that the grant creates "a determinable or qualified fee." Immediately after the quoted words, the Massachusetts Court used this language: "The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted then the estate would cease and determine by its own limitation."

In *Brown v. Independent Baptist Church of Woburn,* 325 Mass. 645, 91 N.E. 2d 922, the will of Sarah Converse devised land "to the Independent Baptist Church of Woburn, to be holden and enjoyed by them so long as they shall maintain and promulgate their present religious belief and faith and shall continue a church; and if the said church shall be dissolved, or if its religious sentiments shall be changed or abandoned, then my will is that this real estate shall go to my legatees hereinafter named." The Court said: "The parties apparently are in agreement, and the single justice ruled, that the estate of the church in the land was a determinable fee. We concur. (Citing authorities). The estate was a fee, since it might last forever, but it was not an absolute fee, since it might (and did) 'automatically expire upon the occurrence of a stated event.' "

In *Smith v. School Dist. No. 6 of Jefferson County* (Missouri), 250 S.W. 2d 795, the deed contained this provision: "The said land being hereby conveyed to said school district for the sole and express use and purpose of and for a school house site and it is hereby expressly understood that whenever said land shall cease to be used and occupied as a site for a school house and for public school purposes that then this conveyance shall be deemed and considered as forfeited and the said land shall revert to said party of the first part, his heirs and assigns." The Court held that the estate conveyed was a fee simple determinable.

In *Collette v. Town of Charlotte,* 114 Vt. 357, 45 A. 2d 203, the deed provided that the land "was to be used by said town for school purposes, but when said town fails to use it for said school purposes it shall revert to said Scofield" (the grantor), "his heirs and assigns, but the town shall have the right to remove all buildings located thereon. The town shall not have the right to use the premises for other than school purposes." The Supreme Court of Vermont in a well reasoned opinion supported by ample citation of authority said: "It was held in *Fall*

Creek School Twp. v. Shuman, 55 Ind. App. 232, 236, 103 N.E. 677, 678, that a conveyance of land 'to be used for school purposes' without further qualification, created a condition subsequent. The same words were used in Scofield's deed to the Town of Charlotte, but they were followed by the provision that 'when said Town fails to use it for said school purposes it shall revert to said Scofield, his heirs or assigns,' clearly indicating the intent of the parties to create a determinable fee, which was, we think, the effect of the deed. *North v. Graham,* 235 Ill. 178, 85 N.E. 267, 18 L.R.A., N.S., 624, 626, 126 Am. St. Rep. 189."

In *Mountain City Missionary Baptist Church v. Wagner,* 193 Tenn. 625, 249 S.W. 2d 875, the deed is an ordinary deed conveying certain real estate. After the *habendum* clause there appears the following language: "But it is distinctly understood that if said property shall cease to be used by the said Missionary Baptist Church (for any reasonable period of time) as a place of worship, that said property shall revert back to the said M. M. Wagner and his heirs free from any encumbrances whatsoever and this conveyance become null and void." The grantor was M. M. Wagner. The Court said: "When we thus read the deed, as a whole, we find that the unmistakable and clear intention of the grantor was to give this property to the church so long as it was used for church purposes and then when not so used the property was to revert to the grantor or his heirs. The estate thus created in this deed is a determinable fee."

In *Magness v. Kerr,* 121 Ore. 373, 254 Pac. 1012, 51 A.L.R. 1466, the deed contained the following provision, to-wit: "Provided and this deed is made upon this condition, that should said premises at any time cease to be used for cooperative purposes, they shall, upon the refunding of the purchase price and reasonable and equitable arrangement as to the disposition of the improvements, revert to said grantors." The Court held that this was a grant upon express limitation, and the estate will cease upon breach of the condition without any act of the grantor.

For other cases of a determinable fee created under substantially similar language see: *Coffelt v. Decatur School District No. 17,* 212 Ark. 743, 208 S.W. 2d 1; *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker,* 373 Ill. 607, 27 N.E. 2d 522, 137 A.L.R. 635; *Board of Education for Jefferson County v. Littrell,* 173 Ky. 78, 190 S.W. 465; *Pennsylvania Horticultural Society v. Craig,* 240 Pa. 137, 87 A. 678.

We have held in *Ange v. Ange,* 235 N.C. 506, 71 S.E. 2d 19, that the words "for church purposes only" appearing at the conclusion of the *habendum* clause, where there is no language in the deed providing for a reversion or forfeiture in event the land ceases to be used as church

property, does not limit the estate granted. To the same effect: *Shaw University v. Ins. Co.*, 230 N.C. 526, 53 S.E. 2d 656.

In *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A. 2d 682, there was in the *habendum* clause of the deed a provision for exclusive use as a public park for the use and benefit of the inhabitants of the Borough of Bangor. The Supreme Court of Pennsylvania said: "An examination of the deed discloses that there is no express provision for a reversion or forfeiture. The mere expression of purpose will not debase a fee." To the same effect see: *Miller v. Village of Brookville*, 152 Ohio St. 217, 89 N.E. 2d. 85, 15 A.L.R. 2d 967; *Ashuelot Nat. Bank v. Keene*, 74 N.H. 148, 65 A. 826, 9 L.R.A. (NS) 758.

In North Carolina we recognize the validity of a base, qualified or determinable fee. *Hall v. Turner, supra; Williams v. Blizzard*, 176 N.C. 146, 96 S.E. 957; *Turpin v. Jarrett*, 226 N.C. 135, 37 S.E. 2d 124. See also: 19 N.C.L.R. pp. 334-344: in this article a helpful form is suggested to create a fee determinable upon special limitation.

When limitations are relied on to debase a fee they must be created by deed, will, or by some instrument in writing in express terms. *Abel v. Girard Trust Co., supra;* 19 Am. Jur., Estates, Section 32.

In the Barringer Deed in the granting clause the land is conveyed to plaintiff "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The *habendum* clause reads, "to have and to hold the aforesaid tract or parcel of land . . . upon the following terms and conditions, and for the following uses and purposes, and none other, to-wit . . . . The lands hereby conveyed, together with the other tracts of land above referred to (the Shore, Wilson and City of Charlotte lands) "as forming Revolution Park, shall be held, used and maintained by the party of the second part" (the plaintiff here) ". . . as an integral part of a park, playground and recreational area, to be known as Revolution Park and to be composed of the land hereby conveyed and of the other tracts of land referred to above, said park and/or recreational area to be kept and maintained for the use of, and to be used and enjoyed by persons of the white race only." The other terms and conditions as to the use and maintenance, etc., of the land conveyed are omitted as not material. The pertinent part of the reverter provision of the deed reads: "In the event that the said lands comprising the said Revolution Park area as aforesaid, being all of the lands hereinbefore referred to . . . and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only . . . then, and in either one or more of said events, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs and assigns," provided, however, that before said lands shall

revert to Barringer, and as a condition precedent to the reversion, Barringer, his heirs or assigns, shall pay unto plaintiff or its successors $3,500.00.

Barringer by clear and express words in his deed limited in the granting clause and in the *habendum* clause the estate granted, and in express language provided for a reverter of the estate granted by him, to him or his heirs, in the event of a breach of the expressed limitations. It seems plain that his intention, as expressed in his deed, was that plaintiff should have the land as long as it was not used in breach of the limitations of the grant, and, if such limitations, or any of them, were broken, the estate should automatically revert to the grantor by virtue of the limitations of the deed. In our opinion, Barringer conveyed to plaintiff a fee determinable upon special limitations.

It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee, and the entire fee automatically ceases and determines by its own limitations. *Collette v. Town of Charlotte, supra; First Universalist Society v. Boland, supra; Brown v. Independent Baptist Church of Woburn, supra; Copenhaver v. Pendleton,* 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324; Tiffany: Law of Real Property, 3rd Ed., Section 217. No action on the part of the creator of the estate is required, in such event, to terminate the estate. 19 Am. Jur., Estates, Section 29.

According to the deed of gift "Osmond L. Barringer, his heirs and assigns" have a possibility of reverter in the determinable fee he conveyed to plaintiff. It has been held that such possibility of reverter is not void for remoteness, and does not violate the rule against perpetuities. 19 Am. Jur., Estates, Section 31; Tiffany: Law of Real Property, 3rd Ed., Section 314.

The land was Barringer's, and no rights of creditors being involved, and the gift not being induced by fraud or undue influence, he had the right to give it away if he chose, and to convey to plaintiff by deed a fee determinable upon valid limitations, and by such limitations provide that his bounty shall be enjoyed only by those whom he intended to enjoy it. 24 Am. Jur., Gifts, p. 731; Devlin: The Law of Real Property and Deeds, 3rd Ed., Section 838; 38 C.J.S., Gifts, p. 816. In *Grossman v. Greenstein,* 161 Md. 71, 155 A. 190, the Court said: "A donor may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it." The 15th headnote in *Brahmey v. Rollins,* (N. H.) 179 A. 186, reads: "Right to alienate is an inherent element of ownership of property which donor may with-

hold in gift of property." We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own.

If negroes use the Bonnie Brae Golf Course, the determinable fee conveyed to plaintiff by Barringer, and his wife, automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer, by virtue of the limitation in the deed, provided he complies with the condition precedent by paying to plaintiff $3,500.00, as provided in the deed. The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and *Shelley v. Kraemer,* 334 U.S. 1, 92 L. Ed. 1161, has no application. We do not see how any rights of appellants under the 14th Amendment to the U. S. Constitution, Section 1, or any rights secured to them by Title 42 U.S.C.A., annotated Sections 1981 and 1983, are violated.

If negroes use Bonnie Brae Golf Course, to hold that the fee does not revert back to Barringer by virtue of the limitation in the deed would be to deprive him of his property without adequate compensation and due process in violation of the rights guaranteed to him by the 5th Amendment to the U. S. Constitution and by Art. I, Sec. 17 of the N. C. Constitution, and to rewrite his deed by judicial fiat.

The appellants' assignment of error No. 1 to the conclusion of law of the court that the Barringer deed vested a valid determinable fee in plaintiff with the possibility of a reverter and assignments of error No. 3 and No. 4 to the conclusion of the court that in the event any of the limitations in the Barringer deed are violated, title to the land will immediately revert to Barringer and that the use of Bonnie Brae Golf Course by negroes will cause a reverter of the Barringer deed, are overruled.

The case of *Bernard v. Bowen,* 214 N.C. 121, 198 S.E. 584, is distinguishable. For instance, there is no limitation of the estate conveyed in the granting clause.

Now as to the Abbott Realty Company deed. This deed conveyed as a gift certain lands to plaintiff upon the same terms and conditions, and for the same uses and purposes, and for the white race only, as set forth in the Barringer deed. This deed contains a reverter provision, if there is a violation of certain limitations of the estate conveyed, but the reverter provision does not provide that, if the lands of Revolution Park are used by members of a non-white race, the lands conveyed by Abbott Realty Company to plaintiff shall revert to the grantor. In our opinion,

the estate conveyed by Abbott Realty Company to plaintiff is a fee determinable upon certain expressed limitations set forth in the deed, with a possibility of reverter to Abbott Realty Company if the limitations expressed in the deed are violated and the reverter provision states that such violations will cause a reverter. That was the conclusion of law of the Trial Judge, and the appellants' assignment of error No. 2 thereto is overruled. However, the reverter provision does not require a reverter to Abbott Realty Company, if the lands of Revolution Park are used by negroes. Therefore, if negroes use Bonnie Brae Golf Course, title to the lands conveyed by Abbott Realty Company to plaintiff will not revert to the grantor. See: *Tucker v. Smith*, 199 N.C. 502, 154 S.E. 826.

The Trial Judge concluded as a matter of law that if any of the reverter provisions in the Abbott Realty Company deed were violated, title would revert to Abbott Realty Company, and that if negroes use Bonnie Brae Golf Course, title to the land granted by Abbott Realty Company will revert to it. The appellants' assignments of error Nos. 5 and 6 are to this conclusion of law. These assignments of error are sustained to this part of the conclusion, that if negroes use Bonnie Brae Golf Course, title to the land will revert to Abbott Realty Company: and as to the other part of the conclusion the assignments of error are overruled.

The appellants' assignment of error No. 7 is to this conclusion of law of the Trial Judge, that the deed from the city of Charlotte to plaintiff created a valid determinable fee with the possibility of a reverter, and that as the city of Charlotte has only one municipal golf course, the use of Bonnie Brae Golf Course by negroes will not cause a reversion of title to the property conveyed by the city of Charlotte to plaintiff, for that said reversionary clause in said deed is, under such circumstances void as being in violation of the 14th Amendment to the U. S. Constitution.

From this conclusion of law the city of Charlotte and the plaintiff did not appeal. We do not see in what way appellants have been aggrieved by this conclusion of law, and their assignment of error thereto is overruled.

The appellants also include as part of their assignments of error Nos. 3, 4, 5 and 6 these conclusions of law of the Trial Judge numbered 7 and 8. No. 7, that the plaintiff is the owner in fee simple, free of any conditions, reservations or reverter provisions of the property which was conveyed to it by W. T. Shore and T. C. Wilson. The city of Charlotte has not appealed from this conclusion of law, and we are unable to see how appellants have been harmed, so their assignments of error thereto are overruled. No. 8, that Revolution Park, in which is located Bonnie Brae Golf Course, was created as an integral area of land, com-

prising the various contiguous tracts conveyed to plaintiff by Barringer, Abbott Realty Company, city of Charlotte, Shore and Wilson, and to permit negroes to use for golf any part of said land will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective, and result in title of the plaintiff terminating, and the property reverting to Barringer and Abbott Realty Company. As to this conclusion of law the assignments of error are sustained as to that part which states that, if negroes use Bonnie Brae Golf Course, the reverter provision in the Abbott Realty Company deed will become effective and title will revert to Abbott Realty Company: as to the other parts the assignments of error are overruled.

Judgment will be entered below in accordance with this opinion.

Modified and Affirmed.

H. F. HARDISON v. JAMES A. GREGORY AND GERALD M. GREGORY, CO-ADMINISTRATORS OF THE ESTATE OF BONNIE M. GREGORY.

(Filed 30 June, 1955.)

1. Appeal and Error § 23—

Exceptions presenting a single question of law for decision are properly grouped under one assignment of error.

2. Appeal and Error § 29—

Exceptions not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Husband and Wife §§ 26, 33—

Alienation of affections and criminal conversation are distinct torts; physical debauchment is generally not a necessary element of a right of action for alienation of affections.

4. Evidence § 32—

G. S. 8-51 applies to tort actions.

5. Same—

The disqualification of a party to the action to testify against the personal representative of a deceased person as to a transaction or communication with the deceased does not prohibit such interested party from testifying as to the acts and conduct of the deceased where the interested party is merely an observer and is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased.

6. Same—

In this action for alienation of affections and criminal conversation against the administrators of the alleged tort feasor, plaintiff's testimony

that when he returned to his home at night he found the deceased standing in the living room of the unlighted house, and that on two other occasions he saw his wife and the deceased alone at farm cabins, *is held* competent as testimony of independent facts. The Supreme Court is evenly divided in opinion, one Justice not sitting, as to the competency of plaintiff's testimony in regard to an assault by plaintiff on the deceased.

7. Husband and Wife § 36—

In an action for criminal conversation it is not necessary to show the adultery of the wife by direct proof, but it may be shown by circumstantial evidence from which the guilt of the parties can be reasonably inferred.

8. Same—Circumstantial evidence held sufficient in this action for criminal conversation.

Evidence tending to show that plaintiff returned home at night, found the alleged tort feasor standing in the living room of the unlighted house, and on two other occasions saw the parties alone in a farm cabin, with no evidence that any one lived in either of the cabins or that any person was in them at the time except plaintiff's wife and the alleged tort feasor, and on another occasion saw through the tort feasor's office window the tort feasor hugging and kissing his wife, together with admissions of the wife that on the occasion plaintiff found the tort feasor in his unlighted house she was in her bedroom fixing to dress, and that on one occasion in leaving one of the cabins with the tort feasor, she knew her husband was pursuing them in his car because of her relationship to the tort feasor, *is held* in this action for criminal conversation sufficient to be submitted to the jury on the question of whether the alleged tort feasor had immoral relations with plaintiff's wife. As to whether an action for criminal conversation survives the death of the tort feasor, *quære.*

HIGGINS, J., concurring.

JOHNSON and BOBBITT, JJ., join in concurring opinion.

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

APPEAL by defendants from *Bickett, J.,* at January Civil Term 1955, of DURHAM.

Action to recover damages for criminal conversation with plaintiff's wife and alienation of her affections by Bonnie M. Gregory, deceased. The defendants are co-administrators of the estate of Bonnie M. Gregory.

The jury found in answer to the issues submitted to them that Bonnie M. Gregory wrongfully alienated the affections of plaintiff's wife, had immoral relations with her, and fixed damages in the sum of $10,000.00. Judgment was entered upon the verdict.

The defendants appealed, assigning error.

Gantt, Gantt & Markham and James R. Patton for Plaintiff, Appellee.

Reade, Fuller, Newsom & Graham for Defendants, Appellants.

PARKER, J. The defendants have grouped their Exceptions One through Fifteen, both inclusive, and have discussed these Fifteen Exceptions as one assignment of error in their brief. This was proper because all these exceptions present a single question of law for decision by the Court. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. The question of law is this: Does the testimony of plaintiff concerning the conduct of the deceased Bonnie M. Gregory to his wife, Mrs. Nellie Hardison, on three separate occasions and his striking Bonnie M. Gregory in the face with a hatchet, constitute a transaction or a communication with a deceased person within the contemplation of G. S. 8-15?

Over the defendants' objections and exceptions plaintiff was permitted to testify in substance as follows:

FIRST OCCASION

In November 1949 plaintiff had been away from home on a duck hunting trip. He arrived home about 8:30 p.m. No lights were on. He walked in the house, turned on the lights, and found Bonnie M. Gregory standing in the living room close to the bedroom door. The bedroom door was locked.

SECOND OCCASION

Plaintiff knew where Bonnie M. Gregory's farm and cabin were on the Roxboro Road. In March 1949 he drove by and saw Bonnie M. Gregory's car parked near the cabin. Later, about 12:00 o'clock noon, he came back, and saw his wife and Bonnie Gregory leaving in Gregory's Cadillac car. He tried to catch them in his Mercury car, but the Cadillac outran him, and he lost them in the northern part of the City of Durham.

THIRD OCCASION

On the afternoon of 3 January 1952, pursuant to a telephone call, plaintiff went out on the Fayetteville Road to a cabin belonging to Rat Massey. This cabin was about 400 yards from the highway. He saw parked there Bonnie Gregory's Cadillac car. He parked his car, and walked by the cabin on a dirt road. Before he got back to his car, he saw Gregory and his wife come out of the cabin, get in the Cadillac, and drive away. He chased the Cadillac five or six miles, going 90 to 95 miles an hour. A train blocked the Fayetteville Road, and Gregory turned down a dead end dirt road. Gregory drove his car to a Negro's home, through the yard, across a field, hit a tree, and stopped. He went to the Cadillac; Gregory rolled up the glass window. The doors were locked. Plaintiff's wife was on the floor board of the front seat.

He went back to his car, got a hatchet, knocked out a glass window of the Cadillac, and struck Gregory in the face with the hatchet. His wife got up from the floor board, opened the right door, and got out. He ran around the car, and knocked the glass there out. Gregory jumped out, ran to a nearby shallow creek, and stood in it putting water on his face. Plaintiff's wife stood 10 or 12 steps from the creek while Gregory was standing in it. Before leaving, plaintiff testified he had a conversation with his wife and Gregory, but he was not asked, and did not testify, as to what was said.

The plaintiff also testified as follows over objection and exception:

FOURTH OCCASION

When plaintiff's wife was working for Bonnie Gregory in 1948, upon one occasion plaintiff looked through a window of Gregory's office and saw Gregory hugging and kissing her.

The exceptions as to this testimony on the fourth occasion are numbered 16 and 17. These two exceptions are not brought forward, and discussed in defendants' brief. Exceptions Nos. 16 and 17 are taken as abandoned. Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 562.

Alienation of affections and criminal conversation are two distinct torts. Generally a physical debauchment of plaintiff's wife is not a necessary element of a right of action for alienation of affections. 42 C.J.S., Husband and Wife, Sec. 668.

The form of action for both torts is *ex delicto*. 42 C.J.S., Husband and Wife, Sections 683 and 699. G. S. 8-51 applies to tort actions. *Boyd v. Williams*, 207 N.C. 30, 175 S.E. 832.

We have a host of cases construing and interpreting the words "a personal transaction or communication between the witness and the deceased person" used in G. S. 8-51, and much litigation has arisen over the application of the quoted words.

The Court said in *Sanderson v. Paul*, 235 N.C. 56, 69 S.E. 2d 156, speaking in reference to G.S. 8-51: "Courts are not disposed to extend the disqualification of a witness under the statute to those not included in its express terms."

We said in *Whitesides v. Green*, 64 N.C. 307: "But there is no prohibition against the defendant testifying as to any matter other than a transaction or communication with the deceased." These words are quoted in *In re the Will of Bowling*, 150 N.C. 507, 64 S.E. 368.

Apparently we have no case directly on all fours, but we have a number of cases that sustain the proposition that G.S. 8-51 does not prohibit an interested party from testifying as to the acts and conduct of the deceased, where the interested party is merely an observer—in

other words as to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased. *Gray v. Cooper,* 65 N.C. 183; *McCall v. Wilson,* 101 N.C. 598, 8 S.E. 225; *Costen v. McDowell,* 107 N.C. 546, 12 S.E. 432; *Lane v. Rogers,* 113 N.C. 171, 18 S.E. 117; *Worth v. Wrenn,* 144 N.C. 656, 57 S.E. 388 (testimony of deceased on former trial); *In re the Will of Bowling, supra; Sutton v. Wells,* 175 N.C. 1, 94 S.E. 688; *In re the Will of Harrison,* 183 N.C. 457, 111 S.E. 867; *In re the Will of Mann,* 192 N.C. 248, 134 S.E. 649; *In re the Will of Foy,* 193 N.C. 494, 137 S.E. 427; *Wilder v. Medlin,* 215 N.C. 542, 2 S.E. 2d 549; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; Stansbury's North Carolina Law of Evidence, pp. 128-129.

In *Gray v. Cooper, supra,* plaintiff was held competent to testify that the deceased had and enjoyed the services of slaves. This Court said: "That the intestate had the possession of the slaves during the years in question was a fact which the plaintiff might know, and which he says he did know, otherwise than from a transaction or communication with the intestate." The Court goes on to say, if this testimony was not true, it might have been contradicted by the slaves.

In *McCall v. Wilson, supra,* it is said that an interested witness may testify as to what she saw the deceased do, as that "she saw him start off with the money, and bring back the deed."

In *Lane v. Rogers, supra,* it was held that plaintiff was competent to testify that she saw the book in the hands of intestate on her wedding day, but that she was incompetent to testify that intestate handed her the book, because that was a personal transaction between her and the intestate.

The case of *In Re the Will of Bowling, supra,* holds that the testimony of an interested witness as to the relative positions of the deceased testator, the attesting witnesses and the desk and counter in a store and as to what he saw deceased testator do, was properly admitted in evidence as "manifestly independent facts," not involving transactions or communications with the deceased.

In *Sutton v. Wells, supra,* an interested party testified the deceased occupied the building after she got her deed. The Court said: "This did not relate to any transaction between the witness and M. M. Wells, but was a substantive fact of which she had knowledge independently of any statement by the deceased and the testimony was competent just as she could have proved the handwriting of the deceased, or the value of property owned by him, or any other substantive fact."

The case of *In re Harrison, supra,* states: "It was competent for the witness to say whether or not the drawer was locked, and to testify as to the habit or custom or keeping it locked. This was a matter within her

own knowledge, and did not perforce entail a recitation of any personal transaction or communication with the alleged testator."

Boyd v. Williams, supra, was a civil action to recover damages for personal injuries brought by a wife against the administrator of her deceased husband. The only evidence of negligence establishing liability was the speed of the car at the curve. The testimony of the wife, who was riding in the car, as to its speed, was held incompetent by virtue of G.S. 8-51 as involving a personal transaction between the witness and the deceased person, because it was an essential or material link in the chain involving liability against the defendant. See also *Davis v. Pearson,* 220 N.C. 163, 16 S.E. 2d 655, which relates to a somewhat similar state of facts. It would seem that the ruling in these two cases was based upon the fact that each plaintiff was a passenger in the car. For a discussion of the *Boyd v. Williams case* and of the decisions elsewhere as to this point, see 19 N.C.L. 231. We consider these two cases are not applicable to the present case.

Our cases hold that an interested party is not prohibited by G.S. 8-51 from testifying concerning his independent acts. *Johnson v. Rich,* 118 N.C. 268, 23 S.E. 1007 (attendance in court as a witness); *Jones v. Waldroup,* 217 N.C. 178, p. 186, 7 S.E. 2d 366; *Lister v. Lister,* 222 N.C. 555, 24 S.E. 2d 342; Stansbury's North Carolina Law of Evidence, p. 130.

It is to be noted that plaintiff gave no testimony as to any words spoken on the three occasions. Applying the principles of law stated above to the facts, we conclude that the plaintiff was competent to testify as to what he saw the deceased Bonnie M. Gregory do and his conduct on the three occasions set forth, because he was testifying as to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased. To hold that this testimony is incompetent because it concerned "a personal transaction or communication" between the plaintiff and the deceased Bonnie M. Gregory, would violate human nature and brand plaintiff as a willing cuckold.

It would seem that the testimony of plaintiff that on the third occasion he struck the deceased in the face with a hatchet was competent as testimony of an independent act of plaintiff.

The defendants discuss their Exceptions Nos. 18, 19, 20 and 21 under one head in their brief entitled, "Was there sufficient evidence adduced on behalf of the plaintiff to warrant the submission to the jury" of the second issue. Exceptions 18 and 19 are to the refusal of the court to allow their motions for judgment of nonsuit made at the close of plaintiff's evidence, and renewed at the close of all the evidence. Exception 20 is to the submission of the second issue. Exception 21 is to the

failure of the court to set aside the verdict as being against the greater weight of the evidence. The defendants in their brief state no reason or argument and cite no authority that the action should have been nonsuited. Their argument and citation of authority is that there was not sufficient evidence for the submission to the jury of the second issue.

"It is not necessary to show the adultery by direct proof, but circumstances are sufficient for that purpose, if therefrom the jury can reasonably infer the guilt of the parties." *Powell v. Strickland,* 163 N.C. 393, 79 S.E. 872.

The defendants called as their witness plaintiff's wife, Mrs. Nellie Hardison, examined her in their behalf, and she denied having had any immoral relations with Bonnie M. Gregory. The following facts were elicited from her on cross-examination: That when plaintiff testified he returned home from a duck hunting trip and found his house dark and Bonnie Gregory standing in the living room beside her bedroom, she said she was in the bedroom fixing to dress. She said she did not know Gregory was in the house. That the door from the living room to the bedroom was closed but not locked: the door to the hall was locked.

In reference to the Third Occasion on 3 January 1952, Mrs. Hardison said on cross-examination that when Gregory and she left Rat Massey's cabin, she knew plaintiff was pursuing her by virtue of her relationship with Bonnie Gregory, and that she does not remember that she offered her husband any explanation as to her presence with Gregory. That when she and Gregory left Massey's cabin in his Cadillac, and were on the road to Durham, Gregory saw her husband's car behind, said "Herbert is behind us," and gave his Cadillac the gas. She stayed with Gregory after he was hit with the hatchet, and Gregory took her to her sister's. She left her husband after this episode.

The admissions of Mrs. Nellie Hardison that when plaintiff returned from his duck hunting trip at night, he found Bonnie M. Gregory in the living room of his house—plaintiff testified the house was dark—at her bedroom door and that she was in the bedroom fixing to dress, and that she knew her husband was pursuing her when she and Bonnie M. Gregory left Rat Massey's cabin by virtue of her relationship to Bonnie M. Gregory, and the evidence of plaintiff as to the four occasions set forth above, considered in the light most favorable to plaintiff, create, in our opinion, a reasonable inference that the conduct of plaintiff's wife and Bonnie M. Gregory was not only very suspicious, but had all the earmarks of a guilty intercourse, and are sufficient to justify the submission of the second issue to the jury.

We have examined the cases of *Barker v. Dowdy,* 224 N.C. 742, 32 S.E. 2d 265, and *S. v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143, cited and relied upon by the defendants. In our opinion, the evidence in the

present case is stronger. Those cases do not contain damaging admissions as made by plaintiff's wife here, when put on the stand by the defendants. In the case here there is no evidence that any one lived in the Gregory or Massey cabins, or that any one was in either cabin when plaintiff testified his wife and Gregory were there, except those two.

Quœre: In North Carolina, does an action for alienation of affections or criminal conversation die with the person who caused the injury? See: 1 C.J.S., Abatement and Revival, Section 147; 1 Am. Jur., Abatement and Revival, Section 99; Annos.: 14 A.L.R. 693; 24 A.L.R. 488; 57 A.L.R. 351; N.C. G.S. 1-74; *Suskin v. Maryland Trust Co.,* 214 N.C. 347, 199 S.E. 276; N.C. G.S. 28-175. This question is not presented for decision.

In the trial below we find

No Error.

HIGGINS, J., concurring:

The plaintiff, over objection, was permitted to testify in the manner described in the opinion as the "third occasion." In substance, the plaintiff testified that on January 3, 1952, he saw Bonnie M. Gregory and plaintiff's wife get into the Gregory car at a cabin several miles from Durham; that he chased them until near Durham the highway was blocked by a passing freight train; whereupon Gregory turned on a dirt road and continued until he hit a tree at the dead end of the road. Plaintiff, armed with a hatchet, went to the Gregory car, the doors to which were locked. Using the hatchet, the plaintiff broke both windows, hit Gregory in the face with the hatchet and chased him into a nearby creek. Plaintiff departed, leaving Gregory in the creek bathing his wounds and plaintiff's wife on the bank of the stream. Gregory was deceased at the time of the trial. The defense was conducted by his personal representatives.

I think the defendant's objections should have been sustained and the evidence excluded under G.S. 8-51 as constituting "a personal transaction between the plaintiff and the deceased." The plaintiff is a party to the action; he testified as a witness in his own behalf and against the personal representative of the deceased. *Bunn v. Todd,* 107 N.C. 266, 11 S.E. 1043; *Seals v. Seals,* 165 N.C. 409, 81 S.E. 613; *Bank v. Wysong,* 177 N.C. 284, 98 S.E. 769; *Peek v. Shook,* 233 N.C. 259, 63 S.E. (2d) 542. Under the authority of the above cases the only ground upon which the evidence could have been competent is that it did not relate to a personal transaction between the plaintiff and the deceased. The chase from the cabin to the end of the road, the breaking out of both windows with a hatchet, and the assault made with the weapon, in my

view, constituted *a personal transaction.* The defendant's objections to the evidence were preserved by exceptions Nos. 10, 11, 12, 13 and 14.

Mrs. Hardison was called as a witness for the defendant. While she did not testify on direct examination about the occurrence on January 3, on cross-examination she did give rather full details in material substance the same as given over objection by the plaintiff. In view of her testimony, therefore, the admission of plaintiff's testimony is not deemed of sufficient importance to justify another trial. I concur in the result.

JOHNSON and BOBBITT, JJ., join in this opinion.

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

LUTZ INDUSTRIES, INC., SUCCESSORS TO LUTZ HOSIERY MILL, INC. v. DIXIE HOME STORES, A CORPORATION, AND ROBERT A. GIBBONS AND HENRY M. SMITH, T/A GIBBONS & SMITH.

(Filed 30 June, 1955.)

1. Pleadings § 30—

When a motion to strike irrelevant matter from a pleading is made in apt time, it is made as a matter of right. G.S. 1-153.

2. Pleadings § 31—

The test of whether matter alleged in a pleading is irrelevant, and therefore should be stricken on motion aptly made, is whether the pleader would have the right to introduce in evidence the facts to which the allegations relate.

3. Appeal and Error § 40f—

The denial of a motion to strike allegations from a pleading, even though the motion be made in apt time, is not ground for reversal on appeal unless the record affirmatively shows that the matter is irrelevant or redundant, and that its retention in the pleading will cause harm or injustice to the moving party.

4. Evidence § 2—

The courts will take judicial notice of the Building Code published by the Building Code Council, since such publication is an important public document having the force of law through enactment by reference. G.S. 143-136 to G.S. 143-143, inclusive.

5. Statutes § 3—

The North Carolina Building Code of 1936 was ratified and adopted by Chapter 280, Public Laws of 1941, by clear and specific reference, and therefore the Building Code and the National Electric Code to which it refers, have the force and effect of law.

6. Same—

Unless prohibited by Constitutional restrictions, the General Assembly may enact by reference standards of conduct promulgated and published by a public body or commission when such publication is clearly identified.

7. Constitutional Law § 13—

For the purpose of protecting life, health and property, the General Assembly has the power to enact by reference a specified building code promulgated and published by the Building Code Council.

8. Negligence § 1—

The violation of a statute which imposes upon a person a specific duty for the protection of others constitutes negligence *per se*, and is actionable when a proximate cause of injury.

9. Electricity § 12: Pleadings § 31—

Provisions of the 1936 Building Code which require that electrical systems be installed in conformity with the National Electric Code and the National Board of Fire Underwriters, contain regulations having the force of law, and therefore in an action to recover for destruction of property in a fire allegedly caused by negligence of defendants in failing to properly install electrical fixtures and wiring and in failing to have the electrical system inspected before turning on the electricity, evidence of violations of germane provisions of the National Electric Code, adopted as the standard by the Board of Fire Underwriters, would be competent, and therefore denial of motions to strike allegations of the complaint referring to such violations is not error.

10. Statutes § 6—

The presumption in favor of the validity of an act of the Legislature is a universal and fundamental rule.

11. Appeal and Error § 40l—

The courts will not determine the constitutionality of a statute unless the question is properly presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution.

12. Electricity § 12: Statutes § 3—

Plaintiff pleaded the provisions of Chapter 280, Public Laws of 1941 granting the Building Code Council power to modify the Building Code, provided its modifications are approved by the Commissioner of Insurance and do not establish more stringent regulations than contained in the Code. *Held:* In the absence of a challenge to the constitutionality of the statute, the presumption of constitutionality will be indulged in an action to recover damages resulting from a fire allegedly caused by the negligent installation of equipment, and the provisions of the National Electric Code of 1951, promulgated by the North Carolina Building Code Council would be admissible in evidence and therefore motions to strike allegations in regard thereto are properly denied.

13. Pleadings §§ 3c, 31—

A municipal ordinance may be pleaded by its caption or the number of the section thereof and the caption, but allegations that "The National

Electric Code of 1951 . . . which has been adopted by" the municipality in question, is an insufficient pleading of the municipal ordinance, and such allegations are properly stricken on motion.

14. Damages § 9—

In an action where punitive damages may be awarded, evidence of the financial condition of defendant and its reputed wealth is competent, but when only compensatory damages are recoverable, evidence thereof is incompetent, and allegations in regard thereto are properly stricken on motion.

15. Damages § 7—

Though no specific form of allegation is required as the basis for the award of punitive damages, the complaint must allege facts showing circumstances justifying the award, such as actual malice, or oppression, or gross and willful wrong, or wanton and reckless disregard of plaintiff's rights.

16. Damages § 8—

This action was instituted to recover damages suffered in a fire allegedly caused by improper installation of electrical equipment in violation of the standard prescribed by law. *Held:* The action was not to recover for any willful or malicious conduct on the part of defendants, and therefore the allegations are insufficient to support an award of punitive damages.

17. Damages § 9: Pleadings § 31—

The allegations of the complaint in this action being insufficient to support an award of punitive damages, allegations as to the pecuniary worth of defendants are irrelevant and should have been stricken upon motion aptly made.

18. Appeal and Error § 40b—

In the absence of a showing to the contrary, it will be presumed that the denial by the trial court of defendants' motion that plaintiff be required to make the allegations of the complaint more definite and certain, was denied in the court's discretion, and such discretionary denial of the motion is not reviewable on appeal in the absence of abuse of discretion.

APPEAL by defendants from *McSwain, Special Judge,* November Term 1954 of CALDWELL.

Civil action to recover compensatory and punitive damages for the destruction by fire on 12 February 1952 of yarn, manufactured hosiery and hosiery machinery allegedly caused by the negligent wiring and installation of electrical fixtures, and by the negligent failure to have the wiring and fixtures inspected and approved before turning on electrical current.

Prior to answer or demurrer, or before an extension of time to plead is granted, each defendant made separate motions to strike and to make more definite certain parts of the complaint.

The language of the two motions is identical, except that the defendants Gibbons and Smith, a partnership trading under the name of Gibbons & Smith, moved to strike a few more allegations than their co-defendant did. The Trial Court entered separate orders denying the separate motions *in toto*.

From the orders entered, each of the defendants appealed, assigning error.

W. H. Strickland and Alfred R. Crisp for Plaintiff, Appellee.

Adams & Adams and Mull, Patton & Craven for Defendant, Appellant Dixie Home Stores.

Townsend & Todd for Defendant, Appellant Gibbons & Smith.

PARKER, J. The defendants Gibbons and Smith state in their brief that both appellants present the same questions for determination, and therefore they adopt *in toto* the brief filed by their co-defendant, the Dixie Home Stores, and abandon any of their assignments of error, which are not carried forward and discussed in the brief of their co-defendant. The Dixie Home Stores has not carried forward and discussed in its brief the denial of the court to strike any allegations, except those contained in its own motion. Therefore, we are concerned with identical motions to strike and to make more definite certain parts of the Complaint.

The defendants having made their motions to strike in apt time, G.S. 1-153, it is made as a matter of right. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412. Upon motion irrelevant allegations in a pleading should be stricken. The test is, does the pleader have a right to introduce in evidence the facts to which the allegation relates? If so, the motion should be denied: if not, it should be allowed. *Daniel v. Gardner, supra; Penny v. Stone,* 228 N.C. 295, 45 S.E. 2d 362. The denial of a motion to strike made in apt time "is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party." *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185.

Assignments of error Nos. 3, 4, 6 and 8 of the Dixie Home Stores, and assignments of error Nos. 5, 6, 9 and 12 of Gibbons & Smith refer to the same allegations of the Complaint, which allegations in substance state that the defendants in making certain electrical installations violated the provisions of the National Electrical Code of 1951, the standard adopted by the National Board of Fire Underwriters, which violation proximately caused a fire destroying the property described in the

Complaint. These allegations are contained in Paragraphs 7, 8, 13 and 14 of the Complaint.

The relevant part of Paragraph 7 follows—the words asked to be stricken are emphasized:" "That the defendant corporation, through its agents, Gibbons and Smith, carelessly, wantonly and recklessly, *and strictly in violation of the National Electrical Code of 1951, which is the standard adopted by the National Board of Fire Underwriters for electrical wiring and electrical apparatus, and also which has been adopted by the City of Lenoir,* in the following, to-wit: That in illegally installing its equipment *in violation of said code* the defendant corporation *violated said code* in the following particulars: (a) That in a group of 7 compressors that were fed by a feeder consisting of two No. 4 and one No. 6 wires, feeding a distance of about 100 feet from a 100 ampere to two fuse switches; that the supply was 120/240 volts, 60 cycle; that type R wire was used with a volt carrying capacity of 70 amperes, whereas *according to the electrical code* a feeder capacity of 82— 15/100 ampere capacity was required. (b) That three feeders from a junction box, the second feeder consisted of two No. 6, five No. 12 and one No. 8 wire in a one-inch conduit; *that this No. 1 size of wire exceeded the 40% fill allowed by Table 11, Chapter 10 of the Electrical Code above referred to;* that the third feeder consisted of two No. 6, two No. 12 and one No. 8 wires in a one-inch conduit; *that this exceeded the 40% fill allowed by Table 11, Chapter 10 of the Electrical Code, and that both of said items were in violation of said code.* (c) That the three feeders above mentioned fed 7 safety switches, one for each compressor. The safety switches connected with the two-inch conduit mentioned above and were used as a junction point with wires feeding through and in some cases splicing in the switches; *that this was in violation of Code Section 3737-b.* (d) *That the motor controllers used for the compressors were not according to the code, and therefore in violation of the National Electrical Code.* (e) That the 7 compressors were installed and wired *in violation of the Code,* in the following manner—(here follows a description of how each compressor was installed and wired). *All of these installations were in violation of Section 2405 of the National Electric Code, and particularly Table 28, Chapter 10, which requires two over current devices in each of the compressor units named."*

The relevant parts of Paragraph 8, with the words asked to be stricken emphasized, are: "That the defendants, Gibbons and Smith, agents of the defendant, Dixie Home Stores, a corporation, knew or should have known *the requirements of the National Electric Code hereinbefore referred to,* and that it was their duty to and they should have refrained from making an installation in connection with the use

of a dangerous instrumentality, to-wit: electricity, *contrary to the provisions of said code . . .*"

The relevant parts of Paragraph 13, with the words asked to be stricken emphasized, follow: "Dixie Home Stores knew or should have known that . . . electricity was highly dangerous in nature, and that in dealing with said instrumentality the defendant corporation and its agents knew or should have known that they *were required to install the wiring and electrical fixtures as hereinbefore alleged, in accordance with the National Electric Code of 1951.* That the defendant corporation, Dixie Home Stores, knew or should have known that before turning the electric current into said installations that they were required to have the said installations inspected by the city inspector of the City of Lenoir; that notwithstanding these facts the defendant corporation, Dixie Home Stores, unlawfully, wilfully, wantonly and in a grossly negligent manner installed said electrical wiring and electrical fixtures in the building belonging to O. P. Lutz Furniture Company, Inc., *in violation of the National Electrical Code* and its failure to have the same inspected as required by the ordinance of the City of Lenoir. Reference to which ordinance, Article 3, entitled 'Electrical Inspection' is hereby referred to and made a part hereof as fully as if incorporated herein, and a certified copy of said ordinance will be produced at the hearing of this action . . ."

All parts of Paragraph 14 reading as follows: "That by reason of the unlawful, wanton, wilful and gross negligent conduct of the defendant corporation and its agents and their failure to observe the rules and requirements of the National Electrical Code, and failure to observe the ordinance of the City of Lenoir, that this plaintiff is entitled to recover punitive damages of the defendant corporation in the amount of $50,000.00."

In support of their motions to strike, the defendants make two contentions. One, the allegations of the Complaint are not sufficient for us to determine that the City of Lenoir has enacted an ordinance adopting the National Electrical Code of 1951 and making it a part of the law of the city. Two, the National Electrical Code of 1951 sets up a private standard of care, which has no relevancy to the legal standard of reasonable care imposed upon all persons by law, and the retention of the allegations of the Complaint in respect thereto will be highly prejudicial to them in the trial. The defendants in their brief state: "We think the Town of Lenoir could have validly enacted an ordinance copying word for word the so-called National Electrical Code of 1951."

The briefs of the parties make no reference to the North Carolina Building Code—enacted by the General Assembly in 1933, and, as subsequently amended, set forth in G.S., Chapter 143, Article 9, Sec-

tions 143-136 to 143-143, both inclusive, which chapter is entitled "State Departments, Institutions, and Commissions." G.S. 143-137 states: "It is the purpose of this article to protect life, health and property and all its provisions shall be construed liberally to that end." G.S. 143-139 created a Building Code Council which was empowered and directed to draw up a building code for the State. In 1936 the Building Code Council adopted, promulgated and published a North Carolina Building Code. This Building Code is an important public document of which we take judicial notice. *Staton v. R. R.*, 144 N.C. 135, 56 S.E. 794; *Clark v. Greenville,* 221 N.C. 255, 20 S.E. 2d 56; 20 Am. Jur., Evidence, Sec. 44.

Chapter XV, entitled "Electrical Control" of the 1936 North Carolina Building Code, reads as follows:

"Except as may be otherwise provided by rules promulgated by the Building Code Council, the electrical systems of a building or structure shall be installed in conformity with the 'National Electrical Code,' as approved by the American Standards Association.

"The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters.

"In order to protect the property of citizens from the dangers incident to defective electric wiring of buildings, it shall be unlawful for any firm or corporation to allow any electric current for the purpose of illuminating any building belonging to any person, firm, or corporation to be turned on without first having had an inspection made of the wiring by the building inspector and having received from the inspector a certificate approving the wiring of such building. It shall be unlawful for any person, firm, or corporation engaged in the business of selling electricity to furnish any electric current for use for illuminating purposes in any building or buildings of any person, firm, or corporation, unless the said building or buildings have been first inspected by the inspector of buildings and a certificate given as above provided. The fee that shall be allowed said inspector of buildings for the work of such inspector of electrical wiring shall be one dollar for each building inspected, to be paid by the person applying for the inspection."

The General Assembly in 1941—P. L. 1941, Ch. 280—passed an Act amending the Building Code enacted in 1933 and restricting and defining the authority of the Building Code Council and providing for appeals therefrom. The relevant part of the amendment, which is set forth in G.S. 143-139, is as follows:

"Subject to the limitations hereinafter set forth, the said Building Code Council is authorized and empowered to establish reasonable and suitable classifications of buildings, both as to use and occupancy; to

determine general building restrictions as to location, height and floor areas; to promulgate rules for the lighting and ventilation of buildings; means of egress therefrom; construction thereof and precautions to be taken during such construction; materials, loads and stresses of construction; chimneys and heating appliances and elevators; plumbing, heating, electrical control and protection; and to adopt such other rules and regulations as may be reasonably necessary to effectuate the purposes of this article: Provided, however, the said Building Code Council shall not establish any standard or adopt or promulgate any rule, regulation, classification, limitation or restriction more rigid, exacting or stringent in its requirements than is authorized in the 'North Carolina Building Code' adopted and promulgated by said Council in the year one thousand nine hundred and thirty-six and published in full in August of that year in a printed volume as an official publication of the North Carolina State College of Agriculture and Engineering of the University of North Carolina, the said volume being known and designated as the 'North Carolina Building Code, prepared by the North Carolina Building Code Council' and also known and identified as 'Bulletin Number Ten, Engineering Experiment Station, State College Station, Raleigh.' *The provisions of said 'North Carolina Building Code' so published are hereby in all respects ratified and adopted and shall continue in full force and effect unless and until they may be modified as hereinafter authorized:* Provided, further, the said Building Code Council may, subject to the approval of the Insurance Commissioner, promulgate rules and regulations which shall have the effect of establishing requirements less rigid and less stringent than those set forth in said 'North Carolina Building Code.' " (Emphasis added).

In 1945 the 1936 North Carolina Building Code was reprinted and reissued by the North Carolina Insurance Department.

The next issue of the North Carolina Building Code by the State Department of Insurance was in 1953. Article XVI of this 1953 Code entitled, "Electrical Installations," is an exact copy of Chapter XV of the North Carolina Building Code of 1936, except that the 1953 Code adds to the first paragraph of Chapter XV of the 1936 Code the words "and as filed in the office of Secretary of State," and except that the last sentence in the third paragraph of Chapter XV of the 1936 Code is omitted.

In 1905 the General Assembly enacted Chapter 506 of the Public Laws 1905, which chapter is entitled "An Act to Amend Chapter 677 of the Public Laws of 1901 to Prevent Fire Waste." Section 23 of the 1905 Act, now G.S. 160-141, reads in part: "The electric wiring of houses or buildings for lighting or for other purposes shall conform to

the regulations prescribed by the organization known as National Board of Fire Underwriters."

The North Carolina Building Code was adopted, promulgated and published in 1936. The Act of the 1941 session of the General Assembly, Ch. 280, amending the 1933 Act, provides "the provisions of said 'North Carolina Building Code' so published are hereby in all respects ratified and adopted and shall continue in full force and effect unless and until they may be modified as hereinafter authorized." The 1941 Act ratified and adopted the North Carolina Building Code published in 1936 by clear and specific reference.

Unless prohibited by constitutional restrictions, reference statutes are frequently recognized as an approved method of legislation to avoid encumbering the statute books by unnecessary repetition. 50 Am. Jur., Statutes, Sec. 36; 19 N.C. Law Review, pp. 457-458. See also *Range Co. v. Carver,* 118 N.C. 328, 24 S.E. 352. In *Scottish Union & Nat. Ins. Co. v. Phoenix Title & Trust Co.,* 28 Ariz. 22, 235 P. 137, it was held that an Act which merely required the "use of the form known as the New York Standard" established a statutory form for a fire insurance policy. See also *Engel v. Davenport,* 271 U.S. 33, 70 L. Ed. 813; *Jones v. First Nat. Bldg. Corp.,* 155 F. 2d 815.

G.S. 4-1 provides that "all such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within this State." A clear example of a reference statute. If this reference statute is not valid, a large body of our laws, many of which have been enforced since the statute of 1778, and earlier, will be eviscerated. See *Central of Georgia R. R. Co. v. State,* 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518.

In respect to the ratification and adoption by the 1941 Act of the North Carolina Building Code published in 1936, it is said in 19 N.C. Law Review, p. 458, "Here the reference is to non-statutory material; but as long as it is quite clearly identified, as in this case, no reason appears for doubting the validity of the enactment."

The General Assembly can prescribe standards of conduct which have the force and effect of law. *Motsinger v. Perryman,* 218 N.C. 15, 9 S.E. 2d 511. The General Assembly by its 1941 Act specifically set the standard of care in respect to the installing of the electrical system of a building and the electric wiring of buildings for lighting or for other purposes, and that is that the electrical system of a building shall be installed in conformity with the "National Electrical Code" as ap-

proved by the American Standards Association and the electric wiring of buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters, all as set forth in the Building Code of 1936; and also provided in said code as to inspection and approval of electric wiring before the turning on of electric current. The legislative purpose was "to protect life, health and property." G.S. 143-137. It is well settled law in this jurisdiction, that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence *per se*. Of course, to make out a case of actionable negligence the additional essential element of proximate cause is required. *Morgan v. Coach Co.*, 225 N.C. 668, 36 S.E. 2d 263; *Wooten v. Power Co.*, 201 N.C. 560, 160 S.E. 758; *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425; 12 A.L.R. 1207; *Leathers v. Tobacco Co.*, 144 N.C. 330, 57 S.E. 11, 9 L.R.A. (NS) 349; 38 Am. Jur., Negligence, Sec. 158.

The Building Code published in 1936 by virtue of the Act of 1941 contains regulations having the force of law. The cases of *Dechert v. Municipal Electric Light Co.* (1899), 39 App. Div. 490, 57 N.Y.S. 225; *Grant v. Libby, McNeill & Libby* (1931), 160 Wash. 138, 295 P. 139, and *Mississippi Power & Light Co. v. Whitescarver*, 68 F. 2d 928, cited and relied on by the defendants, deal with the admissibility of safety codes by governmental department or commission, or promulgated by voluntary associations, or codes not having the force of law. In the *Mississippi Power & Light Co. Case* it was conceded that the National Electric Safety Code issued by the U. S. Department of Commerce, Bureau of Standards, had no compulsive force, because "no law required it." These cases are not in point. The annotation in 122 A.L.R. 644 deals generally with these type cases.

In 1954 Cumulative Supplement to 20 Am. Jur., Evidence, p. 111, it is written: "With the apparent exception of one jurisdiction, (Alabama), safety codes which have been issued by governmental departments or commissions, or promulgated by voluntary associations for their informative value and not as regulations having the force of law, are not admissible to prove the truth of the statements therein contained."

In 122 A.L.R. Annotation at p. 646 it is said: "That the general rule against admission in evidence, in negligence actions, of safety codes or rules is restricted to codes or rules not having the force of law is shown by decisions in various cases involving safety rules enforceable as laws." By way of illustration, this annotation calls attention to *Lehigh Valley R. Co. v. Russia*, 21 F. 2d 406; *Porter Screen Mfg. Co. v. Central Vermont R. Co.*, 92 Vt. 1, 102 A. 44; *Brumhall v. Sutherland*, 110 Cal.

App. 10, 293 P. 672; *Weimer v. Westmoreland Water Co.*, 127 Pa. Super. Ct. 201, 193 A. 665.

The National Electrical Code referred to in the North Carolina Building Code published in 1936, by virtue of the Act of 1941, has the force and effect of law, and the parts of it relevant and material in this action are admissible as evidence in this case. *Mazzu v. Darojo Realty Co.*, 13 N.Y.S. 2d 612, 257 App. Div. 1036, appeal denied 24 N.E. 2d 28, 281 N.Y. 887; *Beauvais v. Springfield Institute for Savings*, 303 Mass. 136, 20 N.E. 2d 957, 124 A.L.R. 611; 65 C.J.S., Negligence, p. 420; 122 A.L.R. Anno. p. 646. See also *McAllister v. Pryor*, 187 N.C. 832, 123 S.E. 92; *Savage v. Kinston*, 238 N.C. 551, 78 S.E. 2d 318.

In *State v. Crawford*, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880, the provision in Section 5 of the Fire Prevention Act, Section 4863 of the General Statutes of Kansas 1915, requiring that "all electric wiring shall be in accordance with the national electrical code" was held void for uncertainty and unconstitutional as an attempt to delegate the legislative power of the State. In our opinion the *Kansas Case* is distinguishable from the instant case, because our General Assembly in the 1941 Act "in all respects adopted and ratified" the National Electrical Code referred to in the North Carolina Building Code issued in 1936.

The 1941 Act continued the Building Code Council, and gave to it certain powers to modify the code, with the approval of the Commissioner of Insurance, but such changes must not establish more stringent regulations than those already incorporated in the Code. By virtue of the 1941 Act the Building Code Council issued the 1953 Edition of the North Carolina Building Code, providing in Article XVI that electrical installations and wirings shall conform to the National Electrical Code.

In this State and in this Nation it is the universal and fundamental rule that there is a presumption in favor of a legislative enactment. *Turner v. Reidsville*, 224 N.C. 42, 29 S.E. 2d 211; *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 168 S.E. 397, 90 A.L.R. 476; *Alaska Packers Association v. Industrial Acci. Com.*, 294 U.S. 532, 79 L. Ed. 1044; 11 Am. Jur., Constitutional Law, Sec. 128, where the countless cases are cited. It is not in accord with the practice of the courts to declare void an act of the Legislature, or any part thereof, unless the question is presently presented, and it is found necessary to do so in order to protect rights guaranteed by the Constitution. *Hyde County v. Bridgman*, 238 N.C. 247, 77 S.E. 2d 628; *Horner v. Chamber of Commerce of City of Burlington*, 231 N.C. 440, 57 S.E. 2d 789; *Turner v. Reidsville, supra; Chemical Co. v. Turner*, 190 N.C. 471, 130 S.E. 154; *Person v. Doughton*, 186 N.C. 723, 120 S.E. 481; *Liverpool, etc. Steamship Co. v. Comrs. of Emigration*, 113 U.S. 33, 28 L. Ed. 899, p. 901.

The constitutionality of the 1941 Act granting to the Building Code Council power to modify in the future the Building Code, is not challenged. Therefore, indulging in the presumption of its constitutionality, it is our opinion that the material and relevant parts of the National Electrical Code of 1951 promulgated as rules and regulations by the North Carolina Building Code Council is admissible in evidence, provided it has been approved by the Commissioner of Insurance, and provided "it does not establish any standard or adopt or promulgate any rule, regulation, classification, limitation or restriction more rigid, exacting or stringent in its requirements than is authorized in the North Carolina Building Code" adopted by the Building Code Council in 1936, and published that year.

The defendants in their assignments of error Nos. 3 and 5 except to the failure of the trial court to strike out of Paragraph 7 of the Complaint the words "and also which has been adopted by the City of Lenoir," which has reference to the National Electrical Code of 1951. In G.S. 160-272 it is written: "In all judicial proceedings it shall be sufficient to plead any ordinance of any city by caption, or by number of the section thereof and the caption, and it shall not be necessary to plead the entire ordinance or section." The Complaint in subsequent paragraphs alleges a city ordinance Article 3 entitled "Electrical Inspection." The allegations in Paragraph 7 totally fail to plead any ordinance of the City of Lenoir making the National Electrical Code of 1951 a part of its municipal law. 41 Am. Jur., Pleading, p. 296. To permit the retention of these words in the Complaint, in our opinion, will cause harm or injustice to the defendants, and the lower court erred in failing to strike them out.

The defendants' assignments of error as to the failure of the lower court to strike out the other parts of Paragraph 7, and the parts of Paragraphs 8 and 13 of the Complaint referring to the National Electrical Code of 1951 are overruled.

The defendants' assignments of error as to the failure of the court to strike out all the allegations of Paragraph 14 of the Complaint will be dealt with later because of the additional allegations as to punitive damages.

The defendants assign as error the failure of the lower court to strike from Paragraph 2 of the Complaint the following words referring to the Dixie Home Stores, to-wit: "With a large chain of stores operating throughout North and South Carolina," and a failure to strike the word "chain" from the following words later on in the same paragraph: "and that the defendant corporation did, on the day hereinafter alleged and does now, operate one of its chain grocery stores in the City of Lenoir . . ." The defendants also assign as error the failure of the lower

court to strike all of Paragraph 15 of the Complaint, which refers to the Dixie Home Stores, and is as follows: "That the defendant corporation, as the plaintiff is advised and believes, is a large, prosperous and wealthy corporation, embracing many stores throughout the South, and the plaintiff is advised and believes, and therefore, alleges, is worth more than the sum of one million dollars." The above assignments of error consist of the Dixie Home Stores' assignments of error Nos. 1, 2 and 9, and of Gibbons' and Smith's assignments of error Nos. 1, 2 and 13.

Taylor v. Bakery, 234 N.C. 660, 68 S.E. 2d 313, was an action to recover both compensatory and punitive damages for slander. The defendant moved to strike the italicized portion of Paragraph 15 of the Complaint reading as follows: "That the defendant is a corporation of large means *and is reputed to be worth a large sum of money and physical properties.*" The Court said: "The exception to the failure of the court to grant the defendant's motion to strike from the plaintiff's complaint the allegation with respect to the reputed wealth of the defendant, will not be upheld. In an action where punitive damages may be awarded, evidence of the financial condition of the defendant, or of its reputed wealth, is admissible in behalf of the plaintiff."

This Court also said in *Roth v. News Co.,* 217 N.C. 13, 6 S.E. 2d 882: "When the allegations of the complaint are sufficient to support a demand for punitive damages, and there is testimony tending to support the allegations, evidence of the pecuniary circumstances and wealth of the defendant is competent on the issue thereby raised."

While it seems that punitive damages need not be specifically pleaded by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded. 25 C.J.S., p. 758. Though no specific form of allegation is required, the complaint must allege facts showing the aggravating circumstances which would justify the award, for instance, actual malice, or oppression or gross and wilful wrong, or a wanton and reckless disregard of plaintiff's rights. *Swinton v. Savoy Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785; *Harris v. Coach Co.,* 220 N.C. 67, 16 S.E. 2d 464; *Roth v. News Co., supra; Baker v. Winslow,* 184 N.C. 1, 113 S.E. 570; *Hall v. Hall,* 179 N.C. 571, 103 S.E. 136; *Fields v. Bynum,* 156 N.C. 413, 72 S.E. 449. Evidence of a defendant's wealth is ordinarily inadmissible in all cases where compensatory damages alone are recoverable. *Sawyer v. Weskett,* 201 N.C. 500, 160 S.E. 575; *Mintz v. R. R.,* 233 N.C. 607, p. 610, 65 S.E. 2d 120; 15 Am. Jur., Damages, Sec. 345; 20 Am. Jur., Evidence, Sec. 259. This is based upon the fundamental principle that in a court of justice neither the wealth of one party or the poverty of the other should be permitted to affect the administration of the law.

Where punitive damages may be awarded, evidence of the defendant's pecuniary condition is competent, and there is strong argument that allegations as to such condition constitute a pleading of evidence.

In our opinion, after a careful study of the complaint, the allegations of fact therein contained are insufficient to support an award for punitive damages. This action, according to the allegations of fact in the Complaint, is to recover for damages arising from the defendants' negligent default and omission and not from any wilful or malicious conduct on their part. The allegations as to the pecuniary worth of the Dixie Home Stores are incompetent on the issue of compensatory damages, and are calculated to mislead the jury and to augment the recovery, if one is had. As the case goes back for trial, a discussion and analysis of these allegations would serve no useful purpose. The assignments of error of the Dixie Home Stores Nos. 1, 2 and 9, and of Gibbons and Smith Nos. 1, 2 and 13 are sustained.

We now come back to the defendants' assignments of error to the failure of the lower court to strike out all of Paragraph 14 of the Complaint. As, in our opinion, the allegations of fact in the Complaint are not sufficient to support an award of punitive damages, we think all of this paragraph, which merely states conclusions, not facts, and a vague reference to an ordinance of the City of Lenoir, should be stricken, and these assignments of error are sustained.

The defendants assign as error the failure of the lower court to make a part of the allegations of Paragraph 11 and of Paragraph 13 of the Complaint more definite. There being no indication to the contrary, we presume that the Trial Judge denied the motion to make the pleading more definite in his discretion, and such discretionary denial of the motion is not reviewable on appeal, in the absence of evidence of abuse of discretion. No abuse of discretion appears. *Lowman v. Asheville,* 229 N.C. 247, 49 S.E. 2d 408.

The Dixie Home Stores states in its brief that it abandons its assignments of error Nos. 5 and 6. Gibbons and Smith by reason of the statement in their brief adopting the brief of their co-defendant have abandoned their assignments of error Nos. 3, 4, 7, 8, 10, 11 and 14.

The National Electrical Codes of 1935, 1940 and 1951 consist of over 300 pages for each year. The plaintiff shall be required by the Superior Court to amend its complaint, and to specifically plead the parts of the National Electrical Code upon which it relies and the year of the Code.

The orders entered, in accordance with this opinion, will be

Modified and Affirmed.

O. P. LUTZ FURNITURE COMPANY, INC. v. DIXIE HOME STORES, A CORPORATION, AND ROBERT A. GIBBONS AND HENRY M. SMITH, T/A GIBBONS & SMITH.

(Filed 30 June, 1955.)

APPEAL by defendants from *McSwain, Special Judge,* November Term 1954 of CALDWELL.

Civil action to recover compensatory and punitive damages for the destruction by fire on 12 February 1952 of furniture and of a building, and for the loss of rent of said building, allegedly caused by the negligent wiring and installation of electrical fixtures and by the negligent failure to have the wiring and fixtures inspected and approved before turning on electrical current.

Prior to answer or demurrer, or before an extension of time to plead is granted, each defendant made separate motions to strike and to make more definite certain parts of the Complaint. The Trial Court entered separate orders denying the separate motions *in toto.*

From the orders entered, each of the defendants appealed, assigning error.

W. H. Strickland and Alfred R. Crisp for Plaintiff, Appellee.

Adams & Adams and Mull, Patton & Craven for Defendant, Appellant Dixie Home Stores.

Townsend & Todd for Defendant, Appellant Gibbons & Smith.

PARKER, J. The questions of law presented for our determination in the present case are identical with the questions of law presented for determination in *Lutz Industries, Inc. v. Dixie Home Stores, a corporation, and Robert A. Gibbons and Henry M. Smith, t/a Gibbons & Smith, ante,* 332. It was the same fire; the allegations of the Complaint are substantially identical, except as to allegations of damages; the defendants are the same, and their briefs are practically verbatim; and the plaintiff's briefs contain substantially the same argument.

What is said in that opinion is controlling here. Therefore, it is ordered:

One. The assignments of error of the Dixie Home Stores Nos. 3, 4 and 8, and the assignments of error of Gibbons & Smith Nos. 3, 4 and 8 are overruled, except that in each defendant's assignment of error No. 3 the words: "and also which has been adopted by the City of Lenoir" appearing in Paragraph 7 of the Complaint, will be stricken.

Two. The assignments of error Nos. 1, 2, 7 and 10 of the Dixie Home Stores, and assignments of error Nos. 1, 2, 7 and 10 of Gibbons & Smith are sustained.

Three. The assignment of error No. 11 of each defendant is overruled.

All other assignments of error have been abandoned by the defendants.

The National Electrical Codes of 1935, 1940 and 1951 consist of over 300 pages for each year. The plaintiff shall be required by the Superior Court to amend its complaint, and to specifically plead the parts of the National Electrical Code upon which it relies and the year of the Code.

The orders entered, in accordance with this opinion, will be

Modified and Affirmed.

VEDA FORD, BY HER NEXT FRIEND, HAROLEE FORD, v. BLYTHE BROTHERS COMPANY, INC.

(Filed 30 June, 1955.)

1. Appeal and Error § 29—

Assignments of error not brought forward and discussed in the brief will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Negligence § 4b—

A condition need not be an attractive nuisance *per se* in order for the owner of the land upon which the condition is maintained to be liable for the injury of a child on the premises, but if the owner knows or by the exercise of ordinary care should know that the premises are frequented by children of tender years, it becomes his duty to exercise ordinary care to provide such children reasonably adequate protection from injuries which can be reasonably foreseen.

3. Same—

Clearing, grading and excavating operations upon land are *held* not to constitute an attractive nuisance *per se.*

4. Same—

A 3-year-old child was burned when she walked into a bed of ashes containing live coals beneath the surface. Defendant, who was doing the clearing and grading work on the land, knew that the premises were frequented by children of tender years, and was chargeable with knowledge of the condition of the fire. *Held:* The fact that the child was not injured by grading machinery and equipment which attracted her to the premises does not preclude recovery, since defendant could have foreseen that some injury might result to children of tender years from the way and manner in which it burned brush and other debris on the land.

5. Same—

The evidence tended to show that a 3-year-old child, in the company of an adult and other children, had gone upon land being cleared and graded by defendant, that the child's mother went where they were to get the child from the premises, talked briefly with the adult, and started back toward her apartment calling the child to come home, and that the child, in returning, walked into a bed of ashes and was burned by live coals underneath the surface. *Held:* The presence of the mother does not preclude recovery, since the evidence does not indicate that the mother had any information or knowledge that would put her on notice that a bed of live coals lay under the apparently harmless bed of ashes.

6. Same—Evidence held sufficient to overrule nonsuit in this action to recover for burns received by child when attracted to premises by grading operations.

The evidence tended to show that defendant was engaged in clearing and grading operations on land near an apartment building, that defendant burned brush and other debris in the area, which it knew was frequented by large numbers of children in going to and from the apartment houses to watch defendant's trucks, bulldozers and other equipment in the grading work, that mothers of the children had urgently and repeatedly requested defendant to guard against the children having access to the property, that no action was taken in compliance with these requests until the morning of the injury, and were not effective at the time, and that a 3-year-old child, while returning home in compliance with the command of her mother, was burned by live coals when she walked into a bed of apparently harmless ashes. *Held:* Defendant was responsible for the condition of the fire, and injury to children of tender years could have been reasonably foreseen therefrom, and therefore defendant's motion to nonsuit was properly denied.

7. Evidence § 46g—

In this action to recover for burns received by a 3-year-old child, evidence was admitted that prior to the injury the child was not nervous and that she slept and ate well, but that after the injury she was excitable, afraid of noises, and neither ate nor slept well. *Held:* Medical expert testimony to the effect that the injury could cause traumatic neuroses or personality shock to the child was properly admitted.

8. Same—

The fact that expert witnesses testify that an injury might or might not result in traumatic neuroses, goes to the weight of their testimony rather than to its admissibility.

9. Trial § 31e: Appeal and Error § 39f—Charge construed as a whole held not to contain expression of opinion that defendant was negligent.

The fact that the court, in dealing with definitions and requisites necessary in establishing negligence, states that "the fact that the defendant had been guilty of negligence" . . . would not render the defendant liable unless the negligence was the proximate cause of the injury, instead of an instruction that the fact that a defendant may have been guilty of negligence, etc., *held* not prejudicial when in other portions of the charge the court clearly instructed the jury that the burden was on plaintiff to estab-

lish negligence of defendant by the greater weight of evidence, and the *lapsus linguae* could not have misled the jury, construing the charge as a whole.

APPEAL by defendant from *Patton, Special Judge,* October Term, 1954, of MECKLENBURG.

This is an action instituted by Veda Ford, by her next friend, Harolee Ford, her father, to recover for injuries allegedly sustained by the plaintiff, a child three years of age, when on 25 July, 1952, she received second and third degree burns to her hands and feet as a result of stepping into a latent bed of hot ashes on the property of the P & N Railway Company, on which the defendant was carrying on a clearing and grading operation. The property which was being improved by the defendant was immediately adjacent to a housing development in which the plaintiff lived.

The defendant entered into a contract with the P & N Railway Company to clear and grade approximately 19 acres of land lying on each side of Thrift Road. The P & N property extended several hundred feet from a branch, up a hillside to within nine feet of the service drive to the rear of the nearest apartment building in the housing development, which building is located only 34 feet from the P & N property.

At the time the plaintiff was burned, there was no visible line between the playground area provided for the children who lived in the housing development and the P & N property. Some fifteen or twenty children lived in the eleven apartments located near the property. They were accustomed to play in the general area, including the area where the plaintiff was burned.

The defendant's grading project called for excavating the hill near the apartment buildings to the extent that the embankment created thereby was at some points approximately fifty feet high. According to the plaintiff's evidence, sometimes as many as twenty or possibly twenty-five machines, dump trucks, bulldozers and digging machines were used in the excavating operation. The equipment, when in operation, made a lot of noise. The father of plaintiff testified that the work started around 7:00 o'clock in the morning, and "you'd definitely have to get up. You couldn't sleep." This excavating operation could be seen from the apartment premises and the children were attracted by the noise of the machinery and went on the P & N property to watch the grading operation.

The work on the project started around 1 June, 1952, and as the excavating approached near the apartment houses, the mothers tried to keep their children off the premises, but without success. Finally, Mrs. William Shymanski, who lived with her two children in one of the apartments, had a conference with the defendant's superintendent who was in

charge of the project. This interview took place during the first week in July, and the work at that time was so close to the apartments and the playground, the mothers were all concerned about the drop, which was then about thirty feet, and the debris in the area where the children played. The superintendent was requested to build a fence between the P & N property and the apartment house area so as to protect the children, but nothing was done. He was again contacted about a week later, at which time he said, "they weren't going to go to the expense of putting up a fence." In clearing the land to be excavated, this witness testified, the defendant burned a lot of logs and stumps on the unexcavated area of the land.

Mrs. Claudine Ford, mother of the plaintiff, testified that on the afternoon of 25 July, 1952, around 2:30 or 3:00 o'clock, Veda was playing with other children; that she went out to check on her; that she called her and she didn't answer. That she was not concerned over the fires but concerned over the bank; that she had punished the child on one occasion for disobeying her instructions and going on the P & N property; that she had forbidden her to play down there; that she found her with a Mr. McDaniel and his children, watching the machines that were in operation on a lower level; that Mr. McDaniel did not ask her if her little girl could go along with them. "I knew he was there with the children and I knew Veda was playing . . . and would probably be with them because the children play around the playground in that area." That she went down where they were and said a few words to Mr. McDaniel, but did not sit down; she started back toward the apartment and called her child to come on home. The child did not have on shoes, and in returning she walked into the bed of ashes which were the same color as the land and located about 24 feet north of the apartment house property. "Of course you could tell where the stumps and leaves and all had been burned." The child received second and third degree burns and has bad permanent scars on her feet and legs. According to the testimony of the mother, the child was not nervous before the accident; she ate and slept well, but has been excitable and nervous since the accident and neither eats nor sleeps well. She is afraid of noise and is very restless.

Charles B. Wurtenberger, the defendant's superintendent, testified that, "When the machines were working in the area some distance from the apartment houses, small children from the area came on the property. . . . I saw the little girl when she went on the P & N property. She was accompanied by an adult man and three other children. . . . The man and the children went over to the edge of the bank and sat down . . . . A few moments later, I'll say three or four minutes later, a lady, whom I now recognize as Mrs. Ford, came . . . sort of running

. . . and went on down to the bank and sat down. She stayed . . . possibly five or six minutes. The next thing I knew, Mrs. Ford came running back out carrying the baby . . . ." This witness further testified that Mrs. Shymanski talked to him about the children being on the property. "Someone else beside Mrs. Shymanski talked with me about doing something about the children going down there to watch the operation, . . . It got so that every time I got up the top of the hill some of the women were after me to request that something be done. I did not see the little child when she stepped into the ash bed. The ash bed was about 15 feet behind the bank . . . which I would say would make it close to 30 feet inside the property line. . . . The defendant, Blythe Brothers, through my instructions, started the construction of a fence near the property line the morning of July 25th, the day of the accident. . . . There were fires being built there on the P & N property by me and my men. Children had been in and about the general area of the job on occasions before July 25th. . . . I said the children came out on the property. They came out frequently. They came in groups of three and four. . . . I mean kids eight, nine, ten years old. . . . Any time that we were able to get to them to tell them to get off the property, we told them to. . . . I had seen small children in the area where this particular fire was on occasions prior to that time, in the general area. I knew that . . . fire was built on July 24, 1952. I didn't have anybody there attending it the morning of July 25th. I think we had moved off to work in another area that day. It was built and I knew about it, and it was under my supervision."

C. M. Colvin, the defendant's foreman on the P & N job, testified that "When we were working in excess of one hundred feet or more from the line between the P & N property and the apartment house property, children came on the land very frequently, and we'd ask them to get off and they were very nice about it, they'd always run back, but they'd come back after we got on down further. . . . They looked like they run from about three to six or seven or eight years old. . . . On the day prior to the time the child was burned, we quit working at 5:30. . . . At that time the fire had burned down there, there was no smoke, we had rounded up and pulled away all the dry stuff from around it. I left a man out there in charge of the fire at that time. He was an old colored man that lived out in the Hoskins neighborhood. He's died since then. . . . I got on the job the morning of the day the accident happened at 6:30. The fire at that time was just like I left it. I couldn't tell there was any fire in it. . . . I don't remember particularly checking this fire. I didn't use any water or anything to put out the fires at night. . . . We never put any brush on them after three or four o'clock in the afternoon. . . . There's quite a lot of decomposed limbs, and some that were

not decomposed, and fat wood with tar in it, all around there, but we always clean it off before we leave a fire. Clean it off and burn it in the fire, clean off an area around it. We burn the trash and small limbs and haul the logs and stumps off."

According to the record, the fire department of the City of Charlotte was called to extinguish a fire that broke out on the premises of the P & N around 7:55 p.m. on 24 July, 1952, where the defendant had been burning "trash and rubbish." This fire, however, was not located at the place where the plaintiff was burned but a very short distance from it. The captain in charge of the crew that answered the call testified: "As far as we know, the fire was out when we left, but that stuff for days and days may smolder under there."

It was stipulated by the parties to this action that the father of the minor plaintiff Veda Ford, to-wit: Harolee Ford, who is the next friend of the minor plaintiff, waived his cause of action as to medical and hospital expenses in connection with the alleged accident, as well as any loss in earning capacity between the date of the accident and the time the minor plaintiff would become 21 years of age; and all parties agreed that the cause might be considered in the same manner as if the plaintiff were an adult.

From verdict and judgment in favor of the plaintiff, defendant appeals, assigning error.

Henry L. Strickland and Wm. H. Booe, for appellee.

Kennedy, Kennedy & Hickman, for appellant.

DENNY, J. The appellant does not bring forward in its brief and discuss or cite any authority in support of these assignments of error: Nos. 1 through 10, 16, 25, 29 and 30. Therefore, each one of them will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544.

Assignment of error No. 17, based on an exception to the refusal of the court below to sustain its motion for judgment as of nonsuit, interposed at the close of plaintiff's evidence and renewed at the close of all the evidence, presents the crucial question involved in this appeal.

The evidence clearly establishes the fact that the defendant knew that its clearing and excavating operation was attracting children in large numbers to the premises under its control; that its agents and servants knew of the frequent presence of children on the premises and on several occasions requested them to leave. The defendant's evidence also reveals that the children always left when requested to do so, but would return as soon as the person making the request left. The evidence likewise tends to show that the defendant's employees built fires

and burned brush and other debris in the area where they knew the children were accustomed to play or cross in going to and from the apartment houses to a vantage point on the hillside, to watch defendant's trucks, bulldozers, scrapers, crane, and other equipment move to and fro on a level far below them. It would be difficult to conceive of anything short of a circus that would be more likely to attract children to premises than the conditions which existed on the premises controlled by the defendant for the period of six or seven weeks immediately prior to the time the plaintiff sustained her injuries. Even so, in the face of urgent pleas by mothers of children who lived in the nearby apartment houses, to build a fence between the P & N property and the apartment houses, or to otherwise guard against the children having access to the property while the clearing and grading operation was in progress, no action was taken in compliance with these requests until the morning of 25 July, 1952, when the defendant started to build a fence along the line of the P & N property. However, the fence had not been erected between the apartment house area and the P & N property when the plaintiff sustained her injuries.

In *Briscoe v. Lighting & Power Co.*, 148 N.C. 396, 62 S.E. 600, 19 L.R.A. (NS) 1116, the plaintiff was not permitted to recover because the evidence failed to show that the premises of the defendant were especially attractive to children, or that children were accustomed to play there, but *Connor, J.*, in speaking for the Court, said: "We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury. The principle is well stated in 21 A. & E., 473, and was cited with approval in *McGhee's case, supra* (147 N.C. 142). 'A party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon.' Immediately following this language the editor says: 'The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been anticipated is well applied in the rule of numerous cases, that one who maintains

dangerous implements or appliances on uninclosed premises of a nature likely to attract children in play, or permits dangerous conditions to exist thereon is liable to a child who is so injured, though a trespasser at the time when the injuries are received; and, with stronger reason, when the presence of a child trespasser is actually known to a party or when such presence would have been known had reasonable care been exercised.'" See also *Ferrell v. Cotton Mills,* 157 N.C. 528, 73 S.E. 142, 37 L.R.A. (NS) 64, in which this Court quoted with approval from 2 Shearman & Redfield on Negligence (4th Ed.), section 705, page 586, the following: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition; for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees."

The defendant contends the operation carried on by it did not constitute an attractive nuisance and that the law with respect thereto is not applicable, citing *Briscoe v. Lighting & Power Co., supra; Boyd v. R. R.,* 207 N.C. 390, 177 S.E. 1; *Reid v. Sustar,* 208 N.C. 203, 179 S.E. 659; *Harris v. R. R.,* 220 N.C. 698, 18 S.E. 2d 204; *Hedgepath v. Durham,* 223 N.C. 822, 28 S.E. 2d 503; *Boyette v. R. R.,* 227 N.C. 406, 42 S.E. 2d 462; *Nichols v. R. R.,* 228 N.C. 222, 44 S.E. 2d 879, and similar cases. Certainly we are unwilling to hold that a clearing and grading operation such as that in which the defendant was engaged when the plaintiff was injured, constituted an attractive nuisance *per se,* but, on the other hand, it is not necessary that a thing or operation be an attractive nuisance in order for it to allure or attract children. For example, we have held in numerous cases that ponds, lakes, streams, reservoirs, and other bodies of water do not *per se* constitute attractive nuisances. *Stribbling v. Lamm,* 239 N.C. 529, 80 S.E. 2d 270; *Fitch v. Selwyn Village,* 234 N.C. 632, 68 S.E. 2d 255; *Nichols v. R. R., supra; Barlow v. Gurney,* 224 N.C. 223, 29 S.E. 2d 681; *Hedgepath v. Durham, supra.* But, *Barnhill, J.,* now Chief Justice, in speaking for the Court in *Barlow v. Gurney, supra,* in holding that it is not negligence for a person to maintain an unenclosed pond or pool on his premises, pointed out that "When, however, he exercises this right and children of tender years are attracted thereto and it becomes a common resort of persons of tender years to which they go to play, and it appears that the owner knows or by the exercise of ordinary care should know that it is being so used, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes an act of negligence. Proximate cause is for the jury," citing numerous authorities.

The defendant further contends that if the plaintiff was attracted to its premises by the operation of its machinery and other equipment, as alleged, she is not entitled to recover since she was not injured by the machinery and equipment which attracted her. We cannot agree with this contention.

In *Comer v. Winston-Salem,* 178 N.C. 383, 100 S.E. 619, a child, twenty-eight months old, was killed by falling from a bridge with insufficient guardrails. The bridge had been constructed across a large branch. A culvert was constructed underneath the bridge through which the branch flowed. As the water ran out of the culvert, over an extension of its base, it rushed out with considerable force, making such noise that people passing over the bridge could hear the rushing of the water. Owing to the dyes poured into the stream from the mills above the bridge, the water was at times of many colors. While the rippling of the water could be heard by the children on the bridge, the water could only be seen by them by leaning over the bannister or railing, or getting through it. The culvert was located about 200 feet from the child's home and was near a number of houses in the community, it being a residential and thickly settled section, adjoining the playground where the children of the neighborhood were accustomed to gather. The court below overruled the motion for judgment as of nonsuit and submitted the case to the jury. From a verdict in favor of the plaintiff, the defendant appealed to the Supreme Court. *Clark, C. J.,* in writing the opinion disposing of the appeal, said: "The plaintiff did not claim that the bridge was defective, but relied upon the fact that the authorities knew that the rippling of the water and its many-hued colors attracted the children, and that for twenty years the locality adjacent had been a playground for them, and with knowledge of the natural curiosity of children in such cases, more sufficient protection should have been placed at that point. . . . This is not even the case of an 'attractive nuisance' on the property of another, which would render that other liable if not sufficiently protected. A silent turntable on the property of a railroad would not attract the attention of children as irresistibly as their irrepressible curiosity would tempt them to investigate the cause of the gurgling of the many-hued water, which rushed from under the bridge 20 feet below the point at which they would attempt to see it. The bridge was not an attractive nuisance. It was not a nuisance at all. It was a necessary structure for the use of the city. But the noise made by the gurgling of the water would move children to wish to investigate the cause. . . . The negligence was not in the grade of the street, nor in the bridge or culvert, but in the want of sufficient protection for the children of the neighborhood frequenting that spot."

Likewise, in *Arrington v. Pinetops*, 197 N.C. 433, 149 S.E. 549, one Louis Morgan, father of Mamie Morgan, rented certain lands from John R. Pitt in Edgecombe on which to make a crop for the year 1926. The edge of Morgan's cotton field was only eleven steps from a power line owned by the Town of Pinetops. Sometime prior to the time Mamie Morgan was killed, the Hookerton Terminal Company, in excavating sand and gravel, had undermined one pole of the transmission line, leaving the wires thereon from five to seven feet above the ground, on top of an embankment. Mamie Morgan, a child nearly thirteen years old, and her half sister went into the woods adjoining the field of their father. Coming back from the woods to their work in the field, they stopped and were looking at the sand digger; it was not working. The half sister started on to the field when she heard a roaring. Mamie had her hand on the high voltage wire and was killed. From a verdict in favor of plaintiff, establishing primary liability against the Hookerton Terminal Company, and secondary liability against the Town of Pinetops, both defendants appealed. The Hookerton Terminal Company insisted that the little girl was a trespasser upon its property and that her administrator should not be allowed to recover. *Brogden, J.*, said: ". . . the defendant, Hookerton Terminal Company, was charged with notice that these children were working in the field only eleven steps away, and that they had a right to use the woods for any lawful purpose. While there was no pathway or walkway at the place where the pole was excavated, still these children, doubtless attracted by the machinery and sand pit, could not be reasonably held as trespassers in a legal sense because they came up to the bank out of curiosity and peeped over into the sand pit."

In our opinion, it was within the reasonable prevision of the defendant to have foreseen that some injury might result from burning brush and other debris in the way and manner it did within the area it knew was frequented by children of tender years. Neither do we think the presence of the mother who came for and called her child, or the presence of McDaniel and his children, in any way relieved the defendant of its duty to keep the premises safe in the light of its knowledge of the frequent presence of children. There is nothing in the evidence to indicate that the mother of this plaintiff had any information or knowledge that would put her on notice that a bed of coals lay under the apparently harmless bed of ashes, while the defendant's agents and servants knew that a fire had been burning there all day, the day before the accident. They also knew the type and character of trash and debris that had been burned there, but made no effort to see that the fire was put out. Furthermore, there is no question about the ash bed containing live coals beneath the surface, a condition for which the defendant was

responsible and which we think it might reasonably have foreseen was likely to cause an injury to a child of tender years, should it walk or run through it.

Therefore, in our opinion, the court's ruling on the defendant's motion for judgment as of nonsuit was correct.

Assignments of error Nos. 11, 12, 13, 14 and 15 are based on exceptions to the admission of expert testimony by Dr. William H. Shaia, who treated the plaintiff at the time of her injury, and that of Dr. George D. Page, who examined her on 21 May, 1954, as to whether or not such injuries as those sustained by the plaintiff could cause any traumatic neurosis or personality shock to her. Both experts expressed the opinion that they could. We think the testimony of these experts, to which the defendant objected, was admissible, particularly in view of other testimony offered by the plaintiff, without objection, to the effect that plaintiff was not a nervous child before her injury; that she ate and slept well, but since the accident she is excitable, nervous, afraid of noises, and neither eats nor sleeps well. The fact that these expert witnesses further testified that the experience encountered by the plaintiff in connection with her injuries might or might not result in traumatic neurosis or personality shock to her, goes to the weight of their testimony rather than to its admissibility.

The defendant also excepts and assigns as error the following excerpt from the court's charge to the jury: "The fact that the defendant has been guilty of negligence, followed by an injury, does not make such defendant liable for that injury which is sought to be referred to the negligence unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the proximate cause, that is the producing cause of the injury complained of."

We concede that it would have been more appropriate if his Honor had said: The fact that *a* defendant has been guilty of negligence, etc., or, the fact that a defendant *may have been* guilty of negligence, etc. However, in this portion of the charge the court was dealing with definitions and the requisites necessary to establish actionable negligence. Moreover, when the court came to charge the jury on the issue of negligence, it clearly put the burden on the plaintiff to establish the negligence of the defendant by the greater weight of the evidence. This *lapsus linguæ* on the part of his Honor, in our opinion, was not prejudicial to the defendant when the charge is considered as a whole. Hence, this assignment of error is overruled.

We have carefully examined the remaining assignments of error and, in our opinion, they present no harmful or prejudicial error that would justify us in disturbing the result of the trial below.

In the trial below we find no error.
No error.

ROBERT H. PINNIX v. T. C. TOOMEY AND FRANK TOOMEY, PARTNERS, DOING BUSINESS AS TOOMEY BROS. PLUMBING & HEATING COMPANY.

(Filed 30 June, 1955.)

1. Negligence § 1—

Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty imposed by law, by mandate of statute, or by the common-law rule that every person is under an obligation so to act, or so to use that which he controls, as not to injure another.

2. Same—

The common-law duty to use due care may be a specific duty owing by defendant to the plaintiff, or a general one owing by defendant to the public, of which the plaintiff is a part.

3. Same—

The duty to use due care may arise out of a contractual relationship upon the theory that accompanying every contract is a common-law duty to perform with ordinary care the thing to be done, so that negligent performance may constitute a tort as well as a breach of contract, but in an action for negligence the contract is pertinent only to the extent of showing the relationship between the parties and the nature and extent of the contractual duty performed without due care, and the contract may not be used to substitute a different standard of care from that prescribed by the common-law rule.

4. Negligence § 16—

In an action for negligence, it suffices to state in a plain and concise manner the ultimate facts from which the law will imply the legal duty owed by defendant to plaintiff, and the complaint should not contain collateral, irrelevant, redundant or evidentiary matters in respect to the relationship of the parties and the legal duty or duties upon which the plaintiff grounds his cause of action.

5. Same: Pleadings § 31—

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations in regard to the contractual duties of defendant to coordinate his work with the other contractors, to make water and air pressure tests of pipe lines, and to afford other contractors reasonable opportunity for the storage of their materials, are properly stricken when plaintiff fails to allege facts showing that the subcontractor was negligent in the performance of any of these duties. G.S. 1-153.

6. Appeal and Error § 40f—

The action of the trial court in striking out a portion of a pleading may not be held prejudicial on appeal when appellant fails to show what the stricken portion contained.

7. Negligence § 16: Pleadings § 31—

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations as to the contractual provisions for arbitration in the event one contractor causes damage to another, subrogation of the owner, the owner not being a party, clearing progress reports and discrepancies with the architect, are all foreign to plaintiff's cause of action as alleged, and are properly stricken on motion.

8. Same:

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations of contractual provisions that where one contractor's work depends for execution on the work of another contractor, the former shall inspect the work of the latter and report any defective work to the architect, and failure to do so would constitute an acceptance on the part of the defendant contractor except for latent defects, *are held* anticipatory of defendants' defense and also calculated to substitute a contractual standard of care for the common-law rule of due care, and such allegations are properly stricken on motion.

9. Same—

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties on specific allegations of faulty workmanship, allegations in regard to defendants' contractual duty to provide materials for the project are irrelevant to the cause of action as stated, and are properly stricken on motion.

10. Pleadings §§ 3c, 31—

In an action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations that defendants were under duty to perform their contract in accord with the plumbing code of the municipality in question are properly stricken where the complaint nowhere specifically alleges the plumbing code of the city, nor any negligence based on the violation of the city code.

11. Negligence § 16: Pleadings § 31—

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, the action of the court in striking from the complaint a general reference to the North Carolina Plumbing Code is not prejudicial to plaintiff when in other portions of the complaint the pertinent sections of the Code are specifically pleaded.

12. Same—

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations in regard to the contractual duty of defendants in regard to proper support

for underground pipe, back fill for all pipe trenches, the making of specified water and air pressure tests of all lines of piping, all tend to substitute a contractual standard of care for the common-law rule of due care, and are properly stricken on motion.

13. Same—

Where the facts alleged are sufficient for the law to imply a duty of defendants to warn of defects in their work, a specific averment of such duty is not necessary, and plaintiff is not prejudiced by the action of the court in striking such averment.

14. Same—

Custom or common practice relates to evidentiary facts bearing on the question of due care and may be shown under the allegations of ultimate facts showing negligence, and therefore plaintiff is not prejudiced by the trial court in striking from the complaint allegations relating to custom or common practice.

15. Appeal and Error § 40l—

Where defendants move to strike allegations of the complaint referring to a statute on the ground that the allegations are irrelevant and evidentiary, but do not attack the constitutionality of the statute in the lower court, they may not question the constitutionality of the statute initially in the Supreme Court.

16. Constitutional Law § 8c: Pleadings § 31—In action for negligence in performance of contractual duties, plaintiff may allege violations of Building Code.

This action was instituted by a general contractor against a subcontractor to recover for damages allegedly caused by negligence in violating provisions of the North Carolina Building Code in the performance of the subcontract. Defendant moved to strike the allegations referring to the Code on the ground that the Code failed to provide fixed standards upon which actionable negligence might be based because its standards were subject to relaxation or modification by the Building Code Council with the approval of the Insurance Commissioner. *Held:* The objection is untenable when all portions of the Code incorporated in the complaint and all allegations of negligence based thereon relate to provisions which remain precisely as set out in the original Code adopted by legislative enactment, and which were thus given the force of law. The constitutionality of the statute (G.S. 143-139) not being challenged in the lower court, the presumption of constitutionality is indulged.

17. Appeal and Error § 40f—

The refusal to strike certain allegations from the complaint will not be held for reversible error, even though some of the allegations be of doubtful materiality and others be somewhat evidential, when it is not made to appear that movants will be prejudiced by the retention of such allegations in the pleading.

18. Negligence § 16: Pleadings § 31—

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations

referring to contractual duties under contract were properly stricken on motion as tending to substitute such contractual duties for the common-law rule of due care. Held: It is error for the court to refuse to strike other allegations based on negligence in the violation of the contractual duties which had been stricken.

APPEAL by plaintiff and defendants from *McSwain, Special Judge,* at 1 November, 1954, Civil Term of GASTON.

Civil action in tort by general contractor to recover for damage to a school building in process of construction, due to the alleged negligence of the defendants, plumbing contractors. The plaintiff and the defendants were engaged in the building project under separate written contracts with the Board of Education of Mecklenburg County, whereby the plaintiff was to furnish the materials and labor in connection with the general contract work, and the defendants the plumbing materials and labor. The gravamen of the plaintiff's cause of action as stated in his second amended complaint is that the defendants in performing their plumbing contract did their work in a negligent manner, as a result of which underground water lines broke and so flooded the foundations of the building that large sections of the walls and underpinning erected by the plaintiff caved in, broke off, and had to be rebuilt.

The complaint incorporates and refers to numerous sections of the plumbing contract between the defendants and the Board of Education, and also alleges that the defendants violated various specific sections of the North Carolina Building Code.

The defendants, before answering or otherwise pleading, moved to strike numerous portions of the complaint. The portions sought to be stricken relate to the allegations which set forth and refer to the terms and provisions of (1) the construction contract between the defendants and the Board of Education, and (2) the North Carolina Building Code. The court below allowed the motion in part and overruled it in part. Several allegations relating to the contract were ordered stricken; whereas those relating to the Building Code were left in the complaint.

Upon exceptions duly taken, both sides appeal, assigning errors.

L. B. Hollowell, Mullen, Holland & Cooke, and Jones & Small for plaintiff.

Helms & Mulliss, Garland & Garland, and John D. Hicks for defendants.

PLAINTIFF'S APPEAL.

JOHNSON, J. The plaintiff's appeal challenges the rulings of the court below in striking from the complaint allegations which incorpo-

rate and refer to specific portions of the contract between the defendants and the Board of Education of Mecklenburg County.

The plaintiff's cause of action sounds in tort. He seeks to recover damages for the alleged actionable negligence of the defendants. Nevertheless, he contends that the pleaded sections of the contract embrace ultimate facts, relevant and pertinent to the statement of his cause of action, as tending to show the relationship of the parties and the nature and extent of the legal duties which he alleges the defendants breached. On the other hand, the defendants, pointing to the fact that the theory of the plaintiff's cause of action as declared on is in tort, and not *ex contractu,* insist that the stricken portions of the complaint were properly eliminated on the ground of irrelevancy.

In resolving the contentions so made by the parties, these principles of substantive and procedural law come into focus:

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551; *Prosser on Torts,* 1941 Hornbook, Sec. 33. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to endanger the person or property of others. 65 C.J.S., p. 339 *et seq.* This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. 38 Am. Jur., Negligence, Sec. 20. But it must be kept in mind that the contract creates only the relation out of which arises the common-law duty to exercise ordinary care. Thus in legal contemplation the contract merely creates the state of things which furnishes the occasion of the tort. *Mule Co. v. R. R.,* 160 N.C. 215, 76 S.E. 513. This being so, the existence of a contract is ordinarily a relevant factor, competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common-law duty on which the tort is based. Necessarily, then, it is proper for the

complaining party to allege facts from which it can be said as a matter of law that the defending party owed to him a legal duty arising out of a contractual relationship. See *Truelove v. R. R.*, 222 N.C. 704, 24 S.E. 2d 537; *Shives v. Sample*, 238 N.C. 724, 79 S.E. 2d 193. However, it suffices to state in a plain and concise manner the ultimate facts from which the law will imply such duty. 38 Am. Jur., Negligence, Sec. 259. And the complaint should not contain collateral, irrelevant, redundant, or evidentiary matters in respect to the relationship of the parties and the legal duty or duties upon which the plaintiff grounds his cause of action. G.S. 1-153; *Barron v. Cain*, 216 N.C. 282, 4 S.E. 2d 618; *Chason v. Marley*, 223 N.C. 738, 28 S.E. 2d 223; *Guy v. Baer*, 234 N.C. 276, 67 S.E. 2d 47. Furthermore, where the injured party elects to sue in tort rather than in contract, he must accept the standard of care prescribed by the common law as the test of determining actionable negligence, *i.e.*, that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances. *Watkins v. Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917; *Rea v. Simowitz*, 225 N.C. 575, 35 S.E. 2d 871. Therefore, any contract provision prescribing a different standard of care from that imposed by rule of the common law is not relevant to the issue of actionable negligence and should be stricken on motion. See *Council v. Dickerson's, Inc., supra.*

Our examination of the complaint in the light of the controlling principles of law leaves the impression that the plaintiff has failed to show prejudicial error in respect to any of the stricken portions of the complaint.

No part of Paragraph 4 was stricken. The allegations of this paragraph suffice to show the legal relationship between the parties, *i.e.*, that in the erection of the school building the plaintiff was the general contractor and the defendants the plumbing contractors, and that each was operating under a separate written contract with the Board of Education of Mecklenburg County. The unstricken portions of the complaint contain allegations of ultimate facts adequate to show all the essentials of actionable negligence, namely: (1) the existence of legal duties on the part of the defendants to protect the plaintiff from the injuries of which he complains, (2) failure on the part of the defendants to exercise ordinary care in the performance of these duties, and (3) damage to the plaintiff proximately resulting from such negligent performance of duty.

Our analysis of the stricken portions of the complaint, with reasons for sustaining the rulings of the trial court, are stated in summary below.

Paragraph 5. Here the plaintiff alleges that the contracts made by the Board of Education of Mecklenburg County with the plaintiff and

with the defendants contain a common set of general conditions, and two of these conditions, namely, sections 48(a) and 51(a), are pleaded *verbatim.*

Section 48(a) of the contract provides in gist that all contractors shall cooperate and coordinate their work with each other so as to facilitate the general progress of the work. However, nowhere in the complaint is it alleged by proper averment of facts, as distinguished from mere conclusions of the pleader, that the defendants were negligent in the performance of any legal duty with respect to coordinating their work with that of the plaintiff. Hence Section 48(a) of the contract was properly stricken for irrelevancy.

Section 51(a) incorporates by reference 44 Articles of the Standard Form of Contract of the American Institute of Architects. Of these 44 Articles, only two are set out in the record on appeal. As to the 42 Articles not shown in the record, error in respect to their elimination has not been made to appear. It would seem to be elemental that the action of the trial court in striking out a portion of a pleading may not be held prejudicial on appeal unless the appellant shows what the stricken portion contained.

Paragraph 6. Here the plaintiff sets out *verbatim* Articles 34 and 35 of the Standard Form of Contract of the American Institute of Architects.

Article 34 provides that in case one contractor causes damage to another contractor, settlement may be made "by agreement or arbitration." This Article also contains a stipulation for the protection of the owner by way of subrogation over against any contractor who may cause another contractor damage. The arbitration agreement is completely foreign to the theory of the defendants' liability as alleged in the complaint. Also, since the Board of Education is not a party to the action, the subrogation agreement for its protection is completely foreign to plaintiff's cause of action as declared on in the complaint.

Article 35 is in three parts: (1) It stipulates that each contractor in coordinating his work with other contractors shall afford them reasonable opportunity for the storage of their materials. Plaintiff nowhere in the complaint alleges negligence in respect to failure to furnish storage space. Hence the contractual stipulation as to storage space is foreign to the issue. (2) Next, this Article stipulates in gist that where one contractor's work depends for execution or results on the work of another contractor, the former shall inspect the work of the latter and report any defective work to the architect, and failure to so inspect and report shall constitute an acceptance on the part of the dependent contractor, "except as to defects which may develop in the other contractor's work after the execution of his work." The provisions of this part

of the contract are not only anticipatory of the defendant's defense but are calculated to substitute a contractual standard of care for the established rule of the ordinarily prudent man as the test in determining the question of negligence. No such substitution is permissible in a negligence action. *Council v. Dickerson's, Inc., supra* (233 N.C. 472). See also 12 Am. Jur., Contracts, Sec. 458, p. 1042; 38 Am. Jur., Negligence, Sec. 20. (3) The third phase of Article 35 has to do with the procedure to be followed by a contractor in clearing progress measurements and discrepancies with the architect. All this is entirely foreign to the plaintiff's cause of action as alleged. It necessarily follows that Article 35 of the contract was properly stricken from the complaint.

Paragraph 7. Here the plaintiff pleads *verbatim* Sections 1, 4, 16(a), 26, 27, and 28(a) of Division 2 of defendant's contract with the Board of Education. These sections deal specifically with the plumbing work.

Section 1 provides in gist that the defendants shall furnish the plumbing materials, as well as the labor, for the project. This stipulation is entirely irrelevant. This is so for one reason, among others, that the plaintiff's cause of action is grounded on specific allegations of faulty workmanship, not materials.

Section 4 stipulates that the plumbing work shall be done in strict accord with the "plumbing code of the State of North Carolina, and of the city of Charlotte." The plumbing code of the City is nowhere specifically alleged (*Lutz Industries v. Dixie Home Stores, ante,* 332), nor does the complaint allege any aspect of negligence based on a violation of the City code. Hence the reference to this code is foreign to the plaintiff's cause of action and was properly stricken. As to the reference to the North Carolina Plumbing Code, it is noted that in Paragraphs 8 and 17 of the complaint this Code is specifically pleaded. Therefore the elimination of the general reference to the State Code in Paragraph 7 was not prejudicial to the plaintiff. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660.

Sections 16(a) and 28(a) may be treated together. Section 16(a) stipulates that all underground pipe shall be supported on solid brick masonry piers, extending down to firm soil; whereas Section 28(a) prescribes in detail how the back fill for all pipe trenches shall be closed and tamped. These Sections in effect would substitute a contractual standard of care for the common-law rule of the ordinarily prudent man as the test of negligence. For this reason they were properly stricken.

By Sections 26 and 27 of the contract the defendants were required to make certain specified water and air pressure tests of all lines of piping for the purpose of discovering any existing leaks or defects. Again, it is noted that these Sections tend to substitute a contractual standard of care for the established rule of the common law as the test

of negligence. Also, it is observed that the complaint nowhere contains any allegation of negligence predicated on failure to perform any duty to make tests that may have been imposed by law in connection with the contract. Therefore the elimination of these sections of the contract may not be held for error.

Subparagraph (h) of Paragraph 17. Here the plaintiff alleges by way of conclusions, without supporting factual averments, that the defendants failed to coordinate their work with that of the plaintiff so as to facilitate the progress of the construction project. Since this subparagraph is devoid of factual allegation relevant to the cause of action declared on, its elimination by the trial court may not be held for error. See *Shives v. Sample, supra* (238 N.C. 724), and *Daniel v. Gardner, supra* (240 N.C. 249).

Subparagraphs (i) and *(j) of Paragraph 17.* Here the court below struck out, in addition to certain conclusions of the pleader, factual allegations to the effect (1) that the defendants failed to warn or notify the plaintiff of the alleged defects in their plumbing work, and (2) that the various acts and omissions of the defendants, as previously alleged, were violative of the law, violative of "generally accepted good practice" (custom), and violative of duties owed the plaintiff by the defendants. The elimination of these argumentative allegations was not prejudicial to the plaintiff. True, the breach of a legal duty is an essential element of negligence. And the complaint in a negligence action must contain proper allegations showing a legal duty owing from the defendant to the plaintiff, which duty the defendant failed to perform, in consequence of which the injury complained of was occasioned. Therefore the complaint should set forth the ultimate facts showing the relation between the parties out of which the duty to avoid negligence arises under the law—"facts from which it can be said as a matter of law that the defendant owed to the injured party a duty arising from some legal relation existing at the time of the injury." 38 Am. Jur., Negligence, Sec. 259; *Shives v. Sample, supra.* Where the facts alleged are sufficient for the law to imply a duty to warn, a specific averment of the existence of such duty is not necessary. 65 C.J.S., Negligence, Sec. 186(e), p. 879. Nor is it necessary for the plaintiff to allege specifically that it was the duty of the defendant to do or not to do a particular thing. It is enough for him to state in a plain and concise manner the material, essential, and ultimate facts from which such duty appears, or from which the law will imply such duty. 38 Am. Jur., Negligence, Sec. 259. Accordingly, where the duty violated is one imposed by general or public statute, it is sufficient to allege facts which disclose the duty imposed by statute. 65 C.J.S., Negligence, Sec. 186(f), p. 879. Also, it is not necessary that custom or common practice be

specifically pleaded. These are evidentiary facts bearing on the question of due care and may be shown under the allegation of ultimate facts showing negligence. 38 Am. Jur., Negligence, Sections 34, 267, and 317-319. The unstricken portions of the complaint sufficiently imply the duties specifically asserted in the stricken portions of subparagraphs (i) and (j), and their elimination will be upheld under application of the general rule that a complaint should not contain collateral, irrelevant, redundant, or evidentiary matters in respect to the relationship of the parties and the legal duty or duties upon which the plaintiff grounds his cause of action. *Barron v. Cain, supra* (216 N.C. 282); *Chason v. Marley, supra* (223 N.C. 738); *Guy v. Baer, supra* (234 N.C. 276).

On the record as presented and in view of the grounds on which we affirm the court below on the plaintiff's appeal, we do not reach for decision the question, discussed in the briefs and debated on the argument, whether the plaintiff is in contractual privity with the defendants by virtue of the provisions of G.S. 160-280.

Also, we have given consideration to the decisions in *Jones v. Elevator Co.*, 231 N.C. 285, 56 S.E. 2d 684, and *S. c.* 234 N.C. 512, 67 S.E. 2d 492, cited and relied on by the plaintiff. The facts in these cases are distinguishable. There the complaint incorporated *in toto* the contract between the defendant and a third party, but no motion was made to strike any part of the contract.

On the plaintiff's appeal, the order entered below is

Affirmed.

DEFENDANTS' APPEAL.

The defendants' appeal relates to the refusal of the trial court to strike from the complaint allegations of negligence based on (1) the North Carolina Building Code, and (2) portions of the contract between the defendants and the Board of Education of Mecklenburg County.

1. *The allegations relating to the North Carolina Building Code.* First, the defendants make the contention that the statutes, codified as G.S. 143-139 and 143-141, authorizing and ratifying the State Building Code, are unconstitutional, and for that reason they assert the allegations of the complaint based on the Code should be stricken. This contention is untenable since the question of constitutionality does not appear to have been raised in the court below. The grounds of the defendants' motion to strike are that the challenged allegations "are evidentiary, argumentative, irrelevant, redundant, and . . . unnecessary to a plain and concise statement of facts." It is established by authoritative decisions of this Court that when the constitutionality of a

statute is not raised in the lower court, such question may not be presented for the first time in this Court. *Mahan v. Read,* 240 N.C. 641, 83 S.E. 2d 706; *Phillips v. Shaw, Comr. of Rev.,* 238 N.C. 518, 78 S.E. 2d 314. See also *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888; *Bank v. Caudle,* 239 N.C. 270, 79 S.E. 2d 723.

Next, the defendants assert that, assuming the constitutionality of the North Carolina Building Code, the allegations of the complaint based thereon should have been stricken for the reason that the statutes which adopt and authorize the Code prescribe no fixed standards of care.

In following the thread of the defendants' argument, we take note of these steps in the historical development of the present North Carolina Building Code:

1. By Chapter 392, Session Laws of 1933 (now codified in part as G.S. 143-139), a Building Code Council was created and authorized to formulate, in cooperation with the Insurance Commissioner of the State, a building code.

2. A code was so formulated. It was published in 1936 as an official publication of North Carolina State College, under the title "North Carolina Building Code, prepared by the North Carolina Building Code Council," known and identified as "Bulletin No. Ten, Engineering Experiment Station, State College Station, Raleigh."

3. The provisions of the Building Code, as so promulgated and published in 1936, were expressly ratified and adopted by legislative enactment in 1941 (Chapter 280, Sec. 2, Session Laws of 1941, now codified as G.S. 143-139). However, the ratifying act of 1941 provides in effect that the Building Code Council, with the approval of the Insurance Commissioner, may promulgate rules and regulations which shall have the effect of establishing requirements less rigid and less stringent than those set forth in the Code as adopted. It is also noted that Section 6 of the 1933 Act, now codified as G.S. 143-141 (as recompiled in 1952), provides in part:

"It shall be the duty of the Council not only to make recommendations to the Insurance Commissioner relative to the proper construction of the pertinent provisions of the Building Code but it shall also recommend that he shall allow materials and methods of construction other than those required by the Building Code to be used, when in its opinion such other material and methods of construction are as good as those required by the Code, and for this purpose the requirements of the Building Code as to such matters shall be considered simply as a standard to which construction shall conform."

The defendants, pointing to the foregoing statutes and other related enactments which allow the Building Code Council and the Insurance

Commissioner to relax and vary the standards as fixed by the Building Code as adopted by the Act of 1941, urge that the present Code is without fixed standards upon which actionable negligence may be based. On this record the contention is untenable. None of the challenged allegations involves any modification made by the Building Code Council since the original Code was approved in 1941. On the contrary, all portions of the North Carolina Building Code incorporated in the complaint and all allegations of negligence based thereon relate to provisions of the Code, the terms of which remain precisely as set out in the original Code, formulated and published in 1936 and adopted by legislative enactment in 1941, now codified as G.S. 143-139. The provisions of the Code as so ratified and adopted by the General Assembly prescribe standards of conduct which, indulging the presumption of constitutionality, have the force of law, as explained in detail by *Parker, J.*, in *Lutz Industries v. Dixie Home Stores, ante,* 332. It necessarily follows from what is said in the *Lutz Industries case* that a plaintiff in framing a complaint on actionable negligence may, subject to the general rules governing the form of pleadings, refer to or incorporate material portions of the Building Code as ratified by the statute of 1941.

In the case at hand it may be conceded that some of the challenged allegations relating to the North Carolina Building Code are of doubtful materiality and that others are somewhat evidential. Nevertheless, it has not been made to appear that the defendants will be prejudiced by such averments. Therefore, the exceptions relating thereto are overruled under application of the doctrine applied in *Ledford v. Transportation Co.*, 237 N.C. 317, 74 S.E. 2d 653, and *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185. See also *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660.

2. *The refusal to strike allegations of negligence based on alleged violations of the plumbing contract.* Here the defendants contend that the court below erred in failing to strike subparagraph (g) of Paragraph 17 of the complaint. In this subparagraph the plaintiff alleges negligence on the part of the defendants in failing to back-fill over underground pipes, in violation of Section 28(a) of the plumbing contract between the defendants and the Board of Education. This section of the contract was stricken by the court below. We approved the ruling in deciding the plaintiff's appeal, on the ground that this section of the contract if allowed to remain in the complaint would have the effect of substituting a contractual standard of care for the common-law rule of the ordinarily prudent man as the test of negligence. If Section 28(a) of the contract is irrelevant for the reason stated, manifestly the specific allegation of negligence based thereon as made in subparagraph (g) of Paragraph 17 is also irrelevant and should have been

stricken. The defendants' assignment of error relating thereto is sustained.

It is also noted that in subparagraph (e) of Paragraph 17 of the complaint the plaintiff predicates an allegation of negligence in part on violation of Section 16(a) of the contract. The court below ordered that this Section be stricken, but inadvertently allowed the reference to the section in the later subparagraph to remain. In deciding the plaintiff's appeal, we approved the ruling of the court in striking Section 16(a) on the ground that it was calculated to substitute a contractual standard of care for the rule of the ordinarily prudent man. The reference made in subparagraph (e) of the contract should be stricken when the case goes back to the court below.

On the defendants' appeal, the order entered below will be modified as indicated herein, and as so modified, it will be affirmed.

Modified and affirmed.

AMERICAN TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT AND ESTATE OF THOMAS LEE WILSON, SR., v. CATAWBA SALES & PROCESSING COMPANY, A CORPORATION.

(Filed 30 June, 1955.)

1. Pleadings § 15—

The allegations of the complaint will be taken as true upon demurrer.

2. Contracts § 8—

Separate contracts executed in the same transaction for a common purpose, even though the parties are not the same provided the several contracts are known to all of them, may be construed together to ascertain the intent of the parties. This rule may not be applied so as to avoid an essential part of one of the contracts, and does not import that the provisions of one contract may be incorporated bodily in another.

3. Contracts § 9½—Contracts held for benefit of third person, construing the agreements together to effectuate intent of parties.

The person in charge of the management and sales of "A" corporation, and who controlled a majority of its stock, upon impairment of health, desired to provide good management and adequate sales service for the corporation. He sold half his stock to "B" corporation, and "A" corporation executed an agreement with "B" corporation, giving it exclusive selling rights of the entire production of "A" corporation at a stipulated commission, with the provision that the contract should continue so long as "B" corporation and the individual stockholder, his executors and administrators, etc., should own a majority of the stock of "A" corporation. On the same date the individual stockholder and "B" corporation entered into an agreement for "B" corporation to vote the stock of the individual

and to manage and control "A" corporation, with further provision that neither "B" corporation nor the individual should sell or dispose of his stock for a period of six years, subject to exceptions not material in this action. On the same date a third contract was entered into by the individual stockholder and "B" corporation, under which "B" corporation was to pay to the individual, his executors and assigns, 5 per cent of the commissions paid to "B" corporation by "A" corporation, with provision that this contract should remain in effect so long as the first agreement should be in force. The officers and directors of both "A" and "B" corporations had full knowledge of all three agreements. *Held:* Construing the agreements together, the individual stockholder, and upon his death his estate, was a direct beneficiary of the contract between "A" and "B" corporations, which construction is strengthened by the interpretation given the three contracts by the parties themselves.

4. Contracts § 8—

The interpretation given to a contract by the parties themselves before controversy is a material aid in ascertaining the intention of the parties.

5. Contracts § 19—

A third party may sue to enforce a valid contract made for his benefit even though he is a stranger to the contract and to the consideration, and it is not necessary that he be the sole beneficiary, provided the contract was entered into for his direct benefit and the benefit to him is not merely incidental to the agreement.

6. Contracts § 9½—

Where a contract is made for the direct benefit of a third person, who has accepted and acted upon it, such contract may not be materially modified or changed by the other parties without such third party's consent.

7. Contracts § 21—

Where the complaint alleges that a contract was executed for the benefit of a third party, his executors and assigns, that the contract had been accepted and acted upon by the third party beneficiary, that the other parties had attempted to cancel the agreement contrary to its terms and without the consent of the third party beneficiary, and seeks an accounting for sums due under the agreement, the complaint *is held* sufficient to state a cause of action in favor of the third party beneficiary, and demurrer to the complaint is properly overruled.

8. Same—

Plaintiff alleged a contract under which it was entitled to 5 per cent of the commissions received by defendant under a contract with a third party. *Held:* Demurrer on the ground of want of allegation that the third party had paid defendant any sum is bad when the complaint alleges that the failure of defendant to receive payments due under the contract resulted from defendant's wrongful attempt to cancel same.

9. Pleadings § 17a—

A written demurrer must distinctly specify the ground of objection in order to present the question for decision.

10. Contracts § 21: Election of Remedies § 5—

A party may state in the alternative a cause of action to recover sums due under a contract with a cause of action for damages for breach of the contract if the contract had been canceled in violation of its terms.

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

APPEAL by defendant from *Clarkson, J.*, January Regular Civil Term 1955 of GASTON.

Civil action heard upon a written demurrer. The complaint alleges two causes of action: One, for the recovery of moneys due under three contracts; Two, if the contract between Bowling Green Spinning Company and the defendant was validly cancelled, for the recovery of damages for breach of the agreements between the defendant and Thomas Lee Wilson, Sr. The ground of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action as to either cause of action.

From a judgment overruling the demurrer as to both causes of action, the defendant appeals, assigning error.

R. Gregg Cherry, Helms & Mulliss, Fred B. Helms and John D. Hicks for Plaintiff, Appellee.

Pierce & Blakeney for Defendant, Appellant.

PARKER, J. The complaint alleges two causes of action.

FIRST CAUSE OF ACTION.

This is a summary of the material allegations of the first cause of action—the numbering of the paragraphs is ours:

One. The American Trust Company, the plaintiff and hereafter called the Trust Company, brought this action as Executor and Trustee under the Last Will and Testament of Thomas Lee Wilson, Sr., who died on 30 March 1951. This action is for the recovery of monies due under three agreements involving three parties. One, the late Thomas Lee Wilson, Sr. (hereafter called Wilson), of Gastonia. Two, Catawba Sales & Processing Co. (hereafter called Catawba), a North Carolina corporation with its principal place of business in Gastonia. Three, Bowling Green Spinning Co. (hereafter called Bowling Green), a South Carolina corporation having its principal place of business at Bowling Green, South Carolina.

Two. Bowling Green was engaged in the manufacture and sale of textile goods. Prior to 1950 Wilson had been in charge of the management and sales of Bowling Green, and through his efforts he had developed it from an insolvent condition to a profitable business in 1950.

In 1950 Wilson's health became impaired. At the time Bowling Green had 645 shares of capital stock outstanding, and Wilson and his family owned 324 of these shares.

Three. After Wilson's health became impaired, he desired to provide good management and adequate sales service for Bowling Green. To effectuate his desire he sold 162 shares of the capital stock of Bowling Green to Catawba, and the three contracts set forth below were executed and delivered simultaneously in Gaston County:

FIRST CONTRACT.

This contract, hereafter called the "Sales Agreement," was entered into on 22 August 1950 by and between Bowling Green, party of the first part, and Catawba, party of the second part. It gave Catawba the exclusive selling rights of the entire production of Bowling Green on a 5% commission, to be paid to Catawba, whether the goods were sold by Catawba or not—the agreement being that Catawba will be paid a 5% commission on the entire sales of Bowling Green. This contract further provides:

"(3) This contract shall become effective August 22, 1950; and shall continue in effect so long as Catawba Sales & Processing Company and Thomas L. Wilson, Sr., or his executors, administrators, donees, legatees, widow, next of kin or other persons, firms, or corporations claiming under or through the said Thomas L. Wilson, Sr., own the majority of the outstanding stock in Bowling Green Spinning Company."

SECOND CONTRACT.

This contract, hereafter called the "Management and Voting Control Agreement," was entered into on 22 August 1950, by and between Catawba, party of the first part, and Wilson, party of the second part. After stating that Bowling Green has 645 shares of capital stock outstanding, and that Wilson and Catawba own each 162 shares of this stock, it provides as follows:

"(1) That Catawba Sales & Processing Company through its officers and agents shall manage and operate the mill, plant and business of Bowling Green Spinning Company, for such time as the said Catawba Sales & Processing Company and Thomas L. Wilson, Sr., or his executors, administrators, legatees, next of kin, widow or donees, own the majority of the outstanding stock in Bowling Green Spinning Company.

"(2) During the life of Thomas L. Wilson, Sr., Catawba Sales & Processing Company shall be, and it hereby is, given the right to vote the 162 shares of stock in the aforesaid corporation owned by Thomas L. Wilson, Sr.; and upon the death of the said Thomas L. Wilson, Sr.,

the said Catawba Sales & Processing Company shall continue to vote the said 162 shares owned by the said Thomas L. Wilson, Sr. at the time of his death, and continue to operate and manage the aforesaid plant, mill and business of Bowling Green Spinning Company, so long as the said 162 shares of stock in the said corporation is owned by the executors, administrators, legatees, next of kin, widow or donees of the said Thomas L. Wilson, Sr.

"(3) Neither the said Catawba Sales & Processing Company as the owner of the aforesaid 162 shares of stock nor Thomas L. Wilson, Sr. as the owner of the aforesaid 162 shares of stock, nor any person, firm or corporation claiming under, through or by either of the said two parties to be the owner of any portion of the aforesaid stock, shall sell or otherwise dispose of the same for a period of six (6) years from date. In the event that Catawba Sales & Processing Company should, after six (6) years from date, desire to sell the aforesaid 162 shares of stock in Bowling Green Spinning Company, or in the event that the said Thomas L. Wilson, Sr., his executors, administrators, trustee, legatees, next of kin, widow or donees, after six (6) years from date should desire to sell the 162 shares of the said stock in the said corporation now owned by the said Thomas L. Wilson, Sr., then such party or parties desiring to sell shall offer the said stock to the other party for such price as the seller or sellers may be willing to take. In the event that the offer to sell the said stock is not accepted by the other party, then neither party to this agreement nor any persons, firms or corporations claiming through or under them shall have the right to sell the said stock or any part of it unless the purchaser shall be willing to purchase the entire 324 shares hereinabove referred to at a price satisfactory and agreeable to all of the owners and holders of the said 324 shares of stock. The certificates of stock issued by Bowling Green Spinning Company representing the 324 shares of stock hereinabove referred to, shall have a notation placed upon them to the effect that the same are subject to the provisions of this agreement, which shall remain on file among the records of Catawba Sales & Processing Company at Gastonia, North Carolina, or if the party of the second part so desires, instead of placing the notation on so many of the said stock certificates as evidence the 162 shares of stock owned by the said Wilson, he can place the said stock certificates in escrow with D. R. LaFar, Jr. to guarantee and assure the faithful performance of this agreement."

THIRD CONTRACT.

This contract was entered into on 22 August 1950, by and between Catawba, party of the first part, and Wilson, party of the second part. These are its provisions:

"WITNESSETH, THAT WHEREAS, Catawba Sales & Processing Company has a contract with Bowling Green Spinning Company, a corporation of Bowling Green, South Carolina, dated August 22, 1950, by the terms of which the said Bowling Green Spinning Company has given to the Catawba Sales & Processing Company the exclusive selling of the entire production of the plant of Bowling Green Spinning Company on a straight five (5%) per cent commission, and the Catawba Sales & Processing Company has agreed to devote whatever time is necessary to selling the said production of Bowling Green Spinning Company; and

"WHEREAS, Thomas L. Wilson, Sr. has agreed to advise the Catawba Sales & Processing Company in connection with its selling efforts and to assist it in establishing outputs of a satisfactory and permanent character for the production of the said Bowling Green Spinning Company;

"NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, IT IS AGREED:

"(1) That Catawba Sales & Processing Company will pay to Thomas L. Wilson, Sr. thirty (30%) per cent of all such selling commissions as may be paid by Bowling Green Spinning Company to the Catawba Sales & Processing Company.

"(2) Thomas L. Wilson, Sr. agrees to advise the said Catawba Sales & Processing Company and to assist it in an advisory capacity in selling the production of the aforesaid Bowling Green Spinning Company.

"(3) This contract shall become effective August 22, 1950, and shall remain in effect so long as the aforesaid contract between Bowling Green Spinning Company and Catawba Sales & Processing Company remains in full force and effect. However, should the said Thomas L. Wilson, Sr. die while the aforesaid contract between Bowling Green Spinning Company and Catawba Sales & Processing Company is still effective, then so long as the said contract is in full force and effect, the aforesaid thirty (30%) per cent of the aforesaid commissions to be paid to Catawba Sales & Processing Company, shall be paid to the executor or administrator of the estate of Thomas L. Wilson, Sr., or to such other person as may be designated by the said Thomas L. Wilson, Sr. in his last will and testament. However, should the said contract between Bowling Green Spinning Company and Catawba Sales & Processing Company at any time be cancelled, then this contract shall no longer be effective. Likewise, should Catawba Sales & Processing Company at any time acquire a majority of the outstanding stock of Bowling Green Spinning Company, by purchasing the one hundred sixty-two (162) shares from Thomas L. Wilson, Sr. or his estate or legal representatives, and the Catawba Sales & Processing Company should thereafter desire to cancel this contract, then the Catawba Sales & Processing Company shall be at full liberty so to do."

Four. Since 22 August 1950 the officers and directors of Bowling Green and Catawba have had full knowledge of the three agreements set forth above. Since 1949, and now, D. R. LaFar, Jr. has been President and Treasurer, Dan S. LaFar, Vice-President and Secretary, and Robert E. Caldwell, Assistant Secretary and Assistant Treasurer of Catawba. Since Wilson's death these men have held the identical offices with Bowling Green that they hold with Catawba.

Five. Since 22 August 1950, and up to 31 October 1953, Catawba handled the sales of the entire production of Bowling Green in accordance with the Sales Agreement, and during said time Bowling Green paid 5% commissions to Catawba as agreed. During the same period, Catawba, according to its contract with Wilson, paid to Wilson, and to his estate, after his death, 30% of the commissions received by it from Bowling Green—the payments to Wilson, and his estate, amounting to $52,457.22.

Six. During September 1953 the officers and directors of Catawba, who were likewise the officers and directors of Bowling Green, attempted to cancel, or purported to cancel, the Sales Agreement between them, in pursuance of the plan of Catawba to relieve itself of its obligation to pay the estate of Wilson commissions according to its contract with him.

Seven. Neither the plaintiff, nor the legatees and devisees under the will of Wilson, nor any of the beneficiaries under the trusts erected by his will have consented to, ratified or approved the attempted, or purported cancellation of the Sales Agreement between Catawba and Bowling Green.

Eight. At all times since 22 August 1950 Wilson, or his estate, and Catawba have owned, and still own, a majority of the outstanding capital stock of Bowling Green, and that the attempted, or purported cancellation of the Sales Agreement between Catawba and Bowling Green was invalid and void.

Nine. That under the three contracts set forth above, plaintiff is entitled to recover from Catawba 30% of 5% of the commissions provided by the Sales Agreement between Bowling Green and Catawba commencing with November 1953 and continuing so long as said agreements remain in force, and that plaintiff is entitled to recover for at least a minimum of six years 30% of such commissions from Catawba.

Ten. That plaintiff is entitled to an accounting of all sales of the entire production of Bowling Green by Catawba, or any one else, up to and including July 1954, and for each month thereafter, unless and until the contract between Catawba and Wilson is legally cancelled, as therein provided.

Wherefore, the plaintiff prays for an accounting, and for the recovery of money from Catawba in the amount shown by the accounting due it, according to the contract between Catawba and Wilson.

SECOND CAUSE OF ACTION.

In the second cause of action the first 34 paragraphs of the first cause of action are repleaded. The substance of the allegations of the second cause of action is this: If the Sales Agreement between Bowling Green and Catawba has been validly cancelled by them, then Catawba in agreeing to the cancellation unlawfully breached its contract with Wilson, for which breach it is responsible in damages to plaintiff.

Accepting the allegations of the complaint to be true, as we are required to do upon a demurrer, *McKinley v. Hinnant, ante,* 245, 87 S.E. 2d 568, these facts appear: Prior to 1950 Wilson had been in charge of the management and sales of Bowling Green, and through his efforts he had developed it from an insolvent condition to a profitable business in 1950. In 1950 his health became impaired. At that time he and his family owned a majority of the outstanding capital stock of Bowling Green. After his health became impaired, he desired to provide good management and adequate sales service for Bowling Green. To effectuate his desire he sold one-half of his controlling stock in Bowling Green to Catawba, and the three contracts were executed and delivered simultaneously in Gaston County.

We have said that "when two or more papers are executed by the same parties at the same time, or at different times, and show on their face that each was executed to carry out the common intent, they should be construed together." *Perry v. Surety Co.,* 190 N.C. 284, 129 S.E. 721.

The general rule is thus stated in 12 Am. Jur., Contracts, p. 782: "In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument." Numerous cases are cited in support of the text, including *Lewis v. Nunn,* 180 N.C. 159, 104 S.E. 470.

Ruffin, C. J., said in *Howell v. Howell,* 29 N.C. 491: "Where contracts are put into several instruments, each of which has a sensible meaning and may have a full operation, by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state; and, certainly, the court cannot do such violence to the intention of the parties, and the language in which they are expressed, as to consolidate separate instruments when the effect of doing so would be to avoid an essential part of the contract." This is quoted verbatim in 12 Am. Jur., Contracts, Sec. 246.

In *Peterson v. Miller Rubber Co. of New York,* 24 Fed. 2d 59, 62, the Court said: "A contract may be contained in several instruments. These, if made at the same time, in relation to the same subject matter,

may be read together as one instrument, and the recitals in one may be explained or limited by reference to the other. This rule obtains even when the parties are not the same, if the several contracts were known to all the parties and were delivered at the same time to accomplish an agreed purpose." See also 17 C.J.S., Contracts, p. 716.

This principle is a rule of construction to give effect to the intent of the parties: the provisions of one contract are not thereby imported bodily into another. *Huyler's v. Ritz-Carlton Restaurant & Hotel Co. of Atlantic City,* 1 Fed. 2d 491. "The heart of a contract is the intention of the parties." *Jones v. Realty Co.,* 226 N.C. 303, 37 S.E. 2d 906.

Reading these three contracts together these facts appear: Catawba and Wilson owned a majority of the outstanding capital stock of Bowling Green, and Catawba and Wilson entered into the Management and Voting Control Agreement, which provides that Catawba shall manage the business of Bowling Green for such time as Catawba and Wilson, or his executors, administrators, etc., own the majority of the outstanding capital stock of Bowling Green, and that during such time Catawba shall vote the Wilson stock. That neither shall sell their stock for 6 years. Then the Sales Agreement between Bowling Green and Catawba gives Catawba the exclusive selling of the entire production of Bowling Green on a commission of 5%, and provides that this contract of sales shall continue in effect so long as Catawba and Wilson, or his executors, administrators, etc., own the majority of the outstanding capital stock of Bowling Green. Then the Third Contract, after reciting the terms of the Sales Agreement between Bowling Green and Catawba, provides that Catawba shall pay to Wilson, or his executors, administrators, etc., 30% of all such selling commissions as may be paid by Bowling Green to Catawba, so long as the Sales Agreement between Bowling Green and Catawba remains in effect. This contract provides that should the Sales Contract be cancelled, then this contract shall be cancelled. Reading these three contracts together, it is our opinion that their true intent and meaning are that Wilson was a direct beneficiary of the Sales Agreement between Bowling Green and Catawba. It is true that he was not a party or privy to it. However, he was a party to the other two contracts. Such interpretation violates no essential part of the three contracts.

That Wilson was a direct beneficiary of the Sales Agreement between Bowling Green and Catawba, was the practical interpretation of the three contracts given by the parties to them, while engaged in their performance before any controversy had arisen, because the complaint alleges that since 22 August 1950 and up to 31 October 1953 Catawba handled the sales of the entire production of Bowling Green, in accordance with the Sales Agreement, and during said time Bowling Green

paid 5% commissions on the sales of its production to Catawba, and Catawba paid 30% of these 5% commissions to Wilson, or his estate, as agreed in the Third Contract. Such a construction of the contracts by the parties is one of the best indications of their true intent and meaning, for it is to be presumed that the parties to contracts know best what was meant by their terms, and are least liable to be mistaken as to their purpose and intent, and courts adopting and enforcing such construction are not likely to commit serious error. *Cole v. Fibre Co.*, 200 N.C. 484, 157 S.E. 857; *Holland v. Dulin*, 206 N.C. 211, 173 S.E. 310; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82; *Hull Co. v. Westerfield*, 107 Neb. 705, 186 N.W. 992, 29 A.L.R. 105.

This Court said in *Canestrino v. Powell*, 231 N.C. 190, 56 S.E. 2d 566, in an opinion written by *Ervin, J.*, where 16 of our cases are cited to support the statement: "The rule is well established in this jurisdiction that a third person may sue to enforce a binding contract or promise made for his benefit even though he is a stranger both to the contract and to the consideration." To the same effect: *Brown v. Construction Co.*, 236 N.C. 462, 73 S.E. 2d 147. This is the majority American Rule. Anno. 81 A.L.R. 1279. We have not adopted the principle that he must be the sole beneficiary. *James v. Dry Cleaning Co.*, 208 N.C. 412, 181 S.E. 341; *Supply Co. v. Lumber Co.*, 160 N.C. 428, 76 S.E. 273; *Gastonia v. Engineering Co.*, 131 N.C. 363, 42 S.E. 858; *Gorrell v. Water Supply Co.*, 124 N.C. 328, 32 S.E. 720. If the contract was not made for the benefit of the third party, he has no cause of action upon the contract to enforce it, or sue for its breach. *Land Co. v. Realty Co.*, 207 N.C. 453, 177 S.E. 335.

Contracts for the benefit of third persons have been a prolific source of judicial and academic discussion. Not every such contract made by one with another, the performance of which would be of benefit to a third person, gives a right of action to such third person. Whether such person can enforce the contract depends on the facts and circumstances of the particular case. For a discussion of limitation to the rule stated by various courts, see 17 C.J.S., Contracts, p. 1125 *et seq.*

The United States Supreme Court said in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 72 L. Ed. 290: " 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit.' *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 57 L. Ed. 195, 199, 42 L.R.A. (NS) 1000." See also: Anno. 81 A.L.R. 1286-1288.

"A third person for whose direct benefit a contract was entered into may sue for breach thereof; but if the benefit is only incidental, he may not." 12 Am. Jur., Contracts, Section 281.

Reading the three contracts together it is clear that the provision in the Sales Agreement that it shall continue in effect so long as Catawba and Wilson, or his executors, administrators, etc., own a majority of the outstanding capital stock of Bowling Green, was inserted for the direct benefit of Wilson, or his executors, administrators, etc., and that benefits have been accepted by them, because under these contracts they received from Catawba $52,457.22 from 22 August 1950 to 31 October 1953.

That a contract made for the direct benefit of a third person cannot be materially modified or changed by the other parties thereto without the third party's consent, where the contract has been accepted and acted upon by him, as in the instant case, seems to be the law. *Liner v. Traveler's Ins. Co.*, 50 Ga. App. 643, 180 S.E. 383; *Richardson v. Short*, (Iowa) 202 N.W. 836, 838; *Hamill v. Maryland Casualty Co.*, 209 F. 2d 338; *Pliley v. Phifer*, 1 Ill. App. 2d 398, 117 N.E. 2d 678; *Rhodes v. Rhodes*, Ky., 266 S.W. 2d 790; *Camden Trust Co. v. Haldeman*, 133 N. J. Eq. 427, 33 A. 2d 611, affirmed 40 A. 2d 601, 136 N. J. Eq. 261; Annos.: 81 A.L.R. 1294; 53 A.L.R. 181-182; 17 C.J.S., Contracts, Sec. 390.

It is said in Anno. 53 A.L.R. 181: "It is well settled that, after acceptance or action on a contract by a third person for whose benefit it was made, the original parties may not, without the consent of such third person, rescind the contract by mutual agreement, so as to deprive him of its benefits."

The defendant demurs to each cause of action on the grounds that neither states facts sufficient to constitute a cause of action. These are the grounds of the demurrer as to the First Cause of Action:

First. That it appears from the complaint, and the contracts attached thereto and made parts thereof, that Catawba agreed to pay Wilson, or his estate, 30% of such commissions as might be paid to Catawba by Bowling Green; that the contract between Catawba and Wilson provided that it should remain in effect so long as the contract between Bowling Green and Catawba remains in effect, and that the contract between Catawba and Wilson further provided, however, should the contract between Bowling Green and Catawba be cancelled, then their contract shall no longer be effective; that the contract between Bowling Green and Catawba was cancelled in September 1953, and Catawba has paid Wilson, or his estate, 30% of all commissions received by it through October 1953, and therefore plaintiff has stated no cause of action. This contention ignores the provision of the Sales Agreement between Bowling Green and Catawba that this Sales Agreement shall continue in effect so long as Catawba and Wilson, or his executors, administrators, etc., own the majority of the outstanding

capital stock of Bowling Green, and that the complaint alleges they still own a majority of such stock. Since Wilson, or his executors, administrators, etc., are direct beneficiaries of this Sales Agreement, reading the three contracts together to carry out their intent and meaning, Catawba and Bowling Green could not cancel it without the consent of Wilson, or his executors, administrators, etc., and the complaint alleges they have never consented to the cancellation.

Second. That the complaint has not alleged that defendant has been paid one cent for commissions since October 1953. If Catawba has received no commissions since October 1953, because it has cancelled the Sales Agreement between Bowling Green and itself without the consent of Wilson, or his executors, administrators, etc., this ground of the demurrer as to plaintiff's second cause of action is bad.

Third. The substance of this ground is that there is nothing in the contract between Wilson and Catawba to prevent Catawba from cancelling the Sales Agreement between Bowling Green and itself, that the contract between Catawba and Bowling Green has been cancelled, and that the contract between Catawba and Wilson provides that should the Sales Agreement between the two corporations be cancelled, then the contract between Catawba and Wilson, or his estate, shall no longer be effective.

Fourth. That it appears from the complaint that whatever rights, if any, the plaintiff has against this defendant in connection with the monies herein sued for, are bottomed upon the contract between Catawba and Wilson, and upon the facts alleged, the complaint negatives the plaintiff's right to recover.

What we have said under the first ground of the demurrer answers the third and fourth grounds of the demurrer.

The grounds of the demurrer as to the Second Cause of Action are substantially the same as those to the First Cause of Action.

The defendant contends in its brief that the Management and Voting Control Agreement between Catawba and Wilson is invalid. Defendant's demurrer does not specify this as a ground of objection. G.S. 1-128 states: "The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded." This Court said in *Love v. Comrs.*, 64 N.C. 706: ". . . Every demurrer is special, and must distinctly specify the ground of objection to the complaint. It is so easy to specify the ground of objection that the Court is not disposed to relax the rule." Defendant has not presented the alleged invalidity of the Management and Voting Control Agreement for decision.

Plaintiff has stated two good causes of action in the alternative in order to meet different aspects of the evidence. First, plaintiff has alleged a good cause of action to recover monies from Catawba due

under existing contracts. Second, plaintiff has alleged a good cause of action in the alternative to recover damages for breach of contracts by Catawba, if the Sales Agreement between Bowling Green and Catawba has been cancelled by the parties thereto without the consent of Wilson, or his executors, administrators, etc., the Sales Agreement having been accepted and acted upon by them.

The judgment of the lower court overruling the demurrer as to both causes of action is

Affirmed.

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

T. CURTIS ANDREWS AND CATHERINE ANDREWS v. T. B. ANDREWS.

(Filed 30 June, 1955.)

1. Hunting and Fishing § 4—Maintenance of pond with bait and lame wild geese may constitute nuisance per accidens.

The allegations of the complaint were to the effect that the defendant constructed and maintained a pond on his land, within 400 feet of plaintiffs' property, and kept bait and lame wild geese thereon for the purpose of attracting wild geese, that as a result thereof wild geese were attracted to the pond and returned to the pond each winter in increasing numbers, that defendant knew the nature of wild geese, and that they would return to the same pond each winter with their young and with additional geese, and that the wild geese used the pond as a base, and foraged out on the adjacent land of plaintiffs, destroying plaintiffs' grain crops, and further that defendant persisted in maintaining the condition after repeated warnings by plaintiffs of the damage to their crops by the geese. *Held:* The complaint is sufficient to state a cause of action based upon defendant's maintenance of a private nuisance *per accidens*, and judgment sustaining defendant's demurrer to the complaint for failure to state a cause of action is reversed.

2. Nuisance § 1—

An improper use of one's property which results in injury to the land, property or rights of another, constitutes in law a private nuisance under the maxim *sic utere tuo ut alienum non laedas.*

3. Same—

A private nuisance *per se* is an act, occupation or structure which is a nuisance at all times or under any circumstances or surroundings; a private nuisance *per accidens* is one which constitutes a nuisance by reason of its location or the manner in which it is constructed, maintained or operated.

4. Same—

Negligence and nuisance are separate torts, and private nuisances *per accidens* may exist without the element of negligence, and are in fact usually intentionally created or maintained.

PARKER, J., dissenting.

APPEAL by plaintiffs from *Clarkson, J.*, November 1954 Term, RICHMOND Superior Court.

This is a civil action instituted on 22 October, 1954, in which the plaintiffs ask for a restraining order and damages for the causes set forth in the following complaint:

"The plaintiffs, complaining of the defendant, say and allege:

"1. That the plaintiffs are residents of Richmond County, North Carolina, and are owners in possession of the following described tract of land:

"All that certain piece, parcel or tract of land situate, lying and being in Steele's Township, Richmond County, N. C., on both sides of the River Road about one mile east of Mangum, bounded on the east by the lands of John C. Matheson, the lands of W. C. Lisk, the lands of J. H. LeGrand and the lands of E. J. Haywood; on the north by the lands of T. B. Andrews; on the south by the Pee Dee River and on the west by the lands of T. B. Andrews and the estate lands of D. N. Currie, containing 449.2 acres, more or less.

"The above described lands were purchased by the plaintiffs by warranty deed dated January 11, 1945, and recorded in Book 267 at page 163 in the office of the Register of Deeds for Richmond County, N. C., reference to which is made for the purpose of incorporating that said deed herein the same as if set forth herein.

"2. That the defendant is a resident of Richmond County, N. C., and owns a tract of land situate in Richmond County, N. C., adjoining the plaintiffs' lands on the east and west.

"3. That since the purchase of the land described in paragraph 1 of the complaint in 1945, the plaintiffs have lived thereon and have their home thereon; that they have earned their living thereon by raising livestock and farming; that this farm is their only source of income.

"4. That a large portion of the plaintiffs' farm land borders on lands owned and occupied by the defendant; that a large portion of the plaintiffs' land which borders that of the defendant has been annually planted in grain crops since 1945; that said crops have to be planted in the fall months and mature in the spring of the following year.

"5. That prior to 1949 the plaintiffs' crops and fields were never molested or damaged in any way by wild geese or any other wild fowl; that in the year 1949 the defendant, at a point about 400 feet from the

border line between the property of the plaintiffs and the property of the defendant, excavated springs of water which were situate on his land and created at that point an artificial pond containing about three and one-half acres of stagnate water. The said pond is of little actual value to the defendant's land.

"6. That during the winter of 1951-1952 the defendant placed lame wild geese on the said pond, and placed food and bait on the pond and on the banks thereof, at regular intervals, for the purpose of attracting wild geese to the pond and the surrounding area. That as a direct result of the defendant's building and maintaining the pond near the plaintiffs' lands, placing food and lame wild geese thereon for the purpose of attracting wild geese, wild geese in large numbers immediately came to the pond, but instead of staying on the pond, used the pond as a base from which to set upon and destroy plaintiffs' crops and fields as hereinafter alleged.

"7. That between the months of October 1951 and June 1952, approximately 200 wild geese, as a direct result of the acts of the defendant heretofore complained of, used the defendant's pond as their winter home, but instead of staying on the pond, used the pond as a base from which to set upon and destroy plaintiffs' crops and fields. That during the period from October 1951 to June 1952, the defendant's pond, lame wild geese and bait proximately caused about 200 wild geese to be attracted daily to the plaintiffs' fields and said wild geese destroyed 1½ acres of plaintiffs' matured corn; that the fair market value of the corn destroyed was $48.00; that the defendant's maintaining the pond, lame wild geese and bait near the plaintiffs' land proximately caused and directly resulted in the plaintiffs suffering damages through loss of their corn in the amount of $48.00, between the months of October 1951 and June 1952.

"8. That between the months of October 1952 and June 1953 approximately 1,200 wild geese, as a direct result of the acts of the defendant heretofore complained of, used the defendant's pond as their winter home, but instead of staying on the pond, used the pond as a base from which to set upon and destroy plaintiffs' crops and fields. That during the period from October 1952 to June 1953 the defendant's pond, lame wild geese and bait proximately caused about 1,200 wild geese to be attracted daily to the plaintiffs' fields and said wild geese destroyed 60 bushels of plaintiffs' matured corn; that the fair market value of the destroyed corn was $105.00; that the defendant's maintaining the pond, lame wild geese and bait near the plaintiffs' land proximately caused and directly resulted in the plaintiffs suffering damages through loss of their corn in the amount of $105.00 between the months of October 1952 and June 1953.

"9. That between the months of October 1953 and June 1954, approximately 3,000 wild geese, as a direct result of the acts of the defendant heretofore complained of, used the defendant's pond as their winter home, but instead of staying on the pond, used the pond as a base from which to set upon and destroy the plaintiffs' crops and fields. That during the period from October 1953 to June 1954, the defendant's pond, lame wild geese and bait, proximately caused about 3,000 wild geese to be attracted daily to the plaintiffs' fields and said wild geese destroyed 400 bushels of the plaintiffs' wheat, the fair market value of which was $1,036.80; destroyed seven acres of the plaintiffs' pasture grass, the fair market value of which was $100.00; destroyed 140 bushels of plaintiffs' barley, the fair market value of which was $154.00; destroyed 75 bushels of plaintiffs' oats, the value of which was $52.50; that the defendant's maintaining the pond, lame wild geese and bait near the plaintiffs' land, proximately caused and directly resulted in the plaintiffs suffering damages through loss of his crops as alleged in the sum of $1,343.30.

"10. That plaintiffs are informed and believe the nature of wild geese, which is known to the defendant, is that they migrate from the north in the fall months and locate at ponds where shelter, food and other geese are located or lame geese maintained; that said geese spend the winter at the pond and feed on the surrounding country side, particularly on cultivated crops; that in the spring they migrate north again, raise young geese, and return to the same pond with their young and additional geese to spend the winter, so long as shelter, other geese, and food are provided at the pond. That each year more and more wild geese return to the ponds where they are sheltered; that the defendant knew or should have known this before building his pond.

"11. That each year more and more wild geese are being attracted to plaintiffs' fields by the defendant's pond, lame wild geese and food; that the defendant is under a duty to the plaintiffs to use his property in such manner as not to interfere with the plaintiffs' use and enjoyment of their lands.

"12. That the pond, the lame wild geese and bait kept on the pond by the defendant, constitute a nuisance to the plaintiffs' property in that their proximity to the plaintiffs' fields directly results in large numbers of wild geese being attracted to the plaintiffs' fields and crops; that the defendant, by maintaining said pond, bait and lame wild geese, as alleged, has proximately caused the plaintiffs damages in the sum of $1,536.30, for which said sum the plaintiffs are entitled to judgment against the defendant; that each year more and more wild geese are attracted by the defendant's pond, bait and wild geese, to the plaintiffs' fields; that unless the defendant is restrained from maintaining the said

pond, lame wild geese and bait, the plaintiffs will be permanently and irreparably damaged.

"13. That about October 1, 1954 the defendant was still maintaining the said pond and lame wild geese and about that date began placing food on the pond; that during the period between October 1, 1954 and October 20, 1954 about 400 wild geese had been attracted to the pond and are again setting upon and destroying the plaintiffs' crops.

"14. That the plaintiffs are informed and believe the nature of wild geese is such that if the pond, bait and lame wild geese were not maintained by the defendant on his pond, the said wild geese would not be attracted to the plaintiffs' fields and destroy their crops. That the defendant knew or should have known, before constructing the said pond at the location stated, placing lame wild geese thereon and bait thereon, that large numbers of wild geese would be attracted to the plaintiffs' fields and destroy plaintiffs' crops.

"15. That the plaintiffs have repeatedly warned the defendant of the damages resulting from the defendant maintaining the said pond, lame wild geese and bait, but the defendant only ridiculed and laughed at the plaintiffs and has refused to abate the said nuisance.

"16. That this complaint is made also as plaintiffs' affidavit to be used in all hearings in this matter.

"WHEREFORE, the plaintiffs pray the Court:

"1. That the court issue a temporary injunction restraining the defendant until final judgment in this cause from keeping lame wild geese on the said pond and placing any food or bait on the said pond.

"2. That the defendant be permanently restrained from maintaining the said pond on his land, from baiting any pond on his land and from keeping any lame wild geese on his land or pond.

"3. That the court order the defendant to fill in the pond and destroy the same and that a mandatory injunction issue against the defendant to accomplish this purpose.

"4. That the plaintiffs have and recover of the defendant the sum of $1,536.30 for damages actually sustained with interest.

"5. That the plaintiffs recover the cost of this action as taxed by the Clerk and have and recover such further relief as to the Court may be just in the premises."

The defendant in apt time filed the following demurrer:

"Comes now the defendant through his attorneys and demurs to the complaint in this cause of action, and moves to dismiss same on the following grounds, to-wit:

"1. That said complaint fails to state a cause of action against T. B. Andrews, the defendant herein.

"2. That said complaint fails to put any duty on the part of the defendant to protect the property of the plaintiffs from the alleged depredation of wild fowl as alleged in the complaint.

"3. That said complaint fails to allege any negligent action on the part of the defendant which would create any liability on the part of the defendant to said plaintiffs or either of said plaintiffs.

"4. That said complaint fails to allege any specific act or acts of negligence on the part of the defendant or any of his agents, representatives or servants by virtue of which the damage alleged to have been suffered by the plaintiffs, or either of them, was occasioned or inflicted.

"5. That plaintiffs failed to allege the commission of any unlawful act or any negligent act on the part of the defendant which proximated the alleged depredation of the plaintiffs' property by wild fowl.

"6. That said complaint does not allege any lawful or legal causal connection between unlawful or negligent acts of the defendant and the alleged depredation of the property of the plaintiffs by wild fowl.

"7. That said complaint failed to allege that the wild fowl which allegedly damaged the property of the plaintiffs, was owned, possessed, or controlled in any manner whatsoever by the defendant.

"8. That the defendant is not liable for the trespasses of animals which are *feras naturae,* and which have not been reduced to possession but which exist in a state of nature."

From the judgment sustaining the demurrer, the plaintiffs appeal.

M. C. McLeod for plaintiffs, appellants.

Pittman & Webb, By: W. G. Pittman for defendant, appellee.

HIGGINS, J. On account of the novelty of the question involved in this appeal, we have set out in full both the complaint and the demurrer. The assignment of error raises the question whether the complaint states a cause of action. If it does, the judgment must be reversed. If it fails, the judgment must be affirmed. The question of proof does not arise at this stage of the proceeding. We are concerned with allegation alone. Does the complaint allege enough facts to entitle the plaintiffs to go to the jury if they prove all they allege?

Some of the salient facts alleged are: The defendant in 1949 constructed upon his own land an artificial pond covering three and one-half acres within 400 feet of plaintiffs' lands which theretofore had never suffered depredations by wild geese. During the winter of 1951-1952 the defendant placed lame wild geese (those that cannot fly) on the pond, kept food and bait on and around the pond *for the purpose of attracting wild geese,* and as a result of the decoys and food, *wild geese in large numbers immediately came to the pond;* and from it as a base,

foraged out upon the adjacent lands of the plaintiffs, destroying their crops. The first year, because of the food and decoys maintained on and around the pond, approximately 200 wild geese spent the winter there. For the same reasons about 1,200 spent the succeeding winter; and the third winter approximately 3,000 stayed from October until Spring. These wild geese feeding out from the defendant's pond as a base, destroyed plaintiffs' crops of the value of $48.00 the first year, $105.00 the second year, and $1,343.00 the third year.

The plaintiffs allege also the defendant knew it is the nature of wild geese to do the things charged. He knew they migrate from the north in the Fall months to ponds where shelter, food, and other geese are located, or lame geese kept. Geese spend the winter on the pond and feed on the surrounding countryside, particularly on cultivated crops. In the Spring they migrate north, raise young geese, and *return to the same pond* with their young and with additional geese to spend the winter so long as shelter, decoys, and food are provided. As more and more wild geese are attracted, they feed upon and become more and more destructive to plaintiffs' crops, grown and growing upon their lands. Of all this the defendant had knowledge.

The defendant continues to maintain lame wild geese upon his pond and up until the time of bringing this suit is and has been placing food for them. The plaintiffs have repeatedly warned the defendant of the damage to their crops by the geese attracted to the pond, but the defendant only laughed at and ridiculed the plaintiffs' complaint and refused to abate the nuisance.

The defendant argues in his brief no cause of action arises because the geese are wild; that the defendant does not own them; that they are in a state of nature; that he is not responsible for what they do; that it was lawful for him to build a pond on his own land and that if he feeds geese because of his love for wild things he is within his rights; that the plaintiffs have no right to complain, at least to complain in the courts.

The argument appears deceptively logical until a few other pertinent facts are taken into account. The defendant knew, according to the allegations in the complaint, that wild geese are attracted to a pond where food is placed and where lame wild geese are maintained; that each year they return to the same pond in numbers increasing in geometric progression as long as shelter and food and decoys are provided. They feed out from the base which the defendant maintains and destroy crops, especially those close at hand. Plaintiffs' farm of 449.2 acres is within 400 feet of the base of operations provided and maintained for the geese by the defendant with knowledge of what they do. At the same rate of increase 7,500 will be there this year and 20,000 next. If there is no relief for the plaintiff as of the date suit was brought, there

will be none next year. Surely the arm of the law is neither too short nor too weak to reach out to the pond and take away the wild geese maintained as prisoners there to attract their kind in ever increasing numbers.

While careful search fails to reveal a case based on similar facts, the application of well established legal principles offers some help in pointing the way to a solution of the legal problem presented. The plaintiffs call to their aid an ancient maxim handed down to us from the time when Latin was the language of the court: *Sic utere tuo ut alienum non laedas,* (to use your own so that you do not injure another). The law makes it a private nuisance when one by an improper use of his property does injury to the land, property, or rights of another. *Holton v. Oil Co.,* 201 N.C. 744, 161 S.E. 391.

The plaintiffs' cause of action is grounded in that field of tort liability designated as private nuisance. Private nuisance may be *per se* or *per accidens.* A private nuisance *per se* (by itself) or at law, is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. A private nuisance *per accidens,* or, in fact, becomes a nuisance by reason of its location or the manner in which it is constructed, or maintained, or operated. *Morgan v. Oil Co.,* 238 N.C. 185, 77 S.E. 2d 682.

The defendant, in the brief and on the oral argument, contends the complaint is insufficient by reason of the fact that negligence neither in the construction of the pond nor in the manner in which it is maintained and operated is alleged. The argument ignores the fact that negligence and nuisance are separate fields of tort liability. While the same act or ownership may constitute negligence and at the same time become a nuisance *per accidens,* and be practically inseparable, yet the latter may be created, or maintained, or operated without negligence. *Swinson v. Realty Co.,* 200 N.C. 276, 156 S.E. 545.

"Most private nuisances *per accidens,* or, in fact, are intentionally created or maintained and are redressed by the courts without allegation or proof of negligence." *Morgan v. Oil Co., supra; Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485. In the *Morgan case, Justice Ervin* discusses most thoroughly the whole concept of nuisance liability, citing the decisions of many courts.

We conclude the plaintiffs' complaint, when liberally construed, states a cause of action for nuisance *per accidens,* or in fact. Whether they can offer proof to support the allegations of the complaint will present a problem for another day and another tribunal.

The judgment of the Superior Court of Richmond County is

Reversed.

PARKER, J., dissenting: This question is presented for decision: Can the defendant be held liable for the trespasses of wild geese, which are *ferae naturae,* which he did not own and which have not been reduced to possession, but exist in a state of nature? My brethren say Yes: I do not agree.

The general rule is there is no individual property in wild animals, geese or fish so long as they remain wild, unconfined, and in a state of nature. 2 Am. Jur., Animals, p. 696.

The doctrine of liability attaching to one who owns or keeps insecurely confined on his premises wild animals causing injury has no application to the facts here. As to that see: Anno. 69 A.L.R. 500; 3 C.J.S., Animals, Section 143.

Sickman v. U. S., 184 F. 2d 616, *certiorari* denied 341 U.S. 939, 95 L. Ed. 1366, rehearing denied 342 U.S. 843, 96 L. Ed. 637, motion for leave to file a second petition for rehearing denied, 342 U.S. 874, 96 L. Ed. 657, is a case with strikingly similar facts, and was brought under the Federal Tort Claims Act, 28 U.S.C.A., Sections 1346 (b) and 2671-2680, to recover $26,500.00 alleged damages to crops of corn and soybeans claimed to have been destroyed in 1946 and 1947 by migratory waterfowl, principally Canada geese. The Court said: ". . . a private person could not be held liable for the trespasses of animals which are *ferae naturae,* and which have not been reduced to possession, but which exist in a state of nature. The United States, considered as a private person, did not have any ownership, control or possession of these wild geese which imposed liability for their trespasses."

I vote to affirm.

LAWSON LESTER, JR. v. M. P. McLEAN, JR. AND R. G. BURGE v. M. P. McLEAN, JR.

(Filed 30 June, 1955.)

1. Fraud § 8—Representation of replacement cost held to relate to matter of opinion and insufficient to support action for fraud.

On defendant's counterclaim based on fraud inducing the purchase of property, defendant testified that plaintiffs represented that they had an equity in a large sum in the property, and that the cost of the project was in a certain amount, which amount substantiated the representation as to the amount of the equity. The evidence further tended to show that the representations as to cost were based upon a project analysis showing the present replacement value and that they were made in pointing out the figures on the project analysis, to which defendant had access. *Held:* The representations as to the equity were based upon the known amount of the mortgage subtracted from the present replacement cost, which was

necessarily a matter of opinion, and therefore such representations do not constitute a basis for an action for fraud.

2. Same—

A representation which is nothing more than a statement of opinion cannot constitute fraud.

3. Fraud § 5—Evidence held insufficient to show that purchaser was deceived by or relied upon representation.

On defendant's counterclaim based on fraud inducing the purchase of property, defendant testified that plaintiffs represented that the buildings had been constructed in accordance with plans and specifications approved by the FHA. The evidence further tended to show that defendant had never seen the original plans and specifications of the project, that the original plans had been modified by consent of the parties several times during the progress of the work, and that the FHA had approved the finished buildings for the purpose of guaranteeing a mortgage loan thereon, and further that defendant, his attorney and officers and employees of defendant's company, had unlimited opportunity to inspect the property and did so repeatedly before the purchase, and that defendant made payments on the purchase money notes for fifteen months after he was in possession. *Held:* The evidence is insufficient to show that defendant was deceived by the representations or induced thereby to purchase the property.

4. Fraud § 10—

Where defendant sets out fraud as an affirmative defense, the burden of the issue is on defendant.

5. Fraud § 1—

To constitute fraud, there must be a false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with the intent to deceive.

6. Fraud § 11—

On a counterclaim for fraud inducing the purchase of property by defendant, the contract of sale entered into by the parties is admissible as evidence as to what the parties actually agreed, even though the action is in tort.

APPEAL by defendant from *McSwain, S. J.*, October Term 1954, FORSYTH Superior Court.

The plaintiffs each brought a separate action against the defendant for the recovery of the balance due on a note dated 15 February, 1951, in the sum of $30,555.52, upon which five payments had been made, each for $3,819.44, on 15 May, 15 August, and 15 November, 1951; and 15 February and 15 May, 1952, leaving a balance due of $11,558.32 on each note, with interest at four per cent.

The defendant admitted the execution of the notes, the payments, and the balance due as alleged. As a defense and counterclaim he alleged

the notes were given in part payment for capital stock in Park Terrace, Inc., which he was induced to purchase at the price of $182,500, by the false and fraudulent representations of the plaintiffs. Specifically, he alleged that Park Terrace, Inc., was the owner of a Federal Housing Administration financed project consisting of 355 rental apartments grouped in approximately 90 buildings, intended as low priced, low rental units, for occupancy by colored tenants, built according to the plans and specifications approved by the Federal Housing Administration and financed by a government insured loan on the project for $1,632,000; that the plaintiffs represented they had, in the property, an equity of $187,000, and that the improvements were constructed according to plans and specifications approved by the Federal Housing Administration. The defendant alleged he relied on the representations of the plaintiffs, both as to the equity and as to the construction of the improvements according to the plans and specifications; that these representations were false and fraudulent; that he was induced by them to purchase the stock to his damage in the sum of at least $170,000.

Each plaintiff replied to the counterclaim, denying any false or fraudulent representations, and set up as a bar thereto a contract entered into 15 February, 1951, between the plaintiffs and W. B. Pollard, parties of the first part, and M. P. McLean, Jr., party of the second part, under the terms of which the plaintiffs sold their stock to the defendant for $182,500, and that the defendant at the time of the contract stipulated and agreed that he was taking the property in its then condition and without any guarantee, and agreed that no claim should be made against the parties of the first part or Park Builders, or J. A. Bolich, of any nature whatsoever because of defective workmanship, defective or inferior building materials in the structures, and that the same were accepted unconditionally.

The two cases were consolidated and tried together. Each plaintiff introduced his note, together with the allegations of the complaint with respect to its execution, balance due, and the corresponding admissions in each answer. The plaintiffs introduced the agreement dated 15 February, 1951, and rested.

The defendant testified in his own behalf and offered the testimony of W. B. Pollard, Ed Coble, and others, together with numerous documents, including construction contract, project analysis, inspection reports, and correspondence. This evidence will be referred to in the opinion. At the conclusion of defendant's evidence the plaintiffs moved for judgment of nonsuit as to defendant's counterclaim in each case. The motions were allowed, to which the defendant excepted. Under peremptory instructions the jury answered the issues in each case in

favor of the plaintiff. Judgments were entered accordingly, to which the defendant excepted, and from which he appealed.

Broaddus, Epperly & Broaddus and Womble, Carlyle, Martin & Sandridge for plaintiffs Lester and Burge in each case, appellees.

Spry, White & Hamrick, by W. D. Spry, and Dallace McLennan for defendant, appellant.

HIGGINS, J. The pleadings and stipulations have settled all matters in dispute in these cases except the defendant's counterclaims. If evidence of fraudulent misrepresentation was sufficient to raise a jury question, then the trial court committed error in granting the motions for judgment of nonsuit on the counterclaims and a new trial should be awarded. On the other hand, if the defendant's proof of fraud was insufficient to go to the jury, then, of course, the trial court was correct and the judgments should stand.

While details are unnecessary, a few of the essential facts constituting the background of the case will help to clarify the issue involved. Prior to August, 1949, the plaintiffs, in collaboration with W. B. Pollard, applied to the Federal Housing Administration for a commitment to insure a loan for the construction of a low cost, low rent housing project in Winston-Salem for colored occupants. Plans were submitted for 355 apartments with streets, drives and parking space. After examining the plans, the Federal Housing Administration indicated a willingness to insure a loan up to 90 per cent of the value of the project. Whereupon the applicants incorporated under the name Park Terrace, Inc., with plaintiffs and W. B. Pollard each subscribing for 100 shares of A stock at $1.00 per share par value. Pollard was elected president and he and the plaintiffs were named directors. The plaintiffs and others, not including Pollard, organized another corporation, Park Builders, Inc. The plaintiffs were elected to its board of directors. Park Terrace entered into a contract with Park Builders under the terms of which the latter was to do the actual construction work on the project. There is evidence the contract price for the structures was $1,527,225.

In addition to the A stock, Park Terrace issued B stock of the par value of $1.00 per share as follows: 41,097 shares to each of the plaintiffs and to W. B. Pollard; and 70,151 shares to Lief Valand. For the B stock the owners agreed to pay to the corporation its par value in cash, or in property, or in services. Lief Valand was the architect who drew the plans and supervised the construction, and apparently received his B stock for his services. The incorporators paid $8,160 insurance premiums; $8,160 inspection fees; $4,896 Federal Housing Administration examination fee; and other expenses incident to the

incorporation. The Federal Housing Administration agreed to guarantee a loan for $1,632,000. The commitment was first made to the First National Bank of Martinsville, Va., and later transferred to the Wachovia Bank & Trust Company, Winston-Salem, N. C. After the construction of the project was completed, Valand offered his B stock for sale, first to the corporation, and, when the offer was refused, later sold it to the plaintiffs for an alleged price of $500. However, all B stock was surrendered to the corporation and canceled before negotiations began for the sale of the A stock to McLean.

Park Builders began constructing the housing units in October, 1949, subcontracting parts of the work. As the work progressed, Valand, the architect, made progress reports and after inspection and approval by the Federal Housing Administration the Wachovia Bank & Trust Company made advances against the amount of the loan. The final advancement was made 23 October, 1950. "Shortly following the final advance of $186,605.09, which was approved by the Federal Housing Administration, and finally approved for insurance on November 3, 1950, . . . said final approval . . . was not given by FHA until the architect in charge of the project . . . had approved said final advancement; nor until Wachovia Bank & Trust Co. had reported to the FHA that the construction was completed; nor until the inspectors of the FHA had inspected and made their final reports."

On 4 December, 1950, Burge, Lester and Pollard sold to J. A. Bolich, Jr., 101 shares of A stock in Park Terrace. Bolich was directed to negotiate a sale of the entire property to the Federal Government as a public housing project. These negotiations were not successful. As an investment the project proved a financial failure. Demand for rental property of this type among colored people did not meet expectations. Only about one-half the apartments were occupied and many of the tenants defaulted in payments of rent.

Such was the situation the latter part of January, 1951. At that time the McLean Trucking Company, of which the defendant was president, was in need of housing facilities for its truck drivers and their families. In order to provide housing for the employees of his company, the defendant planned to develop his own housing project. To use his own words: "I went to see Mr. Bolich about helping with possibly building . . . as a result of that contact I learned about Park Terrace . . . Mr. Bolich said there was a housing project on Walkertown Road that was having a rough time getting along and that might be bought for $125,000 above the mortgage. He told me it was owned by Mr. Burge, Mr. Lester and Mr. Pollard. Mr. Bolich and I rode out to see the project." With this beginning, negotiations continued for two weeks and resulted in a sale and transfer to the defendant of all the outstand-

ing A stock in Park Terrace for the price of $182,500. The purchase price was arranged by part payment in cash and the execution of notes for the remainder.

The gist of defendant's claim is that the plaintiffs induced him to purchase the stock in Park Terrace by false and fraudulent representations in two particulars: First, that they had an equity of approximately $187,000 in the property, whereas the property was not worth the amount of the mortgage; second, that the housing units were constructed in accordance with the plans and specifications approved by the Federal Housing Administration, whereas both the workmanship and materials used were inferior, and not in accordance with the plans and specifications, to his damage in the sum of $170,000.

The plaintiffs, by way of reply, denied all charges of false representation and set up the contract of sale as a bar to recovery on the counterclaims.

So much for the contentions—now the evidence: The representations with respect to the equity in the property according to McLean's testimony were: "In the course of the conversation . . . with Bolich, he showed me what they owed on the project . . . I can't remember the exact figure . . . then he showed me a project analysis. One figure showed $1,900,000, which I supposed to represent the replacement cost of the property. And another figure of one million eight hundred and some thousand dollars, representing the cost of the project." However, when confronted with the project analysis, he said: "This is the document Mr. Bolich showed me. The figures were pointed out to me which is No. 7. Total estimated replacement cost of the property, and is $1,819,908. That was represented to me to be the cost of the project by Mr. Bolich. I am sure Mr. Bolich told me where he got this document . . . he got it from Mr. Burge and Mr. Lester." The defendant introduced the project analysis which showed the $1,819,908 *to be the present replacement value.* "Mr. Bolich said Mr. Burge and Mr. Lester had indicated they would take the difference between the mortgage and the $1,819,000 for their stock. It came to $187,000 and I offered him $175,000 . . . Some two weeks later we had a meeting in Mr. Sandridge's office. That was on February 15, 1951. I do not personally know what the stock was worth when I acquired it. I have no objection to paying for the stock if they will fix the project like they told me it was when I bought it."

The defendant offered as a witness Herman Ward, a certified public accountant, who testified he had examined the books of Park Terrace. "These figures I have here are taken from the books as of February 15, 1951, as they were turned over to us . . . The books showed as to the property that went to make up Park Terrace: Lands and improvements

and buildings and equipment was shown at a total value of $1,722,163. That figure contained a writeup of the assets of $196,641.83, showing a net cost of the property, $1,525,521.17. The mortgage on the property as of February 15, 1951 was $1,632,000. The figure I called out is the cost of land and improvements and buildings and equipment." He further testified an analysis of the books showed the value of the property to be $42,000 less than the mortgage debt. On cross-examination, the witness admitted: "It is frequently the case that there is a vast difference between the book value of a corporation shown on its books and the actual value of the corporation. At times there is no connection between the two, and at times there is . . . The books at the date of February 15, 1951, show a net worth of $154,582.05. That net worth is a matter of 100 shares of preferred stock, $300 of common class A stock, and an appraised surplus of $169,083.83, and an operating deficit of $14,901.78."

"The minutes of the meeting of the board of directors on November 4, 1950, provided that the land, improvements and buildings and equipment be carried on the books at $1,722,163, which does not include $48,000 . . . That represents an outlay by the promoters." The witness testified that including the $48,000 there was a total of prepaid items amounting to $81,114. "There is nothing wrong with including that as an asset." The defendant introduced as his Exhibit 4 the Federal Housing Administration project analysis dated 8-31-49, signed by Guy T. Allen, Deputy for Chief Valuator (probably a private realtor), who certified he had read Sec. 512 (a) of the National Housing Act, and that he had no interest in the project nor in the proceeds of the mortgage. Under the heading, "Estimated Present Replacement Cost of Property," was the following: Improvements to land, $238,198; structures, $1,269,433; fees, $154,532; carrying charges, $93,745; legal and organization, $2,000; fair market value of the land in fee simple, $60,000; total replacement cost of property, $1,819,908. On the basis of this appraisal the directors seem to have been somewhat conservative in setting up the financial structure of Park Terrace under their resolution dated 4 November, 1950. McLean did not become interested in the property until two months later. It is not claimed the books were set up for the purpose of perpetrating a fraud.

The defendant offered the testimony of Mr. Minish and Mr. Kempton, experienced realtors, who gave as their opinion Park Terrace was worth $1,200,000 on 15 February, 1951.

McLean admitted he was an educated, successful businessman, the president of a large trucking company which under his management and direction had expended a million dollars in buildings constructed in Winston-Salem and an equal amount elsewhere. He had access to

the document from which Mr. Bolich gave him the figure showing $1,819,908 to be the estimated replacement cost as of 1949. Bolich told him the plaintiffs had an equity of $187,000 in the property and that they would take that amount for their stock. McLean immediately offered $175,000. The deal "hung fire" for two weeks and was finally closed for $182,500. The plaintiffs refused for two weeks to take $175,000, holding out for $187,000. If they were intentionally trying to unload worthless stock they were unhurried about it, to say the least. After all, the difference between the value of the property and the amount of the mortgage constituted the equity. The amount of the mortgage was known. The value of the property, however, was necessarily a matter of opinion. It does not appear to have been represented as anything else. Under the decisions of this Court, such representations do not constitute fraud. *McCormick v. Jackson*, 209 N.C. 359, 183 S.E. 369; *Laundry Machinery Co. v. Skinner*, 225 N.C. 285, 34 S.E. 2d 190; *Cox v. Johnson*, 227 N.C. 69, 40 S.E. 2d 418.

The general rule is that the mere expression of an opinion or belief, or more precisely, a representation which is nothing more than the statement of an opinion, cannot constitute fraud. 37 C.J.S. 226, citing cases from the Federal courts and from the appellate courts of 26 of the states, including the case of *American Laundry Machinery Co. v. Skinner, supra,* decided by this Court.

The remaining question relates to the alleged representations that the structures were erected in accordance with plans and specifications approved by the Federal Housing Administration. The gist of defendant's claim of fraudulent representations is embodied in his own words: "Before I signed the paper that Mr. Sandridge had here this morning, we asked Mr. Lester and Mr. Burge, both, or Mr. Bolich asked him if the project had been built in accordance with the plans and specifications and Mr. Bolich said, 'there is the two men that built it, ask them,' and they said it had; said, 'if it hadn't been, we couldn't have gotten the money.' And they sent up to the bank and got Mr. Styers down to verify that the money had been paid out on the project; . . . I was induced to sign the contract by the representations on which I relied that it was an FHA project and the people who built it were standing there saying it had been built in accordance with the plans and specifications of FHA and it had a 33-year mortgage on it."

It appears from all the evidence that at the time of the sale and transfer of the stock the defendant had never seen the plans and specifications and did not know what was in them. At the time he bought, he apparently relied upon his surmise or conjecture, and nothing else, as to what plans and specifications the Federal Housing Administration had approved. It is difficult to understand how the defendant could have

been deceived when he did not know what the plans called for. The defendant offered the evidence of Mr. Stirewalt, a contracting foreman, "found to be an expert in the field of building," who testified he had examined the plans and specifications obtained from the Federal Housing Administration and had made a careful inspection of the structures on the project. He described in detail the defective workmanship and the substitution of the materials different from and inferior to those called for in the plans and specifications, and concluded: "In my estimation it would be almost an utter impossibility to make the project like the plans and specifications called for. Roughly, I would say it would take between two hundred and fifty and three hundred thousand dollars to make it substantially comply with the plans and specifications."

It is apparent from Mr. Stirewalt's testimony that he examined the plans as originally drawn and submitted to the Federal Housing Administration. The date when he made his examination is not given but apparently it was after the defendant had made material alterations in the structures, "in order to render them suitable for white occupancy." On 21 August, 1951, approximately six months after Mr. McLean went into possession, he made application to the Federal Housing Administration for permission to increase the rents. In transmitting the application, his attorney said: "I think I should also point out that we have gone to tremendous expense in the renovation of this property to convert the same for use to white occupants. The outlay, in addition to repairs . . . already exceeds $30,000." Mr. Stirewalt's examination showing structural changes and materials different from the plans was evidently made after the "renovation." In his examination he used the original plans and apparently did not take into account the changes agreed upon during the progress of the work as testified to by the defendant's other witnesses, Coble and Pollard. The original plans were not the plans by which the buildings were constructed. The plans as changed by agreement were the plans by which the structures should be judged. The changes had been made and the buildings completed months before McLean first heard of the project from Mr. Bolich. In this connection, Ed Coble, a defendant's witness, testified in substance that he was construction examiner for the Federal Housing Administration until the Park Terrace project was about half completed, then he became chief architect. He inspected the property and made suggestions and approved cheaper stoves than those called for in the specifications, on condition that cabinets be substituted for shelves in the kitchens. His inspections showed that streets and service drives were different from the plans but that the actual construction was an improvement and more expensive than the plans called for. However, in

certain particulars the plans had not been strictly followed. "When all of the apartments had been constructed and the owners had asked FHA to insure the loan and for the final payment to be made, FHA made what was called a final inspection . . . before the last money was disbursed. It is set up by FHA as the final inspection . . . FHA did have a final inspection made of this project and they accepted the project . . . Yes, sir, that meant essentially that we accepted it as built in accordance with the plans and specifications . . . On the basis of FHA's records, the inspection reports contained therein, my own visits, and the inspections the various inspectors had made on the job, if I had been asked on February 15, 1951, with this material before me whether or not in my opinion the project had been completed according to the plans and specifications and finally approved by FHA, I would have had to say yes, sir, to the best of my information at that time, that would have been my honest opinion."

Pollard, another defense witness, testified: "Well, so far as I know, Park Terrace was built in accordance with the plans and specifications of FHA, except to the extent that those plans may have been modified from time to time by mutual consent."

Taking the evidence in the light most favorable to the defendant as must be done in passing on the motion to dismiss his counterclaims, it seems the evidence of Coble and Pollard, who kept up with the work and changes in plans as the work progressed, would have warranted the plaintiffs in expressing the opinion that the structures had been completed in accordance with the FHA's plans and specifications. Coble was chief architect for the Federal Housing Administration. He represented the guarantor. Pollard was president of Park Terrace. He represented the mortgagor. Both were of the opinion the structures conformed to the plans. There is nothing in the record to indicate Lester and Burge had a different opinion. The burden of the issue was on the defendant. To constitute fraud, there must be a false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with the intent to deceive. *Electric Co. v. Morrison,* 194 N.C. 316, 139 S.E. 455; *Peyton v. Griffin,* 195 N.C. 685, 143 S.E. 525; *Harding v. Ins. Co.,* 218 N.C. 129, 10 S.E. 2d 599; *Cash Register Co. v. Townsend,* 137 N.C. 652, 50 S.E. 306; *Frey v. Lumber Co.,* 144 N.C. 759, 57 S.E. 464; *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202; *Berwer v. Ins. Co.,* 214 N.C. 554, 200 S.E. 1; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5.

The contract entered into by the parties was written. It was signed and sealed by the parties in the presence and by advice of counsel. All discussion, all representations were designed to, and did culminate in the contract. While these actions are grounded in tort and not in con-

tract, yet the contract is admissible as evidence of what was actually agreed to by the parties. The pertinent part of the contract is paragraph 4, which is here quoted:

"(4) 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 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 condition is made by the parties of the first part, Park Builders, Inc., or J. A. Bolich, Jr. The above stipulation shall not apply to two apartments located on said premises which have been damaged by fire and which the parties of the first part agreed to restore to their original condition at their own expense. It is agreed between the parties hereto that payments from an insurance company or companies shall go to the parties of the first part as a part of the expense of repairing the two apartments that have been damaged by fire."

The evidence of defendant's witnesses Coble and Pollard, the inspections made by the defendant, his attorney, the other officers of his company, and by 60 of his employees, and his admission that he had unlimited opportunity to inspect the property and go over it with a fine tooth comb, the terms of the contract, and the fact the defendant made the payments on the notes as they became due for 15 months after he went into the possession of the property would seem not only to explain but also to destroy all implications of fraud disclosed by this record.

The judgments of the Superior Court of Forsyth County are

Affirmed.

STATE v. RICHARD SCALES.

(Filed 30 June, 1955.)

1. Criminal Law § 13: Jury § 9—

A motion for change of venue or for a special venire on the ground of prejudice created against defendant by publicity in the county, is addressed to the sound discretion of the trial court.

2. Homicide § 14—

Under an indictment for murder in the form prescribed by G.S. 15-144, the State is entitled to introduce evidence that the defendant committed the homicide in the perpetration, or attempted perpetration, of a felony, and thus make out defendant's guilt of murder in the first degree.

3. Same: Indictment and Warrant § 18—

Where under an indictment drawn under form prescribed by G.S. 15-144, the theory of trial is in accordance with pre-trial statements of defendant, tending to show that he killed deceased in an attempt to perpetrate rape, the defendant is in no way prejudiced by the denial of his motion for a bill of particulars. G.S. 15-143.

4. Indictment and Warrant § 18—

A motion for a bill of particulars is addressed to the discretion of the trial court.

5. Criminal Law § 5a—

The test of mental responsibility for crime is whether defendant had sufficient intelligence to distinguish right from wrong, and therefore the exclusion of testimony of a psychiatrist that defendant was a man of low mentality is not error.

6. Homicide § 27h—Under evidence in this case the court correctly refused to submit question of guilt of less degrees of crime.

The State's evidence tended to show that defendant went to the house in which deceased lived and found her alone with small children, that he admitted an intent to have sexual relations with her, that he said something to her about sex, and that when she became frightened and ran into the kitchen, he followed her, with further evidence that she was found lying on the kitchen floor, dead from stab wounds, with her body exposed below the waist and her underclothing rolled up and torn. Defendant introduced no evidence. *Held:* The evidence warrants the submission of the single issue of defendant's guilt of murder in the first degree or not guilty, and defendant's contention that the court should have also submitted the questions of defendant's guilt of murder in the second degree or manslaughter, is untenable.

APPEAL by defendant from *Sharp, Special Judge*, March Term, 1955, of GUILFORD (Greensboro Division).

Criminal prosecution tried upon a bill of indictment charging that the defendant Richard Scales feloniously, willfully and with malice aforethought did kill and murder Mrs. Bertha M. Cook. To this indictment the defendant entered a plea of not guilty.

The evidence on behalf of the State tends to show that shortly after 1:00 o'clock on the afternoon of 19 January, 1955, on which date the ground was covered by a heavy snow, the defendant, an employee of the Richardson Motor Company of Greensboro, was sent with a truck to pull a stalled car out of a ditch near the entrance to the

Jefferson Club on New Garden Road in Guilford County. A passing motorist had assisted the stalled motorist in getting his car out of the ditch. According to the evidence, the defendant did not return to the garage until between 2:00 and 3:00 o'clock in the afternoon at which time he reported that he couldn't find the person who had called the garage for help.

The defendant was seen by witnesses driving the truck belonging to the Richardson Motor Company between 1:00 and 2:00 o'clock that afternoon in the vicinity of the home of the deceased which is located on New Garden Road. A truck identified as one belonging to the Richardson Motor Company was seen by one of the State's witnesses between 1:45 and 2:00 o'clock that afternoon parked in front of the home of the deceased.

As a result of telephone conversations, neighbors went to the home of the deceased and, upon being admitted to the house by the five-year-old daughter of the deceased, Barbara Cook, they found another daughter, Betty, lying dead in a pool of blood in the hallway of the home. In the kitchen, witnesses found the lifeless body of Mrs. Cook. She was stretched out on her back across the floor. Her clothes were disarranged and the lower part of her body was exposed, from her waist down. Mrs. J. D. Jenkins, who was the first person to arrive at the Cook home, testified that shortly before the officers or anyone else came in she pulled Mrs. Cook's skirt down from her waist. Mrs. Cook was lying in a pool of blood and to one side there were tracks of blood which looked like a man's shoe print. There was blood spattered all over the kitchen. A complete post-mortem was made by Dr. W. W. Harvey, Coroner of Guilford County, after the body was moved to a funeral home. Dr. Harvey, however, examined the body of Mrs. Cook to some extent before it was moved from her home. He testified that when he examined the body of Mrs. Cook at the home ". . . She was lying on her back; her head was tilted a little on a piece of furniture. One leg was straight, the other was semi-flexed. Her dress and slip were about half way between her knees and her thigh. We saw evidence of numerous stab wounds, which weren't examined in detail at the home. . . . The pants were torn apart at the time I saw the body of Mrs. Cook at her home. The leg of the pants was torn apart and her underclothing was rolled up just above the thighs. Her underclothing did not cover any of her private parts. The crotch of her underclothing was torn completely in two, . . ."

The post-mortem showed no less than twelve or fifteen serious cuts and stab wounds on the body of the deceased, and Dr. Harvey testified that in his opinion the deceased came to her death as a result of the numerous stab wounds about her body.

The defendant was arrested on 20 January, 1955, upon a warrant charging him with murder. That same day, after being warned as to his rights with respect to any statement he might make, G. T. Jones, a deputy sheriff of Guilford County, said to him, "We have you for the murder of Mrs. Cook and her daughter." The defendant said, "I killed Mrs. Cook, but I didn't kill her daughter." He was then asked who killed the daughter and he said, "Lawrence Gaston." He then proceeded to tell about being sent out on New Garden Road to pull a man out who was stuck in a ditch. That he picked up Lawrence Gaston on Lawndale Drive Extension and said that Gaston talked of being in desperate need of money, something about being $40.00 behind in his rent; that he went out on New Garden Road and the car he had been sent to pull out of the ditch had gone; that they turned around and came back and stopped in front of the Cook home, and gained admission to the house on the pretense of using the telephone; that he went in and told the lady he wanted to call his office. That she informed him it was a party line; that she checked the 'phone to see if it was clear, and it was clear and that he dialed his number in town and when the man answered, he did not answer him; that Mrs. Cook got frightened and started out the door; that Lawrence Gaston got between her and the door and then Mrs. Cook and Gaston began to scuffle on back to the kitchen and Mrs. Cook picked up a butcher knife. That he (Scales) "took the butcher knife away from her and began stabbing her and stabbed her until he killed her." That the little girl came into the kitchen screaming, and Gaston said, "she knows too much, we'll have to kill her, too." He said that Gaston killed the little girl and then they left the house. He then said they brought the butcher knife with them to the truck and drove up the New Garden Road, coming to Highway 220, and there was a Scotty dog sign on the right-hand side of the road and they threw the knife out at the sign and returned to Greensboro.

After the defendant Scales made the above statements, he and Gaston were carried to Winston-Salem and put in the Forsyth County jail, around 4:00 o'clock on the afternoon of the 20th of January, 1955. The next morning, the same officer, in company with Lt. Burch, Officer Cowan, and SBI Agent Allen, went to see Scales. Deputy Sheriff Jones informed him that they had checked on Gaston's whereabouts the day before and that he had no part in it, and that they were going to release him; that they wanted to know if he had anything to say about it. He said, "Yes. He didn't have anything to do with it. I involved him in it because I thought he turned me in to the police." Gaston was released that day. This officer said, "In talking to Scales, I told him that we had checked the house, we found no motive for

robbery and that we didn't think it was robbery, and I asked him, I said, 'Did you intend to have sexual relations with Mrs. Cook?' He said, 'Yes.' I told Scales then, I says, 'Scales, how about just starting at the first and tell us the truth all the way through this thing?' He said, 'Well, I'm going to tell you the truth about it just like it happened.' " He then proceeded to tell about being sent out on the New Garden Road by the garage to a car stuck out there in the ditch, and not finding the car he went to the home of Mrs. Cook to call the garage. He again said Mrs. Cook gave him permission to use the 'phone, and she checked to see if the line was clear; that he got the garage but when the 'phone was answered he hung up; that he noticed there were "no menfolks in the house, no one but Mrs. Cook and the small children, and he began to talk to Mrs. Cook, and then he said at that time he mentioned something about sex and Mrs. Cook got excited and afraid and ran into the kitchen, and he ran into the kitchen after her, she grabbed the knife and began to scream; that he took the knife away from her and at that point he began stabbing Mrs. Cook until she fell on the floor. He said when she fell on the floor that he fell down beside Mrs. Cook, and he said that he had one leg in between Mrs. Cook's legs and the other one was on the outside of her legs in a kneeling position, and he continued to stab Mrs. Cook until she didn't holler any more, and he said at that point this child came running into the kitchen, screaming, scratching and hitting him on the back, and he said he swung a back-handed lick with the knife and only hit the child in the chest with the knife one time, and then he said he got up and took the knife with him and left." He again stated that he threw the butcher knife out at the Scotty dog sign, and then he left and "went back to the garage and he drove back to the wash pit, and there he washed his hands, washed the blood off his hands and cleaned up, and he said he cleaned his clothes with some cleaning stuff that they use to wash motors with. He said that was what he cleaned his clothes with." The officers spent several hours raking in the snow in an effort to find the butcher knife at the place where the defendant said he threw it, but they failed to find it. The next day, in company with these same officers, the defendant directed them to Haywood Street. He pointed out a place right back of his house where he said he threw the butcher knife, and it was located later in a hedge behind his house within a few feet of where he said he put it. This butcher knife was identified by the husband of Mrs. Cook as being one he had purchased in Tennessee about a year before.

According to the record, the defendant is six feet three inches tall and weighs approximately 200 pounds. The victim was 31 years of age and weighed 115 pounds.

The defendant's evidence tends to show that he came to work between 8:30 and 9:00 o'clock the morning of 19 January, 1955; that he was seen taking one drink during the morning; that he worked hard putting chains on cars and made several trips that morning for the garage, driving the same pick-up truck that he later drove out on New Garden Road; that he appeared normal during the morning and after he returned to the garage in the afternoon. He had worked for the Richardson Motor Company off and on for a couple of years, the last time for about six months. The defendant did not testify in his own behalf.

Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

Judgment: Death by inhaling lethal gas.

Defendant appeals, assigning error.

Attorney General McMullan and Asst. Attorney General Bruton, for the State.

C. Clifford Frazier, Jr. and Stedman Hines, for defendant.

DENNY, J. The defendant's second assignment of error is based on the denial of his motion for a change of venue or for a special venire from outside Guilford County. He contends that the publicity this alleged crime had received in the newspapers, over the radio and television stations in Greensboro and High Point, had prejudiced the minds of the people of Guilford County against him to such an extent that his motion should have been allowed.

A motion for a change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court. *S. v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; *S. v. Shipman,* 202 N.C. 518, 163 S.E. 657; *S. v. Wiseman,* 178 N.C. 784, 101 S.E. 629; *S. v. Plyler,* 153 N.C. 630, 69 S.E. 269. Therefore, this assignment of error is overruled.

The defendant assigns as error the refusal of the court below to grant his motion for a bill of particulars.

The defendant was charged with murder in the first degree in the manner and form prescribed by G.S. 15-144. Under such an indictment the State is entitled to introduce evidence that the defendant committed the homicide in the perpetration of, or attempt to perpetrate rape or other felony, and it is sufficient to sustain a charge based upon evidence relative to murder committed in the perpetration of rape, attempt to commit rape or other felony. *S. v. Grayson,* 239 N.C. 453,

80 S.E. 2d 387; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536.

It is provided in G.S. 15-143, "In all indictments when further information not required to be set out therein is desirable for the better defense of the accused, the court, upon motion, may in its discretion, require the solicitor to furnish a bill of particulars of such matters."

In our opinion the defendant has in no way been prejudiced by the denial of his motion since his statements to the officers as to how, when, and under what circumstances he killed the deceased were in accord with the theory of the trial in the court below. There was no variance between the *allegata* and the *probata. S. v. Grayson, supra.* Moreover, the statute which provides that a motion for a bill of particulars may be granted leaves it in the discretion of the trial court as to whether or not such motion should be granted. *S. v. Wadford,* 194 N.C. 336, 139 S.E. 608. The ruling of the court below will be sustained.

Assignments of error Nos. 17 through 23A are directed to the refusal of the trial court to permit an expert psychiatrist and witness for the defendant to testify to the effect that the defendant was a man of low mentality. Low mentality does not mean that a man is insane or unable to distinguish between right and wrong. Furthermore, the defendant did not plead insanity or mental irresponsibility. Neither did he offer any evidence to the effect that he did not know the difference between right and wrong at the time he committed the alleged crime, which is the test of responsibility of a person charged with a criminal offense. *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825.

In *S. v. Jenkins,* 208 N.C. 740, 182 S.E. 324, *Stacy, C.J.,* in considering a similar assignment of error, said: "The only testimony offered by the defendant to support his plea of insanity was that of several witnesses who would have testified, if permitted to do so, that the defendant was a man of low mentality. The exclusion of this evidence is the principal question presented by the appeal. There was no error in its exclusion. *S. v. Vernon, ante,* 340. Low mentality is not the test of insanity. *S. v. Spivey,* 132 N.C. 989, 43 S.E. 475. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Potts,* 100 N.C. 457, 6 S.E. 657. We are aware of the criticism of this standard by some psychiatrists and others. Nevertheless, the critics have offered nothing better." These assignments of error are overruled.

Assignment of error No. 25 is based on the defendant's exception to the failure of the court to charge the jury as to murder in the second degree and manslaughter.

The defendant contends that it is only where all the evidence tends to show that the homicide was committed in the perpetration or

attempted perpetration of a felony that the court may instruct the jury to return a verdict of guilty of murder in the first degree, or not guilty, citing *S. v. Perry*, 209 N.C. 604, 184 S.E. 545, in which case there was no evidence whatever to support the view that the homicide was committed in the perpetration or attempt to perpetrate a felony as described in G.S. 14-17.

The defendant likewise contends there is no evidence in this case to support the view that the murder was committed in the perpetration or attempt to perpetrate rape. He admitted an intent to have sexual relations with the deceased, and that he said something to her about sex, but contends there is no evidence whatever to show that he intended to gratify his passion upon the deceased at all events, no matter what resistance she might offer, or that he attempted to do so. We do not so interpret the record. When he said something about sex to the deceased, she became frightened and ran into the kitchen of her home. He did not desist, but followed her. Why did he follow her? His admitted purpose was to have sexual relations with her, and the manner in which her underclothing was torn and rolled up above her thighs and her body left nude below the waist, tends to show an attempt to rape the deceased and such evidence was sufficient to support the charge as given. The fact that this wife and mother put up such a terrific struggle and sacrificed her life rather than yield her body to the embrace of her assailant, and thereby prevented him from accomplishing his purpose, is not susceptible of the construction the defendant would have us put upon it when considered in light of all the evidence adduced in the trial below.

We have carefully examined the remaining exceptions and assignments of error and in our opinion they present no prejudicial error.

The defendant has been represented by able counsel who have presented their cause with commendable zeal. But the jury accepted the State's theory of the case and the evidence supports the verdict. The trial was in all respects fairly conducted by a competent and experienced judge, and in our opinion there is no legal ground to complain of the result.

No error.

G. T. REID v. H. T. HOLDEN, T/A HOLDEN RECAPPING COMPANY, CARL L. TUCKER AND R. W. ISLEY.

(Filed 30 June, 1955.)

1. Judgments § 35—

Res judicata is an affirmative defense which may not be raised by demurrer unless the facts supporting the plea appear on the face of the complaint or are alleged or admitted in plaintiff's reply. Otherwise the plea must be raised by answer, in which event it must be determined according to the practice of the court, and ordinarily is not available on motion to dismiss.

2. Trial § 5½—

Unless otherwise provided by stipulation, only the documents constituting the record proper are before the court at pre-trial conference, and ordinarily evidence may not be introduced thereat.

3. Judgments § 32—

Generally, the plea of *res judicata* may be sustained only when there is an identity of parties, of subject matter, and of issues.

4. Same—

Plaintiff-relator is the real party in interest in an action brought in the name of the State on official bonds, G.S., 109-34, G.S. 109-35, and he will be so considered in determining the identity of the parties under a plea of *res judicata.*

5. Judgments § 35—

Upon a plea of *res judicata* the prior judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge, and the issues submitted to and answered by the jury.

6. Same—

Where a prior action relates solely to a cause of action for personal injuries from an assault, the judgment therein is not *res judicata* as to a subsequent action for tortious injury and damage to personal property, even though based on the same transaction, and even though both causes might properly have been joined in the prior action, since plaintiff is not required to so join them in order to prevent a judgment in the one from barring an action in the other.

7. Same—Ordinarily it is error for the court on pre-trial hearing to dismiss the cause on the plea of res judicata.

Plaintiff instituted action for tortious injury and damage to his automobile and for the wrongful seizure and conversion of tires therefrom. Defendants entered a plea of *res judicata* on the ground that in a prior action by plaintiff as relator he sought to recover actual and punitive damages for personal injuries from an assault committed by some of the defendants in executing claim and delivery. *Held:* On the pre-trial hearing at which the evidence and charge of the court in the former action were not before the court so that it could not be determined to what

extent, if any, the claim and delivery proceeding was determined by the jury and adjudicated by the court in the former action, the dismissal of the action on the plea of *res judicata* was error.

8. Trover and Conversion § 3—

The one-year statute of limitations does not apply to action for tortious injury and damage to personal property or for wrongful seizure and conversion of personalty. G.S. 1-52, G.S. 1-54.

9. Conspiracy § 1—

A civil action for conspiracy will not lie for an unlawful agreement alone, but only for damages suffered by plaintiff from some overt act in furtherance of such agreement.

10. Same: Judgments § 35—

When a judgment exonerates the conspirators who perform the overt act, it must of necessity exonerate an absentee conspirator who committed no overt act resulting in damage. But where the complaint alleges that all the defendants committed the wrongful acts pursuant to the unlawful conspiracy, and it is not made to appear on the plea of *res judicata* that one of defendants, who was not a party to the prior action, was an absentee conspirator, the dismissal of the action as to him is error.

11. Same—

Dismissal of an action for an assault on the plea of *res judicata* is error when it does not appear from the pleadings, admissions or evidence that the same assault was the basis of the prior action.

12. Limitation of Actions § 15—

The defense of the statute of limitations must be pleaded affirmatively by answer and cannot be considered upon demurrer. G.S. 1-15. Ordinarily such plea will not be considered on a motion to dismiss.

13. Assault § 7½—

Where it affirmatively appears from the complaint that the cause of action for personal injuries was based on an assault occurring more than one year prior to the institution of the action, the cause of action is barred. G.S. 1-54 (3), nothing else appearing. The present cause being remanded, plaintiff may move, if so advised, for leave to amend in order to plead such facts, if any there be, as would repel the bar of the statute.

APPEAL by plaintiff from *Phillips, J.*, 11 October, 1954, Civil Term of GUILFORD, Greensboro Division.

Plaintiff alleges, in substance, that defendants entered into a conspiracy unlawfully to repossess five automobile tires plaintiff had purchased *on credit* from defendant Holden; that defendant Tucker was a constable; that defendant Isley was a deputy sheriff; that pursuant to such conspiracy, to wit, on 12 April, 1952, *defendants*, in order to gain possession of the tires, "shot the plaintiff in the face" with tear gas, causing the loss of his left eye and impairing the use of

his right eye and otherwise injuring him; that *defendants* broke the glass out of plaintiff's car and otherwise damaged it; and that *defendants,* acting under *void process,* unlawfully seized the tires and have failed and refused to account to plaintiff for the value thereof. Plaintiff prays judgment against the defendants for actual and punitive damages on account of personal injuries, for damages to his automobile, and for damages for the unlawful taking and conversion of the tires. The reference to "void process" is the only intimation that there had been a prior action between any of the parties relating to the subject of this action.

While there are variations in the separate answers filed by defendants, each defendant set up as pleas in bar three further defenses, viz.:

FIRST FURTHER DEFENSE: That on 13 June, 1952, in the same court, this plaintiff, as relator, instituted a civil action against defendants Tucker and Isley and others, in which he sought to recover actual and punitive damages for alleged personal injuries; that all issues arising on the pleadings herein were raised or could have been raised in said former action; that when said former action was tried at 17 November, 1952, Civil Term, the first issue submitted to the jury was, "Was the plaintiff injured and damaged by the unlawful and wilful assault of the defendants Tucker and Isley, as alleged in the complaint?"; that the jury answered this issue, "No," and did not reach the second and third issues relating to actual damages and punitive damages, respectively; that judgment was entered on the verdict at said term, adjudging that the plaintiff recover nothing from the defendants; that plaintiff did not appeal therefrom; and that said judgment is *res judicata* as to all issues raised by the pleadings herein.

SECOND FURTHER DEFENSE: That on 12 April, 1952, defendant Holden instituted against this plaintiff before a Justice of the Peace a claim and delivery proceeding to recover possession of the five tires referred to in the complaint herein; that defendants Tucker and Isley executed the process, taking possession of the tires under authority thereof; that plaintiff, defendant in said proceeding, failed to give bond to retain possession *pendente lite;* that, at the hearing of said cause on 5 May, 1952, defendant Holden was adjudged entitled to the possession of the tires by virtue of his lien thereon; that plaintiff, defendant therein, did not appeal from said judgment; and that said judgment is *res judicata* as to the issue raised by the pleadings herein relating to the alleged unlawful seizure of the tires.

THIRD FURTHER DEFENSE: That this action was commenced 24 August, 1953; that plaintiff's cause of action, if any, arose 12 April, 1952; and that the one-year statute of limitations, G.S. 1-54, is pleaded in bar of plaintiff's right to recover.

Defendants Tucker and Isley alleged additional facts, not germane to decision on this appeal.

In reply, plaintiff denied that the judgments referred to in the First and Second Further Defenses constituted *res judicata*. Further, plaintiff alleged that the proceeding before the Justice of the Peace, including the purported judgment entered therein, was and is void. Further, plaintiff alleged that his action was not barred by any statute of limitations. Also, plaintiff denied the said additional allegations made by defendants Tucker and Isley.

The cause was calendared for trial on 20 October, 1954. At a pretrial conference, after the pleadings were read, defendants offered *in evidence,* over objection by plaintiff, the summons, complaint, answers and judgment in the former action referred to in said First Further Defense, entitled, "STATE OF NORTH CAROLINA ON RELATION OF GURNEY T. REID, Plaintiff, v. JOHN E. WALTERS, Sheriff of Guilford County, North Carolina; ROBERT W. ISLEY, Deputy Sheriff of Guilford County, North Carolina; J. S. WYRICK, Jailer of Guilford County, North Carolina; CARL LEE TUCKER, Constable of Morehead Township, Guilford County, North Carolina, and NATIONAL SURETY CORPORATION, Defendants." No other evidence was offered.

Thereupon, upon the pleadings herein, and upon the pleadings and judgment in said former action, the court below entered judgment for defendants dismissing the action and taxing plaintiff with the costs. This judgment is predicated upon certain Findings of Fact, set forth therein, and upon rulings sustaining defendants' pleas of *res judicata* and the statute of limitations. Plaintiff excepted to this judgment and appealed, assigning errors.

Gavin, Jackson & Gavin for plaintiff, appellant.

Hines & Boren, Jordan & Wright and Perry C. Henson for defendants Holden and Tucker, appellees.

Harry C. Stanley for defendant Isley, appellee.

BOBBITT, J. As stated by *Seawell, J.,* in *Sanderson v. Ins. Co.,* 218 N.C. 270, 10 S.E. 2d 802: *"Res judicata* is an affirmative plea in bar which must be taken by answer and supported by competent evidence. When properly raised, the issue will be determined according to the practice of the Court, but the defense is not available on a motion to dismiss. *Williams v. Hutton & Bourbonnais Co.,* 164 N.C. 216, 80 S.E. 257; *Redmond v. Coffin,* 17 N.C. 437; *Bear v. Comrs. of Brunswick County,* 124 N.C. 204, 32 S.E. 558."

Nor can this plea be considered on demurrer unless the facts supporting it appear on the face of the complaint. *Hampton v. Pulp Co.,*

223 N.C. 535, 27 S.E. 2d 538; *Miller v. Bank,* 234 N.C. 309, 67 S.E. 2d 362. In the present case, no facts supporting defendants' pleas of *res judicata* appear on the face of the complaint. Nor do the replies contain allegations or admissions sufficient to support such pleas.

Unless otherwise provided by stipulation, only the documents constituting the record proper are before the court at pre-trial conference. When the summons, pleadings and judgment in the former action brought by plaintiff, as relator, were offered *in evidence,* the time for offering evidence had not arrived. However, since plaintiff does not challenge the authenticity of these documents, plaintiff's counsel, upon the oral argument, asked that the court treat as abandoned his exceptive assignment of error based on the admission of this evidence and consider its significance in relation to defendants' pleas of *res judicata.* We accede to this request. Even so, we are mindful that these documents constituted the only evidence before the court below and before this Court.

In the former action, as appears from the caption, plaintiff, as relator, sued the named officials and the surety on their bonds. The action was to recover actual and punitive damages. Briefly stated, the complaint alleged that Tucker, the constable, and Isley, the deputy sheriff, on 12 April, 1952, acting under color of their respective offices, in connection with serving papers in a claim and delivery proceeding, "viciously, maliciously and wantonly assaulted, severely wounded and permanently and seriously injured the relator herein by shooting him between the eyes with a tear gas bomb," etc. Upon defendants' denial, the issue was submitted and answered in favor of defendants; and final judgment adverse to plaintiff-relator was entered.

Generally, the plea of *res judicata* may be sustained only when there is an identity of parties, of subject matter, and of issues. *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570; *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688.

The plaintiff herein was the plaintiff in the former action. True, as required by G.S. 109-34 in relation to actions on official bonds, the action was brought "in the name of the State." But the plaintiff-relator had the absolute right to bring such action. *Boothe v. Upchurch,* 110 N.C. 62, 14 S.E. 642. "Entitled to receive to his own use the money recovered," he was the real party in interest. G.S. 109-35. The conclusive effect of a prior judgment is on the real party in interest, not on a nominal party. 50 C.J.S. 300, Judgments sec. 771; *Patterson v. Franklin,* 168 N.C. 75, 84 S.E. 18.

Defendant Holden was not a party to the former action. Indeed, the complaint therein contains no reference to him. Moreover, the cause of action alleged by plaintiff-relator was for the sole purpose of

recovering damages on account of *personal injuries.* No cause of action was alleged either to recover damages for wrongful seizure and conversion of the tires or for damages to plaintiff's automobile.

While not separately stated, it appears that plaintiff has attempted to allege at least three separate causes of action, to wit, (1) for personal injuries caused by unlawful assault upon him, (2) for damages to his automobile, and (3) for wrongful seizure and conversion of the tires. No demurrer was interposed on the ground of misjoinder of causes of action. *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104. The intermixture of these separate causes of action renders it somewhat more difficult to deal with the questions now presented.

It is important to bear in mind that no evidence in relation to the claim and delivery proceeding, referred to in the Second Further Defense, was before the court. It does appear that defendants Tucker and Isley, in their answers to the complaint in the former action, alleged that they were engaged in serving claim and delivery papers on the plaintiff; but, unaided by either the evidence or the charge in the former action, we are unable to determine to what extent, if any, the validity of the claim and delivery proceeding was determined by the jury and adjudicated by the court. It is well settled that a verdict must be interpreted with reference to the pleadings, the evidence and the judge's charge. *Jernigan v. Jernigan,* 226 N.C. 204, 37 S.E. 2d 493. And in determining whether a judgment constitutes *res judicata,* the judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge and the issues submitted to and answered by the jury. *Clinard v. Kernersville,* 217 N.C. 686, 9 S.E. 2d 381.

As stated, the former action included no alleged cause of action on account of damages to plaintiff's automobile. Nor does it appear that this subject was referred to in any pleading in the former action. True, where there is an indivisible cause of action the plaintiff cannot bring suits piecemeal for distinct elements of damage. *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909; *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686. As stated by *Connor, J.,* in *Underwood v. Dooley, supra:* "It is, therefore, well settled in this jurisdiction that one who has sustained damages, resulting from injuries both to his property, and to his person, caused by the single wrong or tort of another, can maintain only one action for the recovery of his damages, and that he cannot split his cause of action, arising from a single wrong or tort, and maintain separate actions against the *tort-feasor,* as defendant, and recover therein for separate items of damage resulting from said wrong or tort."

But a cause of action for an assault inflicting personal injuries, nothing else appearing, is separate and distinct from a cause of action

for tortious injury and damage to personal property. While distinct causes of action belonging to defined classes may be united in the same complaint, G.S. 1-123, the plaintiff is permitted, not compelled, to do so. *Shakespeare v. Land Co.*, 144 N.C. 516, 57 S.E. 213; *Tyler v. Capeheart*, 125 N.C. 64, 34 S.E. 108; *Gregory v. Hobbs*, 93 N.C. 1. "Although a plaintiff, having separate and distinct causes of action against the same defendant, may properly join them in one action, he is not required to do so in order to prevent a judgment on one from barring an action on the other." 50 C.J.S. 114, Judgments sec. 668. In *Shakespeare v. Land Co., supra*, this appears: "The judgment is decisive of the points raised by the pleadings, or which might properly be predicated on them. This certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings." *Jefferson v. Sales Corp.*, 220 N.C. 76, 16 S.E. 2d 462.

For the reasons stated, upon the present record, the court below was in error in holding that the former judgment, under principles of *res judicata*, constituted a bar to the alleged causes of action for (1) tortious injury and damage to the automobile, and (2) for wrongful seizure and conversion of the tires. Nor does the one-year statute of limitations apply to such actions. G.S. 1-52; G.S. 1-54.

In their brief, appellees state: "In the present action the plaintiff alleged that as a result of a conspiracy between the defendant Holden and the defendants Tucker and Isley, the defendants Tucker and Isley wilfully shot the plaintiff in the face with a tear gas gun." Thereupon, they contend that defendant Holden, an absentee conspirator, cannot be liable for acts of defendants Tucker and Isley for which they have been exonerated.

Appellant contends that the cause of action alleged herein is the unlawful conspiracy. On this ground, he contends that the present cause of action is wholly separate and distinct from that alleged in the former action, to wit, a cause of action grounded on specific overt acts of defendants Isley and Tucker.

Attention is called to certain relevant general principles. "Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing

upon rules of evidence or the persons liable." 11 Am. Jur. 577, Conspiracy sec. 45. To create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to the scheme and in furtherance of the objective. 15 C.J.S. 1000, Conspiracy sec. 5. These principles have been recognized and applied by this Court. *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783; *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448.

It would seem that, as to a conspirator who committed no overt act resulting in damage, the basis of his liability for the conduct of his co-conspirators bears close resemblance to the basis of liability of a principal under the doctrine of *respondeat superior* for the torts of his agent. It is well established that a judgment in favor of an agent or employee in an action brought by or against a third person in a tort action is a bar to any subsequent action brought by such third person against the principal or employer in which the same alleged tortious acts of the agent or employee are alleged to impose liability upon the principal or employer under the doctrine of *respondeat superior. Coach Co. v. Burrell, supra; Stone v. Coach Co.,* 238 N.C. 662, 78 S.E. 2d 605; *Leary v. Bank, supra.* In *Whitehurst v. Elks,* 212 N.C. 97, 192 S.E. 850, this general statement appears: "Where the relation between two parties is analogous to that of principal and agent, or master and servant, or employer and employee, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against plaintiff's right of action against the other. 15 R.C.L. 1027."

Assuming, without deciding, that the facts as to alleged conspiracy have been sufficiently alleged, *Thomas & Howard Co. v. Ins. Co.,* 241 N.C. 109, 84 S.E. 2d 337, the question debated is not now before us; for the statement quoted from appellees' brief is at variance with the complaint. The complaint does not allege that defendants Tucker and Isley committed the alleged wrongful acts, and that defendant Holden is liable solely as an absentee conspirator. Rather, the complaint alleges affirmatively, repeatedly and consistently that all alleged wrongful acts, pursuant to the alleged unlawful conspiracy to repossess the tires, were committed by *the defendants.*

It would seem that the alleged assault by defendants Isley and Tucker, whereby personal injuries were inflicted upon the plaintiff, is the same assault alleged and involved in the former action. If so, their plea of *res judicata* in respect of said alleged assault would seem to be well founded. Yet, in the absence of admissions or evidence, we cannot declare that the incidents referred to are the same.

There remains for consideration the defendants' plea of the one-year statute of limitations. This is applicable to an action "against

a public officer, for a trespass under color of his office." G.S. 1-54(1). While the evidence may so reveal, the plaintiff does not ground his action on trespass under color of office. Even so, the same statute is applicable to an action "for assault." G.S. 1-54(3).

A statute of limitations must be pleaded. It cannot be considered on demurrer. *Lewis v. Shaver,* 236 N.C. 510, 73 S.E. 2d 320. The plea must be interposed affirmatively, by answer. G.S. 1-15. It was so pleaded here.

Ordinarily, such plea would not be considered on a motion to dismiss. *Oldham v. Rieger,* 145 N.C. 254, 58 S.E. 1091. But it appears affirmatively that this action was commenced 24 August, 1953; and that the alleged assault whereby defendants inflicted personal injuries on plaintiff occurred 12 April, 1952. Thus, the action for alleged assault was barred, nothing else appearing. Although plaintiff filed a reply to each answer, he alleged no facts that would repel the plea of the statute. True, he alleged generally that his action was not barred by the statute. *Quaere:* When the complaint discloses that plaintiff's action is barred by a statute of limitations pleaded by defendant, *and the plaintiff replies thereto* without alleging facts sufficient to repel defendant's plea, should such action be dismissed as a matter of law? Since the cause will be remanded, plaintiff may move, if so advised, for leave to plead such facts, if any there be, as would repel the bar of the statute.

For the reasons stated, the judgment of the court below dismissing the action is reversed; and the cause is remanded for further proceedings not inconsistent with the law as stated herein.

Reversed and remanded.

NORTH CAROLINA STATE PORTS AUTHORITY v. FIRST-CITIZENS BANK & TRUST COMPANY AND WACHOVIA BANK & TRUST COMPANY.

(Filed 30 June, 1955.)

1. Municipal Corporations § 8f—

The statutes relating to the N. C. Ports Authority should be liberally construed to enable the Authority to accomplish the purposes of its creation, and a statute will not be given a construction that would tend to hamper the Authority in this respect unless plainly required by the express terms thereof. G.S. 143-228.

2. Statutes § 13—

A later statute will not repeal a former statute by implication unless it is in irreconcilable conflict therewith.

3. Municipal Corporations § 8f—Ports Authority may issue bonds for new facility to be paid from revenues from such new facility.

The State Ports Authority may issue valid bonds to raise funds for the construction of a particular new facility and secure the payment of such bonds solely from the revenues to be derived from such new facility. The issuance of such bonds is not precluded by Section 13, Chapter 820, Session Laws of 1949, requiring that net operating earnings of the Authority, after reserving operating capital and improvements, be paid to the State Treasurer for the State Ports Bond Sinking Fund, since the pledged revenues from the new facility do not involve revenues from any facility constructed by use of the proceeds of the State Ports Bonds, but to the contrary the general revenues of the Authority will be augmented by wharfage and dock charges of ships using such new facility.

4. Same—

The N. C. Ports Authority was created and empowered to act in order to accomplish the public purpose of developing and promoting the natural resources of the State and to expand the agricultural, industrial and commercial interests of the people of the State.

5. Same—

The validity of bonds issued for the purpose of constructing a grain handling facility at a State port is not affected by the fact that the bonds are to be paid solely from revenues from rental of the facility to a private corporation, since the new facility is to be used by lessee in the public interest for the purpose of providing additional facilities auxiliary and subordinate to the principal operations of the Port, and the fact that the lessee is a private corporation is incidental.

6. Taxation § 6—

The issuance of bonds to obtain funds for the construction of a new facility in connection with the operations of the State Ports Authority, which bonds are payable solely from revenues derived from the lease of such new facility to a private corporation, is not in effect a lending of the credit of the State to a private corporation in violation of Article V, sec. 4 of the Constitution of North Carolina, since such bonds do not constitute a debt of the State or of the State Agency by which they are issued.

APPEAL by defendants from *Fountain, Special J.*, March A Term 1955 of WAKE.

This action is for a declaratory judgment, G.S. 1-253 *et seq.*, determinative of the validity of $60,000 of Grain Handling Facility Revenue Bonds (Revenue Bonds) authorized and sold by the North Carolina State Ports Authority (Authority) to First-Citizens Bank & Trust Company (First-Citizens). If the Revenue Bonds are valid obligations of the Authority, First-Citizens is ready, able and willing to pay its bid and to consummate the purchase thereof; otherwise, it refuses to do so.

The Grain Handling Facility (Facility) was constructed by the Authority at its Morehead City Port. It occupies approximately two (2%) per cent of the available wharf and dock space at the port. It does not interfere in any way with the general operation and conduct of the business of the port. Prior to its construction, grain could not be handled satisfactorily for shipment from the port. The Facility will promote and facilitate the sale and shipment of grain produced in North Carolina, thereby increasing the business of the port.

The Revenue Bonds are payable solely from revenues to be derived from operation of the Facility, which revenues are pledged to secure payment thereof. They were authorized, issued and sold in conformity with the provisions of G.S. 143-219.

The Authority, an instrumentality of the State of North Carolina, was created in 1945. (Session Laws of 1945, ch. 1097; G.S. 143-216 *et seq.*). Express authority to issue and sell such revenue bonds was conferred upon the Authority by Section 4 of the 1945 Act. G.S. 143-219.

In 1949, the General Assembly provided for the issuance and sale of $7,500,000 of North Carolina State Ports Bonds (State Ports Bonds). These are not obligations of the Authority. They are direct obligations of the State of North Carolina, the full faith, credit and taxing power of the State being pledged for the payment thereof. The proceeds derived from the sale of State Ports Bonds were appropriated to the use of the Authority "for the purpose of construction, reconstruction, enlargement or improvement of seaports in North Carolina," etc. Wachovia Bank & Trust Company, joined as a party defendant, owns $40,000 of State Ports Bonds, and represents herein the owners of such bonds.

Section 13 of the State Ports Bonds Act, Session Laws of 1949, ch. 820, is worded as follows:

"Sec. 13. That the North Carolina State Ports Authority shall annually pay to the State Treasurer the net earnings of the operations conducted by the said Authority after reserving an amount deemed necessary by said Authority for operating capital and after reserving such amounts as may be deemed by said Authority proper and desirable for making enlargements, extensions and other improvements in the facilities of any North Carolina seaport, *provided* that the amounts reserved for such purposes above recited shall be approved by the Governor and Council of State. All amounts so paid to the State Treasurer shall be credited to a fund to be set up by the State Treasurer and designated as 'State Ports Bond Sinking Fund.'

"Until all bonds issued under this Act shall have been paid or provisions for such payment made, said fund shall be applied to the payment of the principal of and interest on said bonds as such principal

and interest become due, *provided, however,* that whenever and for so long as the amount in said fund exceeds an amount equal to the amount of such principal and interest then due or to become due within the next ensuing twelve months, the excess may, if the General Assembly shall authorize such application, be applied to other purposes. Subject to said proviso, the said fund is hereby pledged to the payment of the principal of and interest on said bonds as such principal and interest become due. Nothing in this Section shall be construed to modify the provisions of Section 9 of this Act."

On 1 December, 1954, the Authority determined that the Facility "was necessary and desirable and in the public interest." The need was considered so urgent that the Authority proceeded forthwith with the construction thereof, at an estimated cost of $80,000, advancing temporarily its operating funds to pay therefor as construction progressed. Provision for financing this new Facility, to replace the operating funds so advanced, was as follows: (1) $20,000 was to be reserved from the net earnings derived from the general operations of the Authority; and (2) $60,000 was to be obtained from the sale of the Revenue Bonds. In addition, the Authority authorized and executed a lease of the Facility to Cargill, Incorporated, (Cargill) for an initial term of five (5) years with the privilege of renewal for an additional five-year term. Relevant provisions of the lease are referred to in the opinion.

The Governor and Council of State, by appropriate formal action, have approved the action of the Authority with reference (1) to the said reservation of $20,000, (2) to the issuance and sale of the Revenue Bonds, and (3) to the pledge of the revenues from the Facility to secure payment of the Revenue Bonds.

The court below held that the $60,000 of Revenue Bonds are valid obligations of the Authority, in accordance with the terms thereof, and adjudged that First-Citizens pay its bid therefor and consummate the purchase thereof. Defendants excepted and appealed, assigning as error that "the court erred as to each and all of the findings of fact appearing in the judgment and in pronouncing judgment and signing of same as set forth in the record."

Attorney General McMullan and Assistant Attorney General Moody for plaintiff, appellee.

Ward & Tucker for defendant First-Citizens Bank & Trust Company, appellant.

Womble, Carlyle, Sandridge & Rice for defendant Wachovia Bank & Trust Company, appellant.

Murray Allen and Norman C. Shepard as amici curiae.

BOBBITT, J. Upon waiver of jury trial, the court found the facts. G.S. 1-262. The findings based on competent evidence, embrace all facts narrated in the foregoing statement and in this opinion.

The questions for decision are these: (1) Does Section 13 of the State Ports Bonds Act, quoted above, prohibit or suspend, as long as any of the State Ports Bonds remain outstanding and unpaid, the Authority's right to raise $60,000 of the cost of construction of the Facility by the issuance and sale of the Revenue Bonds and to pledge the revenues to be derived from the Facility to secure payment thereof? (2) If not, is the validity of the Revenue Bonds impaired by the fact that the only revenues from the Facility during the term of these bonds are rentals under a lease by the Authority to Cargill, a private corporation?

In limine, it is observed that present owners of State Ports Bonds, Wachovia and others, are not materially affected by decision of the questions presented. Only the residue, if any, of the net earnings, after the Authority, with the approval of the Governor and Council of State, has reserved the amount "deemed necessary" for operating capital and the amount deemed "proper and desirable" for making enlargements, extensions and other improvements in the facilities," is pledged to the payment of the State Ports Bonds. The State Ports Bonds being unconditional obligations of the State of North Carolina, it is apparent that the effect of the provisions of Section 13 of the State Ports Bonds Act upon the value thereof is infinitesimal.

Prior to 1 December, 1954, all funds made available to the Authority by the sale of State Ports Bonds had been used in the construction of docks, wharves and other permanent facilities. True, if the amount had been sufficient, a portion of such funds might have been used to pay the cost of construction of a grain handling facility. Such was not the case. Yet the lack of such facility rendered impossible an important use of the port, namely, the handling and shipment of grain.

It is to be noted that the Authority's action involves no pledge of revenues from any facility constructed by use of the proceeds derived from the sale of State Ports Bonds. To the extent ships are loaded or unloaded at the Morehead City Port in connection with the use of the Facility the general revenues of the Authority will be augmented by wharfage and dock charges. Thus, the Facility provides two new sources of revenue. Only the portion thereof derived from the operation of the Facility itself is pledged to secure the payment of the Revenue Bonds.

It is to be noted further that the Revenue Bonds are in no sense obligations of the State of North Carolina. Nor are they general obli-

gations of the Authority. They are payable solely from the revenues to be derived from *a new facility*.

Hence, the precise inquiry is whether the Authority, in order to raise the funds for the construction of *a particular new facility* that will enhance rather than impair its general operations and revenues, can lawfully issue bonds secured by and payable only from the revenues to be derived from *such facility*. The legislative intent, as manifested in relevant statutory provisions, is determinative.

The primary and public purposes for which the Authority was created are plainly declared in the 1945 Act. Adequate transportation facilities, by water as well as by land, stimulate economic growth by making possible the satisfactory and profitable marketing of the products of farm and factory. Conversely, lack of such facilities retards economic development. The General Assembly, in the exercise of its policy making powers, established the Department of Conservation and Development, G.S. 113-1 *et seq.*, to promote the conservation, development and profitable use of the natural resources of the State and to expand the agricultural, industrial and commercial interests of the people of the State. One of its more important projects was the promotion of, and later cooperation with, the Authority in its efforts to provide maximum development and use of our seaports. Recognizing this dominant intent of the General Assembly, no construction should be placed upon statutes relating to the Authority, unless plainly required by the express terms thereof, that would tend to hamper the Authority in its efforts to accomplish the very purposes of its existence.

It is significant that, subsequent to the State Ports Bonds Act of 1949, the General Assembly on three occasions amended the 1945 Act. Session Laws of 1949, ch. 892; Session Laws of 1951, ch. 1088; Session Laws of 1953, ch. 191. But these amendments did not repeal or amend Section 4 of the 1945 Act. Hence, Section 4 of the 1945 Act remains in full force and effect except to the extent, if any, it is in irreconcilable conflict with Section 13 of the State Ports Bonds Act. *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E. 2d 748, and cases cited. We find no irreconcilable conflict in relation to the question presented here. The conclusion reached is that Section 13 of the State Ports Bonds Act does not prohibit or suspend the Authority's right to raise $60,000 of the cost of construction of this particular new Facility by the issuance and sale of the Revenue Bonds and to pledge the revenues to be derived from the operation of this particular new Facility to secure the payment thereof.

There remains for consideration the lease to Cargill. In this connection, the Authority determined that its best interests required that the Facility be operated, at least for a limited time, by persons experi-

enced and successful in the operation of such facilities. Assisted by the Commissioner of Agriculture, the Authority approached Cargill. Cargill, a private corporation, had successfully operated such facilities and was further interested as an exporter of grain. Negotiations resulted in the lease by the Authority to Cargill of the Facility. Apparently, no other private corporation was interested in obtaining such lease. In any event, the lease is not challenged on any ground other than the absence of legal power in the Authority to lease the Facility to any such private corporation. The contention seems to be that the Facility cannot be operated otherwise than by the employees and personnel of the Authority itself.

The General Assembly has expressly declared its intention that a liberal construction be placed upon the power conferred upon the Authority to enable it to accomplish the purposes for which it was established. G.S. 143-228. To carry out such purposes, the power "to rent, lease, buy, own, acquire, mortgage, or otherwise encumber, and dispose of such property, real or personal," is expressly conferred. G.S. 143-218. We are concerned only with the leasing of a particular new specialized Facility, auxiliary and subordinate to the principal operations of the port.

No question arises here as to the validity of a lease of properties for some use unrelated to the accomplishment of the primary purposes of the Authority. The Facility affected by the lease under consideration is adapted for use only in such operations as will enlarge the principal operations of the port. It is a means incident to providing adequate facilities for the marketing and export of grain and for the increase of the port's overall business.

Close scrutiny impels the conclusion that the lease is advantageous both to the Authority and to the owners of the Revenue Bonds. It provides, in substance, that Cargill will pay, during the initial 5-year term, all costs of operation of the Facility and rentals sufficient to pay in full the $60,000 of Revenue Bonds. These revenue bonds mature within a 5-year period, $12,000 on the first day of January of each of the years 1956-60, inclusive. If Cargill exercises its option to renew the lease for an additional 5-year term, the annual rental during this additional 5-year term is an amount equal to 5% of the actual cost of the construction of the Facility. Thus, Cargill, during the original 5-year term, is obligated unconditionally to pay rentals sufficient in amount to retire the $60,000 of Revenue Bonds. If it elects to become the lessee for the additional five years, it will thereupon be obligated unconditionally to pay an additional amount approximating $20,000. In such case, the full cost of construction of this Facility will have been liquidated within ten years. Thereafter, all revenues from this Fa-

cility, whether in rentals from a lessee or otherwise, will become part of the general revenues of the Authority. Moreover, all along the Authority will be receiving, in addition to the rentals under the lease, wharfage and dock charges from ships loaded and unloaded in connection with the handling of grain through this Facility.

Beyond question, the Authority was created and empowered to act to accomplish a public purpose. *Webb v. Port Com.*, 205 N.C. 663, 172 S.E. 377. In such case, the principle applicable, in relation to this public purpose, is stated in 1 Dillon on Municipal Corporations (5th Ed.), sec. 269, as follows: "Hence land taken for wharves is taken for a public purpose, although some portions of the land actually used may be thereafter, in the discretion of the city, divided off and placed in the exclusive possession of a lessee for the sole purpose of using it in the transaction of the necessary business connected with the loading and unloading of passengers and cargoes of ships and steamers."

The principle stated has been applied in seaport development cases: *Dyer v. Mayor, etc., of City of Baltimore,* 140 Fed. 880, appeal dismissed, 201 U.S. 650; *In re Mayor, etc., of New York,* 135 N.Y. 253, 31 N.E. 1043, 31 Am. St. Rep. 825; *Marchant v. Mayor and City Council of Baltimore,* 146 Md. 513, 126 A 884.

As aptly stated by *Peckham, J.*, in *In re Mayor, etc., of New York, supra:* "When used by lessees under the facts already stated, the use is a public one. The use is public while the property is thus leased, because it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public,—obligations which could not otherwise be properly or effectually performed."

The principle stated has been applied in housing development (slum clearance) cases: *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693; *Herzinger v. Mayor & City Council of Baltimore,* 203 Md. 49, 98 A 2d 87; *Hunter v. Norfolk Redevelopment & Housing Authority,* 195 Va. 326, 78 S.E. 2d 893; *Berman v. Parker,* 348 U.S. 26, 99 L. ed. (Advance p. 63), 75 S. Ct. 98.

See also, *Lowell v. Boston,* 322 Mass. 709, 79 N.E. 2d 713; *Public Parking Authority v. Board of Property A. etc.,* 377 Pa. 274, 105 A 2d 165; *Albritton v. City of Winona,* 181 Miss. 75, 178 So. 799; 115 A.L.R. 1436.

The principal contention made by counsel for the Atlantic Coast Line Railroad Company, permitted to file brief herein as *amici curiæ,* is that the construction, financing and leasing of the Facility in effect constitutes lending the credit of the State to aid a private corporation, in violation of Art. V, sec. 4, Constitution of North Carolina. But the Revenue Bonds do not constitute debts either of the State of North

Carolina or of the Authority. This Court has held that such revenue bonds do not constitute "debts" of the State agency by which they are issued. *Brockenbrough v. Comrs.*, 134 N.C. 1, 46 S.E. 28; *Williamson v. High Point*, 213 N.C. 96, 195 S.E. 90.

We are in agreement with authority in other jurisdictions that a lease made for an adequate consideration is not a loan of the credit of the state or of the agency making such lease. *Miller v. Greater Baton Rouge Port Com.*, 225 La. 1095, 74 So. 2d 387; *City of Oakland v. Williams*, 206 Cal. 315, 274 P. 328.

In *Cline v. Hickory*, 207 N.C. 125, 176 S.E. 250, a lease by the City of Hickory of the auditorium in its municipal building to a private corporation for use as a motion picture theatre was upheld. Other portions of the building were used by departments of the City. It is noted that, under the facts presented, the operation of the theatre served no public purpose. However, the rentals inured to the general benefit of the City. See also, *Oil Co. v. Mecklenburg County*, 212 N.C. 642, 194 S.E. 114; Annotations, 63 A.L.R. 614 *et seq.*, and 133 A.L.R. 1241 *et seq.*

Where, as here, the lease of a particular specialized Facility aids and promotes the accomplishment of the primary and public purposes of the Authority, the fact that the lessee is a private corporation is incidental and not controlling.

For the reasons stated, the judgment of the court below is affirmed. Affirmed.

MAUDE BARNETTE, UNMARRIED, v. MRS. ANNIE LAURIE WOODY, WIDOW, DR. LESLIE B. HOHMAN AND DR. G. W. GENTRY.

(Filed 30 June, 1955.)

1. Appeal and Error § 6c(1)—

Exceptions which appear nowhere in the record except under the assignments of error are ineffectual, since an assignment of error must be supported by exception duly noted.

2. Same—

Exceptions not set out in the case on appeal and numbered as required by Rule of Practice in the Supreme Court No. 21, need not be considered on appeal.

3. Appeal and Error § 23—

Where the grouping of the assignments of error refers to the exceptions, but the exceptions do not appear on the page indicated, so that it would require a voyage of discovery through the record to ascertain upon what

the appellant is relying to show error, such exceptions will not be considered.

4. Appeal and Error § 6c (1)—

G.S., 1-206, as amended, does not eliminate the necessity for setting out and numbering the exceptions relied upon in the statement of case on appeal.

5. Appeal and Error § 6c(2)—

In the absence of any exceptions, or where they have not been preserved as required by the Rules of Court, the appeal itself will be taken as an exception to the judgment, and presents the question of whether the court below committed error in sustaining plaintiff's motion as of nonsuit.

6. Malicious Prosecution § 14: Process § 17—

An action for malicious prosecution or an action for abuse of process is not barred until the expiration of three years after the accrual of the cause of action. G.S. 1-52.

7. False Imprisonment § 3—

The one year statute of limitations applies to an action for false imprisonment. G.S. 1-54.

8. Malicious Prosecution § 1: Process § 15—

The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued.

9. Process § 15—

Abuse of process consists in the malicious misuse or perversion of a civil or criminal writ to accomplish some purpose not warranted or commanded by the writ, and is composed of the two elements of the existence of an ulterior purpose and an act in improperly using the process in the regular prosecution of the proceeding.

10. Malicious Prosecution § 1—

In an action for malicious prosecution the plaintiff must prove malice, want of probable cause, and termination of the prosecution or proceeding in plaintiff's favor.

11. Process § 16—

Where plaintiff's evidence discloses that the process under which she was committed to the State Hospital was used for the purpose for which it was intended and that the result accomplished was warranted and commanded by the writ, the evidence is insufficient to make out a cause of action for abuse of proces.

12. Malicious Prosecution § 4—

Evidence in this case *held* insufficient to show malice on the part of defendants in suing out a writ for plaintiff's commitment to the State Hospital.

13. Conspiracy § 2—

Evidence *held* insufficient to establish a conspiracy on the part of defendants to procure plaintiff's commitment to the State Hospital for alleged ulterior motives.

14. Appeal and Error § 40i—

In passing upon the correctness of judgment as of nonsuit, the Supreme Court may consider evidence excluded by the lower court only when such evidence is competent and erroneously excluded, with preservation of exception to its exclusion.

APPEAL by plaintiff from *Paul, Special Judge,* August Term, 1954, of PERSON.

This is a civil action to recover damages from the defendants. The plaintiff alleges in her complaint that the defendant Mrs. Annie Laurie Woody, sister of the plaintiff, for an ulterior motive, conspired with the defendants Dr. G. W. Gentry and Dr. Leslie B. Hohman, who, for large sums of money, certified to facts necessary to procure the admission of the plaintiff to the State Hospital in Raleigh; that in furtherance of said conspiracy she was committed to the said hospital by the Clerk of the Superior Court of Person County on 21 March, 1950, where she remained until 8 June, 1950. She prays damages, both actual and punitive.

The defendant Mrs. Woody in her answer admits that she is the younger sister of the plaintiff; that she signed an affidavit before the Clerk of the Superior Court of Person County for the commitment of plaintiff to the State Hospital for observation; that supporting affidavits were filed by her codefendants Dr. Gentry and Dr. Hohman. She denies that she entered into any conspiracy with her codefendants, or that she acted with malice and without probable cause. The other defendants likewise filed answers and denied any conspiracy or bad faith in connection with the execution of the affidavits filed by them in the proceeding before the Clerk of the Superior Court. In addition thereto all the defendants, as a further answer and defense, pleaded the one and three years' statutes of limitations as a bar to the plaintiff's action, and also pleaded immunity from any liability in connection with the matters and things alleged in the plaintiff's complaint on the ground that their affidavits were filed in a judicial proceeding and were privileged.

The plaintiff testified that she was 71 years old at the time of the trial below and is the older sister of the defendant Mrs. Woody; that up until 14 November, 1949, the condition of her physical health was such that she was able to work and make her living, doing sewing, handwork and embroidery, taking subscriptions for magazines, and

things like that; that she suffered from some physical disability, namely, her back and a lame hip, having had the lameness in her hip since she was a child; that aside from that her physical condition was such that she kept going all the time and was in pretty good shape; that she was earning her livelihood and was happy and contented and enjoyed the friendship of many friends in the community. That her parents died in 1930; that between the death of her parents and November, 1949, her relations with her sister Mrs. Woody were that they got along just fine for years; that some time after the death of her parents she became ill and after a stay in the hospital she went to the home of Mrs. Woody, who waited on her uncomplainingly; that during most of the year 1933 she lived with Mrs. Woody and during the years 1934, 1935 and part of 1936 she lived at Sue Bradsher's and that Mrs. Woody paid her board; that most of the time thereafter she lived at the homeplace; that the witness owned one-fifth interest in the homeplace and her sister Mrs. Woody owned the other four-fifths interest; that she rented rooms there and that she received all the rents, Mrs. Woody not receiving "a dollar of the rent money from the time the witness left Mrs. Woody's home until she left the homeplace." That at the time the witness was sent to the State Hospital she was occupying two rooms in the homeplace and receiving rent of $25.00 per month from the tenant who occupied the other part of the house; that in March or April 1949 when plaintiff remarked to Mrs. Woody that she had heard Mrs. Woody was using her as a dependent on her income tax returns, Mrs. Woody threatened to send her to an institution.

Plaintiff further testified that Dr. Hohman came to her house on 21 March, 1950, and talked with her for a while and that shortly thereafter she was taken to the hospital in Raleigh. The plaintiff insisted that this was a most perfunctory examination, but Dr. Hohman's evidence, elicited by plaintiff, shows that he had discussed the case with Mrs. Woody on several occasions and had a history of plaintiff. None of the facts disclosed or statements made to him by Mrs. Woody were ever disputed or contradicted by plaintiff. Plaintiff also testified that she had known Dr. Gentry for many years; that he was physician to her parents and that she had had him a few times and that the last time she consulted him was in January or February, 1949; that he never examined her as to her mental condition. She testified that in the early part of 1949 she went to the office of Dr. Gentry and tried to talk to him, but he ordered her out of his office and told her to never come again, and repeated that twice, and that she never went back to his office again.

The plaintiff offered as witnesses numerous local residents, an osteopathic physician and a dentist from Durham, all of whom testified that in their opinion the plaintiff's mental condition was normal.

Mr. J. A. Bass, Clerk of the Superior Court of Person County, testified that the commitment papers were in the possession of Mrs. Woody from 14 November, 1949, until she brought them into his office on 21 March, 1950; that he did not know what physicians, if any, examined the plaintiff until he saw their signatures on the commitment papers; that the papers appeared to be in proper order and he signed the order of commitment and that Mrs. Woody picked the papers up and walked out and when she got to the door she turned to the Clerk and said, "If it weren't for my pull at Duke, I would have never gotten this through," and left. This statement was admitted against Mrs. Woody only.

The Clerk further testified that he was related to plaintiff and had known her all his life; that Mrs. Woody had talked to him on several occasions as to the advisability or propriety of her committing plaintiff to some institution for observation and that "he told Mrs. Woody that he thought or in his opinion it would be the kindest thing she could do for her sister"; that some time thereafter Mrs. Woody signed an affidavit to procure admission of plaintiff but suggested delaying the commitment until after Christmas so plaintiff would not be in the hospital at that time; that on 21 March, 1950, he entered an order for the commitment of plaintiff to the State Hospital for observation for a period not exceeding thirty days; that upon the affidavits of Drs. Hohman and Gentry and the witness' own knowledge of plaintiff he stated to Dr. Pleasants (Superintendent of the State Hospital) that in his opinion she was a fit subject for his institution; that he had suggested the observation of plaintiff at Duke Hospital and Mrs. Woody had urged him to have this done; that he had formed an opinion for more than a year prior to November, 1949, that plaintiff was a fit subject to be restrained in the State Hospital and had held that opinion for a year or maybe two years and that he considered his opinion was based upon valid information. "That the things about her that led him to the opinion before she was taken to the insane asylum, that she was a fit subject for the insane asylum, was that Miss Maude would talk you to death and worry you to death . . . . And that she thought Mrs. Woody was persecuting her . . . ." The Clerk also testified that upon the request of the Superintendent of the State Hospital he issued a second order for plaintiff to remain in the said hospital for observation thirty days in addition to the thirty days theretofore ordered and that plaintiff was retained for seventeen additional days beyond this thirty-day extension.

Dr. Hohman, one of the defendants, was called by plaintiff as an adverse witness and testified, among other things, that Mrs. Woody told him that she thought her sister was mentally sick and inquired whether the witness thought it would be wise to have her admitted for observation to Duke Hospital for a period of one or two weeks, expressing her willingness to pay for the care as a private patient if the witness thought it wise; the witness testified that he replied to Mrs. Woody "that there was a long waiting list at Duke Hospital and this case seemed to be of such long-standing chronicity that he did not think a short period of observation at Duke Hospital would be serviceable." That after the witness advised Mrs. Woody not to bring the plaintiff to Duke, Mrs. Woody stated to the witness that she desired to have plaintiff committed to the State Hospital; that she informed the witness that the plaintiff thought that she, Mrs. Woody, had mistreated her; that the plaintiff had made threats that she would injure herself, these statements having been made over the course of several years. That the plaintiff had been spying on the nephew (son of Mrs. Woody); that the neighbors and relations were fearful that she might harm the nephew; that her niece who lived in the homeplace with plaintiff was scared to death of her, and on one occasion a piece of cake was found between the front door and screen of the Woody home and Mrs. Woody told her son not to eat it and the next day the plaintiff was found peering into the window; that Dr. Gentry told the witness that Miss Barnette had wandered away from home trying to get medical attention for a crooked back and heart disease; that Mrs. Woody also informed the witness that the plaintiff has turned successively against those most kind to her, and specifically enumerated to the witness who those people were. That the witness was requested by Mrs. Woody to examine plaintiff with reference to her mental condition; that he did examine the facts in the case. The evidence further tends to show that the plaintiff applied for a permit to carry a pistol in 1949.

At the close of plaintiff's evidence the court entered judgments of nonsuit as to each of the defendants and the plaintiff appeals assigning error.

John F. Matthews, Charles P. Green and Davis & Davis, attorneys for plaintiff appellant.

Reade, Fuller, Newsom & Graham, and R. B. Dawes and E. C. Bryson, attorneys for appellee Annie Laurie Woody.

Reade, Fuller, Newsom & Graham, and F. L. Fuller, Jr., attorneys for appellee Dr. Leslie B. Hohman.

Spears & Spears and R. P. Burns, attorneys for appellee Dr. G. W. Gentry.

DENNY, J. The appellant groups her twenty-four assignments of error based on a similar number of purported exceptions, but an examination of the record discloses that a large percentage of these purported exceptions appear nowhere in the record except under the assignments of error, and not a single one of the remaining exceptions is set out in the case on appeal and numbered, as required by Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558. Moreover, in many instances, the words "exception by plaintiff," which appear in the context of the case on appeal, and apparently being the exception upon which the appellant intended to rely in grouping her assignments of error, do not appear on the page indicated thereunder. Hence, it would require a tedious and time-consuming voyage of discovery for us to ascertain upon what the appellant is relying to show error, and our Rules and decisions do not require us to make any such voyage. *In re Will of Beard,* 202 N.C. 661, 163 S.E. 748; *Cecil v. Lumber Co.,* 197 N.C. 81, 147 S.E. 735.

This Court has universally held that an assignment of error not supported by an exception is ineffectual. *Rigsbee v. Perkins, post,* 502; *S. v. Howell,* 239 N.C. 78, 79 S.E. 2d 235; *S. v. Moore,* 222 N.C. 356, 23 S.E. 2d 31; *Smith v. Supply Co.,* 214 N.C. 406, 199 S.E. 392; *Rogers v. Jones,* 172 N.C. 156, 90 S.E. 117; *Thompson v. R. R.,* 147 N.C. 412, 61 S.E. 286. Moreover, the provisions of G.S. 1-206, as amended by Chapter 150, Session Laws of 1949, and by Chapter 57, Session Laws of 1953, *do not eliminate the necessity for setting out and numbering the exceptions relied upon in the statement of the case on appeal.* Rule 21, *supra.* But, in the absence of any exceptions, or where they have not been preserved in accord with the requirements of our Rules, the appeal will be taken as an exception to the judgment. *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320; *Dixon v. Osborne,* 201 N.C. 489, 160 S.E. 579. Therefore, the only question presented on this appeal is whether or not the court below committed error in sustaining the defendants' motions for judgment as of nonsuit.

An examination of the plaintiff's complaint leaves one in doubt as to whether she is seeking to recover on an action for malicious prosecution, abuse of process, or for false imprisonment. Likewise, judging from the brief filed in her behalf, her counsel seem doubtful as to what cause of action they are relying upon. In fact, they say in their brief "that the plaintiff's evidence has made out a case of actionable tort against the defendants and each of them and that it is immaterial whether the label of malicious prosecution or abuse of process or omission of duty be affixed to the case."

This action was begun two years, eleven months and twenty-one days after the plaintiff was discharged from the State Hospital, after having been under observation at that institution for seventy-six days and held not to show any evidence of a mental disorder. Hence, the three-year statute of limitations pleaded by the defendants, G.S. 1-52, would not be a bar to an action for malicious prosecution or abuse of process. However, it would seem that the plea of the one year statute of limitations, G.S. 1-54, would be a bar to an action for false imprisonment. *Jackson v. Parks,* 216 N.C. 329, 4 S.E. 2d 873.

Abuse of process consists in the malicious misuse or perversion of a civil or criminal writ to accomplish some purpose not warranted or commanded by the writ. *Ellis v. Wellons,* 224 N.C. 269, 29 S.E. 2d 884; *Melton v. Rickman,* 225 N.C. 700, 36 S.E. 2d 276, 162 A.L.R. 793; *McCartney v. Appalachian Hall,* 230 N.C. 60, 51 S.E. 2d 886.

The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued. In an action for malicious prosecution the plaintiff must prove malice, want of probable cause and termination of the prosecution or proceeding in plaintiff's favor. *Abernethy v. Burns,* 210 N.C. 636, 188 S.E. 97; *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609. However, the only essential elements of abuse of process are: First, the existence of an ulterior purpose and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. *Ledford v. Smith,* 212 N.C. 447, 193 S.E. 722; *Carpenter v. Hanes,* 167 N.C. 551, 83 S.E. 577.

In the instant case, however, the plaintiff's evidence clearly establishes the fact that the process which she alleges was maliciously sued out was used for the purpose for which it was intended and the result accomplished was warranted and commanded by the writ. This was not the case in either *Davenport v. Lynch,* 51 N.C. 545 or *Getsinger v. Corbell,* 188 N.C. 553, 125 S.E. 180, cited and relied upon by the plaintiff. Hence, in our opinion, the evidence adduced in the trial below is insufficient to support an action for abuse of process.

On the other hand, conceding, but not deciding, that the complaint alleges a good cause of action for malicious prosecution and is not demurrable on the ground of a misjoinder of causes of action, we have concluded that the plaintiff's evidence is insufficient to establish a conspiracy on the part of the defendants or to establish malice on their part or any one of them.

The task of passing upon the motions for judgment as of nonsuit has been somewhat complicated because counsel for appellant have quoted, in their brief, about as freely from the excluded evidence as they have

from the evidence admitted in the trial below. They cite as authority for their right to do so, *Whitmire v. Heath,* 155 N.C. 304, 71 S.E. 313. It will be noted, however, that the evidence excluded in the last cited case should have been admitted and proper exception was preserved to its exclusion. Such is not the case on the record before us. Consequently, we have not considered the excluded evidence in passing upon these motions.

In view of the conclusions we have reached, we deem it unnecessary to discuss or consider the question of privilege, *Jarman v. Offutt,* 239 N.C. 468, 80 S.E. 2d 248, or to determine whether or not the order of the Clerk, adjudging the plaintiff a fit subject for observation in the State Hospital, was a termination of the proceeding in favor of the defendants and, therefore, *res judicata.*

The separate judgments of nonsuit entered as to each defendant in the court below will be upheld.

Affirmed.

JOAN HIBBS HOSKINS v. LUCIUS A. CURRIN, JR., AND WIFE, PAULINE CURRIN, AND RALPH HICKS CURRIN.

(Filed 30 June, 1955.)

1. **Constitutional Law § 28: Divorce § 21—**

The decree of another state awarding the custody of a minor child is not conclusive on our courts when such child is within the boundaries of this State, since an action relating to the custody of a child is in the nature of an *in rem* proceeding and the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. Article IV, Section 1, Constitution of the United States.

2. **Same—Our court may determine question of right to custody of child within this State notwithstanding foreign decree.**

The evidence tended to show that the husband, serving in the Armed Forces, maintained his legal residence in North Carolina, that he obtained his minor son from his estranged wife in another state, brought him to North Carolina and placed him in the home of his brother and sister-in-law, that thereafter in a divorce action instituted by the wife in such other state, custody of the child was awarded the husband, and that the foreign decree was later modified to award the custody of the child to his mother, notwithstanding the child was and had remained in this State. *Held:* Upon appropriate findings from the evidence, the court of this State had authority to hear and determine the question of the custody of the child, the foreign decree not being binding on our courts in this respect.

3. **Divorce § 19—**

Upon the court's findings, supported by evidence, that the mother is not a proper and suitable person to have the custody of the minor child, that

its father is a proper and suitable person, but because of his frequent changes of residence incident to military service, it is not to the best interest of the minor that its custody be awarded the father, but further that the brother and sister-in-law of the child's father are proper and suitable persons to have its custody, and that the best interest of the child would be served by awarding its custody to them, the decree awarding the child's custody to its uncle and aunt will be affirmed.

APPEAL by plaintiff from *Clifton L. Moore, Judge,* October Term, 1954, of GRANVILLE.

This is a proceeding instituted by the plaintiff, pursuant to the provisions of G.S. 50-13, to obtain custody of Rodney Alan Currin, the infant son of plaintiff and Ralph Hicks Currin, hereinafter called intervenor.

At the hearing below all parties to this proceeding were present in person and represented by counsel, including the infant son of plaintiff and the intervenor. The facts found, the conclusions of law drawn therefrom and the judgment entered pursuant thereto, are set out below:

"1. That Ralph Hicks Currin, intervenor, was born in Granville County, North Carolina, on December 12, 1918, and resided with his parents in said County until 1940 when he enlisted in the United States Marine Corps; that since his enlistment in the Marine Corps in 1940 he has continuously been a member of and on active duty with said Marine Corps until the present, and from time to time has resided in various places both within and without the boundaries of the United States as his duties with the Marine Corps required; that intervenor's present rank in the Marine Corps is Lieutenant-Colonel.

"2. That intervenor on July 3, 1947, intermarried with Joan Hibbs (Currin, Hoskins), plaintiff, in the State of California, where plaintiff resided with her parents and where intervenor was on duty with the Marine Corps; that plaintiff's father is a Captain in the United States Navy and is a native of the State of Montana.

"3. That after their marriage, intervenor and plaintiff moved to Washington, D. C., where intervenor's duty with the Marine Corps required him to be, and they continued to reside in Washington, D. C., until intervenor was transferred by the Marine Corps to California in June 1951; that plaintiff early in January 1951 preceded intervenor to California.

"4. That a child, Rodney Alan Currin, was born to plaintiff and intervenor on March 3, 1950, while they were residing in Washington, D. C.

"5. That after intervenor's transfer to California, in June 1951, his duty with the Marine Corps required him to be away from his family and in Foreign Service without the United States a great portion of the time.

"6. That in the latter part of 1951 plaintiff met and began to associate with one, Dr. Gregory Hoskins, and occupied rooms with him alone at various places and on a number of occasions, and on at least one occasion occupied an apartment for the night with the said Dr. Gregory Hoskins, with no one present except the infant child, Rodney Alan Currin.

"7. That because of plaintiff's associations with Dr. Gregory Hoskins intervenor and plaintiff became estranged and separated on December 24, 1951.

"8. That on or about January 8, 1952, intervenor instituted an action against plaintiff for divorce in San Diego County, California, but intervenor took a nonsuit in this action on or about February 28, 1952.

"9. That on March 1, 1952, intervenor went to the place plaintiff was then residing, obtained his son, Rodney Alan Currin, and carried the said Rodney Alan Currin to Oxford, Granville County, North Carolina, and placed his said son in the home and under the care of the defendants, the brother and sister-in-law of intervenor; and Rodney Alan Currin has at all times resided in said home in Granville County, North Carolina, since March 2, 1952, and has not been in California since March 1, 1952; that intervenor returned to California where his duty with the United States Marine Corps required him to be.

"10. That Granville County is the domicile of origin of intervenor.

"11. That on March 12, 1952, plaintiff instituted an action against intervenor in the Superior Court of Los Angeles County, California, for divorce and for custody of Rodney Alan Currin, and summons was personally served on intervenor; and on April 11, 1952, intervenor filed in said cause a cross-action for divorce from plaintiff, and asserted (as he did on all occasions thereafter in said cause) that the courts of California had no jurisdiction of the custody of Rodney Alan Currin and that intervenor's domicile was in North Carolina.

"12. That a judgment was entered in Superior Court of Los Angeles County, California, in the aforesaid divorce action, on March 16, 1953; said judgment declared that plaintiff was not entitled to a decree of divorce, but said judgment granted intervenor an interlocutory decree of divorce from plaintiff; and said judgment declared plaintiff was not but intervenor was 'a fit and proper person to have the care, custody and control of the minor child,' and it awarded custody of said child to intervenor, granting right of visitation to plaintiff and right to plaintiff to have said child visit her in June, July and August each year; and said judgment also provided as follows: 'that until further order of Court said minor child shall remain in the State of North Carolina with the brother and sister-in-law of defendant, Lucius Currin, Jr., and Pauline Currin, at Oxford, North Carolina, except for that period of time said

child is visiting (Joan Hibbs Currin)—in the months of June, July and August at the residence of (Joan Hibbs Currin)—; that said persons, to-wit: Lucius Currin, Jr. and Pauline Currin, are fit and proper persons to have the physical care and custody of said minor child.'

"13. That both plaintiff and intervenor appealed from said judgment, and said appeals were pending until June 1, 1954, on which date opinion of the District Court of Appeal, Second District, Division 1, California, was filed, and said opinion is reported in 'Currin v Currin, 271 Pac 2d 61'; said opinion affirmed the judgment of the Superior Court in all respects; that Superior Court had found as a fact that the residence of intervenor was in California, and the appellate court goes further and declares that his domicile was in California and that California had jurisdiction of the child and could determine his custody.

"14. That Lucius A. Currin, Jr. and Pauline Currin have at no time since March 1, 1952, been in the State of California.

"15. That on May 29, 1953, the Marine Corps transferred intervenor to Newport, Rhode Island, and he has not since that date been in the State of California.

"16. That intervenor has never during his lifetime been in the State of California except while on duty for and under official orders of the United States Marine Corps; he bought a dwelling house in California because of an acute housing shortage for service men and in order that he and his family might have quarters while he was stationed there; his service records have always shown Granville County, North Carolina, as his home; and he is registered for voting in Granville County, North Carolina, and voted there in 1940 and 1952.

"17. That Granville County, North Carolina has at all times been the legal domicile of intervenor, and certainly has been at all times during the pendency of the present action.

"18. That the aforesaid judgment of the Superior Court of Los Angeles County recognized North Carolina as the domicile of Rodney Alan Currin by attempting to award his physical custody to defendants herein, at Oxford, North Carolina.

"19. That the Superior Court of Los Angeles County, California, made the decree of divorce final on December 16, 1953; and plaintiff is now married to Dr. Gregory Hoskins.

"20. That on October 4, 1954, on motion of plaintiff, the Superior Court of Los Angeles County, California, made an order modifying its former judgment, finding plaintiff to be a fit and proper person to have the custody of said Rodney Alan Currin, and awarding his care and custody to plaintiff with right of visitation to intervenor. Notice of the motion was served on intervenor's attorney of record, who sent same to intervenor, and intervenor sent a counter-affidavit but did not personally appear.

"21. That plaintiff filed her petition in the instant cause in the Superior Court of Granville County on October 11, 1954, under the provisions of Section 50-13 of the General Statutes of North Carolina; summons was personally served on the defendants on October 14, 1954; defendants filed answer October 21, 1954; upon motion, Ralph Hicks Currin, was allowed to intervene and filed answer October 25, 1954.

"22. That plaintiff, Joan Hibbs Hoskins, is not a fit and proper person to have the unqualified custody of Rodney Alan Currin, minor.

"23. That the intervenor, Ralph Hicks Currin, is a man of excellent character, good habits and conduct, and is a fit and suitable person to have the care, custody and control of the minor, Rodney Alan Currin, but because of the frequent changes of residence required by his service in the Marine Corps, it is not to the best interest of said minor that unqualified physical custody of said child be awarded to said intervenor.

"24. That the defendants, Lucius A. Currin, Jr. and Pauline Currin, are fit, suitable and proper persons to have the care, custody and control of the minor, Rodney Alan Currin, their nephew; that the home of said defendants is modern, comfortable and commodious; that defendants are of excellent character, and have given and are giving said minor such instruction, and are setting for him such examples, as to promote the wholesome development of said minor and instill in him social, moral and religious principles, and defendants are giving to said minor such care and affection as to promote his best welfare, interest and development.

"DECREED:

"(1) That this Court, in passing upon the care, custody and control of Rodney Alan Currin, infant son of plaintiff and the intervenor, is not bound by or required to give effect to the judgments and orders of the courts of California hereinbefore referred to.

"(2) That the plaintiff's petition to be awarded the care, custody and control of the said Rodney Alan Currin is hereby denied.

"(3) That the care, custody and control of the said Rodney Alan Currin is hereby awarded to the defendants, Lucius A. Currin, Jr. and wife, Pauline Currin.

"(4) That plaintiff and the intervenor are hereby given the right and privilege of visiting the said Rodney Alan Currin on any day, at reasonable hours, and of taking the said Rodney Alan Currin on trips or for rides outside the home of said defendants, but within the State of North Carolina; and these rights and privileges shall not be denied by said defendants; but the defendants may impose any or all of the following restrictions upon said rights and privileges:

"(a) That upon said visits plaintiff or intervenor shall be unaccompanied; and

"(b) The said Rodney Alan Currin shall not be taken on a trip or for a ride unless accompanied by a law enforcement officer of Granville County, North Carolina, or of the City of Oxford, North Carolina.

"(5) This cause is retained and held open for further motions, proceedings and orders.

"This October 29, 1954."

The plaintiff excepts to certain of the foregoing findings of fact, conclusions of law, and to the judgment entered, and appeals to the Supreme Court.

Wright T. Dixon, Jr., for plaintiff.

Royster & Royster for defendants and intervenor.

DENNY, J. The appellant challenges the validity of the judgment entered below on the ground that the courts of North Carolina are bound by the full faith and credit clause of the Constitution of the United States, Article IV, Section 1, to recognize and enforce the modified decree of the California court. Therefore, she takes the position that the court below was bound by the findings of the California court with respect to her present fitness to have the care and custody of Rodney Alan Currin, and that it was error to admit any evidence to establish facts contrary to those found by the California court in the modified decree. We do not concur in this view.

The decisions in this country are well-nigh hopelessly in conflict with respect to the extraterritorial effect that should be given to judgments awarding the custody of children. 9 A.L.R. 2d Anno.—Custody Award —Child Outside of State, page 434; 4 A.L.R. 2d Anno.—Custody of Child—Jurisdiction, page 25; 27 C.J.S., Divorce, section 333 (c), page 1299. However, the decisions in this jurisdiction are to the effect that regardless of what the court of a sister State may decree with respect to custody, if the child involved in such decree becomes a resident of this State, our courts are not without authority to hear and determine questions of custody and welfare when properly raised. *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32; *In re DeFord,* 226 N.C. 189, 37 S.E. 2d 516; *In re Ogden,* 211 N.C. 100, 189 S.E. 119; *Burrowes v. Burrowes,* 210 N.C. 788, 188 S.E. 648; *In re Alderman,* 157 N.C. 507, 73 S.E. 126, 39 A.L.R. (N.S.) 988. See also *Elliott v. Elliott,* 181 Ga. 545, 182 S.E. 845; *Boardman v. Boardman,* 135 Conn. 124, 62 A. 2d 521; *Gilman v. Morgan,* 158 Fla. 605, 29 So. 2d 372; *Boor v. Boor,* 241 Iowa 973, 43 N.W. 2d 155. *Cf. In re Application of Reed,* 152 Neb. 819, 43 N.W. 2d 161; *Byers v. Superior Court,* 61 Ariz. 284, 148 P. 2d 999, and *Dawson v. Dawson,* Mo. App., 241 S.W. 2d 725.

In light of the finding of the court below that North Carolina is the legal domicile of the intervenor who has had the legal custody of Rodney Alan Currin since 16 March, 1953; and the further fact that he has been in the physical custody of the defendants in Granville County, North Carolina, since the 2nd day of March, 1952, which antedates the institution of the California action, we hold the California decree is not binding on the courts of this State.

An action which relates to the custody of a child is in the nature of an *in rem* proceedings. Therefore, the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798. *Cf. McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27.

We have carefully examined all of the pertinent findings of fact by the court below and they are supported by competent evidence. Hence, the order of custody from which the plaintiff appeals, is in all respects

Affirmed.

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

(Filed 30 June, 1955.)

Actions § 3c: Contracts § 7—New agreement may not be enforced when it is executed solely to facilitate performance of agreement void as against public policy.

Plaintiff and the individual defendant entered into a written agreement for the division of land sold at judicial sale, predicated upon suppression of bidding at the sale. This agreement was held void as contrary to public policy. Thereafter plaintiff instituted this action to recover on a subsequent parol agreement in regard to the lands, and the evidence plainly and clearly disclosed that the parol agreement was entered into solely for the purpose of simplifying performance of the void written agreement and grew immediately out of and was directly connected with the void contract. *Held:* Nonsuit was correctly entered in the second action for specific performance of the oral agreement or for damages for its breach, since a court of justice will not lend its aid to enforce an illegal contract, but will remit the parties to their own folly under the maxim, *ex colo malo non oritur actio.*

APPEAL by plaintiff from *Clifton L. Moore, J.,* September Term 1954 of ALAMANCE.

Civil action to have it adjudged that the individual defendants Crumpler and Humphrey hold title to certain lands as trustees for plaintiff; to require all defendants to convey title to these lands to

plaintiff, and in the event that they cannot convey title, that the plaintiff recover compensatory and punitive damages.

At the close of plaintiff's evidence, upon motion of the defendants, the court entered a judgment of nonsuit.

The plaintiff appealed, assigning error.

Cooper, Long, Latham & Cooper for Plaintiff, Appellant.

Young, Young & Gordon and Allen & Allen and Clarence Ross for Defendants, Appellees.

PARKER, J. This case, with the same parties and the same complaint, has been heretofore before this Court. *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138. In that appeal in affirming a judgment overruling a demurrer, we said: "The defendants may answer, and issues be drawn upon the pleadings and the factual situation may be fully developed upon the trial in Superior Court. Then the court may consider the case in the light of the evidence offered. And such consideration will not be foreclosed by decision now made on the demurrer."

This case is a sequel to the decision in *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336. In that case the parties were the plaintiff here and the individual defendants here, and the action was to reform a written contract pertaining to land and for specific performance of contract as reformed for conveyance of land. The action was based upon a contract executed and delivered on 2 July 1949 by and between J. C. Lamm, party of the first part, plaintiff here, and June Crumpler, party of the second part, one of the defendants here. This Court said in that case in sustaining a demurrer to the complaint and in dismissing the appeal: "It clearly appears from the complaint that the withdrawal of the raised bid, plaintiff had placed on tract No. 34, was a consideration for the contract plaintiff now seeks to reform, and then to enforce. Manifestly, its purpose, reflected in the contract itself, was to stifle bidding on both tracts Nos. 34 and 35. Thus, the withdrawal of the amount required to raise the bid was fraudulent toward those interested in the property bringing a fair price through fair competition. (Citing authorities). This makes the transaction contrary to public policy, and void. Therefore, plaintiff has no right to be aided, and enforced."

The complaint, and the amendment thereto, here are set forth almost verbatim in *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138, to which reference is hereby made. There is no need to repeat here what is there set forth.

This action had its genesis in the sale of Hornaday land on the edge of Burlington at public auction under order of court. At a resale on

22 June 1949 plaintiff became the high bidder for tract 35, and the defendants Crumpler and Humphrey the high bidders for tract 34.

Plaintiff's evidence tends to show the following facts: Between 9:00 and 10:00 p. m. on Saturday, 2 July 1949, plaintiff, his brother-in-law, and his lawyer, and the defendant Crumpler and his lawyer met in plaintiff's store in Burlington. Crumpler told plaintiff he was planning a housing project, and would need tract 34 and a part of tract 35, or the project would fail: that he had to let the FHA know immediately how much land he had. Plaintiff had made a tentative bid on tract 34. After further conversation plaintiff testified: The defendant Crumpler "finally proposed that I assign him my bid on Tract 35, that he put up the $16,800 necessary to purchase it, that he deed me a 150-foot strip from the west side of it for $1500, that he dedicate a 50-foot street through the tract just east of that, that he give me an option to buy 225 feet east of the proposed street at the same price per acre that the land had cost him, and that I withdraw a tentative bid that I had made on Tract 34. He further proposed that he would deed me back all the land that was not actually necessary in his housing development at the same price that he had to pay for it. I accepted this proposition . . . ."

Whereupon a written contract then and there was prepared and signed by and between plaintiff, party of the first part, and June Crumpler, one of the defendants, party of the second part. This contract was introduced in evidence. It is the identical contract set forth in full in *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336, which this Court held void. There is no need to repeat here this written contract.

On 6 July 1949 the Court confirmed the bid of plaintiff on tract 35 and of the individual defendants on tract 34, as they were the last and highest bidders, and directed the Commissioners to execute and deliver deeds upon payment of the purchase price.

Plaintiff makes this allegation in Paragraph 6 of his Complaint: "That about said time"—referring to 6 July 1949—"the defendant Crumpler represented to the plaintiff that *they could simplify the performance of the agreement between them on July 2, 1949, as hereinbefore alleged,* and save the expense of additional conveyances, by agreeing upon a temporary division of Tract No. 35, and have the Commissioners and the plaintiff join in a deed to the remaining part of Tract No. 35 to the defendants Crumpler and Humphrey, subject to the terms of their agreement, and that, when the defendants Crumpler and Humphrey had procured approval of their housing development by the appropriate authorities, and had thereby ascertained exactly how much of the part of Tract No. 35 to which they were taking title

was required for the housing development, they would promptly reconvey the remainder to plaintiff."

Plaintiff's evidence tended to support the allegation from Paragraph 6 of his Complaint quoted above.

Pursuant to their oral agreement to simplify the performance of the written agreement between them of 2 July 1949, which this Court has held void, a deed was executed and delivered on 20 July 1949 by and between M. A. Coble, S. D. Ross and Clarence Ross as Commissioners of the Superior Court of Alamance County, and J. C. Lamm, parties of the first part, and J. A. Crumpler and T. R. Humphrey, parties of the second part. The deed states that the plaintiff Lamm directed the Commissioners to convey 8.28 acres of tract 35 to the individual defendants, and the plaintiff joined in the deed for that purpose. The deed conveyed 8.28 acres of tract No. 35 to the individual defendants, and tract No. 34.

In his Complaint plaintiff alleges that the Court Commissioners conveyed by deed 9.30 acres of tract No. 35 to his mother and himself.

Plaintiff's evidence tends to show that the individual defendants put into their housing project only 76/100 of an acre from tract No. 35 and all of tract No. 34, and sold and conveyed this land to the corporate defendant.

Plaintiff's evidence also tends to show that Crumpler told him several times that he would convey to plaintiff the 7.52 acres of tract No. 35 not used in the housing project, but finally said in November 1949 he had changed his mind. On 22 April 1952 the individual defendants conveyed the 7.52 acres of tract No. 35 to Irving Park, Inc., for $40,000.00.

Plaintiff testified that when the defendant Crumpler told him that he had not ascertained how much of tract No. 35 would be required for the housing development, and that he would reconvey to plaintiff the part of tract No. 35 to be conveyed to him, that would not be used in the housing project, he believed these statements, and executed the deed dated 20 July 1949.

Plaintiff's evidence further tends to show that several months prior to receiving the official application of the corporate defendant for an FHA loan on 8 August 1949, W. G. Jerome, Chief Underwriter for the FHA, went to Burlington. Jerome testified: "I advised Mr. Crumpler to buy Tracts 34 and 35, and I insisted on his buying No. 14, the old homeplace. I did not require Mr. Crumpler to purchase both Tract 34 and Tract 35. I thought it would be good business on his part to acquire that land and be good for the project for him to have it as it might be developed." In the official application the land proposed for use in the project was 19.26 acres: Tract No. 34 consisting of 18.50 acres and

76/100 of an acre of Tract No. 35. Jerome, a witness for plaintiff, further testified: "So far as I know, the FHA never instructed Mr. Crumpler that the Brookwood Gardens Housing Project would have to be abandoned unless he could obtain a substantial part of Tract 35. If such a requirement had been made, according to our regulations, I would have been the one to make it." The commitment for the FHA loan passed the Review Committee on 25 August 1949.

Plaintiff alleges in Paragraph 2 of his amendment to his Complaint: "Plaintiff states that the alleged agreement, by which the plaintiff is alleged to have assigned his bid on Tract No. 35 of the R. G. Hornaday property to the defendant June A. Crumpler, and by which the defendants June A. Crumpler and T. R. Humphrey are alleged to have agreed to reconvey to plaintiff all of Tract No. 35 not necessary for the housing development, was not wholly in writing."

Plaintiff's proof clearly and plainly shows that he and the individual defendants entered into an agreement we held void in *Lamm v. Crumpler*, 233 N.C. 717, 65 S.E. 2d 336, and that the subsequent oral agreement grew immediately out of, and is directly connected with, the void written agreement. Plaintiff's allegation and proof demonstrate that the purpose of the subsequent oral agreement was to simplify the performance of the void agreement of 2 July, 1949. The oral agreement cannot be separated from the void written agreement. It is true that plaintiff contends that he was induced by the actionable fraud of the individual defendants to enter into these agreements, but these agreements are the very basis of his action, for he is seeking to enforce these agreements by having the individual defendants adjudged to hold certain lands as trustees for him, and by having specific performance of the agreements to convey lands, and if specific performance cannot be had, to recover damages for breach of these agreements.

No principle of law is better settled than that a party to an illegal contract cannot come into a court of law, and ask to have his illegal objects carried out. The rationale of this principle is expressed in the maxim, *Ex dolo malo non oritur actio. Shoe Co. v. Department Store*, 212 N.C. 75, 193 S.E. 9; *Waggoner v. Publishing Co.*, 190 N.C. 829, 130 S.E. 609; 17 C.J.S., Contracts, Sec. 272. As *Stacy, C. J.* vividly said in *Hodges v. Hodges*, 227 N.C. 334, 42 S.E. 2d 82: "In all such cases, the parties are remitted to their own folly, and each is left, as best he can, to paddle his own canoe."

This Court in *Electrova Co. v. Ins. Co.*, 156 N.C. 232, 72 S.E. 306, 35 L.R.A. (NS) 1216, said: "The principle of law is thus stated by *Chief Justice Marshall:* 'Where a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. But if the promise be entirely discon-

nected with the illegal act, and is founded on a *new* consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act.' " The quoted words appear in Chief Justice Marshall's opinion for the Court in *Armstrong v. Toler,* 24 U.S. 258, 6 L. Ed. 468.

In *McMullen v. Hoffman,* 174 U.S. 639, 43 L. Ed. 1117, p. 1123, it is said: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. Citing copious cases in support."

In *Tator v. Valden,* 124 Conn. 96, 198 A. 169, 117 A.L.R. 1243, the Court said, quoting from *Vaszauskas v. Vaszauskas,* 115 Conn. 418, 423, 161 A. 856, 858: " 'It is unquestionably the general rule, upheld by the great weight of authority, that no court will lend its assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action courts will not enforce it, nor will they enforce any alleged right directly springing from such contract, but, if both parties are in *pari delicto,* the law will leave them where it finds them.' "

See also, to the same effect, 12 Am. Jur., Contracts, Sec. 152 and Sec. 210, where numerous cases are cited in the text and in the 1954 Cumulative Supplement. In 12 Am. Jur., Contracts, Sec. 152, it is said: "If a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery."

If a contract is so connected with the illegal or immoral purpose or transaction as to be inseparable from it, a court will not enforce it. *Standard Furniture Co. v. Van Alstine,* 22 Wash. 670, 62 P. 145, 51 L.R.A. 889, 79 Am. St. Rep. 960.

"The rule supported by the weight of authority is that courts will not aid in the division of the profits of an illegal transaction between associates . . . ." 17 C.J.S., Contracts, Sec. 277.

On the first appeal in this case, 240 N.C. 35, 81 S.E. 2d 138, we were concerned solely with the complaint and the amendment thereto. The only allegation as to the oral agreement is in the amendment to the complaint, and reads as follows: "The alleged agreement by which plaintiff is alleged to have assigned his bid on Tract No. 35 . . . to

the defendant June A. Crumpler, and by which the defendants June A. Crumpler and T. R. Humphrey are alleged to have agreed to reconvey to plaintiff all of Tract No. 35 not necessary for the housing development, was not wholly in writing." We now have the evidence before us, and the evidence plainly and clearly shows that the oral agreement is so interlocked with, and growing immediately out of the void and illegal written agreement of 2 July 1949, that a court of justice will not lend its aid to enforce it. The judgment of the lower court nonsuiting plaintiff's action is

Affirmed.

ELIZABETH McLEAN SCARBORO v. PILOT LIFE INSURANCE COMPANY.

(Filed 30 June, 1955.)

1. Appeal and Error § 6c (2)—

A sole assignment of error to the signing of the judgment presents the question whether the facts found by the lower court are sufficient to support the judgment.

2. Insurance § 28—

A single-seated glider is an "aircraft" within an Aviation Exclusion Rider in a life insurance policy.

3. Same—

Insured was fatally injured when a single-seated glider he was operating fell to the earth. *Held:* The pilot of a glider is under duty to exercise ordinary care to avoid injury to persons in the air and upon the ground, particularly in returning to earth, and therefore insured was a "pilot" having "any duties whatsoever aboard such aircraft while in flight" within the purview of an Aviation Exclusion Rider in the policy of insurance on his life.

4. Same—

A provision in a policy of life insurance excluding risk if insured "is a pilot, officer or other member of the crew" of an aircraft, is not ambiguous and does not require that insured be a pilot who is a member of a crew in order for the exclusion clause to obtain, since the terms are disjunctively set forth and the occurrence of any one of the conditions excludes liability.

5. Insurance § 13a—

When the terms of an insurance policy are not ambiguous, they must be given their usual, ordinary and commonly accepted meaning and enforced accordingly, like any other contract, since it is the duty of the courts to construe policies of insurance as written, and not to rewrite them.

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

APPEAL by plaintiff from *Stevens, J.*, February-March Civil Term 1955 of ROBESON.

Civil action on a policy of insurance issued by defendant on the life of George Howard Scarboro, wherein plaintiff Elizabeth McLean Scarboro is named as beneficiary.

The parties agreed to waive a jury trial, and that the Trial Judge should find the facts and declare the law arising thereon.

The Trial Judge found these facts:

One. On 25 May 1954 George Howard Scarboro applied to the defendant Pilot Life Insurance Company for a $10,000.00 policy upon his life. Pursuant to his application and supplemental application, the defendant, upon the payment of the premium recited in the policy, issued a $10,000.00 policy with attachments appearing thereon on his life.

Two. The defendant admitted these facts: As alleged in the complaint, George Howard Scarboro on 12 September 1954 was operating an aircraft, generally known and designated as a glider. While he was operating this glider, it crashed to the ground thereby causing injuries to him, which resulted in his death the next day. That the liability of defendant under the policy is to be determined by whether or not the Aviation Exclusion Rider attached to the policy and made a part thereof excludes from coverage the death of the insured under such circumstances. If the Aviation Exclusion Rider does not exclude from coverage the death of the insured under such circumstances, the defendant is liable.

Three. It was a single-seated glider. George Howard Scarboro was operating it; it fell, and in the fall he was fatally injured.

Four. Attached to the policy is an Aviation Exclusion Rider, which is a part thereof. The judgment entered herein setting forth the findings of facts and conclusions of law does not set forth this rider, but refers to it as a part of the policy. This is a copy of the Aviation Exclusion Rider attached to and made a part of Policy No. 393980 on the life of George Howard Scarboro:

"AVIATION EXCLUSION RIDER

Death of the Insured as a result of travel or flight in or descent from or with any kind of aircraft is a risk not assumed under this policy.

(a) If the Insured is a pilot, officer, or other member of the crew of such aircraft, is giving or receiving any kind of training or instruction, or has any duties whatsoever aboard such aircraft while in flight; or

(b) If the aircraft is operated for any aviation training; or

(c) If the aircraft is maintained or operated for military or naval purposes.

APPEAL by plaintiff from *Stevens, J.*, February-March Civil Term 1955 of ROBESON.

Civil action on a policy of insurance issued by defendant on the life of George Howard Scarboro, wherein plaintiff Elizabeth McLean Scarboro is named as beneficiary.

The parties agreed to waive a jury trial, and that the Trial Judge should find the facts and declare the law arising thereon.

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Death of the Insured as a result of travel or flight in or descent from or with any kind of aircraft is a risk not assumed under this policy.

(a) If the Insured is a pilot, officer, or other member of the crew of such aircraft, is giving or receiving any kind of training or instruction, or has any duties whatsoever aboard such aircraft while in flight; or

(b) If the aircraft is operated for any aviation training; or

(c) If the aircraft is maintained or operated for military or naval purposes.

"AVIATION EXCLUSION RIDER

Death of the Insured as a result of travel or flight in or descent from or with any kind of aircraft is a risk not assumed under this policy.

(a) If the Insured is a pilot, officer, or other member of the crew of such aircraft, is giving or receiving any kind of training or instruction, or has any duties whatsoever aboard such aircraft while in flight."

There is no evidence or finding of fact that George Howard Scarboro "was giving or receiving any kind of training or instruction." As plaintiff states in her brief "George Howard Scarboro was flying alone for his own purposes, namely for pleasure." The Judge found as a fact that he was operating a single-seated aircraft, known as a glider, when it fell to earth, and in its fall he was fatally injured.

Plaintiff contends that the word "crew" used in the RIDER means "the company of airmen who man an aircraft"; that the words "or other member of the crew" refer back to and limit the words "pilot, officer," "and incorporates them into the general category, which follows, namely, "other members of the crew"; and that the language used means pilot, officer, of a crew of airmen. Plaintiff further contends that, considering the words of the RIDER as a whole, the words "any kind of aircraft" refer to mechanical species of aircraft, and do not cover a single-seated glider as here; and that the words "such aircraft" refer to that species of aircraft. Plaintiff further contends that George Howard Scarboro was not a pilot of a crew, had no duties whatsoever aboard the glider while in flight, and that she is not excluded from recovering the face value of the policy by any provision of the RIDER.

Attached to this policy and made a part thereof is a double indemnity provision for death through external, violent and accidental means, but "the agreement as to benefits under this provision shall be null and void if death occurs . . . (b) as the result of travel or flight in or descent from any species of aircraft if (I) the insured is a pilot, officer or other member of the crew of such aircraft, is giving or receiving any kind of training or instruction, or has any duties whatsoever aboard such aircraft while in flight, . . . , or (III) the aircraft is operated other than by a duly licensed or certified pilot in the course of his regular employment in the transport of passengers for wages or salary . . . ." It is to be noted that plaintiff in her complaint did not seek to recover on the double indemnity provision of the policy.

It is clear that the usual, ordinary and commonly accepted meaning of the word "glider" is that it is a form of aircraft. It is so defined in Webster's New International Dictionary, 2nd Ed.: *"Aeronautics.* A form of aircraft similar to an airplane, but, without any engine."

2 C.J.S., Aerial Navigation, Section 2, in Pocket Parts, gives the same definition. In *Spychala v. Metropolitan Life Ins. Co.*, 339 Pa. 237, 13 A. 2d 32, the Court said: "It thus appears that a glider is a type of airplane which is not equipped with a motor . . . ."

It is equally clear that George Howard Scarboro was pilot of this glider when it fell. In *Wilmington Trust Co. v. Mutual Life Ins. Co.*, 177 F. 2d 404, the Court said: "A few months later while on a test flight in California in a glider piloted by a Colonel Gabel, duPont was forced to bail out and was killed when his parachute failed to open." Webster's New International Dictionary 2d Ed. defines the word "pilot": "*Aeronautics.* One who flies, or is qualified to fly, a balloon, an airship, or an airplane." See also 29 Am. Jur., Insurance, Sec. 968; *Irwin v. Prudential Ins. Co. of America*, 5 Fed. Supp. 382, (1934) U.S. Av. R. 77.

In our opinion, the language of the AVIATION EXCLUSION RIDER is clear that the word "aircraft" therein used includes a single-seated glider, and there is no ambiguity in that respect.

In *Provident Life & Acc. Ins. Co. v. Anderson*, 166 F. 2d 492, the Court said: "Limitations as to war risks and aviation risks are often placed in the same section or clause of an insurance policy and the courts have been inclined to construe each type of limitation as if it were a separate and distinct provision. The mere circumstance that all the exclusions are placed in one sentence is not vital as long as no ambiguity is thereby created."

In this RIDER this risk is not assumed: "(a) If the insured . . . has any duties whatsoever aboard such aircraft while in flight." The same words are used in the double indemnity provision of the policy. These words are plain, clear, and specific and create no ambiguity, nor do any other words used in the policy create any ambiguity in respect to these words.

"In the absence of statute, the ordinary rules of negligence and due care obtain with respect to the operation of aircraft. The degree of care required of one not carrying passengers for hire is ordinary care, that is, that degree of care which the great mass of men, or an ordinarily prudent or reasonably careful person, would use under the same or similar circumstances." 6 Am. Jur., Aviation, Sec. 60. See also 2 C.J.S., Aerial Navigation, Sec. 19.

In *Smith v. Metropolitan Life Ins. Co.*, 29 N.J. Super. (Appellate Division) 478, 102 A. 2d 797, the Court said: "Surely, if any one has 'duties' relating to an aircraft, its travel or flight, it is the licensed pilot thereof."

"The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to pro-

tect others from harm, and calls a violation of that duty negligence." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551.

A glider is not an inherently dangerous instrument on the ground, although in flight, when improperly used or improperly handled or in the hands of an incompetent pilot, it may be. It seems plain that the law imposed upon George Howard Scarboro the duty while piloting this glider in flight to exercise ordinary care to avoid injury to persons and property in the air and upon the ground, and particularly in returning to earth. Such being the law, upon the facts found by the Judge, the unfortunate death of George Howard Scarboro as a result of injuries received by him, when this glider piloted by him fell to earth, was not a risk assumed by the defendant, and the ruling of the Trial Judge was correct.

If the AVIATION EXCLUSION RIDER had used the words, "If the Insured is a pilot, officer, *and* other member of the crew," it might be that the word "other" would restrict the meaning of the word "pilot," so as to mean a pilot who is a member of a crew. See *City of St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462, pp. 465-6. However, the RIDER uses the words "or other member of the crew." This creates no ambiguity. The risk is not assumed under the RIDER if the insured is: (1) a pilot, (2) an officer, (3) or other member of the crew, or (4) has any duties whatsoever aboard such aircraft while in flight. George Howard Scarboro was pilot of a glider, whose fall to earth resulted in his fatal injuries. The specific words of the AVIATION EXCLUSION RIDER exclude his death from the risk assumed by defendant under the policy.

We have examined the case of *Ezell v. Atlantic Life Ins. Co.*, 119 F. Supp. 614, strongly relied upon by plaintiff. In that case the language of the "Exclusion of Certain Aviation Risks" is not identical to the one here, and in the *Ezell Case* the two riders to the policies "were not as all inclusive as the double indemnity rider attached to each policy." The *Ezell Case* is factually distinguishable.

A contract of insurance, like any other contract, is to be interpreted, and enforced according to the terms of the policy, and, unless such terms are ambiguous, they will be interpreted according to their usual, ordinary and commonly accepted meaning. *Haneline v. Casket Co.*, 238 N.C. 127, 76 S.E. 2d 372; *Johnson v. Casualty Co.*, 234 N.C. 25, 65 S.E. 2d 347.

It is our duty to construe policies of insurance as written, and not to rewrite them. *Ford v. Insurance Co.*, 222 N.C. 154, 22 S.E. 2d 235.

The AVIATION EXCLUSION RIDER states: "The provision of this policy relating to incontestability shall not be construed to require payment by the Company of any amount in excess of that provided in

this rider, if death of the Insured occurs under any of the circumstances set forth herein."

Plaintiff makes no contention in her brief that the costs were improperly taxed.

The ruling below is

Affirmed.

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

GARNET HATCHER v. LUTHER J. CLAYTON AND OWEN PASS.

(Filed 30 June, 1955.)

1. Automobiles §§ 16, 18h (2)—

Evidence, considered in the light most favorable to plaintiff, tending to show that plaintiff was standing 7 or 8 feet from the hard surface on the west side of a highway, and, while his attention was attracted to the south, was struck by a vehicle approaching from the north, *is held* sufficient to be submitted to the jury on the issue of negligence of the operator of the vehicle.

2. Automobiles § 24½e—

Admission by one defendant that he owned the vehicle driven by another and involved in the accident is sufficient to require submission of the issue of agency to the jury. G.S. 20-71.1.

3. Appeal and Error § 29—

Assignments of error in support of which no argument is stated or authority cited are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

4. Appeal and Error § 38—

When the charge of the court is not in the record, it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts.

5. Appeal and Error § 39e—

The exclusion of testimony cannot be held prejudicial when the record fails to disclose what the witness would have testified had he been permitted to answer the questions.

6. Same—

Where the driver and the owner of a vehicle make common defense in an action to recover for alleged negligent operation of the vehicle, and the driver, while under examination in his own behalf, testifies in detail as to the absence of conversation or arrangement between him and the owner

with reference to his use of the truck on the occasion in question, the exclusion of his testimony on his examination by the owner as to the absence of such conversation or arrangement, cannot be prejudicial.

7. Automobiles § 18g (5)—Testimony of tracks may be competent as corroborative evidence of location even though tracks are not identified as those of defendant's vehicle.

It was admitted that plaintiff, a pedestrian, was struck by a vehicle operated by one of the defendants and owned by the other. The controversy was as to whether plaintiff, at the time of the impact, was standing on the hard surface or was standing some 7 or 8 feet on the shoulder of the road, as testified to by plaintiff. *Held:* Testimony of a witness that some 4 hours after the accident he inspected the scene and saw footprints of a man and tire tracks of a vehicle some 6 to 8 feet off the hard surface in the wet earth, is competent for the purpose of corroborating plaintiff's testimony as to where he was standing when struck, the testimony not being offered for the purpose of identifying the footprints as plaintiff's, or the tire tracks as those of defendant's vehicle.

8. Trial § 17—

Where testimony is competent for the purpose of corroboration, its general admission will not be held for error in the absence of a request by the adverse party that its admission be restricted. Rule of Practice in the Supreme Court No. 21.

APPEAL by defendant Pass from *Sharp, Special J.*, November Term, 1954, of PERSON.

Action commenced 23 November, 1951, for damages on account of personal injuries sustained by plaintiff when struck by a truck owned by defendant Pass and operated by defendant Clayton.

Plaintiff alleged that his injuries were caused by the negligence of Clayton in the operation of the Pass truck; that Clayton, the driver, was the employee of Pass and was then and there acting within the scope of his employment and in performance of the duties thereof; and that, on account of his injuries, he was entitled to recover from defendants damages in the amount of $35,750.00. Defendant Pass denied that Clayton was negligent in any of the respects alleged, and denied the alleged agency, and pleaded that plaintiff's injuries were caused solely by his own negligence or, in any event, plaintiff's negligence contributed thereto. The answer of defendant Clayton does not appear in the record.

The collision occurred 8 December, 1950, between 6:30 and 7 o'clock a.m., just outside the corporate limits of Roxboro, near the intersection of N. C. Highway 501 and Pointer Street. Clayton operated the truck from his home to said highway, thence south along said highway to the point of collision. His only stop was at Clegg's Grocery and Service Station, where he picked up Clyde Brown. Clegg's place was estimated

to be "about 150 or more yards from the intersection," also "some 100 or 200 feet" north of the point of collision.

Plaintiff lived on Pointer Street. Plaintiff walked along Pointer Street to said highway, where he expected to catch a bus or "get a ride with someone else" to his place of work. According to plaintiff, he had known Clayton some twelve months and "had ridden with him one time before the accident and had ridden with others on various occasions."

Plaintiff testified: "There was a spot on the shoulder of the highway about seven or eight feet from the hard surface which was not so muddy and I stood on that spot. . . . I stood there waiting for the bus to take me to work when I saw the truck . . . stop and pick up Clyde Brown. The truck then proceeded towards where I was standing going in a southerly direction. It was some 125 feet away when I heard a Model A Ford at a filling station south of where I was standing make a terrible noise. I looked in that direction. It was opposite from the direction in which Mr. Pass' truck was coming." According to plaintiff, he knew nothing thereafter until he regained consciousness in the Roxboro Hospital some days later.

Thus, plaintiff's allegations and evidence are based on the theory that he was standing at a safe place on the west side of the hard surfaced portion of said highway, seven or eight feet therefrom, when Clayton without warning operated the truck to his right, leaving the hard surfaced portion of said highway and moving onto the shoulder to the spot where plaintiff was standing.

According to Brown and Clayton, plaintiff had ridden with Clayton "a dozen times" or "about eight or ten times" before the morning of the accident. As Clayton put it, "when he rode with me I was 'custom to picking him up where Pointer Street comes out into 501." On this particular morning, Clayton, according to his testimony, "looked in the Pointer Street intersection and could not see Mr. Hatcher anywhere." Clayton testified further that it had been raining, that it was foggy, and that he was blinded by the lights of approaching cars. Both Clayton and Brown testified that the truck did not leave the hard surfaced portion of said highway. Brown was riding on the right side of the truck. Brown testified: "The first time I saw Mr. Hatcher, the plaintiff was about three feet away standing on the edge of the hard surface about one foot or eighteen inches out on the concrete and I called to Mr. Clayton, saying 'Hatcher.' The front wheels, fender and all missed the plaintiff."

State Highway Patrolman Palmer, a witness for defendants, testified that he received word of the accident at 6:45 o'clock a.m. and went to the intersection of said highway and Pointer Street. He testified that mud from Pointer Street, then unpaved, had washed onto said highway.

He testified further that he found some skid marks of a dual wheel truck on the hard surface, five feet from the edge of the hard surface. He testified: "I did not see any signs of a dual truck wheel track along the shoulder of the road. . . . I do not recall whether there were any people's tracks there or not. There were no car tracks, no vehicle tracks there."

Thus, defendants' allegations and evidence are based on the theory that the truck never left the hard surfaced portion of the highway but that plaintiff came onto the highway and walked or ran against the side of the truck.

The court submitted issues as to negligence, contributory negligence, agency and damages. The jury answered all issues in favor of plaintiff, awarding damages in the amount of $12,750.00.

The court signed judgment on the verdict against both defendants. Defendant Pass excepted and appealed, assigning errors.

Donald J. Dorey, Beam & Beam, and Gholson & Gholson for plaintiff, appellee.

R. B. Dawes and Davis & Davis for defendant Pass, appellant.

BOBBITT, J. The evidence, when considered in the light most favorable to plaintiff, was sufficient in our opinion to warrant submission thereof to the jury on the issue as to the alleged negligence of Clayton. Admittedly, Pass owned the truck operated by Clayton. Such admission was sufficient to require submission of the issue of agency to the jury. G.S. 20-71.1; *Davis v. Lawrence, post,* 496, and cases cited. Assignments of error directed to the denial of appellant's motions for judgment of nonsuit are overruled. Indeed, they are deemed abandoned; for no reason or argument is stated and no authority is cited in appellant's brief in support thereof. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544; *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

The charge of the trial court was not included in the record on appeal. Hence, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; *Todd v. Mackie,* 160 N.C. 352, 76 S.E. 245.

Appellant's assignments of error #3 and #4 are based on exceptions 7-12, inclusive. Assignment #3 asserts that the court erred in excluding testimony of Clayton, the alleged agent; and assignment #4 asserts that the court erred in denying to appellant his right to a full cross-examination of Clayton.

As to exceptions 7, 8, 10 and 11, relating to instances where the court sustained objections to questions asked Clayton by appellant's counsel, the record fails to show what the witness would have testified had he

been permitted to answer. Hence, there is no basis for a consideration of these exceptions. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342.

The question involved in exception 9 is as follows: "Mr. Clayton, state whether or not Mr. Pass gave you any instructions on the afternoon of the 7th of December through the 8th of December when you came back in respect to performing any service for him?" If the witness had been permitted to answer, he would have said, "No."

The question involved in exception 12 is as follows: "Mr. Clayton, at the time this accident occurred on December 8, 1950, were you performing any service for the defendant, Owen Pass?" If the witness had been permitted to answer, he would have said, "No."

While the defendants filed separate answers, they made common cause in the defense of plaintiff's action. Thus, when Clayton, after *direct* examination by his separate counsel, was turned over to appellant's counsel for examination, the true character of such examination was that of further *direct* examination rather than cross-examination. No attempt was made by appellant's counsel to impeach Clayton or discredit his testimony.

The court permitted Clayton, while under the examination by appellant's counsel, to testify that he performed no work for Pass from the time he got home on the afternoon of 7 December, 1950, until he left home on 8 December, 1950. Moreover, Clayton testified that he was using the Pass truck "for transportation," that is, as a means of travel between his home and his place of work. Too, when examined by his own separate counsel, Clayton gave detailed testimony of the arrangements he had made with Breeze, appellant's foreman, as to Clayton's use of the Pass truck. All the evidence tended to show that there was no conversation or arrangement between Clayton and Pass, personally, with reference to plaintiff's use of the Pass truck. Moreover, the question involved in exception 9 would seem to require a "yes" or "no" answer to a conclusion rather than a fact.

No prejudicial error being made to appear, said assignments of error #3 and #4 are overruled.

Assignments of error #1 and #2 are based on exceptions 1-5, inclusive. These assignments assert that the court erred in permitting Harold Hatcher to testify, concerning footprints and tire tracks and marks, as set out below.

Harold Hatcher, plaintiff's son, testified that Clayton came to his house about 7:30 a.m. and told him "that he had hit my father with the truck"; that he went first to the hospital to see his father; that, upon leaving the hospital, he went to the place where the accident occurred; and that his observations there were made between 10 and

10:15 a.m. He testified, over objection by appellant, as follows: "On the morning of the accident I went down Pointer Street to No. 501 and, as I said awhile ago, I saw the footprints of a man. I saw the tracks there. They were approximately six to eight feet off the west side of the hard surface . . . Later on, I saw the tracks, the marks of a dual wheel truck where they had run off the hard surface. It first ran off approximately 45 feet from where the footprints of a man were."

Appellant contends that Harold Hatcher's testimony, set out above, should have been excluded on the ground that the footprints were not sufficiently identified as plaintiff's footprints and the tracks were not sufficiently identified as those of Pass' dual wheel truck, citing *McAbee v. Love,* 238 N.C. 560, 78 S.E. 2d 405; *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908; *S. v. Ormond,* 211 N.C. 437, 191 S.E. 22; *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169; *S. v. Young,* 187 N.C. 698, 122 S.E. 667; Annotation: Admissibility of evidence as to tire tracks or marks on or near highway, 23 A.L.R. 2d 112 *et seq.*

But this testimony was not offered to identify the Pass dual wheel truck as the vehicle that struck and injured plaintiff. This was admitted. The case, in point of fact, turned largely on this crucial question, viz.: Was plaintiff on the west shoulder of the highway when struck as contended by him or on the hard surfaced portion thereof as contended by appellant?

Conceding that Harold Hatcher's testimony was insufficient to identify the footprints and the dual wheel tracks, yet testimony as to *a man's footprints* and as to *dual wheel tracks* where plaintiff contended he was standing when hit was relevant and competent as tending to corroborate the testimony of plaintiff; and testimony as to the absence of *a man's footprints* and of *dual wheel tracks* at such location was relevant and competent as tending to corroborate the testimony of defense witnesses. Harold Hatcher did not attempt to identify the footprints and the dual wheel tracks. The significance of the testimony is in the fact that a failure to show the presence of, as well as testimony tending to show the absence of, *any such footprints and tracks* on the shoulder of the highway after a rain would be a circumstance tending strongly to discredit plaintiff's testimony. Harold Hatcher's testimony, being relevant and competent as corroborative evidence as indicated, was properly admitted. The appellant was entitled, had he so requested, to have the jury instructed to consider this testimony only for the restricted purpose of corroboration. Stansbury, N. C. Evidence, sec. 79. In the absence of such request, its admission without restriction cannot be successfully challenged. Rule 21, Rules of Practice in the Supreme Court, 221 N.C. 558; *S. v. Cole, supra; S. v. Eason, ante,* 59, 86 S.E. 2d 774; *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449.

As stated above, there was sharp conflict in the evidence. The issues were duly submitted to the jury under instructions presumed correct. The verdict and judgment must be upheld, for we find no error in law sufficient to warrant a new trial.

No error.

MARY BENNETT ATKINSON AND HUSBAND, JOHN D. ATKINSON, PETITIONERS, v. ELEANOR BENNETT BENNETT AND HUSBAND, JOHN R. BENNETT, RESPONDENTS.

THE SCOTTISH BANK, A CORPORATION, ADMINISTRATOR OF EMILY P. BENNETT, DECEASED, PLAINTIFF, v. MARY BENNETT ATKINSON AND HUSBAND, JOHN D. ATKINSON, AND ELEANOR BENNETT BENNETT AND HUSBAND, JOHN R. BENNETT, AND MRS. AVIS F. NELSON, DEFENDANTS.

(Filed 30 June, 1955.)

1. Descent and Distribution § 13—

While a parent cannot change into an advancement that which was intended as a gift at the time of delivery, a parent may change into a gift that which was at the time of delivery intended as an advancement, and where more than a year after an alleged advancement, the parent executes a deed conveying all of her property in equal division between two of the children, without providing for advancements previously made, the asserted advancement to one of them should not be taken into account in the division of the property conveyed by the deed.

2. Same—

A gift to a child cannot be considered in applying the doctrine of advancements.

3. Same—

A child must account for advancements in order to share by inheritance or by distribution in the real estate and personal property owned by the parent at death, and therefore it must be ascertained that the parent left property before the question of advancements can arise.

4. Appeal and Error § 40d—

Where insufficient findings of fact appear of record to support the judgment, the judgment must be reversed and the cause remanded for further proceedings.

APPEAL by defendants Eleanor Bennett Bennett and John R. Bennett, from *Grady, E. J.*, January 1955 Civil Term, ROBESON Superior Court.

The cause first captioned above is a special proceeding instituted in Columbus County on 13 March, 1952, in which the petitioners ask that eight specifically described tracts of land and three additional lots be partitioned between Mary Bennett Atkinson and the respondent

Eleanor Bennett Bennett, and that in the division Eleanor Bennett Bennett be charged with $28,500 alleged to have been advanced to her by Emily P. Bennett.

The second cause captioned above is a civil action instituted in the Superior Court of Robeson County on 16 June, 1953, by the Scottish Bank, Administrator of Emily P. Bennett, against Mary Bennett Atkinson and Eleanor Bennett Bennett and their husbands, praying for judgment against the Bennetts for (1) $28,500 advanced; (2) for possession and power to sell 140 shares of stock in Avant and Sholar, Inc., and other property belonging to the estate of Emily P. Bennett to pay taxes and costs of administration.

In their petition in the first cause, the Atkinsons allege (1) that Mrs. Mary Bennett Atkinson and her sister, Mrs. Eleanor Bennett Bennett, are the owners as tenants in common (each having a one-half interest) in certain real estate in Columbus County consisting of eight described tracts and, in addition, lots Nos. 15, 16 and 17 in the subdivision of the Gore property; (2) that Eleanor Bennett Bennett has been advanced the sum of $28,500 for which she should be required to account in the division.

In their answer and cross-action in the partition proceeding, the Bennetts allege (1) that Mrs. Emily Bennett conveyed the described lands to Mrs. Atkinson and Mrs. Bennett, and in addition she conveyed all her personal property to them; (2) that all personal property has been divided except a certificate of stock in Avant & Sholar, Inc.; (3) that Mrs. Bennett has never been advanced any sum whatsoever; (4) that in addition to the lands described in the petition, Mrs. Bennett and Mrs. Atkinson are equal owners of 35/100 interest as tenants in common of two additional tracts described in the cross-action which should also be included in the partition.

In the second action, the Scottish Bank, Administrator, alleges (1) that taxes are due on the estate of Mrs. Emily P. Bennett in the estimated sum of $30,000, including penalties and interest, and the estate is without funds with which to pay these assessments and the costs of administration; (2) that plaintiff's intestate owned 35/100 interest in two tracts of land in Columbus County (referring to a registered deed for description); (3) that Mrs. Eleanor B. Bennett has received $28,500 from Emily P. Bennett as a loan or advancement which is an asset of the plaintiff administrator; (4) that Mrs. Emily P. Bennett owned 140 shares of stock in Avant & Sholar, Inc., worth more than $30,000; (5) that the plaintiff administrator is entitled to the possession of the personal property and to the rents and profits from the real estate to the end that plaintiff may pay off and discharge the tax liability and costs of administering the estate.

The Atkinsons filed answer to the administrator's complaint, alleging (1) that Mrs. Emily P. Bennett conveyed the 35/100 interest in the Columbus County lands to Mrs. Atkinson and Mrs. Bennett who are the owners thereof; (2) that the stock in Avant & Sholar, Inc., was owned by Mrs. Emily P. Bennett, but that it should be divided in the settlement of the estate equally between Mrs. Atkinson and Mrs. Bennett; (3) that Mrs. Eleanor B. Bennett was advanced $28,500 for which she should account.

The Bennetts filed answer to the administrator's complaint, alleging (1) that plaintiff's intestate did not own the 35/100 interest in the described lands in Columbus County, but that same were conveyed to Mrs. Atkinson and Mrs. Bennett by deed from their mother, Emily P. Bennett; (2) that the shares of stock in Avant & Sholar, Inc., do not belong to the estate; (3) that shortly before her death Mrs. Emily P. Bennett conveyed by deed all her property, both real and personal, (including the stock in Avant & Sholar, Inc.) to Eleanor B. Bennett and Mary B. Atkinson in equal shares; (4) that Emily P. Bennett, before making the deed on 28 October, 1949, made a gift of $23,500 to John R. Bennett, husband of Eleanor B. Bennett, for the purchase of a theatre and fixtures, for which neither John R. Bennett nor Eleanor B. Bennett should be required to account; (5) that more than three years elapsed between the date of the gift and the date the action was instituted, and that recovery is barred by the lapse of time and the three-year statute of limitations.

The partition proceeding in Columbus County and the administrator's action in Robeson County were "by consent consolidated for trial and the Columbus County case was, by order of the court, transferred to Robeson County. Thereafter, by consent, W. Osborne Lee was appointed referee to hear the evidence and report his findings of fact and conclusions of law."

The referee held hearings at which much testimony was taken relating to the contentions of the parties. In material substance so much of the evidence as the record discloses may be summarized as follows:

Mrs. Emily P. Bennett died intestate in Columbus County on 12 November, 1949, leaving as her heirs at law and distributees, three daughters: Mrs. Avis F. Nelson, Mary Bennett, now the wife of John D. Atkinson, Eleanor Bennett, now the wife of John R. Bennett. Mrs. Nelson has been fully advanced and does not assert any claim whatever to any property involved in these cases.

Prior to June, 1948, John R. Bennett and wife, Eleanor, lived in the home of the latter's mother, Mrs. Emily P. Bennett. John R. Bennett made plans to move to Winston-Salem to work for McLean Trucking Company. In order to provide a job for John R. Bennett so that he

and Eleanor would remain in Whiteville, Mrs. Emily Bennett delivered to him $23,500 in cash for the purchase of a theatre and fixtures in a nearby town. The lot cost $10,000, the title to which was taken in the name of John R. Bennett. The fixtures cost $13,500, the bill of sale for which was taken in the name of John R. Bennett and wife, Eleanor Bennett. Later, Eleanor Bennett received a check for Building and Loan stock which her mother had purchased in the sum of $5,000, for which she has not accounted. These transactions all took place prior to October, 1949.

On 28 October, 1949, Mrs. Emily P. Bennett executed a deed (not included in the record) which, according to the evidence of Clayton C. Holmes, attorney who drew it, conveyed property to her two daughters, Mrs. Atkinson and Mrs. Bennett. "It was her (Mrs. Emily P. Bennett) instructions and intentions that the two daughters should have all her property, share and share alike . . . at that time she and I both understood that I had included in this deed, which deed is dated October 28, 1949, now of record in Columbus County in Book 186 at page 373, that it included the Avant & Sholar property and later found out it didn't, and another deed was executed to the same effect." The deed also contained the following: "Also a one-half interest to said Eleanor Bennett and one-half interest to said Mary E. Bennett (now Mrs. Atkinson) in and to all the personal property and mixed property of every nature, description and kind, including automobiles, household and kitchen furnishings, stocks, bonds, notes, and money which the said party of the first part owns or in which she has any interest."

The referee made findings of fact and stated as his conclusions of law based thereon, the following:

1. That it was intended and a *prima facie* presumption arose that the defendants John R. Bennett and Eleanor Bennett Bennett should repay the aforesaid moneys ($23,500).

2. That the cause of action set out by the plaintiff and the defendants Atkinson is not barred by the statute of limitations pleaded.

3. That the plaintiff administrator is entitled to recover of the defendants John R. Bennett and Eleanor Bennett Bennett the sum of $23,500 with interest on $13,500 from 25 February, 1948, until paid, and interest on $10,000 from 2 July, 1948, until paid, both at the rate of six per cent per annum.

The Atkinsons filed exceptions to the report, contending the referee committed error in failing to hold Mrs. Eleanor Bennett Bennett was advanced $28,500 instead of $23,500 as found by the referee. The Bennetts filed exceptions to the findings and conclusions that Mrs. Bennett had been advanced any sum whatsoever, contending that the money delivered by Mrs. Emily P. Bennett to John R. Bennett was a gift, or at most a loan which was barred by the statute of limitations.

On appeal, the Judge of the Superior Court made findings of fact set forth in 13 numbered paragraphs and stated the following conclusions of law:

1. That John R. Bennett and Eleanor B. Bennett should repay $28,500 with interest from the death of Mrs. Emily P. Bennett.

2. That the cause of action is for advancements and is not barred by the statute of limitations.

3. That the property should be partitioned between Mary Bennett Atkinson and Eleanor Bennett Bennett, first allowing to Mrs. Atkinson property of the valuation of $28,500, and the remainder equally divided.

To certain of the findings of fact and all the conclusions of law above stated, John R. Bennett and Eleanor B. Bennett filed specific exceptions and appealed, assigning errors.

McLean & Stacy for respondents, appellants.

Varser, McIntyre & Henry for defendants Atkinson, appellees.

HIGGINS, J. The pivotal question in this case is whether the money delivered by Mrs. Emily P. Bennett to John R. Bennett ($28,500 according to the Atkinsons, $23,500 according to the Bennetts) was an advancement to Eleanor B. Bennett or a gift to John R. Bennett. Bearing on the main question and necessary to its solution are certain issues raised by the pleadings. These secondary, though apparently controlling issues are omitted from the findings, conclusions, and judgment of the trial court.

The pleadings raise the question whether the deed executed by Mrs. Emily P. Bennett on 12 November, 1949, conveyed *all her property,* both real and personal, to Mary B. Atkinson and Eleanor B. Bennett to be equally divided between them. The deed is not a part of the record. The only evidence bearing on the question is the testimony of Mr. Holmes, who drew the deed. "It was her instructions and intention that the two daughters should have all the property, share and share alike." It does not appear that she owned any other property at the time of her death and it cannot be presumed that she did. *Headen v. Headen,* 42 N.C. 159.

Assuming, but not deciding, the mother made an advancement in June or July, 1948, to her daughter, Eleanor B. Bennett, as found by the trial court, and on 28 October, 1949, executed and delivered a warranty deed conveying all her property to her daughters, Mary B. Atkinson and Eleanor B. Bennett, to be equally divided between them, can the advancement be taken into account in the division of the property conveyed by the deed, or do the terms of the deed control? In making the deed without providing for advancements previously made, did not

the parent cancel out the advancement in so far as the property conveyed by the deed is concerned? While a parent cannot change into an advancement that which was intended as a gift at the time of delivery, there is no apparent reason why a parent cannot by deed change into a gift that which was at the time of delivery intended as an advancement. *Prevette v. Prevette,* 203 N.C. 89, 164 S.E. 623; *Parker v. Eason,* 213 N.C. 115, 195 S.E. 360.

For another reason equally compelling, we must hold as error the trial court's conclusion and order that in the division of property conveyed by the deed Mrs. Atkinson first must be allotted property of the value of $28,500 and the remainder be equally divided. Under G.S. 29-2, a child must account for advancements in order to share by inheritance or by distribution in the real estate and personal property owned by the parent at the time of death. The child must first put into hotchpot that which has been advanced in order to share in the undisposed of property which the parent left. The child may elect to keep that which has been advanced, but in so doing he is excluded from sharing further until the other children have been made equal. To quote further from *Headen v. Headen, supra,* "It is true the Act does not provide for the case of advancement to the same child of both kinds of property (real and personal); and it was not necessary to do so in order to give effect to the purpose of the Legislature; which was to establish perfect equality in division of intestate's whole estate, real and personal, among his children, *excepting only that no property given by a parent to a child is in any case to be taken away.*" (Emphasis added.) The case from which the above is quoted has often been cited with approval—the last time in *King v. Neese,* 233 N.C. 132, 63 S.E. 2d 123.

The preliminary question, whether there is any property to divide, must be answered in the affirmative before the question of advancements arises. Since an affirmative answer does not appear in the record (except by allegation without proof) the case must go back for a further hearing. If further inquiry discloses the mother left an estate, any advancements must be made up to Mrs. Atkinson, first from personalty, if sufficient; if not, then from realty under the formula given in *King v. Neese, supra.* Ahead of advancements must come the cost of settling the estate, including taxes.

The judgment ordering that Mrs. Atkinson be allotted $28,500 of the property embraced in the deed before equal division shall begin is without support, either in fact or in law, must be reversed. *Thigpen v. Bank,* 203 N.C. 291, 165 S.E. 720; *Keith v. Silvia,* 233 N.C. 328, 64 S.E. 2d 178.

It is realized, of course, that the able lawyers who prepared the record and briefs did so in the light of their detailed and intimate knowledge of the facts in the case. The record was prepared in the light of such background. The learned judge who rendered the judgment had the benefit of the transcript of all the testimony developed in the hearings as well as unlimited time to hear arguments. The appellate court, in the nature of things, does not have these advantages. On the record as here presented, we deem it necessary to reverse the judgment and remand the case for further hearing and judgment not inconsistent with this opinion.

Reversed and remanded.

R. L. BROWN, JR., JOHN B. MORRIS, JR., J. HEATH MORROW, FRANK N. PATTERSON, JR., CHARLES W. PICKLER, AND H. WELLS ROGERS, TRUSTEES OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, AND CLAUDE GRIGG, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE ALBEMARLE CITY ADMINISTRATIVE UNIT, v. ELIZA JANE DOBY AND J. LILLIAN DOBY.

(Filed 30 June, 1955.)

1. Process § 6: Eminent Domain § 14—

In a summary proceeding for the condemnation of land under G.S. 115-85, the provision of the statute that nonresident landowners may be served by publication does not preclude service by publication on resident landowners upon a proper showing under the provisions of G.S. 1-98, *et seq.*

2. Process § 6—

It is sufficient for an affidavit for service by publication to allege the ultimate fact that after due diligence personal service on the defendant could not be had in the State, without statement of any of the probative or evidentiary facts to support the conclusion of due diligence. In the present case it appeared of record that evidentiary facts showing due diligence were before the clerk, but in the absence thereof it will be presumed, ordinarily, from the clerk's order that sufficient probative facts were presented to and found by the clerk to sustain the order. G.S. 1-98.4 (a).

APPEAL by defendants from *Gwyn, Regular Judge* holding the courts of the Thirteenth Judicial District, at Chambers in Monroe, 28 February, 1955. From STANLY.

Special proceeding by Trustees and Superintendent of Albemarle City Administrative School Unit to acquire by condemnation a school site.

The plaintiffs are invoking the summary procedure prescribed by G.S. 115-85 for the acquisition of the school site. The land sought to be condemned is located in Stanly County. The defendant landowners

are residents of Davidson County. Notice, pursuant to G.S. 115-85, was served on each of the defendants by the Sheriff of Davidson County on 1 October, 1954, advising them that application would be made to the Clerk of the Superior Court of Stanly County at his office in the courthouse in Albemarle at a designated hour on 8 October, 1954, for the appointment of appraisers to lay off the school site and assess its value.

On 6 October, 1954, the defendants herein instituted an independent action in the Superior Court of Stanly County against the present plaintiffs and obtained from Judge Armstrong a temporary order of injunction, restraining the plaintiffs herein from proceeding further with the condemnation proceeding. However, on 13 October, 1954, the temporary order of injunction was dissolved by Judge Clarkson. Following this, the plaintiffs in the other action, defendants herein, submitted to a judgment of voluntary nonsuit, and the injunction action was dismissed.

Thereafter, on 20 November, 1954, the plaintiffs herein by petition applied to the Clerk of the Superior Court of Stanly County under G.S. 115-85 for the appointment of appraisers to lay off and assess the value of the school site. Efforts were made to have the defendants served with summons and copies of the petition by the Sheriffs of Davidson and Stanly Counties. Neither defendant was found and each Sheriff made return indicating by appropriate memorandum his inability to find either defendant in his county. Following this, R. L. Brown, Jr., one of the individual plaintiffs, filed an affidavit praying for service by publication. The Clerk entered an order directing that the defendants be served by publication, and they were so served. The notice of service allowed the defendants until 25 January, 1955, in which to appear and answer the plaintiffs' petition.

On 22 January, 1955, the defendants through counsel entered a special appearance and moved to dismiss the proceeding on the ground that the court had not acquired jurisdiction over the persons of the defendants by service of valid process.

The Clerk overruled the motion and entered an order adjudging that the defendants have been served with process according to law. From the order of the Clerk, the defendants appealed to the Judge of the Superior Court (G.S. 1-272). Whereupon the Clerk, as required by G.S. 1-274, prepared his statement of case on appeal for transmittal to the Judge. The statement so prepared includes the contents of these documents: (1) the original notice served on the defendants by the Sheriff of Davidson County on 1 October, 1954; (2) the proposed application intended to be filed 8 October, 1954; and (3) the judgment roll in the injunction action instituted by the defendants herein against the present plaintiffs.

The defendants, as permitted by G.S. 1-274, filed objections to various portions of the statement and certificate of the Clerk. The objections relate in the main to the references to the original notice personally served on the defendants by the Sheriff of Davidson County and to the judgment roll in the injunction action.

On appeal, all the defendants' objections to the Clerk's statement were overruled, and Judge Gwyn found and concluded in substance: (1) that notice was served upon the defendants pursuant to G.S. 115-85; (2) that the defendants by instituting the independent injunction action against the plaintiffs herein submitted to the jurisdiction of the court in the instant condemnation proceeding; and (3) that the defendants have been "served with summons and process . . ." Thereupon an order was entered affirming the Clerk's decision and decreeing that the defendants have been served with process as provided by law.

From the order so entered the defendants appeal, assigning errors.

Morton & Williams for plaintiffs.

Charles E. Knox, Robert G. Sanders, and J. C. Sedberry for defendants.

JOHNSON, J. Decision here requires nothing more than a determination of the two basic questions raised by the defendants' motion to dismiss the proceeding for want of jurisdiction. In the motion, as lodged with the Clerk, the defendants assert as alternate grounds for dismissal: (1) that since they are residents of this State, the summary procedure prescribed by G.S. 115-85 for the condemnation of a school site does not sanction service of process by publication upon them; but (2), if so, in any event, the affidavit on which publication was made is fatally defective and does not confer jurisdiction for the reason that it fails to set forth facts sufficient to support the Clerk's finding of fact that the defendants cannot, after due diligence, be found within the State. Both grounds urged by the defendants are untenable. We discuss them *seriatim*.

1. *The question whether the defendants are amenable to service of process by publication.*—The defendants contend that since G.S. 115-85 expressly provides that where land sought to be condemned is "owned by a nonresident of the State, . . . notice to such nonresident owner shall be given . . . by publication . . .," it follows by implication that where the landowners, as here, are residents of the State, they are amenable only to personal service of process, and not to service by publication. We know of no rule of statutory construction which would sustain any such interpretation of G.S. 115-85. But be this as it may, our general statute which fixes the scope of service of process by pub-

lication expressly provides as follows: "As used in G.S. 1-98 through G.S. 1-108, 'process' includes summons, order to show cause and any other order or notice issued in any action or special proceeding, legal service of which is a requisite to the relief sought." Section 1, Chapter 919, Session Laws of 1953, now codified as New G.S. 1-98 (1953 Supplement). Therefore it is manifest that the statutes relating to service of process by publication (G.S. 1-98 through 1-108) as amended by Chapter 919, Session Laws of 1953, apply to a resident defendant in a condemnation proceeding under G.S. 115-85 no less than to such defendant in any other special proceeding. Both tribunals below were correct in holding that the defendants are amenable to service of process by publication in this proceeding. The authorities cited by the defendants are distinguishable.

2. *The question whether the plaintiffs' affidavit is sufficient to support the order of publication.*—Here, we limit discussion to the scope of the defendants' attack on the affidavit, which is that it does not allege sufficient facts to justify the Clerk's finding of fact that due diligence was exercised to locate the defendants within the State. Again, the defendants' position is untenable. Our examination of the affidavit discloses a four-page narrative of numerous unavailing efforts made by the plaintiffs and by process officers of Davidson County to locate the defendants for the purpose of effecting personal service. In addition to the foregoing recital of evidentiary facts bearing on the question of due diligence, the affidavit contains this allegation of ultimate fact as to such diligence: "That after due diligence, personal service cannot be had within the State of North Carolina on the defendants, or either of them."

Our statutory requirement as to proof of diligence is that the "pleading or separate affidavit" shall *state* "That, after due diligence, personal service cannot be had within the State." G.S. 1-98.4 (a), as rewritten by Chapter 919, Session Laws of 1953.

While there is authority to the contrary in other jurisdictions (Annotation, 21 A.L.R. 2d 929; 42 Am. Jur., Process, Section 93), we adhere to the rule that the allegation of the mere ultimate fact of due diligence, substantially in accord with the language of the statute, without statement of any of the probative or evidentiary facts, is sufficient to support an order of publication. *Simmons v. Simmons,* 228 N.C. 233, 45 S.E. 2d 124; *Bethell v. Lee,* 200 N.C. 755, 158 S.E. 493. See also *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138. Where the ultimate fact of due diligence is alleged substantially in the language of the statute and the clerk orders publication, ordinarily the presumption obtains that sufficient probative facts were presented to and found by the clerk to sustain the order. See *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391; *Hall v.*

Coach Co., 224 N.C. 781, 32 S.E. 2d 325; *In re Sams*, 236 N.C. 228, 72 S.E. 2d 421; *Vestal v. Vending Machine Exchange*, 219 N.C. 468, 14 S.E. 2d 427.

In the case at hand the affidavit states the ultimate fact of due diligence substantially in the language of the statute. G.S. 1-98.4 (a). This suffices to meet minimum requirements with us. Hence it is not necessary to discuss the sufficiency of the probative facts alleged in the affidavit, though they appear to be adequate. Annotation: 21 A.L.R. 2d 929.

The adjudication below to the effect that the defendants have been duly served with process will be upheld on the ground that they have been served by publication.

In this view of the case we do not reach for decision the remaining assignments of error, including those relating to (1) the refusal of the court to allow the defendants' "objections" to the form and content of the Clerk's statement of case on appeal; (2) the finding and conclusion that the defendants were served personally with notice within the purview of G.S. 115-85; and (3) the finding and conclusion that they submitted to the jurisdiction of the court "in the matter now pending" by instituting the independent action to enjoin the plaintiffs herein from proceeding with the original condemnation proceeding. The questions raised by all these assignments of error are moot in view of the ground upon which we rest decision. Therefore, further discussion is unnecessary. The order entered below will be upheld on the ground announced. It is so ordered.

Affirmed.

HENRY D. CAUDLE, ADMINISTRATOR OF THE ESTATE OF HENRY GERALD CAUDLE, v. SOUTHERN RAILWAY COMPANY.

(Filed 30 June, 1955.)

1. Railroads § 4—

In this action to recover for the death of a passenger in a car, killed in a collision between the car and defendant's train at a grade crossing as the result of the alleged negligence of the railroad company, the evidence *is held* sufficient to be submitted to the jury upon the issue of negligence.

2. Death § 8—

The measure of damages for the loss of human life is the present value of the net pecuniary worth of the deceased based upon his life expectancy.

3. Same—

In an action for wrongful death, the net pecuniary worth of the deceased is to be ascertained by deducting from the probable gross income to be

derived from his own exertions the probable cost of his own reasonably necessary personal living expenses over the period of his life expectancy.

4. Same—

In an action for wrongful death, the jury, in ascertaining the probable gross income of the deceased, may take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was engaged and the means he had for making money.

5. Same—

In an action for wrongful death, the jury, in ascertaining the probable cost of deceased's necessary living expenses during the period of his life expectancy, may take into consideration the deceased's age and manner of living.

6. Same—

In an action for wrongful death, the jury, in ascertaining deceased's life expectancy, may take into consideration the mortuary tables as evidence, along with other evidence as to his health, constitution and habits.

7. Same—

The present value of the net pecuniary worth of a deceased is the value of his net pecuniary worth in terms of a lump sum presently paid rather than when paid from time to time during the deceased's life expectancy.

8. Same—

In this action for wrongful death, the court instructed the jury that only the present pecuniary worth of the deceased might be awarded as damages, without further instruction in regard to the present value of deceased's net pecuniary worth. *Held:* The charge, when taken in connection with the court's final instructions relating to the conflicting contentions of the parties as to the net pecuniary worth of deceased, must be held for prejudicial error as tending to augment the recovery in a substantial sum in leaving the impression that the undiminished net pecuniary worth of deceased might be awarded as damages.

9. Appeal and Error §§ 6c (6), 39f—

While ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it.

APPEAL by defendant from *Phillips, J.*, September 1954 Term of FORSYTH.

Civil action by administrator to recover damages for alleged wrongful death.

Plaintiff's intestate, eighteen years of age, was killed in a collision between an automobile in which he was riding and one of defendant's trains.

The collision occurred 4 November, 1952, about 8:35 a.m., within the city limits of Winston-Salem, where 27th Street crosses defendant's line from Winston-Salem to North Wilkesboro. Brown, the owner-operator of the automobile in which plaintiff was riding, was traveling east on 27th Street. Defendant's train was traveling north towards North Wilkesboro.

Plaintiff alleged that 27th Street was a much traveled street, in a populous section; and that traveling east on 27th Street the view to the right was obstructed by a large warehouse located on the south side of 27th Street and on the west side of the single railroad track. Plaintiff alleged further that the collision was caused by the negligence of the defendant in that (1) there was no watchman at the crossing; (2) there was no automatic signal or other warning device at the crossing indicating the approach of a train; (3) no warning of its approach was given from the train by whistle, bell or otherwise; (4) the train approached and entered upon the crossing at an unlawful and excessive speed; and (5) those in charge of the train failed to exercise due care to keep a proper lookout for, or to keep the train under control so as to avoid injuries to, persons and vehicles approaching and on the crossing.

Answering, defendant denied all allegations of negligence; pleaded contributory negligence on the part of plaintiff's intestate; and pleaded further that the negligence of Brown, the operator of the automobile, was the sole cause of the collision and insulated the negligence, if any, of the defendant.

Plaintiff offered evidence tending to support the allegations of the complaint. At the conclusion of plaintiff's evidence, defendant moved for judgment of nonsuit. The court overruled this motion. Defendant offered no evidence. Thereupon, the cause was submitted to the jury on plaintiff's evidence.

The jury answered the issues of negligence and contributory negligence in favor of plaintiff and awarded damages in the amount of $29,000.

Judgment for plaintiff was entered on the verdict. Defendant excepted and appealed, assigning as error the denial of its motion for judgment of nonsuit and designated portions of the charge.

Elledge & Johnson for plaintiff, appellee.

W. T. Joyner and Womble, Carlyle, Martin & Sandridge for defendant, appellant.

BOBBITT, J. A majority of this Court is of opinion that the evidence offered by plaintiff was sufficient, when considered in the light most

favorable to him, to require submission of the case to the jury. Hence, the assignment of error directed to the denial of defendant's motion for judgment of nonsuit is overruled. Since a new trial is awarded for reasons stated below, we refrain from a discussion of the evidence presently before us. *Harrison v. Kapp,* 241 N.C. 408, 85 S.E. 2d 337; *Davis v. Finance Co., ante,* 233, 87 S.E. 2d 209.

In his initial instructions to the jury on the issue relating to damages, the trial judge, with minor variations, used the language of this Court as set forth in *Carpenter v. Power Co.,* 191 N.C. 130, 131 S.E. 400, in giving a general statement of the rule as to the measure of damages applicable in wrongful death actions. G.S. 28-174; *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194; *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49. The only reference to the element of present value is in this sentence: "It is only the present worth of the pecuniary injury resulting from the wrongful death of the deceased that may be awarded the plaintiff."

In the decisions cited and others of like import the measure of damages, and the successive steps by which the jury is to arrive at the amount of its award, are as set out below.

The measure of damages for the loss of a human life is the *present value* of the *net pecuniary worth* of the deceased based upon his *life expectancy.*

The *net pecuniary worth* of the deceased is to be ascertained by deducting from the probable gross income to be derived from his own exertions the probable cost of his own reasonably necessary personal living expenses over the period of his life expectancy.

In ascertaining the probable gross income to be derived from his own exertions during the period of his life expectancy, the jury may take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was engaged and the means he had for making money.

In ascertaining the probable cost of his reasonably necessary personal living expenses during the period of his life expectancy, the jury may take into consideration his age and manner of living.

In ascertaining his *life expectancy,* the jury may take into consideration the mortuary tables, as evidence, along with other evidence as to his health, constitution and habits.

Having thus ascertained the *net pecuniary worth* of the deceased over the period of his *life expectancy,* the *present value* of such *net pecuniary worth,* that is, its value now in terms of a lump sum presently paid rather than from time to time during his life expectancy, is the amount of damages to be awarded.

The trial judge explained to the jury, in relation to the facts, the elements to be considered in determining the *life expectancy* of the deceased and in determining the *net pecuniary worth* of the deceased over the period of his life expectancy. However, no further instruction of law was given bearing upon the final essential element, namely, that the jury's award should be the *present value* of the net pecuniary worth over the period of his life expectancy. We need not decide whether this omission, standing alone, would constitute prejudicial error. But we are constrained to hold that such omission was prejudicial when considered in connection with the court's statements of the contentions of plaintiff and defendant, respectively, viz.:

"Now, the plaintiff insists and contends that if you would take away from his earnings all but $1,000 a year of his earnings, in other words, that if he would save $1,000 a year for his life expectancy under the mortuary tables, which would be 43½ years, in other words, if he made enough to keep himself and then $1,000 a year over, that in 43 and five-tenths years his estate would be deprived of $43,500 in that length of time; that if he had lived longer than that, why then it might have gone up to $50,000; and the plaintiff insists and contends that $1,000 a year savings would not be much for a young man of his ability, his educational qualifications, his appearance, his character, his ability to earn in the future, and that it is not asking much at your hands to award him $50,000, which would be $1,000 a year that he would save if he reached the age of 68 years, which in all probability he would have reached, or maybe longer, but even under the mortuary tables he had an expectancy of 43½ years. Therefore, the plaintiff insists and contends that you should answer this issue in a substantial amount and pay to his estate the net pecuniary value of his estate, after deducting his reasonable and usual living expenses from his earnings, and say then what his estate would be worth if he had been permitted to live for his expectancy of life.

"Now, the defendant, on the other hand, insists and contends that even if you answer this issue in favor of the plaintiff, that you shouldn't answer it in any large amount; that your answer to this issue should be in a modest amount; that not many people, even with high school educations, and if they lived out their life expectancy, which all of them do not do, that very few of them save, not so many of them, few of them save as much as $50,000 during their lifetime after paying their ordinary expenses, and that he could have been killed the next year in an automobile wreck, or he could have been killed ten years from now in an automobile wreck, or he could have died of some disease in the meantime, and that in all probability he wouldn't have reached his life expectancy under the mortuary tables, or any appreci-

able years in the future, and that you shouldn't give him the maximum of what you could draw from his expectancy, but you should take all things into consideration and give only a reasonable amount, which would be much less than $50,000 as asked for by the plaintiff."

The quoted statements of the respective contentions were the final instructions to the jury relating to the issue of damages. In explicit and understandable terms the question for decision by the jury was drawn sharply into focus; but in so doing the trial judge inadvertently failed to mention the essential element of present value. Rather, we apprehend that the jury must have understood that its task was to determine the amount plaintiff's intestate would have accumulated or saved had his life not been cut short by his untimely death.

The aforesaid omission of the court below when instructing the jury as to the law in relation to the facts, together with the statement of contentions quoted above, brings the case within the rule that "while ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it." *Blanton v. Dairy*, 238 N.C. 382, 77 S.E. 2d 922; *Harris v. Construction Co.*, 240 N.C. 556, 82 S.E. 2d 689.

We therefore hold that the instructions given did not sufficiently explain to the jury that its award should be the *present value* of the net pecuniary worth over the period of life expectancy. The difference between such net pecuniary worth and the present value thereof, particularly in respect of a person eighteen years old, is so great that the prejudicial effect of the instructions is apparent. So, for the error indicated, a new trial is awarded.

We refrain from discussion of other assignments of error directed to the charge. The questions presented thereby may not recur when the case is tried again.

New Trial.

MRS. OLLIE C. ELLIOTT v. BOBBY KILLIAN AND A. E. KILLIAN AND A. E. KILLIAN AS GUARDIAN AD LITEM FOR BOBBY KILLIAN.

(Filed 30 June, 1955.)

1. Automobiles § 25—

The "family purpose car doctrine," which is based upon the principle of *respondeat superior*, is well settled law in North Carolina.

2. Automobiles § 24½c—

Where plaintiff alleges agency and introduces proof that at the time of the accident the automobile was registered in the name of the father of

the driver, plaintiff makes out a *prima facie* case of agency by virtue of G.S. 20-71.1, sufficient to overrule the father's motion to nonsuit, and to support, but not require, a verdict against him upon the issue of agency.

3. Automobiles § 25—Evidence of agency under family car doctrine held sufficient.

Evidence tending to show that the automobile in question was registered in the name of the father, that the father signed a note for the balance of the purchase price and permitted the son to drive the car whenever he wanted to, that a policy of liability insurance on the car was issued in the father's name as owner, that the father drove the car upon occasion and that his wife and daughter rode therein with the son driving, *is held* sufficient to be submitted to the jury on the issue of the liability of the father under the family purpose doctrine, notwithstanding the father's evidence tending to show that the son bought the car with his own money and that the title and insurance were taken out in the father's name solely because of the son's minority.

4. Trial § 30—

Defendant is not entitled to a directed verdict as a matter of law upon an issue upon which the evidence is conflicting.

APPEAL by the defendant A. E. Killian from *Crissman, J.*, January Term 1955 of FORSYTH.

Civil action for damages for personal injuries caused by the alleged actionable negligence of the defendant Bobby Killian, an infant, in the operation of an alleged family purpose automobile owned by his father, the defendant A. E. Killian.

The jury found in response to the first, third and fourth issues that plaintiff was injured by the negligence of the defendant Bobby Killian, as alleged in the complaint, that she was not guilty of contributory negligence, and was entitled to recover damages in a substantial amount. The second issue submitted to the jury with their answer thereto is as follows: "Was the defendant, A. E. Killian, the owner of the 1940 Ford automobile driven by the defendant, Bobby Killian, on December 12, 1953, which was involved in this collision; did he keep and maintain it for the use and convenience of members of his family, and was the defendant, Bobby Killian, operating the automobile at the time of the collision within the scope of such purpose? Answer: Yes."

Judgment was entered upon the verdict.

The defendant A. E. Killian appeals as an individual defendant, and not in his representative capacity as guardian *ad litem* for his son, the defendant Bobby Killian, and assigns error.

Deal, Hutchins & Minor for Plaintiff, Appellee.

Ratcliff, Vaughn, Hudson, Ferrell & Carter for Defendant, Appellant.

PARKER, J. We have before us for determination only the appeal of A. E. Killian as an individual. There is no appeal by the defendant Bobby Killian.

Two exceptive assignments of error are set out in the defendant A. E. Killian's brief. One, did the court err in overruling the motions for judgment of nonsuit made by the defendant A. E. Killian as an individual defendant at the close of the plaintiff's evidence, and renewed by him at the close of all the evidence? Two, did the court err in denying the motion of the defendant A. E. Killian for a directed verdict on the second issue submitted to the jury?

A. E. Killian's other exceptions appearing in the Record, but not set out in his brief, are taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544.

No motions for judgment of nonsuit were made by the defendant Bobby Killian. It would seem that there was ample evidence of his actionable negligence to carry the case to the jury. The charge of the court is not brought forward in the Record.

The evidence, considered in the light most favorable to the plaintiff, tends to show the following: On 12 December 1953 plaintiff was struck and severely injured by a 1940 Ford automobile, Motor No. 18-5512227, driven by the defendant Bobby Killian, a 17-year old son of the defendant A. E. Killian. A North Carolina Certificate of Title on this automobile had been issued to Mrs. Mattie Adams by the State Department of Motor Vehicles. On the back of this Certificate of Title is an assignment of title on this automobile on 12 July 1952 by Mrs. Adams to A. E. Killian, which assignment was subscribed and sworn to by Mrs. Adams before a Notary Public. On the same date A. E. Killian subscribed and swore to before a Notary Public an application to the State Department of Motor Vehicles for a new Certificate of Title on this Ford automobile. In this application A. E. Killian stated he was the purchaser of this Ford automobile. On 13 July 1952 the State Department of Motor Vehicles issued to A. E. Killian a Certificate of Title on this Ford automobile, pursuant to his application. On 12 December 1953 this Ford automobile was registered in the name of A. E. Killian in the records of the State Department of Motor Vehicles. A. E. Killian testified that a Certificate of Title to this Ford automobile, which his son, Bobby Killian, was driving when it struck plaintiff, was issued to him.

A. E. Killian took out a policy of liability insurance on this Ford automobile in his name as owner. His witness, J. Theron Walsh, testified that he wrote this policy in A. E. Killian's name, and the classification was "C," which required a higher rate premium. This classification means that the automobile was used by a young driver as prin-

cipal operator. The premium on this policy had been paid three times: twice by Bobby Killian, once by A. E. Killian.

Bobby Killian was attending a local school, lived in his father's home, and his father provided for him room and board. This automobile was kept at A. E. Killian's home. A. E. Killian testified he didn't have any idea as to how many times he had driven this car a short distance. He also testified: "I never refused to let Bobby use that car when he wanted to." A. E. Killian's wife and 15-year old daughter, who lived with her parents, have frequently ridden in this automobile with Bobby Killian driving—the daughter 95% of the time she rode in it was going to school.

The purchase price of this automobile was $374.00. Bobby Killian paid $224.00 of the purchase price, and A. E. Killian signed a note for the remainder, and paid some on the note. A. E. Killian has stood for repairs on this automobile.

A. E. Killian's evidence tends to show these facts: That Bobby Killian paid nearly all of the purchase price of this automobile from his earnings delivering papers. That A. E. Killian signed a note for the remainder of the purchase price of the automobile because of his son's infancy. That for the same reason title to this automobile was taken in his name. That it was his son's automobile and he exercised no control over it. That Bobby Killian paid for its operation and repairs, and two of the three insurance premiums. That he used it only with his son's permission. That his wife and daughter rode in it only when Bobby was driving.

The "family purpose car doctrine" is well settled law in North Carolina. *Matthews v. Cheatham,* 210 N.C. 592, 188 S.E. 87; *Ewing v. Thompson,* 233 N.C. 564, 65 S.E. 2d 17.

This Court said in *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603: "The very genesis of the family purpose car doctrine is agency, and that the question here presented is governed by the rules of principal and agent and of master and servant." As set forth in the early case of *Tyree v. Tudor,* 181 N.C. 214, 106 S.E. 675, and as so clearly stated by *Hoke, J.,* in *Robertson v. Aldridge,* 185 N.C. 292, 116 S.E. 742, this doctrine is based upon the principle of *respondeat superior.*

G.S. 20-71.1 reads in part: "(b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment; Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within one year after his

cause of action shall have accrued." Plaintiff was injured on 12 December 1953. She commenced this action 26 January 1954.

"G.S. 20-71.1 establishes a rule of evidence, but does not relieve a plaintiff from alleging and proving negligence and agency." *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462.

Plaintiff sues on the theory that the 1940 Ford automobile was a family purpose car, and that Bobby Killian was a member of A. E. Killian's family and she relies on the rule of evidence created by the part of the statute quoted above, which makes proof of the registration of this Ford automobile in the name of A. E. Killian *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct A. E. Killian was legally responsible.

Plaintiff has *allegata* and *probata* of negligence and agency, and her evidence shows that this Ford automobile was registered in the name of A. E. Killian at the time of plaintiff's injury. As to A. E. Killian, by virtue of G.S. 20-71.1, this makes out a *prima facie* case of agency which will support, but does not require a verdict against him upon the doctrine of *respondeat superior,* for any damages assessed against Bobby Killian. *Hartley v. Smith,* 239 N.C. 170, 70 S.E. 2d 767; *Spencer v. Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598.

If plaintiff had not had the benefit of the above statute, it would seem that she has sufficient evidence to carry her case to the jury. *Matthews v. Cheatham, supra; Goode v. Barton,* 238 N.C. 492, 78 S.E. 2d 398.

The lower court properly overruled the motions for judgment of nonsuit.

By virtue of G.S. 20-71.1, plaintiff's evidence has made out a *prima facie* case of ownership of the Ford automobile by A. E. Killian and of his responsibility for the conduct of its operation. A. E. Killian has offered conflicting evidence. Such being the case, the defendant was not entitled to a directed verdict on the second issue as a matter of law. *Perry v. Trust Co.,* 226 N.C. 667, 40 S.E. 2d 116; *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871; *R. R. v. Lumber Co.,* 185 N.C. 227, 117 S.E. 50.

The facts in the cases of *Travis v. Duckworth,* 237 N.C. 471, 75 S.E 2d 309, and *Osborne v. Gilreath, supra,* are distinguishable.

We conclude that the verdict and judgment should be upheld.

No Error.

STATE v. THOMAS DAVIS AND BILLY CATHEY.

(Filed 30 June, 1955.)

1. **Robbery § 3—**

An indictment for robbery with firearms will support a conviction of a lesser offense, such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. G.S. 15-169, G.S. 15-170.

2. **Same: Criminal Law § 53g—Evidence held to require submission of question of defendants' guilt of lesser degrees of crime charged.**

In this prosecution for robbery with firearms, defendants' evidence tended to show that whatever money they took from the prosecuting witness was not taken with use or threatened use of firearms, and further, was taken with the assent of the prosecuting witness for the purpose of buying whiskey, and all the evidence tended to show that thereafter defendants and the prosecuting witness spent the night at a certain house and that they were all drinking whiskey there, the only conflict of evidence in this respect being as to whether the parties arrived at the house at the same time. *Held:* Defendants' exception to the failure of the court to instruct the jury with respect to lesser degrees of the crime charged is sustained.

3. **Criminal Law § 81c (5)—**

Error in failing to submit to the jury the question of defendants' guilt of lesser degrees of the crime charged is not cured by a verdict of guilty as charged.

APPEAL by defendants from *Phillips, J.*, January Term, 1955, of GUILFORD (Greensboro Division).

This is a criminal action tried upon a bill of indictment charging that the defendants Thomas Davis and Billy Cathey, with the use and threatened use of certain firearms, to-wit: a pistol, did unlawfully take from the person of Fred Fuller the sum of $18.00.

The evidence for the State tends to show that on the evening of 24 December, 1954, the prosecuting witnesses Fred Fuller and Clarence Cousins met in the eastern section of Greensboro and went to the Southside Cafe; that it was about 11:30. Fred Fuller left Clarence Cousins at the cafe and walked toward the corner of Bennett and Gorrell Streets. The defendant Thomas Davis approached Fred Fuller with a gun and ordered him back down the street where Davis and Fuller met Clarence Cousins and Billy Cathey; that Cathey had a knife and while Davis pointed the pistol at Fuller, the defendant Cathey searched Fuller's clothing and took approximately $18.00 from him. That the defendants also took $8.00 from Cousins. That while detaining the prosecuting witnesses, Fuller was knocked down and cut on the hand by a knife held by Cathey; that when Cathey and Davis

were arrested several days later they admitted they were the individuals who stopped the prosecuting witnesses on the night of 24 December, and that they were the ones who took the money from the prosecuting witnesses.

The defendants' evidence tends to show that they were at the Southside Cafe on the night of the alleged incident; that the State's witnesses Fuller and Cousins were also present; that during a disturbance an entertainer at the cafe gave a pistol to Cathey, who in turn gave it to Davis. That Fred Fuller was drinking and looked "like he was about knocked out." Cathey and Davis made inquiry of Cousins if he had a gun for sale, stating that they wanted to buy one. Cousins told them that Fred Fuller had one. Fred left, and Cousins said, "Let's go, Fred has left." That Davis, Cathey and Cousins started down Bennett Street to catch up with Fred Fuller. That Clarence Cousins was calling him and when they got up with Fuller that "Clarence started searching him. . . . He patted him down, got his wallet out, looked in it, said he's got $6.00. So Clarence said, 'Let's get a pint of whiskey.' Fred said, 'O. K., give me a dollar back.' " Then all of them went and purchased the whiskey, went to the home of Beatrice Ivey on Tuscaloosa Street and drank it together and spent the night together.

The defendants denied that they told the police officers that they were the ones who robbed Fuller and Cousins. They admitted that Davis had a pistol in the pocket of his coat but denied that it was displayed or used in any manner at the time of the alleged incident.

The evidence of the State and of the defendants tends to show that the prosecuting witnesses and the defendants did spend the night at the home of Beatrice Ivey, and that they were drinking whiskey at her home. The only conflict of evidence in this respect is as to the time the parties arrived at the Ivey house. Beatrice Ivey testified that Billy Cathey and Thomas Davis came to her house that night and that Fred Fuller and Clarence Cousins came approximately one-half hour later.

The jury returned for its verdict, guilty as charged and recommended the mercy of the court.

From the judgment imposed, the defendants appeal, assigning error.

Attorney General McMullan and Asst. Attorney General Moody, for the State.

Elreta Melton Alexander, for the appellants.

DENNY, J. The defendants' assignment of error No. 42 is based on their exception to the failure of the court to charge the jury with

respect to the lesser degrees of the crime charged. It is provided in G.S. 15-169 as follows: "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 . . . ."

It is further provided in G.S. 15-170 that, "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." *S. v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130; *S. v. Burnette,* 213 N.C. 153, 195 S.E. 356; *S. v. Robinson,* 188 N.C. 784, 125 S.E. 617.

An indictment for robbery with firearms will support a conviction of a lesser offense such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *S. v. Holt,* 192 N.C. 490, 135 S.E. 324.

The evidence adduced in the trial below was in such sharp conflict as to what happened at the time of the alleged robbery with respect to the use of firearms and otherwise, that the defendants were entitled to have the trial judge instruct the jury with respect to the lesser degrees of the crime charged. *S. v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *S. v. Holt, supra; S. v. Efird,* 186 N.C. 482, 119 S.E. 881; *S. v. Williams,* 185 N.C. 685, 116 S.E. 736; *S. v. Merrick,* 171 N.C. 788, 88 S.E. 501; *S. v. Nash,* 109 N.C. 824, 13 S.E. 874. If the jury should believe the evidence of the defendants, then whatever money Clarence Cousins took from Fred Fuller was not taken with the use or threatened use of firearms. Moreover, the fact that the defendants were found guilty as charged did not cure the error of the court in failing to submit to the jury the question of the defendants' guilt of less degrees of the crime charged. *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733.

The defendants have 48 additional assignments of error, several of which are not without merit. Even so, the errors complained of may not occur upon another trial and no useful purpose would be served by considering them on this appeal.

The defendants are entitled to a new trial, and it is so ordered.

New Trial.

C. W. HIGGINS AND J. ERLE McMICHAEL, D/B/A HIGGINS & McMICHAEL, v. KEITH M. BEATY.

(Filed 30 June, 1955.)

1. Attorney and Client § 10—

Where an attorney is employed to represent a client in specific matters at a specified fee, and before the matters are concluded, the attorney is discharged by the client without just cause, and the attorney remains ready, able and willing to comply with the contract, the attorney may recover of the client the full contract fee, and not merely the reasonable value of his services to the date of his discharge.

2. Trial § 31e—

The mere statement by the court of the valid contentions made by the respective parties, cannot be held for error as an expression of opinion by the court as to the credibility of the witness and weight of the evidence. G.S. 1-180.

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

APPEAL by defendant from *Phillips, J.*, at September 20, 1954 Term, of FORSYTH.

Civil action to recover on contract for professional service in particular criminal prosecutions in Federal Courts.

Plaintiffs allege in their complaint, and upon trial in Superior Court offered evidence tending to show, summarily stated, that during the latter part of May, 1952, the plaintiffs, residents of Forsyth County, North Carolina, engaged in the general practice of law as partners under the firm name of Higgins & McMichael, and the defendant, resident of Mecklenburg County, North Carolina, "entered into a contract by which C. W. Higgins, one of the plaintiffs, would represent Keith M. Beaty and his brother E. M. Beaty in the trial of indictment against them in the District Court of the United States for the Western District of North Carolina, then pending in the Charlotte Division of said court; that it was agreed that defendant Keith M. Beaty would pay the firm of Higgins & McMichael the sum of $25,000.00 for their services as attorneys in the cases; that it was agreed that a retainer fee of $10,000.00 should be paid immediately, and that payments on the remaining $15,000.00 should be made from time to time as the preparations for trial proceeded and before trial"; that defendant, in partial compliance with the contract, paid the total sum of $7,500.00, leaving a balance of $17,500.00 due thereon; that for the 14 months succeeding the professional employment of plaintiffs, by defendant as aforesaid, C. W. Higgins spent approximately one-third of his time and incurred considerable expense in furtherance of plaintiff's under-

taking under the contract of employment with defendant; that on 11 August, 1953, defendant notified plaintiffs that he no longer intended to use their professional services—that he was terminating his contract with them; that plaintiffs have been at all times ready, willing, and able to comply with and complete the performance of their contract with defendant according its terms and every part thereof, and have so performed their part of said contract except in so far as they have been prevented from so doing by the termination and repudiation thereof by defendant.

And plaintiffs further allege that the termination of the contract by defendant was wrongful, without just cause or excuse, and in direct violation of the terms thereof; and that defendant is justly indebted to them in the sum of $17,500.00 which he unlawfully declines and refuses to pay after repeated demands made upon him for the payment thereof.

And upon the trial plaintiffs offered testimony of others which they contend corroborates their evidence in respect to matters alleged in the complaint; and plaintiffs further offered evidence tending to show that at the time defendant Keith M. Beaty was talking to them about employment defendant told Higgins that "they were claiming from him income tax and penalties and interest that amounted to $2,400,000.00"; that plaintiff Higgins appeared in trial of E. M. Beaty in District Court and in Circuit Court of Appeals; and that case against Keith M. Beaty had not been called for trial on 11 August, 1953, when defendant terminated the contract as aforesaid.

On the other hand, defendant, in answer filed, answering the allegations of the complaint, "admits: (1) that in May, 1952, he and his brother E. M. Beaty engaged the professional services of the plaintiff C. W. Higgins for the cases against the defendant and his brother in the District Court of the United States for the Western District of North Carolina, then pending in the Charlotte Division of the District"; (2) "that he paid to the plaintiff C. W. Higgins the total sum of $7,500.00"; (3) "that he notified the plaintiff C. W. Higgins that he did not desire his further services"; and (4) that "the plaintiffs have demanded that he pay them additional fees and that he has not complied with their demand." He denies all other allegations of the complaint, and avers, and upon trial in Superior Court testified in substance, that "the total sum of $7,500.00 . . . was the total amount of the fee agreed upon between him and the plaintiff C. W. Higgins for all of the services to be rendered by C. W. Higgins in the cases against the defendant and his brother."

The case was submitted to the jury upon these issues, which the jury answered as indicated:

"1. Did the plaintiffs and the defendant enter into the contract, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant wrongfully breach said contract, as alleged in the complaint? Answer: 'Yes.'

"3. Were the plaintiffs ready, able and willing to comply with said contract, as alleged in the complaint? Answer: 'Yes.'

"4. What damages are plaintiffs entitled to recover of the defendant? Answer: '$17,500.00.' "

Judgment was entered in accordance with the verdict, and defendant excepted thereto and appeals to Supreme Court and assigns error.

R. F. Crouse, T. C. Bowie, Jr., Wade E. Vannoy, Jr., for plaintiffs appellees.

McDougle, Ervin, Horack & Snepp for defendant appellant.

WINBORNE, J. Appellant in brief filed in this Court states only two questions as being involved on this appeal.

The first: "Where an attorney accepts employment to represent a client in specific matters at a specified fee, and before the matters are completed the attorney is discharged by the client, may the attorney recover of the client the full contract fee, or only the reasonable value of his services to the date of his discharge?" While no North Carolina decision is cited, and we find none, treating of this particular subject, the majority of decided cases in other jurisdictions hold to the view that in such case in an action for breach of contract the correct measure of damages is the entire agreed fee. Counsel for appellant concedes that this is true, but cites other cases holding that the measure of damages in such a case is the reasonable value of services rendered to the date of the discharge.

The theory of the trial in case in hand was in accordance with the rule first above stated. And this Court holds that this is the sounder view.

In this connection text writers say that "Where the employment of an attorney is under an express valid contract stipulating for the compensation which the attorney is to receive for his services, such contract is, generally speaking, conclusive as to the amount of such compensation." 5 Am. Jur. 378, Attorney at Law Section 195.

Moreover, it seems to be held generally that an attorney, before he undertakes employment by a client, may contract with reference to compensation for his services; that no confidential relation then exists and the parties deal with each other at arm's length; that such contracts are not within the rule of presumption against the attorney which obtains in contracts between the attorney and client after the

relation has been established; that a contract made under such circumstances is as valid and unobjectionable as if made between other persons not occupying fiduciary relations, and who are, in all respects, competent to contract with each other. 5 Am. Jur. 356, Attorney at Law Section 159.

Again, we find it said: "If . . . the action is for damages for breach of the contract in which a definite compensation is fixed, the measure of recovery is . . . held to be the full contract price agreed upon . . . provided, in the case of an employment for a fixed time, that the attorney remained ready and willing to perform, and capable of doing so, during the period of the contract." 5 Am. Jur. 382, Attorney at Law Section 202.

The second question: "Did the trial court's statement of certain of plaintiff's contentions, as set out in the record, amount to the expression of an opinion as to the credibility of witnesses and weight of the evidence, which is prohibited by G.S. 1-180?" A reading of the record discloses that the trial judge stated contentions, not only those made by plaintiffs, but those made by the defendant. And there is nothing in the record and case on appeal to show that the contentions as stated by the judge were not actually made by the respective parties. Error in this respect is not made to appear.

Hence in the trial below, we find

No Error.

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

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, PETITIONER, v. DORIS C. PARDINGTON, WIDOW; COUNTY OF FORSYTH, AND CITY OF WINSTON-SALEM, RESPONDENTS.

(Filed 30 June, 1955.)

Eminent Domain § 17—Acceptance by respondents of voluntary payment by petitioner of award fixed by commissioners settles question of compensation.

Petitioner excepted to the report of commissioners assessing compensation for lands taken in a special proceeding under G.S. 136-19, on the ground that the award was excessive, and respondents excepted thereto on the ground that the amount was inadequate. Thereafter, petitioner sent to the clerk a check in the amount of damages assessed by the commissioners, which check was marked "in payment of the award of commissioners." Petitioner, on motion, was adjudged entitled to possession as a matter of law "prior to any payment being made for said land." *Held:*

HIGHWAY COMMISSION *v.* PARDINGTON.

Under G.S. 136-19, petitioner was not required to make payment before taking possession, and therefore such payment was voluntary and constituted an offer of payment in full or a deposit, depending upon the intent, which, under the facts of this case, constituted an offer of payment in full, which, upon acceptance by respondents, settled the question of compensation and waived and surrendered any right of petitioner to take exception to the commissioners' report.

APPEAL by petitioner from *Crissman, J.*, at March 1955 Term, of FORSYTH.

Special proceeding instituted under provisions of G.S. 136-19 for the purpose of acquiring certain lands of respondent Pardington, described in the petition, for use as part of right of way for a certain public highway, and to ascertain and determine the compensation for the taking.

The record on this appeal discloses that the respondent Doris C. Pardington filed an unverified answer in which she admitted that petitioner had the right to condemn the property set out in the petition, and she prayed that commissioners be appointed by the court, as provided in such cases, and demanded full compensation for the taking, with the right to be heard by the commissioners before filing their report, as is allowed by law.

The record also shows that the commissioners, or jury of view, appointed by the Clerk of Superior Court, for the purpose of assessing compensation, and after hearing, "assessed the damages sustained by the owner of the property by the actual land taken at $13,747.50," as shown in report dated 22 November, 1954; and that on 3 December, 1954, petitioner excepted to the report of the commissioners on the ground that the amount thereof is excessive, and on 6 December, 1954, respondent Pardington excepted to the report on the ground that the amount thereof is inadequate.

In the meantime, as both the Clerk of Superior Court and the Judge of the Superior Court, on appeal from order of the Clerk, find:

"On December 1, 1954, the Clerk of the Superior Court of Forsyth County received a letter dated November 30, 1954, over signature of General Counsel of petitioner, reading as follows: 'November 30, 1954.
Re: NCSHPWC v. Doris C. Pardington et al
Forsyth County

'Dear Mr. Church: Attached hereto is Voucher No. 838736 on the State Highway and Public Works Commission in the amount of $13,747.50. This check is in payment of the award of commissioners in the above captioned case.'

"Enclosed with such letter was . . .

'VOUCHER
838736

'In Payment of the Award of Commissioners in SH&PWC v. Doris C. Pardington et al—$13,747.50.

'Memorandum R. Brookes Peters, General Counsel.'

"Said payment was voluntary; petitioner did not designate such payment as a deposit; nor did petitioner attempt on or prior to such payment to reserve any rights of exceptions or appeal or otherwise. Petitioner did not notify respondent Pardington or her counsel of said payment."

The record also shows that on 6 January, 1955, petitioner filed a motion for an order of possession decreeing that it be put into immediate possession of the land embraced within the right of way boundaries of the project and involved in this proceeding. Upon consideration of the motion, on hearing had after notice, the Clerk of Superior Court concluded as a matter of law, among other things, that upon petitioner determining that the taking of the described land and improvements thereon was necessary for highway purposes in connection with the project in hand, and prior to any condemnation proceeding being instituted or payment being made for said land, petitioner was entitled to possession as a matter of law under the provisions of G.S. 136-19 thereof. And the Judge of Superior Court on appeal from the order of the Clerk approves. Petitioner excepts thereto.

The record also shows that on 13 January, 1955, respondent Pardington filed a motion praying, among other things, "that she be paid the full sum of $13,747.50 which is deposited in the office of the Clerk of Superior Court, in full payment of her said property . . . ; that the report of the commissioners be confirmed and an order entered in accordance therewith; . . . that petitioner be denied any further right of appeal; and for any other and further relief to which she is entitled."

On hearing of this motion, the Clerk of Superior Court concluded, among other things, that "Petitioner, by its voluntary payment of the commissioners' award, waived and surrendered any right to take exceptions to the commissioners' report fixing said award"; that "by voluntary payment of the amount of the commissioners' award, petitioner made a new offer for said tract, open to acceptance by respondent"; and that respondent has accepted said offer.

And so holding, the Clerk ordered that the sum of $13,747.50 heretofore paid to the Clerk by petitioner be paid over to respondent Pardington, less city and county taxes due, if any; that the aforesaid sum is the full, fair and adequate value of and represents just compensa-

tion for the acquisition by the petitioner, its successors and assigns, of the title to the aforesaid lands and premises.

And upon appeal, the Judge of Superior Court reached same conclusion, and rendered like judgment. Petitioner excepts thereto.

To the signing of the judgment, petitioner appeals to Supreme Court and assigns error.

R. Brookes Peters, L. J. Beltman, Womble, Carlyle, Sandridge & Rice for petitioner appellant.

Deal, Hutchins & Minor for respondent appellee.

WINBORNE, J. Decision on this appeal turns upon the answer to the question as to whether in a proceeding instituted under provisions of G.S. 136-19, the petitioner, North Carolina State Highway and Public Works Commission, is required to pay into court the amount of the award made by the Commissioners, as a condition precedent to taking possession of the land sought to be acquired for right of way for public highway purposes. The statute itself furnishes a negative answer.

It is provided in G.S. 136-19 that "The State Highway and Public Works Commission is vested with the power to acquire such rights of way and title to such land . . . as it may deem necessary and suitable for road construction . . . either by purchase, donation, or condemnation, in the manner hereinafter set out . . ."; and that "whenever the Commission and the owner or owners of the lands . . . required by the Commission to carry on the work as herein provided for are unable to agree as to the price thereof, the Commission is hereby vested with the power to condemn the lands . . . , and in so doing the ways, means, methods, and procedure of Chapter 40, entitled 'Eminent Domain,' shall be used by it as near as the same is suitable for the purposes of this Section . . . ."

However it is also provided that "in case condemnation shall become necessary the Commission is authorized to enter the lands and take possession of the same . . . prior to bringing the proceedings for condemnation, and prior to the payment of the money for the said property"; and that "in the event the owner or owners shall appeal from the report of the Commissioners, it shall not be necessary for the Commission to deposit the money assessed with the Clerk, but it may proceed and use the property to be condemned until the final determination of the action."

Thus it is clear that when the North Carolina State Highway and Public Works Commission pays the amount of an award before taking possession of the land, it is a voluntary act controlled by the intent with which, and purposes for which the payment is made. It could

be either in payment or as a deposit. But in the case in hand the intent and purpose is manifested in the language used in the letter of transmittal as well as in the notation on the voucher. The wording is clear and understandable. It was "in payment of the award by the commissioners." True, the respondent was not obligated to accept the amount, but it was an offer subject to acceptance by her. And when she accepted it, the question of compensation was settled—and the purpose of the proceeding accomplished.

Hence in the judgment to the signing of which exception is taken, error is not made to appear.

Affirmed.

ROBINSON & HALE, INC., v. EUGENE G. SHAW, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA.

(Filed 30 June, 1955.)

1. Taxation § 30—

A resident who sells pre-cast septic tanks and component parts thereof at retail within this State for installation within this State is liable for sales tax under Article V, Schedule E, of the Revenue Act under the comprehensive definition contained in G.S. 105-167, such sale not being within the exemptions set forth in G.S. 105-169.

2. Same—

It is a matter of common knowledge that the imposition of our sales tax tended to encourage residents to make out-of-state purchases, and the history of the enactment of the sales and use taxes indicates a legislative intent to impose by the use tax the same burdens on out-of-state purchases as are imposed on purchases within the State by the sales tax.

3. Same—

Where the retail sale of building materials in this State comes within the purview of G.S. 105-167, the seller may not contend that he is not subject to the sales tax because G.S. 105-187 imposes upon the purchaser a use tax on such materials, since the use tax does not apply in such instance, but only when the materials have not been subjected to the sales tax against the seller.

APPEAL by plaintiff from *Fountain, Special Judge,* at January, 1955, Civil Term of FORSYTH.

Civil action to recover for sales taxes paid under protest, heard below upon an agreed statement of facts. These in gist are the material facts agreed:

The plaintiff, a North Carolina corporation engaged in selling septic tanks and component parts therefor, was assessed on the sales of these

articles. The sales were made in this State to property owners, contractors, and plumbers for installation and use in connection with buildings located within the State. The septic tank consists of a molded pre-cast concrete tank which, when installed, is buried outside the building and is connected therewith by cast iron or tile pipe running from the sewer system of the building to the inlet opening of the tank. The outlet side of the tank is connected to a nitrification line composed of tile pipe in a crushed stone filled underground line of varying lengths, depending on the size and needs of the system. In operation the main line carries wastes to the tank and also decomposition gasses back into the building from which the gasses are vented. The liquid wastes are dissipated through the nitrification line.

The plaintiff did not collect from the purchasers of the tanks any payments designated as sales or use taxes. There is no dispute as to the amount involved—$2,776.18. It is conceded that this amount was properly assessed against the plaintiff if the Sales Tax Act, G.S. 105-164 through 105-187, imposes upon the plaintiff liability for taxes on account of the sales here involved. Otherwise, the plaintiff is entitled to refund, with interest.

The court below concluded that the taxes were properly assessed, and from judgment entered in accordance with such ruling, the plaintiff appeals.

Deal, Hutchins & Minor for plaintiff, appellant.

Attorney-General McMullan and Assistant Attorneys-General Lake and McGalliard for the State.

JOHNSON, J. We have here for decision this question: Is one who sells pre-cast septic tanks and component parts therefor at retail within North Carolina for installation within the State liable for sales taxes under Article V, Schedule E, of the Revenue Act, G.S. 105-164 through 105-187? The court below answered in the affirmative, and we approve.

G.S. 105-168 imposes a general sales tax of three per cent of gross sales upon the seller at retail of tangible personal property within the State of North Carolina. The levy is upon the seller for the privilege of engaging in business. By the terms of G.S. 105-167, this levy applies to every person engaged in the business of acquiring "any articles of commerce and selling same at retail," and it extends to the sale of "any articles of commerce in any quantity . . . for any use or purpose on the part of the purchaser other than for resale"; subject, however, to certain exemptions provided for in the Act. Therefore the plaintiff is liable for three per cent of its gross sales of septic tanks and component parts unless these articles come within the exemptions designated in

the Act. The sales which are exempted are set forth in G.S. 105-169. Nowhere in this section, or in any other part of the Act, are septic tanks or component parts therefor exempted from the tax. Therefore the taxes here involved were properly assessed.

The plaintiff claims immunity from liability under the provisions of G.S. 105-187. This statute imposes a use tax on the purchaser of building materials, except with respect to materials expressly exempted. The plaintiff takes the position that septic tanks and component parts are building materials within the meaning of G.S. 105-187 and are subject to the use tax of three per cent imposed by this statute upon the purchaser, and that since the use tax is expressly levied against the purchaser, it follows that the sales of septic tanks and parts made by the plaintiff seller are not subject to the sales tax. We concur in the view that septic tanks and component parts are building materials, but we are constrained to reject the contention that such materials are not subject to the sales tax.

A study of the legislative history of G.S. 105-187 discloses a clear legislative intent to make out-of-state purchases of building materials, other than those expressly exempted, subject to the same burdens imposed by the sales tax on purchases within the State. The sales tax was first levied by Chapter 445, Public Laws of 1933. The original act is substantially the same as the present law, except there was no provision comparable to G.S. 105-187, and there was no general use tax. At that time none of our neighboring states levied a general sales tax. It is a matter of common knowledge that the imposition of our tax tended to encourage residents of this State to make purchases in adjoining states in order to escape payment of the tax. The first step toward curbing out-of-state purchases made for the purpose of tax avoidance was the inclusion in the Revenue Act of 1937 of a section virtually identical with G.S. 105-187 (Section 427, Chapter 127, Public Laws of 1937).

It is significant that the Revenue Act of 1937 also classified sales of certain building materials as wholesale sales, subject to tax at the wholesale rate only. (Public Laws of 1937, Chapter 127, Section 404 (4)). These were the same materials which were exempted from Section 427 of the Act which imposed the use tax on building materials. This classification in the 1937 Revenue Act of certain sales of building materials as wholesale sales shows clearly that the Legislature contemplated that the retail sales tax applied to sales of all building materials other than those expressly classified as wholesale sales.

Moreover, it is noted that the original statutory forerunner of G.S. 105-187, as well as the present statute itself, contained a provision making the statute inapplicable to articles already subjected to the payment of the sales tax.

These phases of the legislative history of G.S. 105-187 indicate a positive legislative intent to impose a use tax of three per cent on purchases of unexempted building materials when and only when such materials have not been subjected to the sales tax as against the seller. The conclusion is inescapable that under the facts here disclosed G.S. 105-187 may not be interpreted as exempting a North Carolina seller of building materials from the sales tax imposed by G.S. 105-168. Instead, it is manifest that G.S. 105-187 was intended to implement the provisions of G.S. 105-168 by curbing tax avoidance by means of out-of-state purchases of building materials. This interpretation is supported in principle by the decision in *Supply Co. v. Maxwell, Comr. of Revenue,* 212 N.C. 624, 194 S.E. 117. This case arose after the enactment of G.S. 105-187. Nevertheless, the Court held that the three per cent sales tax was properly assessed against the seller of plumbing and heating materials and supplies to contractors for installation in buildings.

For the reasons stated, the judgment below will be upheld.

Affirmed.

C. LACY HAITH AND J. W. HAITH v. FANNIE W. ROPER AND HUSBAND, ISAIH ROPER.

(Filed 30 June, 1955.)

1. Boundaries § 5a—

While the description in a deed, in order to meet the requirements of the statute of frauds, must be either certain in itself or capable of being reduced to a certainty by resort to something extrinsic to which the deed refers, a deed will be upheld if this can be done consistently with the principles and rules of law applicable, and a description will be held sufficient if it furnishes a means of identifying the land intended to be conveyed.

2. Same—

It was stipulated that grantor, on the date of the deed in question, owned but two lots within the municipality, which lots had been conveyed to him separately at different times. The description in his deed to the second lot located the lot in the municipality and county, and referred to corners of the other lot owned by him and to corners of an adjacent lot. *Held:* The reference to grantor's own corners are not rendered ineffective on the ground that the lots were adjacent, and that therefore grantor owned but one lot, and the description being rendered certain by reference to the corners of the adjacent tract and to the corners of grantor's first lot referred to in the deed, the description is sufficient.

3. Same—

The contention that a description in a deed is void for uncertainty because it contains five calls which do not close the lines when surveyed as called for in the deed, is untenable when it is apparent that one of the calls is a continuation on the same degree as another call, and that therefore the two calls comprise but one line, and the corners called for in the deed may be located by extrinsic evidence, to which the description refers.

APPEAL by defendants from *Martin, S. J.*, January 1955 Term, ALAMANCE Superior Court.

This is a special proceeding instituted before the Clerk Superior Court of Alamance County in which the petitioners allege that they, together with the respondent Fannie Roper, are the owners as tenants in common of a certain lot in the City of Burlington. They ask for a sale for partition. The respondent pleads sole seisin. Whereupon the case was transferred to the civil issue docket for trial in term. By agreement a jury trial was waived, the court permitted to find the facts and render judgment upon the pleadings and the stipulations entered into by the parties. The parties concede the case turns on the sufficiency of the description contained in a deed executed 1 April, 1908, by Jerry Williamson to his wife, Annie Williamson. If the description is sufficient to make the conveyance a valid deed, the interests of the parties are as set out in the petition. On the other hand, if the description is insufficient, the deed is void for uncertainty, and the respondent is the sole owner.

The pleadings and stipulations disclose that Jerry Williamson, on 16 September, 1897, purchased and took a deed for a lot "in southeast corner" of the junction of Slade and Shepherd Streets in the City of Burlington, described as follows:

"Adjoining lands of Ireland and others, and beginning on a stone in the line of Slade St. and south corner of Shepherd St.; thence South 87½ east with line of Shepherd St. 150 feet to a stone in line of Shepherd St.; thence South 2½ West 75 feet to a stone; thence North 87½ West 150 to a stone in line of Slade St.; thence North 2½ East 75 feet to the beginning; containing one-half acre more or less."

This is designated as Lot No. 1.

On September 1, 1898, Jerry Williamson purchased and took a deed to a lot adjoining Lot No. 1 and specifically described as follows:

"Adjoining the lands of Fred Murray, Jerry Williamson, W. F. Ireland and Slade St. and other and bounded as follows, viz: Beginning on a stake Fred Murray's corner; thence North 2½ deg. East with the line of Slade St. 75 feet to a stake, Jerry Williamson's corner; thence South 87½ deg. East 150 feet to a stake, another corner of Jerry Williamson's; thence South 2½ deg. West 75 feet to Fred Murray's

corner; thence North 87½ deg. West 150 feet to the beginning, containing one acre more or less."

This is designated as Lot No. 2 and is the lot in question in this case.

On 1 April, 1908, Jerry Williamson executed and delivered a deed in which he conveyed, or attempted to convey to Annie Williamson a lot described in the deed as follows:

"A certain tract or parcel of land in Burlington Township, County, State of Alamance, adjoining the lands of Fred Murray, Jerry Williamson, and others . . . and others, bounded as follows, viz: BEGINNING at stake Fred Murray corner thence North 2° ½ East 150 with said Murrays line to a stake thence South 87° East 75 feet Jerry Williamson corner thence South 87° East 15 Jerry Williamson corner thence South 150 feet to Jerry Williamsons corner thence ° South 2° ½ West 75 to Fred Murrays corner the beginning containing one ¼ acre more or less"

The parties stipulated that on 1 April, 1908, Jerry Williamson owned Lots Nos. 1 and 2 above described; that he owned no other real estate; that on 1 April, 1908, the corners and boundaries of the lot between Fred Murray's property and Lot No. 1 owned by Jerry Williamson are as set out in the description of Lot No. 2.

The trial judge held the description sufficient, the deed valid, and remanded the cause to the Clerk Superior Court for further proceeding. From the judgment, the respondent excepted and appealed.

Sanders & Holt for defendants appellants.
W. R. Dalton, Jr. for petitioners appellees.

HIGGINS, J. The petitioners contend the description in the deed of 1 April, 1908, is sufficient to, and does, convey title to Lot No. 2 to Annie Williamson. The respondent contends the description is patently defective and parol evidence is inadmissible to aid the description, and the attempted conveyance is void for uncertainty. The sufficiency of the description, therefore, is the question presented.

From the allegations and admissions in the pleadings and the stipulations entered into, it appears that on 1 April, 1908, Jerry Williamson owned two adjoining lots in the Town of Burlington. Lot No. 1 is rectangular in shape and 75 by 150 feet in area. It was purchased in 1897. Lot No. 2 is rectangular in shape, 75 by 150 feet in area. It was purchased in 1898. It lies between Lot No. 1 on the north and the Fred Murray lot on the south.

Does the deed from Jerry Williamson to his wife contain a description certain in itself, or is the description capable of being made certain by reference to something outside the actual description to which

reference is made in the deed itself? The purpose of a description is to furnish, and is sufficient when it does furnish, a means of identifying the land intended to be conveyed. "It is a general rule that the deed must be upheld if possible, and the terms and phraseology of description will be interpreted with that view and to that end if this can reasonably be done. The Court will effectuate the lawful purposes of deeds and other instruments if this can be done consistently with the principles and rules of law applicable." *Merrimon, J.*, in *Edwards v. Bowden*, 99 N.C. 80, 5 S.E. 283.

"The decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject-matter of the deed, either certain in itself or capable of being reduced to a certainty by a reference to something extrinsic to which the deed refers. *Massey v. Belisle*, 24 N.C. 170." The foregoing is a quotation from the opinion of *Winborne, J.*, in the case of *Self-Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889.

While the words in the general description are somewhat poorly arranged, it is plain the location of the lot is in Burlington, Alamance County. It joins the land of Fred Murray and Jerry Williamson. It is stipulated that Jerry Williamson on the date of the deed owned the two lots and no other land. The boundaries called for in the deed are Williamson's and Fred Murray's corners. When these corners are located, which may be done by parol evidence, the description becomes complete.

The respondent objects to this line of reasoning upon the ground that since Jerry Williamson owns the two lots which adjoin, they become one lot, and that Jerry Williamson's corners between the two lots cease to exist as corners. The answer is that Williamson first bought Lot No. 1 and the two corners marking the termini of his southern line became Williamson's corners. When Lot No. 2 was conveyed to him, the description called for Williamson's corners, which, of course, referred to the corners of Lot No. 1 which he then owned.

The respondent further objects upon the ground that there are five calls in the deed and if the five calls are surveyed as called for in the deed, the lines will not close, and therefore the description fails. Inspection discloses that while there are five calls in the description, one of the calls is a continuation on the same degree and, therefore, the two calls comprise one line. Williamson's and Murray's corners are called for in the deed in question and by the process of locating them by parol evidence in conformity with the recognized and applicable rules, the boundaries of the lot in question become fixed and certain. *Farmer v. Batts*, 83 N.C. 387; *Harrison v. Hahn*, 95 N.C. 28; *Bissette*

v. Strickland, 191 N.C. 260, 131 S.E. 655; *Johnston County v. Stewart,* 217 N.C. 334, 7 S.E. 2d 708; *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440; *Cherry v. Warehouse,* 237 N.C. 362, 75 S.E. 2d 124; *Holloman v. Davis,* 238 N.C. 386, 78 S.E. 2d 143; *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321.

The judgment of the Superior Court of Alamance County is Affirmed.

MAX ZAGER v. JOHN W. SETZER.

(Filed 30 June, 1955.)

1. Fraud § 12: Cancellation and Rescission of Instruments § 12—Evidence held sufficient to overrule nonsuit on issue of fraud.

Evidence tending to show that plaintiff, the owner of personal property comprising a motion picture theatre, represented that the previous operator of the theatre had a weekly gross income therefrom in a certain sum, that defendant purchased the property after determining that his operating costs would be in a smaller amount, that defendant, after renovating the theatre, realized a gross income in a much smaller sum, and that the former operator's gross weekly income was only about half that represented by plaintiff, *is held,* when considered with other testimony of an amplifying and corroborative nature, sufficient to show *prima facie* the existence of all the elements of actionable fraud, and nonsuit on defendant's counterclaim for rescission and damages was erroneously entered.

2. Fraud § 4—

The fact that the evidence discloses that plaintiff had no knowledge of the falsity of his representation is not fatal when the evidence further discloses that the representation was material and was intended by plaintiff to be accepted and relied on by defendant, and that the representation was recklessly made, or positively averred when plaintiff was consciously ignorant whether it was true or false.

3. Trial § 23f: Fraud § 12: Cancellation and Rescission of Instruments § 12—

On defendant's counterclaim for rescission and damages, the fact that defendant alleges *scienter* of plaintiff, whereas the evidence discloses at most *prima facie* proof only of constructive *scienter* in that the representation was recklessly made in conscious ignorance of its truth or falsity, does not justify nonsuit for variance, since upon the record it does not appear that plaintiff was misled to his prejudice. G.S. 1-168.

4. Fraud § 9: Cancellation and Rescission of Instruments § 9: Election of Remedies § 2—

When justified by the facts, a party may maintain an action for rescission of an instrument and also for damages resulting from the fraud which induced its execution.

APPEAL by defendant from *Hall, Special Judge,* at 13 September, 1954, Civil Term of GUILFORD (Greensboro Division).

Civil action to recover balance alleged to be due on a conditional sale contract executed by the defendant in purchasing from the plaintiff personal property comprising a motion picture theatre.

The defendant by answer admits the execution of the conditional sale contract, but by further defense and counterclaim seeks rescission and damages on allegations of fraudulent representations made by the plaintiff whereby the defendant was induced to execute the contract. These affirmative pleas of the defendant were dismissed at the close of the evidence on plaintiff's motion for judgment as of nonsuit. Thereupon the court submitted to the jury the single issue of debt which arose in the plaintiff's action against the defendant. The jury, in response to a peremptory instruction, answered the issue in favor of the plaintiff.

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

Thomas Turner and Proctor & Dameron for defendant appellant.
Moseley and Edwards and Armistead W. Sapp for plaintiff appellee.

JOHNSON, J. Our study of the record leaves the impression that the evidence relied on by the defendant was sufficient to carry the case to the jury on the issues of rescission and damages raised by the further defense and counterclaim.

The evidence discloses that the theatre was operated by C. C. Freeman previous to its acquisition by the defendant. Freeman purchased the equipment on the installment-payment plan from the plaintiff about 15 October, 1951, and continued operations until sometime the following spring or summer, when he gave it up and left town. A foreclosure ensued, under which the plaintiff reacquired title to the equipment. Following this, it was sold to the defendant. As a part of the negotiations leading up to the defendant's purchase of the equipment and the signing of the conditional sale contract, the plaintiff represented to him that the previous operator of the theatre had a weekly gross income therefrom of between $600 and $700. The defendant closed the deal after determining that the costs of operating the theatre would be approximately $560 a week. The building and equipment were completely renovated, after which the defendant operated the theatre for a period of several months under the management of a competent, experienced operator. However, the weekly gross income never approximated $600 or $700, as represented by the plaintiff. On the contrary, it ranged from a high of $487 to a low of $222, with the average being $320. Also, it

was disclosed by the testimony of former operator Freeman that his highest weekly gross income was $443, with the average being only $343, and that he closed the theatre "because it was very unprofitable."

The foregoing line of evidence, when considered with other testimony of an amplifying and corroborative nature, was sufficient to show *prima facie* the existence of all the elements of actionable fraud. *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202.

True, the record discloses no evidence tending to show the plaintiff knew the amount of the former operator's gross income. And in this sense the evidence fails to disclose affirmatively that the plaintiff had knowledge of the alleged falsity of his representation to the effect that the former operator grossed from $600 to $700 a week. However, the evidence is sufficient to support the inference that the plaintiff's representation as to the gross weekly income of the former operator was recklessly made, or positively averred when he was consciously ignorant whether it was true or false, and was intended by him and accepted by the defendant and reasonably relied on as a statement of fact by which the defendant was deceived and caused to suffer loss. The evidence tending to show this state of mind is an adequate substitute for proof of *scienter. Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811; *Gray v. Edmonds,* 232 N.C. 681, 62 S.E. 2d 77; *Mills v. Mills,* 230 N.C. 286, 293, 52 S.E. 2d 915, 921; *Whitehurst v. Insurance Co.,* 149 N.C. 273, 62 S.E. 1067; 23 Am. Jur., Fraud and Deceit, Sec. 68, 1954 Supplement. See also comprehensive annotation entitled "False representations as to income, profits, or productivity of property as fraud," 27 A.L.R. 2d 14, pp. 60 and 61; *Roberson v. Swain,* 235 N.C. 50, 69 S.E. 2d 15.

We have not overlooked the variance between the defendant's allegations and proofs. In his further defense and counterclaim the defendant expressly alleges the *scienter, i.e.,* that the plaintiff knew of the falsity of his representation as to the weekly gross income of the former operator of the theatre. Whereas the evidence discloses at most *prima facie* proof only of the legal substitute therefor—the constructive *scienter, i.e.,* that the representation was recklessly made or averred under circumstances showing conscious ignorance whether it was true or false. The question thus posed is whether this variance is of sufficient materiality to justify nonsuit under application of the rule explained and applied in *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470.

On this record it does not appear that the plaintiff was misled to his prejudice by the variance between the defendant's pleading and proof. Hence, under application of G.S. 1-168 the variance will be treated as immaterial and insufficient to support the judgment of nonsuit entered below.

Our attention has not been directed to any previous decision of this Court involving the precise question of variance here presented and our research discloses none. The case of *Pritchard v. Dailey*, 168 N.C. 330, 83 S.E. 392, cited by the plaintiff, is factually distinguishable.

However, the conclusion here reached finds support in these decisions from other jurisdictions: *Luikart v. Miller* (Mo.), 48 S.W. 2d 867; *Turk v. Botsford*, 70 Or. 198, 139 P. 925. See also *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Packard v. Pratt*, 115 Mass. 405; *Cook v. Gill*, 83 Md. 177, 34 A. 248. And these decisions of this Court support the principle here applied: *Dennis v. Albemarle, ante*, 263; *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844; *Mode v. Penland*, 93 N.C. 292.

The ruling of the court below in dismissing by compulsory nonsuit the defendant's pleas for rescission and damages must be held for error. The verdict and judgment will be set aside to the end that the defendant may have a new trial, and it is so ordered. See *Randle v. Grady*, 228 N.C. 159, top p. 165, 45 S.E. 2d 35, top p. 40.

Since the other questions presented by this appeal may not recur on retrial, we refrain from discussing them.

New trial.

ELIJAH DAVIS AND ESTER DAVIS v. LOUIS LAWRENCE AND LEONARD LAWRENCE.

(Filed 30 June, 1955.)

1. Automobiles §§ 14, 18h(2)—

Evidence tending to show that the automobile, operated by one defendant and owned by the other, smashed into the rear of a car driven 15 to 20 miles per hour on a straight and level two-way street in a 35 mile speed zone, that no other cars were in sight, together with the admission of defendant driver at the scene to the effect that he was at fault, *is held* sufficient to be submitted to the jury on the issue of negligence.

2. Automobiles § 24½c—

The admission that the car driven by one defendant was registered in the name of the other defendant requires the submission of the issue of agency to the jury, G.S. 20-71.1, and even though defendants offer evidence contradicting the allegations as to agency, such evidence may warrant a peremptory instruction based thereon, but not a judgment of nonsuit.

APPEAL by plaintiffs from *Clifton L. Moore, J.*, November Civil Term, 1954, of DURHAM.

Action commenced 4 March, 1954, growing out of automobile collision that occurred 30 August, 1953.

Plaintiffs alleged that their Mercury car was struck and damaged by a Plymouth car, owned by defendant Leonard Lawrence and operated by defendant Louis Lawrence. Plaintiffs alleged further that the negligence of Louis Lawrence, consisting of (1) unlawful speed, (2) failure to keep a proper lookout, and (3) failure to slow down and avoid striking plaintiffs' car, caused the collision and damaged plaintiffs' car.

Defendants, in separate answers, denied negligence, pleading that the collision was caused solely by negligence of plaintiffs or, in any event, that negligence of plaintiffs contributed thereto.

As to the relationship between the defendants, in respect of the Plymouth car, plaintiffs alleged, and defendants admitted, that "defendant, Leonard Lawrence, was the duly registered owner of the 1939 Plymouth being driven by the defendant, Louis Lawrence, . . ."

Plaintiffs alleged further: "5. That at the time of said collision, said Louis Lawrence was driving said automobile for and on behalf of the defendant, Leonard Lawrence, and within the scope of his employment; that said Leonard Lawrence maintained said automobile for a family purpose, and said Louis Lawrence was a member of said family and a member of the household of said Leonard Lawrence, and at the time of the collision herein described, said Louis Lawrence was driving said automobile for a family purpose and within the scope of the family purposes for which said automobile was owned and maintained by the defendant, Leonard Lawrence." Defendants denied these allegations.

Plaintiff Elijah Davis and Frank Eatman, the driver and passenger, respectively, in the Davis car, were the only witnesses. Their testimony tends to show these facts: The collision occurred about two o'clock in the afternoon. The Davis car had been traveling west on Angier Avenue for some 200-250 yards. It was traveling at a speed of 15-20 miles per hour when overtaken and struck from the rear by the Lawrence car which smashed it "all the way across the trunk." Angier Avenue was a two-way street, straight and level. No other cars were in sight. The collision occurred in a thirty-five mile speed zone.

Plaintiffs' said witnesses testified further, without objection, that immediately after the collision Louis Lawrence asked them "not to call the law," that "he was guilty," that "he was in the wrong," and that he "would have Davis' car fixed."

Plaintiffs proffered, but the court excluded, further testimony of Eatman to the effect that the brakes on the Lawrence car, when tested *after the collision,* were defective.

At the conclusion of plaintiffs' said evidence, the court allowed defendants' motions and entered judgment of involuntary nonsuit as to both defendants. Plaintiffs excepted and appealed, assigning errors.

Edwards, Sanders & Everett for plaintiffs, appellants.
Blackwell M. Brogden for defendants, appellees.

BOBBITT, J. As far as the record discloses, plaintiffs' witnesses did not see the Lawrence car before the collision. Evidence adduced to establish plaintiffs' allegations of negligence is circumstantial. *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. The sufficiency of such circumstantial evidence, if standing alone, need not be decided; for this testimony is to be considered in the light of Louis Lawrence's admissions at the scene when the cause of the collision was under discussion. *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196, and cases cited. When so considered, the evidence, apart from the excluded testimony as to defective brakes, was sufficient in our opinion to warrant submission thereof to the jury on the issue as to the alleged negligence of Louis Lawrence.

Plaintiffs, in paragraph 5 of the complaint, quoted above, allege facts sufficient to make the defendant-owner liable for the conduct of the defendant-operator under the doctrine of *respondeat superior. Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765. The admission that defendant Leonard Lawrence was the registered owner of the Plymouth car was sufficient to require submission of the issue of agency to the jury. G.S. 20-71.1; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767; *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644. If defendants offer evidence contradicting the allegations as to agency, such evidence may warrant a peremptory instruction based thereon but not a judgment of nonsuit. *Spencer v. McDowell Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598; *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309; *Jyachosky v. Wensil, supra.*

For the reasons stated, the judgment of nonsuit, as to both defendants, is

Reversed.

JOHN M. TUCKER, F. NAT WEST AND J. G. BARRON, TRUSTEES OF SALEM LODGE NO. 36 I. O. O. F. v. HATTIE F. TRANSOU (WIDOW); VIRGIL A. TRANSOU AND WIFE, EVIE B. TRANSOU; JAMES H. TRANSOU AND WIFE, NANCY M. TRANSOU; AND FRED R. TRANSOU AND WIFE, KATE TODD TRANSOU.

(Filed 30 June, 1955.)

1. Appeal and Error § 40: Pleadings § 30—

On appeal from the clerk's order to the effect that petitioner was entitled to a cartway pursuant to G.S. 136-69, the Superior Court allowed plaintiff's motion to strike certain portions of the answers relating to one defendant's offer to give a right of ingress and egress at a location of her choosing. *Held:* The motion to strike not being made in apt time, it

was addressed to the discretion of the lower court, and its ruling thereon will not be disturbed, since no abuse of discretion or prejudicial error could be involved, the location of the cartway and the assessment of damages, if any, being, initially, solely for the jury of view.

2. Highways § 11—

While an aggrieved party is not required to wait until a cartway is laid off and the damages assessed in a proceeding under G.S. 136-68, before appealing from the order of the clerk adjudging that petitioner is entitled to the relief, the location of the cartway and the assessment of damages, if any, even though the clerk's order be affirmed, remain matters for the jury of view, subject to the right of review.

APPEAL by defendant Hattie F. Transou from *Fountain, Special Judge,* January Term, 1955, of FORSYTH.

This is a special proceeding instituted on 1 December, 1953, before the Clerk of the Superior Court of Forsyth County, to establish a right to have a cartway laid off over the land of appellant and other defendants, pursuant to the authority given in G.S. 136-68.

The Clerk entered an order on 23 February, 1954, to the effect that the petitioner was entitled to the relief sought and appointed a jury of view to view the premises and lay off the cartway, not less than 14 feet in width, from the petitioner's land over the lands of some or all of the defendants to the public highway, and assess damages, if any, the owner or owners may sustain thereby, and to make a report of its findings in writing to the Clerk of the Superior Court not later than 15 March, 1954.

From the foregoing order, all the defendants appealed in apt time to the Superior Court. When the matter came on for trial in the Superior Court in January 1955, and after the jury had been selected and impaneled, the plaintiff moved to strike certain portions of the answers. These portions related to an offer of defendant Hattie F. Transou to give plaintiff a way of ingress and egress to its property, the way, however, to be located at a place of her choosing. The motion was allowed and all the defendants gave notice of appeal to the Supreme Court; however, only Hattie F. Transou perfected her appeal, assigning error.

J. L. Carlton and H. Bryce Parker for petitioner.
W. S. Mitchell and Elledge & Johnson for appellant.

DENNY, J. A motion to strike allegations in a defendant's answer, as a matter of right, pursuant to the provisions of G.S. 1-153, comes too late when it is not made until the case is calendared for trial or until the jury has been selected and impaneled. *Warren v. Virginia-Carolina Joint Stock Land Bank,* 214 N.C. 206, 198 S.E. 624. But when a motion to strike is not made in apt time, the court has discretionary power to

allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Parrish v. R. R.*, 221 N.C. 292, 20 S.E. 2d 299. No abuse of discretion or prejudicial error has been shown on this appeal since it is not within the province of the Superior Court on appeal in such proceeding, to decide where the cartway is to be located and laid out or to determine and assess the amount of damages, if any. *Garris v. Byrd,* 229 N.C. 343, 49 S.E. 2d 625.

It is true that an aggrieved party is not required to wait until a cartway is laid off and the damages assessed before appealing from an order of the Clerk of the Superior Court adjudging that a petitioner is entitled to a cartway. *Triplett v. Lail,* 227 N.C. 274, 41 S.E. 2d 755. But, if upon appeal such order is affirmed, the location of the cartway and the assessment of damages, if any, are matters for the jury of view, subject to the right of the court to review its findings. *Garris v. Byrd, supra.*

The ruling of the court below is

Affirmed.

IN THE MATTER OF: ASSIGNMENT OF THE SCHOOL CHILDREN IN THE STELLA COMMUNITY OF CARTERET COUNTY TO THE WHITE OAK SCHOOL IN ONSLOW COUNTY.

(Filed 30 June, 1955.)

1. Appeal and Error § 5—

This proceeding challenging the order of the State Board of Education relative to assignment of school children to a school district is dismissed as moot, the children having gone to the district of their choice during the preceding school year, and the State Board of Education having been shorn of its power to assign children by statute enacted pending the appeal. G.S. 115-352; ch. 1372, Session Laws of 1955.

2. Same: Costs § 3a—

Where an appeal is dismissed as moot, the Supreme Court will not pass upon the merits of the controversy merely to determine who will pay the costs, and the judgment of the lower court being presumed correct, unless reversed on the merits, no part of the costs can be adjudged against appellees.

APPEAL by B. H. Williams, *et al.*, petitioners, from *Frizzelle, J.*, December Term, 1954, of WAKE.

Carteret County had no school facilities reasonably accessible to the small number of school patrons residing in its Stella Community. Some of the school patrons preferred that the Stella children be assigned to the Maysville Elementary School and the Jones Central High School

in Jones County. Others, the petitioners, urged that the Stella children be assigned to the White Oak School in Onslow County.

The State Board of Education, at its May, 1954, meeting, ordered that, "effective at the beginning of the school year 1954-55," the Stella children should attend said Jones County Schools; and the Division of Transportation was instructed to arrange bus routes accordingly.

In August, 1954, by petition in the Superior Court, petitioners challenged the said order of the State Board of Education. They obtained an *ex parte* order, whereby the State Board and others were restrained from enforcing or putting into operation the said order of May, 1954.

The petition was answered by the State Board. At the hearing in December, 1954, Judge Frizzelle upheld the said order of May, 1954, dissolved the restraining order, dismissed the proceeding and ordered that petitioners pay the costs.

Petitioners excepted and appealed. Thereupon, the petitioners brought to the attention of the court the fact that some of the Stella children, permitted to do so by the temporary restraining order, had been attending the White Oak School in Onslow County; and, at the instance of the petitioners, Judge Frizzelle stayed further the said order of May, 1954, as related to the school year 1954-55, pending final determination of petitioners' appeal to this Court.

Attorney-General McMullan and Assistant Attorney-General Love for respondent State Board of Education, appellee.

John D. Larkins, Jr., for respondent Board of Education of Jones County, appellee.

Jones, Reed & Griffin for petitioners, appellants.

Hughes & Abbott for movants, appellants.

BOBBITT, J. When this controversy was before the State Board of Education, it had authority to transfer children living in one administrative unit or district to another for the school term without the payment of tuition. G.S. 115-352. Petitioners contended principally that the State Board, in making its said order of May, 1954, did not in fact exercise its independent judgment and failed to comply with procedural requirements.

Whether the said order of May, 1954, was valid, is of no significance now. The controversy has become moot. The petitioners' cause of action, if any they had, has ceased to exist.

During the school year 1954-55, each of the Stella children attended the school, whether in Jones or Onslow, of his choice. While the judgment decided the case against petitioners, petitioners have accomplished their purpose in so far as the school year 1954-55 is concerned.

Under ch. 1372, Session Laws of 1955, subchapter VIII, Art. 19, sec. 3, being a comprehensive rewriting of ch. 115 of the General Statutes, the State Board no longer has the authority formerly vested in it by G.S. 115-352. Now, "pupils residing in one administrative unit may be assigned either with or without the payment of tuition to a school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards." Hence, the said order of May, 1954, has no application to any school year subsequent to 1954-55.

The judgment of the court below is presumed to be correct. Unless reversed, upon the merits, by decision on appeal, no part of the costs can be adjudged against the appellees. Moreover, this Court will not pass upon the merits of a controversy that no longer exists, merely to determine who shall pay the costs. *Taylor v. Vann*, 127 N.C. 243, 37 S.E. 263; *Comrs. of Vance County v. Gill*, 126 N.C. 86, 35 S.E. 228; *Herring v. Pugh*, 125 N.C. 437, 34 S.E. 538.

The question as to the validity of said order of May, 1954, having become moot, petitioners' appeal from the judgment of the court below is dismissed.

No judgment adverse to the position taken by Martha Mae Griffin, *et al.*, having been entered by the court below, their purported appeal from the denial of their motion for leave to intervene is dismissed.

Appeal dismissed.

M. M. RIGSBEE AND WIFE, JULIA E. RIGSBEE, v. CARL H. PERKINS.

(Filed 30 June, 1955.)

1. Appeal and Error § 6c(5)—

An exception to the entire charge without specifying wherein it is claimed the trial judge erred in instructing the jury, is ineffective as a broadside exception.

2. Same—

An exception to an instruction as given does not ordinarily challenge the omission of the court to charge further on the same or another aspect of the case.

3. Appeal and Error § 23—

The function of the assignments of error 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, and an assignment of error not supported by exception comes to naught and will be disregarded.

APPEAL by defendant from *Gwyn, J.*, and a jury, at 27 September, 1954, Civil Term of GUILFORD, Greensboro Division.

Civil action in deceit to recover damages for losses resulting from the alleged false and fraudulent representations made by the defendant in selling plaintiffs a one-half interest in a used-car business known as Perkins Motors.

There were twenty-one motor vehicles on the used-car lot at the time of sale. Most of them were subject to floor-plan liens held by finance companies. The plaintiffs alleged, and offered evidence tending to show, that two of the vehicles, a Dodge Coronet and a gray Pontiac, were represented by the defendant to be the property of Perkins Motors and free and clear of encumbrance, except a lien of $750 against the Pontiac; whereas in fact these vehicles were subject to undisclosed liens of more than $2,500, and the title to the Pontiac was registered in the name of a third party.

The issues of fraud and damages were answered by the jury in favor of the plaintiffs, and from judgment on the verdict awarding the plaintiffs a recovery of $2,500, the defendant appeals.

Holt, McNairy, Harris and Smith for plaintiffs.

Harry R. Stanley for defendant.

JOHNSON, J. The defendant has brought forward only one assignment of error. By it he urges that the trial court made errors of omission by failing in two particulars to declare and explain the law arising on the evidence as required by G.S. 1-180. The questions sought to be raised by the assignment of error need not be discussed for the reason that the assignment does not appear to be supported by an exception previously noted, as required by our rules. See Rules 19(3) and 21, Rules of Practice in the Supreme Court, 221 N.C. 554.

The only exception to the charge is Exception No. 3, as to which the record discloses that the defendant "excepts to the whole charge of the court between the letters (A) and (B)." Between the letters (A) and (B) appears the entire charge of the court, approximately fifteen pages in length. The exception does not specify wherein it is claimed the trial judge erred in instructing the jury. Therefore, the exception is broadside and is wholly ineffectual to support the assignment of error as brought forward. *Rawls v. Lupton*, 193 N.C. 428, 137 S.E. 175; *Price v. Monroe*, 234 N.C. 666, 68 S.E. 2d 283; *Poniros v. Teer Co.*, 236 N.C. 145, 72 S.E. 2d 9. Besides, an exception to an instruction as given does not ordinarily challenge the omission of the court to charge further on the same or another aspect of the case. *Peek v.*

Bank, 242 N.C. 1, 16, 86 S.E. 2d 745, 756; *Karpf v. Adams; Runyon v. Adams,* 237 N.C. 106, 114, 74 S.E. 2d 325, 330.

Thus it is manifest that the assignment of error on which the appeal is predicated is not supported by an exception. And the rule is that only an exception previously noted in the case on appeal will serve to present a question of law for this Court to decide. *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *Moore v. Crosswell,* 240 N.C. 473, 82 S.E. 2d 208. The function of the assignments of error 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 this Court. *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. An assignment of error, as in the case at hand, not supported by an exception comes to naught and will be disregarded. *Moore v. Croswell, supra.* Further discussion is unnecessary.

However, the record has been examined, and the charge as given appears to be free of prejudicial error, either of commission or omission. See *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342; *Wilson v. Lumber Co.,* 186 N.C. 56, 118 S.E. 797.

The judgment is supported by the verdict and will be upheld.

No Error.

CHRISTOPHER J. THOMAS v. TRUSTEES OF CATAWBA COLLEGE AND A. R. KEPPEL.

(Filed 30 June, 1955.)

Bill of Discovery § 3—

A petition for leave to inspect and make copies of certain papers in defendant's possession prior to filing complaint must contain factual averments showing that the papers described in the order are material and necessary to establish plaintiff's cause of action, and an order of inspection upon a petition failing to aver such facts, will be reversed.

APPEAL by defendants from *C. L. Moore, Regular Judge,* holding the courts of the Tenth Judicial District, at Chambers in Durham, 4 November, 1954. From ORANGE.

Linn & Linn and Bonner D. Sawyer for defendants appellants.

Barnie P. Jones and W. R. Dalton, Jr. for plaintiff appellee.

JOHNSON, J. The plaintiff is a former member of the faculty of Catawba College. He brings this action to recover damages for his

alleged wrongful discharge. The appeal comes here from a hearing below on motion for leave to inspect documents under G.S. 8-89.

The plaintiff obtained an extension of time in which to file complaint and then petitioned the clerk for leave to inspect and make copies of numerous papers and documents in the possession of the defendants. The papers sought to be inspected are described in twenty paragraphs of the petition. The motion was allowed in part and denied in part by the clerk. His order permits inspection of the papers described in the first four paragraphs of the petition, which are: (1) the annual contracts between the plaintiff and Catawba College for three designated years; (2) minutes of a designated meeting of the Board of Trustees of the College, with reports to the meeting; (3) by-laws of the Board of Trustees in force during two designated years; and (4) faculty handbook for the year 1948. From the order of the clerk denying inspection as to the papers described in the other sixteen paragraphs of the petition, the plaintiff appealed to the Superior Court. There an order was entered allowing inspection of the papers described in twelve of the other sixteen paragraphs of the petition. From the order so entered, the defendants appealed to this Court.

The appeal presents no new question or feature requiring extended discussion. The order of the Superior Court granting leave of inspection is not supported by factual allegations showing that the papers described in the order are material and necessary to establish the plaintiff's cause of action. Such materiality and necessity must be shown by positive factual averments, as distinguished from argumentative conclusions of the applicant as in the instant case. The order appealed from will be vacated and set aside on authority of the decisions in *Dunlap v. Guaranty & Accident Co.*, 202 N.C. 651, 163 S.E. 750, and *Patterson v. R.R.*, 219 N.C. 23, 12 S.E. 2d 652.

The order of the clerk, not having been challenged by the defendants, will remain in effect. This allows the plaintiff substantial privilege of inspection.

Reversed.

ARCADY FARMS MILLING COMPANY, INC. v. W. U. LAWS AND WIFE, HELEN B. LAWS, AND G. C. HUNTER, TRUSTEE FOR PEOPLES BANK.

(Filed 30 June, 1955.)

Appeal and Error § 23—

Where no assignments of error appear in the record on appeal, the appeal must be dismissed for failure to comply with the mandatory requirement of Rule of Practice in the Supreme Court No. 19(3).

APPEALS by plaintiff and by defendants Laws from *Sharp, Special Judge,* 1 November, 1954, Special Term, of PERSON.

Plaintiff's action is to recover judgment on demand promissory note for $39,327.24 dated 7 October, 1953, and to foreclose liens on real and personal property constituting security therefor.

Defendants Laws, in their answer, admit the execution of the note and security therefor but allege facts purporting to constitute an affirmative defense to plaintiff's action. In addition, defendant W. U. Laws seeks to recover judgment against plaintiff on three alleged cross-actions.

Plaintiff demurred to the alleged affirmative defense. The court sustained this demurrer, striking designated portions of the answer. To this ruling, defendants Laws excepted and appealed.

Plaintiff also demurred to each cross-action. The court overruled these demurrers. To these rulings, plaintiff excepted and appealed.

The rulings do not relate to defendant G. C. Hunter, Trustee. He takes no part in these appeals.

Melvin H. Burke for plaintiff appellee and appellant.

Burns & Long and Clarence Ross for defendants Laws, appellees and appellants.

PER CURIAM. No assignments of error appear in the record filed in this Court. This is true as to both appeals. Hence, the appeals must be dismissed for failure to comply with the mandatory requirement of the rules of this Court. Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 546 (554).

Appeal of plaintiff: Dismissed.

Appeal of defendants Laws: Dismissed.

FRANCES McCORMICK ALLGOOD v. THE WILMINGTON SAVINGS & TRUST COMPANY, TRUSTEE.

(Filed 26 August, 1955.)

1. Money Received § 1—

An action for money had and received may be maintained as a general rule whenever the defendant has money in his hands which belongs to plaintiff, and which in equity and good conscience he ought to pay to plaintiff.

2. Same—

An action for money had and received is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at

the expense of another, and neither wrongdoing nor fraud is an element of the cause of action.

3. Pensions § 3—Where pension policy is not canceled after termination of employment, beneficiary is entitled to proceeds upon death of employee.

The rule of a pension system that an employee-member voluntarily leaving the employment should cease to be a member of the system and should receive no benefits from the pension fund or any contract purchased thereunder for his benefit, entitles the trustee of the fund, upon the voluntary termination of the employment by an employee, to cancel at any time before the death of the insured employee an insurance policy purchased for his benefit, but when the trustee does not do so, and the policy is in full force and effect at the death of the insured employee, the beneficiary named in the policy is entitled to the proceeds of the policy rather than the trustee of the pension fund, notwithstanding a rule of the pension system that the equity in such contracts should inure to the benefit of the pension fund, since the insured employee's death immediately wiped out the cash surrender equity of the policy.

4. Same: Insurance § 26—

Any rule of a pension system which would, upon the voluntary termination of the employment by an employee-member, change the beneficiary or divert the proceeds of a life and retirement policy purchased for his benefit from the beneficiary named therein to the pension fund, would be of doubtful validity, since the pension system would not have an insurable interest in the life of such employee. Sec. 2½, Chapter 283, Session Laws of 1951 (G.S. 58-204.3) was not enacted until after the death of the insured in the instant case.

5. Money Received § 1—

Evidence and pretrial stipulations disclosing that an insured employee, after voluntarily leaving the employment, died while a pension fund policy on his life was still in full force and effect, that insurer had paid the full amount of the policy, but that the trustee of the pension fund had retained one-half the proceeds, make out a *prima facie* case for money had and received in favor of the beneficiary named in the policy as against the trustee of the pension fund for the part of the proceeds retained.

6. Trial § 24a—

Where plaintiff's own evidence establishes an affirmative defense set up by defendant, nonsuit is proper.

7. Accord and Satisfaction § 1—

An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself entitled to; and a satisfaction is the execution or performance of such agreement.

8. Same: Compromise and Settlement § 1—

Whether the acceptance of an amount less than that which plaintiff asserts is due her, operates as a compromise and settlement, depends upon the intent of the parties as expressed in their acts and statements at the

time of the acceptance of the lesser amount, and nonsuit is improperly granted on the theory of accord and satisfaction unless such intent is the only reasonable inference deducible from the evidence and stipulations of the parties.

9. Same—Evidence held to raise question for jury as to whether parties intended acceptance of lesser amount to constitute settlement.

Plaintiff was the beneficiary named in a policy of life and retirement insurance purchased under a pension fund system. The insured employee died after voluntarily leaving the employment, but while the policy remained in full force and effect. The insurer paid the full amount of the policy, but the trustee of the pension fund retained one-half and turned over to plaintiff only the other one-half of the proceeds, and plaintiff signed a receipt therefor. The receipt did not state that the sum was accepted in full settlement of her claim, and plaintiff testified that at the time she received the money, she did not intend to abandon any right she might have in the full proceeds of the policy. *Held:* The evidence does not establish, as the sole reasonable inference deducible therefrom, intent on the part of the parties that the acceptance of one-half the proceeds of the insurance should discharge any further obligation to the plaintiff, and therefore nonsuit upon defendant's affirmative defense of accord and satisfaction was error.

APPEAL by plaintiff from *Clarkson, J.*, at November Term, 1954, of SCOTLAND.

Civil action for money had and received.

The plaintiff alleges in her complaint that the defendant is a banking corporation with trust department; that the plaintiff was the sole beneficiary of a life insurance policy issued 2 January, 1948, by the National Life Insurance Company on the life of Lawrence Wheeler Allgood; that while the policy was in force, Lawrence Wheeler Allgood died on 26 February, 1950; that the plaintiff filed proof of death and the Insurance Company issued its check on 3 May, 1950, payable to the plaintiff and the defendant in the sum of $12,659; that on 9 October, 1950, the plaintiff and the defendant endorsed and cashed the check, at which time the defendant delivered to the plaintiff only one-half the proceeds, $6,329.50; that thereafter the plaintiff made demand on the defendant for the balance of the proceeds of the check, but the defendant refused to make payment.

The defendant does not deny receipt of the check and payment to the plaintiff of only half the proceeds. However, by answer the defendant alleges that at the time the insurance policy was written on the life of Lawrence Wheeler Allgood he was an employee of the Bladenboro Cotton Mills, Inc., hereinafter referred to as the Mill, and that the insurance policy was issued in connection with the Mill's pension trust retirement system. And as further defenses the defendant alleges: (1) that because of failure on the part of the insured to comply with the rules

and regulations under which the pension system was established and is operated, the plaintiff was not entitled to the proceeds of the insurance policy, and (2) that in any event, after the Insurance Company issued its check to the plaintiff and the defendant for the full death benefits, to wit, $12,659, the parties agreed to and did divide the moneys half and half between them, and this agreement and the alleged settlement made pursuant thereto are specifically pleaded in bar of plaintiff's right of recovery.

The plaintiff by reply denies that any rule of the retirement system renders her ineligible to receive the death benefits or modifies the terms of the insurance policy "so as to make any person other than the plaintiff . . . entitled to any portion of the proceeds of the policy." The plaintiff further denies that she entered into any agreement or settlement by which she took one-half the proceeds in full settlement of her claim. However, she alleges that if any such agreement or settlement should be found against her, then and in that event, it was induced by fraud.

Certain pretrial stipulations were entered into by the parties. The stipulations disclose these facts in respect to the retirement system: The system was established in December, 1944, for the salaried employees of the Mill. An employee is not eligible for membership until he has been in the employ of the Mill for a period of three years or more. The funds on which the system operates are contributed by the Mill on a voluntary basis, but with provision that no part of the *corpus* or income shall revert to the Mill. No contributions are made by the employee-members of the system. The system is administered by a pension board of three members elected by the Board of Directors of the Mill. The Wilmington Savings & Trust Company is designated as trustee of the funds of the system, with direction that the assets be held as a special trust for the exclusive benefit of the employee-members and beneficiaries, to be administered by the Pension Board in accordance with the established rules and regulations. The rules and regulations provide for the purchase of insurance contracts and annuities so as to furnish the employee-members of the system ordinary life insurance protection, with retirement benefits maturing at age 65. However, the rules provide that: "Any member of the pension system voluntarily leaving the employ of the Company (except for disability or reasons beyond the control of the employer or employee) shall thereupon cease to be a member of the system and shall receive no benefits from the pension fund nor from any annuity or other contract purchased for his benefit. The equity in any such contracts shall thereupon inure to the benefit of the Pension Fund and shall be used for the benefit of the other

members of the System in proportion to the amounts of money contributed for the benefit of such other members of the System, . . ."

The plaintiff's evidence and the pretrial stipulations disclose these further facts: that the insured, Lawrence Wheeler Allgood, was employed in February, 1944, by the Mill and left its employ in August, 1949. He was a member of the pension trust system from December, 1947, until he left the Mill's employ. He died 26 February, 1950. At the time of his death there was in force a life insurance policy issued by the National Life Insurance Company, procured by the defendant Trustee, insuring his life in the amount of $12,659, and naming his wife, the plaintiff herein, as the sole beneficiary, contingent only upon survivorship. Proof of death was duly filed by the plaintiff, as a result of which the Insurance Company issued its check, dated 29 March, 1950, in the amount of $12,659, in payment of the full death benefits, the check being made payable to the order of the plaintiff and the defendant. The check, endorsed by the plaintiff and the defendant, was deposited for collection in the defendant Bank on 9 October, 1950, and was paid in due course. The Bank issued its check to the plaintiff in the amount of $6,329.50 for one-half the insurance moneys. She endorsed the check and collected the proceeds. The other half of the insurance moneys was retained by the defendant Bank in its trust department.

The plaintiff's testimony tends to show these further facts in respect to the division of the proceeds of the insurance moneys: After numerous inquiries the plaintiff learned that the check from the Insurance Company was in possession of the Pension Board at the Mill. She made this discovery about 1 October, 1950. Several days thereafter, a member of the Pension Board phoned her from Bladenboro and arranged for a conference. It was held a few nights later. Two members of the Pension Board came for the conference and met with the plaintiff and her father at his home in Laurinburg. The members of the Board brought with them the documents comprising the rules and regulations of the pension trust system and the trust agreement under which the system is administered. The plaintiff had never seen these documents before. One member of the Pension Board proceeded to read from the documents. Plaintiff said, "It was confusing . . ." From time to time the reading was halted while the other member of the Board explained that the plaintiff was not entitled to any of the insurance moneys. As she put it: "Every few minutes he would get that in. 'You see, Mrs. Allgood, you are not entitled to a cent of it.' At this time, I said to him, 'Well, it seems to me that I am,' and he said, 'But we want to give you some of it, just for good will.' . . . finally we just told him to stop (reading). We didn't understand it anyway. . . . All I knew was what they were telling me, . . . that was all I had to go on . . . the insur-

ance policy had not been in my possession, . . . and he said, 'We're willing to give you half of it.' I thought I'd better take that rather than none." She further said she made "that agreement" because of "what he told me. . . . (that) I wasn't entitled to any of it. . . . that the only way I might get anything would be to sue for it and . . . that will take a year or two, and the lawyers will get half, . . . so you might as well take half and give us the other half."

Two days after the conference in her father's home, the plaintiff went to Bladenboro and there joined a member of the Pension Board and went with him to Wilmington where the insurance check was being held by the defendant Bank, trustee of the pension fund. On arrival, she endorsed the insurance check and in turn received the Bank's check for half the proceeds, $6,329.50, and signed a receipt therefor. The receipt appears on the bottom of a letter written by members of the pension system to the defendant Bank authorizing it to dispose of the $12,659 proceeds of the insurance check by paying one-half to the plaintiff and crediting the pension trust with the other half. The receipt signed by the plaintiff at the bottom of the letter, under the signatures of the writers of the letter, is in words and figures as follows:

"Rec. $6329.50 as set forth above.
(signed) Frances McCormick Allgood
Oct. 9th 1950."

Further testimony of the plaintiff: "I signed this (the receipt) at the request of Mr. Rogers (member of the Pension Board), and I just signed it saying I received that much of the money, and I again made the statement at that time that I thought I was entitled to all or none. Mr. Rogers again told me that he thought it was a very satisfactory agreement. Since I gave receipt for the check in the sum of $6,329.50, I made demand upon the bank for the balance, and they have not as yet returned it to me."

Cross-Examination: ". . . I knew I was receiving half of the total life insurance check and that the pension fund was receiving the other half. . . . Mr. Rogers told me that what I was doing was carrying out the agreement that all the members of the Pension Trust had agreed that he would pay me one-half the check and one-half would go to the Pension Trust."

Redirect Examination: "Q. I understood you to tell Mr. Henry on cross-examination that you understood that you were taking one-half of it. Will you state the reason why you took half of these funds? A. Because I thought that I wasn't going to get anything. I thought I was entitled to all of it, but it looked like they wouldn't let me have all of it,

and they were just going—they claimed they were just giving it to me, and that's the reason I took it. . . .

". . . At the time I received these funds at the bank from Mr. Rogers, I didn't intend to abandon any right that I might have had in the full proceeds of the insurance policy on the life of my husband. Thereafter, I employed counsel and filed the suit."

At the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit. The motion was allowed, and from judgment entered in accordance with such ruling, the plaintiff appeals.

Joe M. Cox and Phillips & McCoy for plaintiff.

Varser, McIntyre & Henry for defendant.

JOHNSON, J. The first question posed by this appeal is whether the plaintiff made out a *prima facie* case of money had and received.

An action for money had and received may be maintained as a general rule "whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff. . . . The plaintiff is entitled to recover when it appears that the money in question belonged to the plaintiff and was secured by the defendant without the consent of the plaintiff, or if with his consent, without consideration." *Wilson v. Lee*, 211 N.C. 434, 436, 190 S.E. 742. Recovery is allowed upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? The right of recovery does not presuppose a wrong by the person who received the money, and the presence of actual fraud is not essential to the right of recovery. The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it. In short, "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the test of natural justice and equity to refund the money." *Moses v. MacFerlan*, 2 Burrow, 1005, 97 Eng. Reprints, 676. See also *Hicks v. Critcher*, 61 N.C. 353; *Bahnsen v. Clemmons*, 79 N.C. 556; *Wilson v. Lee, supra; Sparrow v. Morrell & Co.*, 215 N.C. 452, 2 S.E. 2d 365; *Harrington v. Lowrie*, 215 N.C. 706, 2 S.E. 2d 872; 4 Am. Jur., Assumpsit, Sec. 4; 58 C.J.S., Money Received, Sec. 4; 17 C.J.S., Contracts, Sec. 6.

The plaintiff insists that her evidence and the pretrial conference stipulations support the allegations of her complaint and make out a *prima facie* case of money had and received. She relies on the evidence and stipulations tending to show these facts: (1) that at the time of the death of her husband, Lawrence Wheeler Allgood, the life insurance

policy naming her as sole beneficiary was in force; (2) that proof of death was duly filed; (3) that the Insurance Company issued its check in the amount of $12,656 in payment of the full death benefits, the check being made payable to the order of the plaintiff and the defendant; (4) that the check, endorsed by the plaintiff and the defendant, was deposited for collection in the defendant Bank and was paid in due course; (5) that the defendant Bank paid the plaintiff only half of the insurance moneys, and retained the other half in its trust department for the credit of the pension trust system, and has refused to pay same over to the plaintiff after due demand.

On the other hand, the defendant insists that the plaintiff's evidence and the pretrial stipulations establish conclusively as a matter of law that the plaintiff was not entitled to any of the proceeds of the insurance policy because of failure on the part of the insured to comply with the rules and regulations under which the pension system was operated and under which the insurance policy was procured. In support of its contention, the defendant relies upon the provision which provides that when any member of the pension system voluntarily leaves the employ of the Mill he thereupon ceases to be a member of the system and "shall receive no benefits from the pension fund nor from any annuity or other contract purchased for his benefit," and that the equity in any such contract shall thereupon inure to the benefit of the pension fund.

It is here noted that the insured voluntarily left the employ of the Mill several months before his death. Therefore, it must be conceded that the Pension Board had a right to cancel the insurance policy when he left the employ of the Mill and to collect for the benefit of the pension fund the cash surrender value of the policy. This the Pension Board or Trustee could have done at any time before the death of the insured. However, as it turned out, the policy was not so terminated, but was in full force and effect under an extended term provision when Allgood died in February, 1950. And it is significant that the rules and regulations of the pension trust system nowhere provide for any change of beneficiary upon the termination of the insured's employment, nor do the rules and regulations purport to make any provision, apart from those fixed in the policy, for the payment of death benefits where, as here, the policy is left in force and the death benefits mature and become payable before the normal lapse of the policy. Indeed, any provision in the rules and regulations for diverting death benefits from the policy beneficiary to the pension trust fund in a situation like the one here presented would have been of doubtful validity. This is so for the reason that the pension trust had no insurable interest in the life of a member of the pension system, and any regulation purporting to provide for the payment of insurance death benefits into the pension fund

would have been subject to challenge as a wagering contract contrary to public policy. ". . . an insurable interest exists where there is reasonable ground, founded on the relations of the parties to each other, either pecuniary or contractual or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the insured; and unless there is a reasonable pecuniary interest, or a close tie by blood or marriage, justifying the expectation of benefit or advantage from the continued life of insured, a policy of insurance taken out on the life of another is condemned as one of wager for the purpose of speculating on the hazard of a life in which the beneficiary has no insurable interest." 44 C.J.S., Insurance, Sec. 203 (a), pp. 903, 904. See also *Burbage v. Windley*, 108 N.C. 357, 12 S.E. 839; *Trinity College v. Ins. Co.*, 113 N.C. 244, 18 S.E. 175; *Hinton v. Ins. Co.*, 135 N.C. 314, 47 S.E. 474; *Slade v. Ins. Co.*, 202 N.C. 315, 162 S.E. 734; *Crump v. Ins. Co.*, 204 N.C. 439, 168 S.E. 514; *Wharton v. Ins. Co.*, 206 N.C. 254, 173 S.E. 338; Appleman, Insurance Laws and Practice, Vol. 2, Sec. 762.

It is noted that the statute, Sec. 2½, Chapter 283, Session Laws of 1951, now codified as G.S. 58-204.3, declaring the trustee of a pension plan to have an insurable interest in the lives of the persons covered by the pension plan, was not enacted until after the death of the insured in the instant case.

It necessarily follows that the insurance policy, so far as it relates to death benefits, stands unaffected by the pension trust rules and regulations. Therefore, in no aspect of the case was the defendant, trustee of the retirement funds, entitled to the death benefits. Whereas the policy provisions plainly entitle the wife to all death benefits. Thus the conclusion is inescapable that the insured's death immediately wiped out the cash surrender equity of the policy and brought to maturity the full death benefits due his wife.

We conclude that the plaintiff's evidence when considered with the pretrial stipulations entered below supports the allegations of her complaint and is sufficient to make out a *prima facie* case of money had and received.

It is manifest that the nonsuit below must be held for error unless the plaintiff's evidence together with the pretrial stipulations establish as a matter of law the defendant's affirmative defense of accord and satisfaction under application of the principle explained by *Barnhill, J.* (now *C. J.*) in *Hedgecock v. Ins. Co.*, 212 N.C. 638, 641, 194 S.E. 86, 88: "When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered." See also *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248.

" 'An "accord" is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a "satisfaction" is the execution or performance, of such agreement.' " *Dobias v. White,* 239 N.C. 409, 413, 80 S.E. 2d 23, 27. See also Restatement, Contracts, Sec. 417; 1 Am. Jur., Accord and Satisfaction, Sec. 19; G.S. 1-540.

For the nonsuit to be sustained on the theory of an accord and satisfaction, it must appear from the evidence, as the only reasonable inference deducible therefrom, that the plaintiff contracted to accept the lesser sum paid her in settlement of her claim for all the insurance moneys. This would require unequivocal proof of intent on the part of the parties that the acceptance of half the proceeds should operate as a discharge of any further obligation to the plaintiff by the defendant. *Blanchard v. Peanut Co.,* 182 N.C. 20, 108 S.E. 332. This may be a permissible inference to be drawn from the evidence, but it is not the only reasonable inference deducible therefrom.

In *Blanchard v. Peanut Co., supra,* at p. 22, appears this pronouncement: " 'It is a well recognized principle here and elsewhere that when a dispute exists between two parties as to the amount of an account, and one sends another a check or makes a payment clearly purporting to be in full settlement of the claim, and the other knowingly accepts it, this will amount to an adjustment, and further action thereon is precluded. It is a question, however, of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury.'

"In the case at bar, we do not think it appears unequivocally that the check was sent on condition that its acceptance should amount to a settlement in full, or as a complete discharge of the debt. This may be a permissible view to take of the evidence, but not necessarily the only one. The sending of the check to cover what the defendant claimed was the balance due on the account does not *ipso facto* show conclusively that an accord and satisfaction was the condition annexed to its acceptance. The ultimate fact can only be determined by a jury under proper instructions from the court."

In *McCullen v. Hood,* 14 N.C. 219, there was a plea of accord and satisfaction where plaintiffs' heirs were suing the defendant administrator of their ancestor's estate for rents unaccounted for. The plea was based on a receipt given to defendant by plaintiffs' guardian, which read as follows: "Received of Britain Hood, as next friend to the heirs of Asher McCullen, deceased, the following notes of hand, for rent of

lands, etc., . . ." No other evidence was offered. The trial court left it with the jury to determine whether the notes were received as an accord and satisfaction or as a discharge *pro tanto*. The jury found for plaintiff. This Court held that the receipt, not stating it to be payment in full, was not in itself sufficient evidence to support the plea of accord and satisfaction. See also *Grant v. Hughes,* 96 N.C. 177, top p. 191, 2 S.E. 339, 345.

In *Armstrong v. Lonon,* 149 N.C. 434, 63 S.E. 101, the Court held it to be a jury question whether a discharge of all indebtedness resulted from creditor's endorsement of a check marked "in full to date." The Court said: "The check indicated on its face that it was sent in full payment to date thereof and while this is not, under the circumstances of this case, conclusive, yet the receipt of it by the plaintiffs, their endorsement of it and retention of the money, *is sufficient evidence to go to the jury* that it was sent and received as a full payment and discharge of all indebtedness of defendant to plaintiffs, and so intended." (Italics added.)

In *Rosser v. Bynum,* 168 N.C. 340, 84 S.E. 393, the headnote adequately states the rule enunciated: "A check given and received by the creditor which purports to be in full of account to date does not conclude the creditor, accepting it, from showing that in fact it was not in full, unless under the principles of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account." In the opinion *Hoke, J.,* speaking for the Court, said: "It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full or when such a check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for. . . . (authorities cited) . . . A proper consideration of these and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction, and unless the language and the effect of it is clear and explicit it is usually a question of intent, to be determined by the jury." See also *Walker v. Burt,* 182 N.C. 325, 109 S.E. 43; *Lochner v. Sales Service,* 232 N.C. 70, 59 S.E. 2d 218; *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410.

In the case at hand, while the plaintiff testified "I thought I'd better take that (the half offered) rather than nothing," and "I knew I was receiving half of the total life insurance check and that the pension fund was receiving the other half," nevertheless, she said on redirect examination, "At the time I received these funds at the bank from Mr. Rogers, I didn't intend to abandon any right that I might have had in the full

proceeds of the insurance policy on the life of my husband. . . ." And it is noted that the written receipt she signed nowhere expressly states that the sum received by her was accepted in full settlement of her claim.

We conclude that the plaintiff's evidence does not establish the defendant's affirmative defense of accord and satisfaction as a matter of law. On this record it is an open question for the jury. *Blanchard v. Peanut Co., supra; Winkler v. Amusement Co.*, 238 N.C. 589, 598, 79 S.E. 2d 185, 192; 1 Am. Jur., Accord and Satisfaction, Sections 22 and 78; 1 C.J.S., Accord and Satisfaction, Sec. 49 (b). In this view of the case, we do not reach for decision the question of the sufficiency of the evidence to support the issue of fraud raised by the plaintiff's reply.

The judgment of nonsuit entered below is

Reversed.

CHARLES S. HUNT v. DR. HOWARD BRADSHAW.

(Filed 26 August, 1955.)

1. Physicians and Surgeons § 14—

A physician or surgeon may be held liable only for such damages as proximately result from his failure to possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, or his failure to exercise reasonable care and diligence in his application of his knowledge and skill to the patient's case, or his failure to use his best knowledge in his treatment and care of the patient.

2. Physicians and Surgeons § 19: Evidence § 48—

Whether an operation should be undertaken in a given case relates to a field of expert knowledge and is subject only to expert testimony.

3. Physicians and Surgeons §§ 16 and 20—

Plaintiff had a small piece of steel imbedded in his chest about ¾ of an inch from his lung and about 4½ inches from his heart. Plaintiff introduced expert medical testimony to the effect that such foreign objects tended to migrate in the body, and that it was within the realm of good surgical practice to operate for the removal of such objects, although one expert testified in response to a hypothetical question that in the absence of pain or fever, etc., he would be inclined not to operate in such instance. *Held:* Plaintiff's own evidence fails to show that defendant surgeon was negligent in advising the operation.

4. Same—

In regard to an operation for the removal of a small foreign object from plaintiff's body, expert testimony to the effect that additional X-rays might have been desirable, but that the witness could not say that more X-rays were necessary or might have located the object more exactly, does not

tend to show that good surgical practice required additional X-rays in such instance.

5. Same—

The statement of a surgeon to his patient that the contemplated operation was very simple, while plaintiff's expert testimony is sufficient to support a finding that the operation was of a very serious nature, *is held*, under the facts of this case, insufficient to show such want of ordinary care on the part of the surgeon as to import liability.

6. Physicians and Surgeons § 19: Evidence § 48—

Proof of what is in accord with approved surgical procedure, and what constitutes the standard of care of a surgeon in performing an operation, relate to expert knowledge and may be established only by the testimony of qualified experts.

7. Physicians and Surgeons § 20—

The doctrine of *res ipsa loquitur* does not apply to untoward results of an operation.

8. Same—Evidence held insufficient to establish that unfortunate result of operation was caused by negligence.

Plaintiff's evidence tended to show that defendant surgeon advised an operation to remove a small foreign body from plaintiff's chest, that prior to the operation plaintiff was in apparent good health, without pain or fever, that the foreign object was not removed, and that after the operation plaintiff discovered he had lost permanently the use of his arm. Plaintiff's expert testimony was to the effect that the location of such foreign bodies in an operation was very difficult, that the best surgeons frequently failed to locate them, that the loss of the use of the arm was a result of ischemia, which could occur in exploring a brachial plexus without the cutting or incision of a nerve, and that such results were not unlikely in the performance of an operation in the region of the brachial plexus. *Held:* Although plaintiff's evidence is sufficient to justify a finding that the injury to his hand and arm resulted from the operation, it is insufficient to show that the results were caused by negligence, the doctrine of *res ipsa loquitur* not being applicable, and nonsuit was properly entered.

BOBBITT, J., concurring.

APPEAL by plaintiff from *Crissman, J.*, 14 March, 1955 Term, FORSYTH Superior Court.

This is a civil action for damages alleged to have resulted from the negligent failure of the defendant (1) to use reasonable care and diligence in the application of his knowledge and skill as a physician and surgeon, and (2) to exercise his best judgment in attempting to remove a small piece of steel from plaintiff's body.

To the allegations of negligence the defendant entered a general denial. The substance of so much of plaintiff's evidence as bears on the question of law presented follows:

On 18 July, 1950, the plaintiff, an able-bodied man, was working in his auto repair shop near Kingsport, Tenn., when a small piece of steel, about 3/8" x 2/8" x 2/8", with sharp edges, broke off from the end of an automobile axle under a sledge hammer blow and penetrated plaintiff's body, entering the left front side of his neck just above his collar bone. He was examined by Dr. Howkins and later by Dr. Reed. There was bleeding from the entrance wound for about 15 or 20 minutes, but afterwards very little pain, no fever, and no apparent adverse effect from the accident. However, Dr. Reed had X-ray photographs made. He recommended that plaintiff consult the defendant, Dr. Bradshaw, and follow his advice as to an operation for removal of the missile.

On 31 July, 1950, plaintiff consulted Dr. Bradshaw, who had five X-ray pictures made of plaintiff's upper chest. The pictures were taken from the front, back and side. On one or two the foreign body showed indistinctly. When asked for his advice after the examination, Dr. Bradshaw stated that he thought the metal was going down, that it might get into his heart, and he strongly recommended it be removed. "I asked him about the operation, if it was a very serious one, and he said it wasn't nothing to it, it was very simple."

The defendant performed the operation on the morning of 2 August, 1950. Plaintiff testified: "When I woke up, I was trying to work my hand, and I couldn't use my fingers at all; I had never experienced that feeling before. At the present time (1955) I can't use my left hand at all. I can't use those fingers no way at all." To quote the plaintiff further: "I saw Dr. Bradshaw for just a short time after I woke up; that was the next morning. . . . I told him I couldn't clinch my fingers; that I couldn't use my hand. He said that that would get all right, said it would probably take three or four weeks. He stated they didn't get the piece of metal. . . . He said that he checked and there wouldn't be no danger in it; said everything would be all right." The plaintiff identified five X-ray photographs which Dr. Bradshaw told him he used in the operation. He said some others were made during the operation.

Dr. James Marr, admitted to be an expert in radiology and X-ray diagnosis, a witness for plaintiff, testified that he had examined the X-rays made on 1 August, 1950, on 6 August, 1950, and others made on 30 October, 1954; that in his opinion the steel fragment had moved very little, probably not over one-half inch. The metal object is about three-fourths inch from the lung and about four and one-half inches from the heart. "I have run across many cases of foreign objects lodged in the body . . . In most of those cases the foreign objects were left in the body. I would say it is sometimes difficult to find by operation, a foreign object of the size in question here."

"As to the internal structure of tissues lying between this missile and the heart would be just the muscles of the neck, then the covering of the lung, the lung itself, and the great vessels that supply the entire body coming from the heart. . . . They are about two and three-eighths inches from the piece of metal. The piece of metal may have changed slightly. It is in accord with general experience in the medical field with respect to foreign bodies of this kind and location that they sometimes do move. The depth of penetration of the metal is something that cannot be measured very exactly."

Question: "To what degree of exactness do any of the films dated 8-1-50 reveal the depth of the foreign object to be? (These are the photographs used by Dr. Bradshaw.)

Answer: "I can tell pretty well how far it is from the back surface of the body . . . and it is about three and one-half inches from the back surface of the body. From the front surface, as nearly as I can tell . . . and that is made difficult, of course, because the arms are up here (above the head) and they cast a shadow over this front, so that I can't tell exactly where the front surface of the neck is—that measures about three inches, or a little less."

"The whole area is one of the vital areas of the body. When a physician looks at an X-ray photograph, what he gets is an approximation. You do not see blood vessels, nerves or tendons, or muscles. I believe the brachial plexus lies back of and below where the foreign body is now. The brachial plexus is a cluster of very important nerves in the vicinity of this piece of metal . . . As I recall, there are six large nerves that comprise the brachial plexus and a number of smaller ones. The area involved here would be the area controlling the left arm, left hand and left side of the body. . . . I would say numerous times explorations and operations have been made to locate a foreign body without being able to locate and find it. The very best surgeons, in my experience, frequently are unable to locate and remove small foreign bodies in the body of a patient."

Dr. Everett O. Jeffreys, admitted to be a neurological specialist and surgeon, testified as a witness for the plaintiff: "I saw Mr. Hunt October 30, 1954. My findings at the time were that he had a claw hand on the left side. There were atrophies of the muscles. . . . I think this deformity to his arm was primarily the result of an ischemia (diminished or absence of blood supply) of a part of the brachial plexus, which can happen in exploring a brachial plexus. I don't have evidence to believe that the nerves had been cut in that they are not totally interrupted, and the impairment is a little bit too extensive for a clean cut or incision of the nerve. Therefore it seems to me that the . . . disability in the arm to the extent involved is an impaired blood supply

to a part of the brachial plexus, and this can happen to anybody who performs operations in the region of the brachial plexus."

"I think it is the usual practice to remove objects that lie in this region that have given evidence that they have penetrated tissues of vital function and I would consider it good practice in this territory, or any territory. I think the patient should always be informed that he might have some disability from the arm and some points, salient points, as near as the doctor can tell him about what to expect, be it bad or be it good; and I imagine that was done in Mr. Hunt's case."

In response to a question as to whether additional X-ray photographs would have been helpful in locating the steel missile, Dr. Jeffreys answered: "Foreign bodies are extremely difficult to locate at times. I would say that more X-ray views, giving all planes, as to location, its anteroposterior location or its lateral location, would aid in giving a clearer, more concise view as to where the metal rests; but it still might not locate it exactly." . . . "It has been my experience that it is sometimes difficult to locate and remove a foreign body from . . . a patient; I have had difficulty with it, with locating a piece of metal. . . . I have had difficulty in removing them. I have known instances wherein experienced, skilled and careful surgeons in this field have been unable to locate and remove foreign bodies. I think it is a fairly common experience among skilled surgeons in this field." . . . "When a foreign body, such as a piece of metal . . . gets into the body it migrates, particularly if it gets in the muscle sheaths, or in between layers of muscles. As the muscles contract and relax in their ordinary movement, that missile is propelled up or down or to one side."

In answer to a hypothetical question, Dr. Jeffreys answered that under the facts as set out in the question he would be inclined not to operate if the patient were free from symptoms—pain, temperature, etc.

At the conclusion of the plaintiff's evidence, the defendant's motion for judgment as of nonsuit was allowed, judgment entered accordingly, and the plaintiff excepted and appealed.

Eugene H. Phillips for plaintiff, appellant.
Womble, Carlyle, Sandridge & Rice for defendant, appellee.

HIGGINS, J. A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. *Long v. Austin*, 153 N.C. 508, 69 S.E. 500; *Nash*

v. Royster, 189 N.C. 408, 127 S.E. 356; *Smith v. McClung*, 201 N.C. 648, 161 S.E. 91; *Wilson v. Hospital*, 232 N.C. 362, 61 S.E. 2d 102; *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57. If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable.

The plaintiff does not contend Dr. Bradshaw was deficient, either in learning or skill, or ability as a surgeon. He does contend, however, the defendant was not reasonably careful and diligent in making use of his knowledge, skill and ability, in advising the operation, and in performing it. In particular the plaintiff contends:

1. He was free from pain, fever or other symptoms and that an operation was not necessary.

2. The operation was undertaken without adequate X-ray pictures to enable the defendant to locate with sufficient certainty the piece of steel so that it could be directly approached and removed without extensive exploratory operation and search.

3. The defendant advised the plaintiff the operation was simple, whereas it was serious and involved undisclosed risks.

In determining whether the operation should have been undertaken, resort must be had to the evidence of experts. Expert opinion must be founded upon expert knowledge. The plaintiff offered the evidence of two specialists. Dr. Marr testified: "My field is X-ray examinations. I do not specialize in or practice surgery to any major extent . . . trying to remove this missile calls for very expert ability in the field of surgery." Dr. Marr expressed no opinion as to the advisability of the operation.

Dr. Jeffreys testified: "I think it is the usual practice to remove objects that lie in this region and have given evidence that they have penetrated tissues of vital function; and I would consider it within the realm of good surgical practice in this territory, or any other territory." The witness did state, in response to a hypothetical question that in the absence of symptoms he would be inclined not to operate. The plaintiff, therefore, is without expert testimony to support his contention the operation should not have been undertaken. The plaintiff's witness said the operation is in accord with good surgical practice.

The plaintiff insists the operation was undertaken without adequate X-ray photographs. He testified Dr. Bradshaw had available for use in the operation the five X-rays introduced in evidence and that at least one other was made during the course of the operation, the latter not in evidence. Dr. Jeffreys was asked a hypothetical question as to whether X-rays in addition to the five introduced in evidence would be in accordance with good surgical practice. Witness, after pointing out

the fact he did not have the photograph taken during the operation, said: "And these X-rays show the piece of metal in the base of the neck, that it is present; there is left, perhaps, the other view, which was not present in exhibits, that is mentioned in the question . . . which gives you another dimensional view . . . But that might have been desirable, but I can't say that it was necessary, . . . I would say that more X-ray views, giving all planes, as to location, its anteroposterior location . . . would aid in giving a more . . . concise view; but it still might not locate it exactly." When analyzed, nothing in this statement is to the effect that good surgical practice required additional X-rays.

The plaintiff's evidence is sufficient to support a finding the operation was of a very serious nature. Dr. Bradshaw, after examination, advised the plaintiff the missile might move and get to the heart, and recommended the operation. That a sharp-edged piece of steel does migrate is borne out by plaintiff's expert evidence, especially by Dr. Jeffreys. Upon Dr. Bradshaw's advice the operation was decided upon. It is understandable the surgeon wanted to reassure the patient so that he would not go to the operating room unduly apprehensive. Failure to explain the risks involved, therefore, may be considered a mistake on the part of the surgeon, but under the facts cannot be deemed such want of ordinary care as to import liability.

Proof of what is in accord with approved surgical procedure and what constitutes the standard of care required of the surgeon in performing an operation, like the advisability of the operation itself, are matters not within the knowledge of lay witnesses but must be established by the testimony of qualified experts. When the standards have been thus established, lay testimony may be sufficient to enable the jury to determine whether these standards were followed with ordinary care and diligence. *Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12.

Plaintiff's expert testimony is sufficient to justify the finding the injury and damage to plaintiff's hand and arm resulted from the operation. But, as in cases of ordinary negligence, the fact that injury results is not proof the act which caused it was a negligent act. The doctrine *res ipsa loquitur* does not apply in cases of this character. *McLeod v. Hicks,* 203 N.C. 130, 164 S.E. 617. In the case of *Smith v. McClung, supra, Justice Brogden,* quoting from *Ewing v. Goode,* 78 Fed. 442, said: "A physician is not a warrantor of cures. If the maxim *'res ipsa loquitur'* were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.' "

Of course, it seems hard to the patient in apparent good health that he should be advised to undergo an operation, and upon regaining consciousness finds that he has lost the use of an arm for the remainder of his life. Infallibility in human beings is not attainable. The law recognizes, and we think properly so, that the surgeon's hand, with its skill and training, is, after all, a human hand, guided by a human brain in a procedure in which the margin between safety and danger sometimes measures little more than the thickness of a sheet of paper.

The plaintiff's case fails because of lack of expert testimony that the defendant failed, either to exercise due care in the operation, or to use his best judgment in advising it. As was said in *Smith v. Wharton, supra,* "There can be no other guide. And where want of skill and attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

The judgment of nonsuit entered in the Superior Court is

Affirmed.

BOBBITT, J., concurring: Plaintiff's cause of action is grounded on the alleged negligence of the defendant. The allegations embrace two elements: (1) alleged negligence in advising the performance of the operation, and (2) alleged negligence in the performance thereof.

The court holds that the evidence fails to show that defendant's recommendation that plaintiff undergo the operation was made otherwise than in good faith and in the exercise of the sound judgment of a surgeon of great experience and recognized skill and also fails to show negligence in the performance of the operation. With these holdings I agree.

True, plaintiff alleges that when defendant recommended that the operation be performed, defendant *negligently* represented to him that the "operation was a simple one which entailed and involved no danger to the plaintiff's health and body" and that "but for said representations . . . the plaintiff would not have submitted to said operation." But plaintiff did not allege that said representations were false to the knowledge of the defendant or other facts that might nullify his consent to the operation. In short, plaintiff's action is not for assault and battery, or trespass to the person, predicated upon allegations of an unauthorized operation.

An unauthorized operation constitutes an assault and battery, *i.e.,* trespass to the person. As stated by *Judge Cordozo,* speaking for the Court of Appeals of New York: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.

Pratt v. Davis, 224 Ill. 300, 79 N.E. 562, 7 L.R.A. (N.S.) 609, 8 Ann. Cas. 197; *Mohr v. Williams,* 95 Minn. 261, 104 N.W. 12, 1 L.R.A. (N.S.) 439, 111 Am. St. Rep. 462, 6 Ann. Cas. 303. This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained." *Schloendorff v. New York Hospital,* 211 N.Y. 125, 105 N.E. 92, 52 L.R.A. (N.S.) 505, Ann. Cas. 1915C, 581. See also, *Bennan v. Parsonnet,* 83 N.J.L. 20, 83 Atl. 948; *Moos v. United States,* 118 F. Supp. 275. In *Mohr v. Williams, supra, Brown, J.,* quotes 1 Kinkead on Torts, sec. 375, viz.: "The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." And there is authority to the effect that consent to perform an operation is not valid if induced by representations that are false to the knowledge of the surgeon who makes them. *Birnbaum v. Siegler,* 273 App. Div. 817, 76 N.Y.S. 2d 173; *Pratt v. Davis, supra; Wall v. Brim,* 138 F. 2d 478; *Nolan v. Kechijian,* 75 R.I. 165, 64 A. 2d 866; *Robinson v. Crotwell,* 175 Ala. 194, 57 So. 23; *Wall v. Brim,* 145 F. 2d 492.

Whether plaintiff's evidence would be sufficient for submission to the jury had he elected to bring his action on the ground of injury resulting from an unauthorized operation is not presented for decision on this record. Suffice it to say, plaintiff did not bring such action.

It seems appropriate to say that we have before us only the plaintiff's testimony as to the alleged representations. Judgment of involuntary nonsuit having been entered at the close of the plaintiff's evidence, the defendant was not heard as to his version of what occurred.

STATE v. L. G. OWEN.

(Filed 26 August, 1955.)

1. Municipal Corporations § 37—

Power of a municipality to enact and enforce zoning regulations rests exclusively on statutory authority.

2. Same—

The State-wide statutes authorizing municipalities to enact zoning regulations delegate no power to zone beyond municipal corporate limits. G.S. 160-172 through G.S. 160-181.1.

3. Same—

Section 116, Chapter 232, Public Laws of 1927, when read in context, discloses the legislative intent to enlarge the territorial jurisdiction of the municipal court of the city in question to one mile outside its corporate limits, and the statute does not confer by implication power upon the city to extend its zoning regulations beyond its corporate limits.

4. Same—

Where a city is given no statutory authority to zone outside the corporate limits, a statute (Chapter 677, Session Laws of 1947) which provides that when the city is given authority in the territory outside its corporate limits, the exercise of such authority shall be subject to the approval of the board of commissioners of the county, does not give the city authority to zone property outside its corporate limits.

5. Same: Statutes § 10—

Where at the time of the enactment of a zoning ordinance purporting to extend the city's zoning regulations beyond its corporate limits, the municipality has no statutory authority to zone outside its limits, a later statute (Chapter 777, Session Laws of 1953), which confers authority on the municipality to extend its zoning regulations three miles beyond its corporate limits, but which contains no provision purporting to validate any existing ordinance, does not validate the prior zoning regulations, and in the absence of ordinance passed subsequent to the statute, the violation of zoning regulations in territory outside the corporate limits may not be made the subject of prosecution.

APPEAL by the State from *Sharp, Special Judge,* and a jury, at 6 December, 1954, Term of FORSYTH.

Criminal prosecution tried on appeal from the Municipal Court of the City of Winston-Salem on a warrant charging the defendant with violating a zoning ordinance of the City.

The warrant charges that the defendant wilfully permitted a structure located within an area zoned as "Residence A-1" to be used "for business purposes, to wit: a grocery business, . . . in violation of Chapter 48 of the Code of the City of Winston-Salem, entitled Zoning and Planning, . . ."

The jury returned a special verdict finding in substance these facts: that the zoning ordinance was adopted by the Board of Aldermen of the City of Winston-Salem on 21 December, 1948, and was approved and ratified by the Board of Commissioners of Forsyth County on 7 February, 1949; that under the zoning ordinance certain lands within the City as well as certain properties outside the corporate limits of the City, including the property here involved, were zoned as a "Residence A-1" district, with provision that the property so zoned might be used for residential purposes only, and with further provision that a violation of the ordinance should be a criminal offense punishable by fine or imprisonment; that as of the date of the adoption of the ordinance, the

defendant's property was 1.297 miles outside the corporate limits of the City. However, by reason of an extension of the limits, effective 1 January, 1949, the defendant's property was thereafter 0.712 of a mile outside the corporate limits; that on 8 July, 1953, the defendant applied for and obtained from the building inspector of the City a permit to erect on the premises in question a dwelling for residential purposes; that following the erection of the building, the defendant used it as a combination residence and store, the back portion being used as a residence and the front for the operation of a grocery business.

Upon the facts found in the special verdict the trial Judge was of the opinion that the defendant was not guilty as charged, and accordingly the jury so found for its verdict that he was "not guilty."

From the judgment entered in accordance with the foregoing ruling of the court and the verdict of the jury, the State appealed, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Moody, and Gerald F. White, Member of Staff, for the State.

Fred M. Parrish, Jr., for defendant.

JOHNSON, J. Municipal power to enact and enforce a zoning regulation does not exist in the absence of statutory authorization. 58 Am. Jur., Zoning, Sec. 7. See also *James v. Sutton,* 229 N.C. 515, 50 S.E. 2d 300; *Rhodes, Inc., v. Raleigh,* 217 N.C. 627, 9 S.E. 2d 389; *S. v. Dannenberg,* 150 N.C. 799, 63 S.E. 946. Therefore the validity of a zoning ordinance must be tested by the limitations of the enabling act. *122 Main Street Corporation v. Brockton,* 323 Mass. 646, 84 N.E. 2d 13, 8 A.L.R. 2d 955. See also *Harrington & Co. v. Renner,* 236 N.C. 321, 72 S.E. 2d 838.

The single question for decision here is whether the zoning regulation of the City of Winston-Salem is supported by enabling legislation adequate to make the ordinance enforceable against the defendant's property outside the corporate limits of the City.

First, we dismiss from consideration the provisions of Chapter 160, Article 14, of the General Statutes, which is the State-wide enabling legislation from which municipalities derive the general power to enact zoning regulations. G.S. 160-172 through 160-181.1. This legislation is inapplicable here for the reason that it nowhere makes provision for zoning beyond municipal corporate limits.

Next, it is noted that the charter of the City of Winston-Salem as it existed prior to the enactment of Chapter 677, Session Laws of 1947, nowhere authorizes zoning regulations beyond the corporate limits. True, as urged by the State, the charter of the City as rewritten in 1927

provides that "The ordinances now in force in the city . . ., and such as may hereafter be adopted, shall operate and have effect within one mile outside of the corporate limits of the city, . . ." However, when this provision (Section 116 of Chapter 232, Public Laws of 1927) is read in context, it is manifest that the legislative intent was merely to enlarge the territorial jurisdiction of the Municipal Court of the City and to authorize the police force of the City to execute criminal process within the extended area. The State's contention that this section of the charter impliedly confers upon the City the power to extend its zoning regulations one mile beyond the corporate limits is untenable.

This brings us to a consideration of Chapter 677, Session Laws of 1947, which is the enabling act under which the City endeavored to zone the property of the defendant. It is observed that this Act provides in Section 23 that "Wherever in this Act the City Planning Board or the Board of Aldermen of the City of Winston-Salem or the Board of Adjustment of the City of Winston-Salem are given authority in the territory outside of the corporate limits of the City of Winston-Salem, the exercise of such authority beyond one mile from the corporate limits of the City of Winston-Salem shall be subject to the approval of the Board of Commissioners of Forsyth County."

However, nowhere in this Act is the City of Winston-Salem or the County of Forsyth given authority to zone property outside the corporate limits of the City. It is true the record discloses that the preliminary draft of the bill which as enacted became Chapter 677, Session Laws of 1947, contained two paragraphs in Section 23 which purported to confer upon the Board of Aldermen of the City of Winston-Salem the power to extend its zoning regulations three miles beyond the corporate limits. But these two paragraphs were omitted from the bill as finally enacted. Therefore, for want of legislative authority to zone beyond the corporate limits, the ordinance of the City, so far as it attempts to do so, was and is invalid.

While the paragraphs which were omitted from the Act of 1947 were inserted by subsequent amendatory act, Chapter 777, Session Laws of 1953, it is noted that there is no provision in the amendatory act which purports to validate the zoning ordinance. In the absence of such provision, the amendatory act of 1953 may not be treated as retrospective in the sense of validating the provisions of the pre-existing municipal ordinance. A municipal ordinance invalid under an enabling statute existing at the time of its enactment is not validated by mere amendment of the statute so that the ordinance might be validly enacted under the amended law. *McGillic v. Corby,* 37 Mont. 249, 95 P. 1063; 37 Am. Jur., Municipal Corporations, Sec. 168. See also *Frank J. Durkin Lumber Co. v. Fitzsimmons,* 106 N.J.L. 183, 147 A. 555; *Borshesky v. Board*

of Works, 8 N. J. Mis. R. 386, 150 A. 237; *Frelinghuysen v. Morristown,* 77 N.J.L. 493, 72 A. 2. Here the record discloses no subsequent ordinance purporting to activate the original zoning regulation as to property outside the corporate limits. Indeed, the State rested its case below, and here as well, on the original ordinance of 21 December, 1948. Since the pre-existing zoning ordinance was neither activated as to property outside the city limits by the amendatory legislative act nor by amendatory ordinance of the Board of Aldermen, the ordinance is unenforceable as against the defendant's property. The judgment below will be upheld.

No error.

R. E. SHEPPARD, EXECUTOR OF THE ESTATE OF W. BRUCE KENNEDY, DECEASED, v. WILLIAM WOOTEN KENNEDY, MABEL LILLIAN SUTTON KENNEDY, BETTY BRUCE KENNEDY, A MINOR, AND AGNES RICKS KENNEDY, INDIVIDUALLY, AND AGNES RICKS KENNEDY, GUARDIAN AD LITEM FOR BETTY BRUCE KENNEDY, A MINOR, AND W. W. W. KENNEDY, ADMR. C.T.A. OF ESTATE OF MABEL LILLIAN SUTTON KENNEDY, DECEASED, AND THOMAS B. GRIFFIN, GUARDIAN AD LITEM FOR THE UNKNOWN HEIRS AT LAW AND NEXT OF KIN OF WILLIAM WOOTEN KENNEDY.

(Filed 26 August, 1955.)

Wills § 41—

Where a will makes substantial provision for a class of beneficiaries to which the posthumous child of testator belongs, such provision precludes the application of G.S. 31-45, and such child is not entitled to claim under the statute as a pretermitted child. G.S. 31-45 has been rewritten by Section 7, Chapter 1098, Session Laws of 1953, codified as G.S. 31-5.5.

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

APPEAL by defendant Betty Bruce Kennedy from *Parker, J.,* at 28 February, 1955, Civil Term of LENOIR.

Jones, Reed & Griffin for appellees.

Whitaker & Jeffress for appellant.

JOHNSON, J. This is a proceeding under G.S. 28-158 to determine the share to which a posthumous child is entitled in the settlement of her father's estate. The appellant, Betty Bruce Kennedy, is the posthumous child. Her father, W. Bruce Kennedy, died leaving a last will and testament.

It is alleged on behalf of the child that the father died without making provision for her and that by virtue of G.S. 31-45 she is entitled to share in his estate in the same manner as if he had died intestate.

The court below ruled, however, that the father's will, by gift to a class to which the child belongs, makes provision for her within the meaning of G.S. 31-45, and that therefore the child is bound by the terms of the will.

Whether this ruling was correct is the single question presented by the appeal.

G.S. 31-45 provides in part as follows: "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, . . ."

The testator, W. Bruce Kennedy, was first married to Ethlyn A. Kennedy, who died in 1948. Later that year he married Agnes Ricks Kennedy, who is now his widow. He made his will in July, 1948, twenty-two days after the second marriage. He died 31 May, 1950, at the age of 45, survived by a son, William Wooten Kennedy, age then 19, the only child of his first marriage. However, on 18 February, 1951, 8 months and 17 days after his death, his widow, Agnes Ricks Kennedy, gave birth to Betty Bruce Kennedy. This child and the son by the first marriage are the testator's only heirs at law and next of kin.

The pertinent parts of the will are Items II and III.

By Item II, the testator devised his 130-acre farm, on which was located his home, to his mother for life, then to his son William for life, with remainder "at his death to the child or children of his body him surviving; . . .," with provision for the child or children of any deceased child to take the share of the deceased parent.

The 130-acre farm which was devised under Item II of the will to the testator's mother and son was valued for the purposes of this action at $20,000.

By Item III, the testator directed that "all the remaining property of which I may die seized and possessed . . . shall be . . . distributed among my next of kin and heirs at law in the same manner as if I had died intestate; . . ."

The residue of the estate which passed under Item III of the will includes personal property of the value of several thousand dollars and a 22½% interest in two tobacco auction sales warehouses and operating equipment located in or near Kinston. The undivided interest of the testator in the warehouse property was sold under order of court and brought $100,000.

The widow, Agnes Ricks Kennedy, dissented from the will and claimed the cash value of her dower in the warehouse property. This,

amounting to $24,745.14, was paid to her. Out of the residue of the warehouse moneys the debts of the testator, after application of the personal estate, have been paid. The principal debt of the estate was a specific lien of $22,000 against the testator's real estate, securing an original loan of $35,000 used in acquiring a 22½% interest in one of the warehouses purchased by the testator after the will was made in 1948. His 22½% interest in the other warehouse was owned at the time the will was made.

The executor now has on hand a balance of $37,198.85, as real estate assets, derived from the sale of the warehouse property, for final distribution, less the costs and charges of administration.

Here, then, we have a net residuary estate in land of the value of some $35,000 for equal division, according to Item III of the will, between the testator's two children, namely: William Wooten Kennedy and the posthumous child, Betty Bruce Kennedy. This amounts to substantial provision for the child. We are constrained to the view that the will makes "provision for" her within the meaning of our pretermission statute, G.S. 31-45, and prevents application of this statute for her benefit.

It is true the will makes no direct, specific provision for the child, and it is also true that the testator at the time of his death did not know the child had been conceived. However, on this record neither of these factors is of controlling importance. Here the testator has made substantial provision for a class of beneficiaries to which the posthumous child belongs. Also, we think the language of the will when considered from its four corners and in the light of the circumstances surrounding the testator, manifests a clear intent to provide for the contingency of an after-born child, including one posthumously born. See *Lamar v. Crosby*, 162 Ky. 320, 172 S.W. 693. There the testator, having two children, made a bequest of property to "my children," and it was held that a posthumous child, being included in the term "children," was not entitled to claim under the statute as a pretermitted child.

The decisions cited and relied on by the appellant have been carefully considered. They are either factually distinguishable or are not considered controlling. It would serve no useful purpose to discuss the cited cases or to elaborate further on this opinion, particularly so in view of the fact that by Section 7, Chapter 1098, Session Laws of 1953, our pretermission statute, G.S. 31-45, was completely rewritten. It is now codified as G.S. 31-5.5. Whether this statute should be amplified so as to deal more specifically with the rights of a posthumous child who takes only as a member of a class of beneficiaries is a question which might well be pondered by the lawmaking body.

It follows from what we have said that the appellant must take under the will of her father, rather than under the intestacy statutes. The judgment below so decreeing will be upheld.

Affirmed.

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

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1955

WILLIE E. TURNER AND GEORGE L. TURNER, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF E. F. TURNER, PETITIONERS, v. HOBSON D. TURNER, E. ROYALL TURNER, ODETTE T. WEBB, OLIA T. SPRUILL, BESSIE T. HYATT AND CHARLIE P. TURNER; AND RUTH U. TURNER, ADDITIONAL DEFENDANT, DEFENDANTS.

(Filed 21 September, 1955.)

1. Husband and Wife § 1: Dower § 5—

Dower rights may be released by a valid antenuptial contract which so provides in plain and unequivocal language. G.S. 52-13.

2. Husband and Wife § 3—

Where both parties are competent to contract, and each owns realty and has knowledge of the realty owned by the other, an antenuptial contract in which each releases to the other any estate in the realty of the other predicated upon marriage, which contract is acknowledged before the clerk, who incorporates in the certificate a finding that the agreement is not injurious to the *feme*, is valid, the mutuality of the stipulations being a sufficient consideration.

3. Husband and Wife § 1—

Antenuptial agreements are not against public policy.

4. Husband and Wife § 12d (4)—

A deed of separation is annulled by the subsequent resumption of conjugal cohabitation by the parties.

5. Husband and Wife § 3—

In the absence of contractual or statutory provisions to the contrary, an antenuptial agreement is not affected by a later separation and subsequent reconciliation of the parties.

6. Husband and Wife § 3—

Antenuptial contracts may be modified or rescinded during coverture with the full and free consent of the parties thereto, provided the rights of third parties have not intervened.

7. Contracts § 13—

Whether a new contract between the same parties discharges or supersedes a prior agreement between them depends upon their intention as ascertained from the instrument, the relation of the parties and the surrounding circumstances.

8. Same—

A new contract does not discharge a prior contract between the parties unless it deals with the subject matter of the former contract so comprehensively as to be complete within itself and raise the legal inference of substitution, and a new contract which is consistent with or supplementary to the prior agreement does not rescind the prior contract.

9. Same—

The parties may rescind or modify an agreement between themselves by a new contract unless the rights of third persons have intervened.

10. Husband and Wife § 2—

The principles of construction applicable to antenuptial contracts and to contracts generally are the same.

11. Same: Husband and Wife § 12d (2)—

Where the terms of an antenuptial agreement and a deed of separation are plain and explicit, the court will determine their legal effect.

12. Husband and Wife §§ 3, 12d (3): Dower § 5—Antenuptial agreement held not rescinded by subsequent deed of separation.

The parties executed an antenuptial agreement under which each released to the other any estate in the realty of the other predicated upon marriage. Subsequent to the marriage the parties executed a deed of separation which provided that the real and personal property owned by each respectively or thereafter acquired by either, should be and remain the sole and separate property of each, and that each would execute all deeds and papers as might be necessary to enable the other to sell or dispose of their respective properties. The deed of separation was rescinded by the subsequent resumption of conjugal cohabitation. *Held:* The deed of separation was supplementary to and not inconsistent with the antenuptial agreement, and did not rescind or discharge the antenuptial agreement, and therefore upon the later death of the husband, the antenuptial agreement precludes the wife's right of dower in his lands.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by the defendant Ruth U. Turner from *Morris, Resident Judge,* in Chambers. GATES.

This appeal is concerned solely with the alleged right of dower of Ruth U. Turner in the real property of which her deceased husband,

E. F. Turner, was beneficially seised during the marriage. A jury trial was waived, and the question was submitted to the court upon an agreed statement of facts.

The administrators of E. F. Turner, who died intestate on 1 March 1954, pursuant to G.S. 28-81 *et seq.*, commenced a proceeding to sell real property of their intestate for the payment of his debts. In this proceeding his widow Ruth U. Turner filed answer asserting her claim for dower.

On 20 January 1939 E. F. Turner and Ruth Umphlett, in contemplation of a marriage between them the next day, entered into a written antenuptial agreement. At the time this agreement was executed by them Ruth Umphlett owned real and personal property of the approximate value of $2,500.00 and E. F. Turner owned real and personal property of the value of about $17,500.00, of which property part was realty subject to a deed of trust securing his note in the sum of $2,000.00. All of this realty E. F. Turner owned at the time of his death, and this is the realty in which his widow claims dower. Before and at the time of the execution of this agreement Ruth Umphlett had full knowledge of E. F. Turner's financial status.

The antenuptial agreement states that it shall not apply to the personal property of which either party may die possessed, and that the survivor shall be entitled to that part of the personal property of the one who dies first, as provided by the Statute of Distribution of an intestate's estate.

The antenuptial agreement states at its beginning that whereas a marriage is soon to be solemnized between Ruth Umphlett and E. F. Turner, each of them has consented and agreed with the other that neither shall have or acquire any estate or interest in the real property of which the other is, or shall be seised at the time of marriage, or may thereafter acquire; that E. F. Turner shall have no right, interest or claim in the estate of Ruth Umphlett as tenant by curtesy or by virtue of any statute relating to the descent of real estate; and that Ruth Umphlett shall have no right of dower or homestead in any real estate of which E. F. Turner is or shall be seised or possessed. Ruth Umphlett in consideration of E. F. Turner releasing all right and claims which he might have in the realty which she now owns, or may hereafter acquire, and in further consideration of one dollar paid to her by him, acquitted, released and discharged all the real estate which E. F. Turner now owns or may hereafter acquire, of all claims of dower, homestead or as an heir at law, to which she might be entitled by force of any statute, custom or otherwise, so that in the event she shall survive E. F. Turner, his real property may go, and be disposed of in every respect as if he had remained unmarried. For a similar consideration E. F. Turner released

all rights and claims which he might have in Ruth Umphlett's real property now owned, or hereafter acquired, and agreed that she should have entire and free disposition of all her realty by will as if she were unmarried, and that he should have no right, claim or interest whatever in it.

E. F. Turner and Ruth Umphlett on the day they signed this agreement acknowledged their due execution of it before the Clerk of the Superior Court of Gates County; and the parties being separately examined by the Clerk, and it appearing to him that they executed the agreement freely and voluntarily, and that it was not unreasonable or injurious to either party, he ordered it registered. The same day it was filed for registration, and is recorded in Book 84, p. 115, in the public registry office of Gates County.

On 21 January 1939 E. F. Turner and Ruth Umphlett were married. They lived together until 22 December 1939, when they separated, and entered into a written separation agreement, which is of record in Book 85, p. 44, in the public registry office of Gates County. This agreement provides that they shall live apart; that the wife shall be free from any control of her husband as if she were unmarried; that the real and personal property now owned by each respectively, or by either hereafter acquired, shall be and remain the sole and separate property of each free from all rights of the other, with full power of each to convey, assign or deal with the property belonging to each as if each one were unmarried; that each will from time to time execute all such deeds and papers as may be necessary to enable each to sell, assign or deal with the respective property of each; that the wife shall incur no debts for which the husband would be liable. This deed of separation was duly proved as required by G.S. 52-12 and the examining officer incorporated in his certificate a statement of his conclusions and findings of fact that the deed of separation was not unreasonable or injurious to her.

In November 1940 Ruth U. Turner and E. F. Turner, by mutual consent, resumed their marital status, and from then until his death lived together as man and wife.

The judge made these conclusions of law:

One. The deed of separation did not operate as an abandonment of, or substitution for, the antenuptial agreement.

Two. The antenuptial agreement was in full force and effect at the time of E. F. Turner's death.

Three. The deed of separation became inoperative and of no force and effect, when the parties became reconciled, and lived together as man and wife until the husband's death.

Four. The antenuptial agreement precluded Ruth U. Turner from dower in the lands of which her husband died seised and possessed.

The judge entered judgment that Ruth U. Turner had no dower in the lands of which E. F. Turner died seised and possessed, and that the lands could be sold free and clear of any claim of dower of his widow.

From the judgment entered the defendant Ruth U. Turner appeals, assigning error.

T. W. Costen and Worth & Horner for Plaintiff, Appellees.

John H. Hall for Ruth U. Turner, Defendant, Appellant.

PARKER, J. The defendant Ruth U. Turner contends that the deed of separation operated as a substitution for, or a rescission of, the antenuptial agreement, that the resumption of conjugal cohabitation by E. F. Turner and herself annulled the deed of separation, and therefore she is entitled to dower.

Ruth Umphlett, in contemplation of marriage, with E. F. Turner was expressly authorized by G.S. 52-13 to release by valid contract her right of dower in the lands of E. F. Turner. *Stewart v. Stewart,* 222 N.C. 387, 23 S.E. 2d 306; *Blankenship v. Blankenship,* 234 N.C. 162, 66 S.E. 2d 680. This statute states "such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released."

In this antenuptial agreement Ruth Umphlett in plain and unequivocal language acquitted, released and discharged all lands and real estate of which E. F. Turner is possessed, or shall be entitled to at his decease, from all claims of dower and homestead, so that his realty, in the event she survived him, should go in every respect as if E. F. Turner had continued unmarried. The mutuality of the stipulations in this agreement whereby E. F. Turner, the prospective husband, and Ruth Umphlett, the prospective wife, mutually released rights in each other's property is a sufficient consideration. *Blankenship v. Blankenship, supra; Smith v. Farrington* (Maine), 29 A. 2d 163. At the time of the execution of the agreement Ruth Umphlett had full knowledge of E. F. Turner's financial status. She owned property at the time, and so did he. She entered into the agreement freely and voluntarily: there is no suggestion of any fraud or imposition in procuring her to execute it. The parties were legally competent to contract. The Clerk of the Superior Court of Gates County, before whom the parties acknowledged the due execution of the antenuptial agreement, incorporated in his certificate that the agreement was not unreasonable or injurious to Ruth Umphlett.

There is no contention that the antenuptial agreement was unjust or unreasonable, or that it was improperly executed.

Antenuptial agreements are not against public policy, and if freely and intelligently and justly made, are considered in many circumstances as conducive to marital tranquility and the avoidance of unseemly disputes concerning property. *Seuss v. Schukat,* 358 Ill. 27, 192 N.E. 668, 95 A.L.R. 1461.

The antenuptial agreement here is a valid contract, and in equity should be enforced as written, *Stewart v. Stewart, supra,* unless the deed of separation operated as a substitution for, or a rescission of, the antenuptial agreement. The deed of separation was annulled by the subsequent resumption of conjugal cohabitation by Ruth U. Turner and E. F. Turner. *Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672; *S. v. Gossett,* 203 N.C. 641, 166 S.E. 754.

It seems that in the absence of contrary provisions in an antenuptial agreement, or of special statutory provisions, a separation and reconciliation between husband and wife will not affect or extinguish property rights under such an agreement. *Cryar v. Cryar,* 243 Ala. 318, 10 So. 2d 11; *Suess v. Schukat, supra;* 41 C.J.S., Husband and Wife, Sec. 310. The antenuptial agreement here contains no contrary provisions, and we have no statutory provisions applicable to such facts.

We said in *Taylor v. Taylor,* 197 N.C. 197, 148 S.E. 171, that, on grounds of public policy, deeds of separation between husband and wife are not favored by the law. There is this prime difference between a deed of separation and an antenuptial agreement: the former provides for a husband and wife living separate and apart, the latter contemplates a marriage and a living together.

Antenuptial contracts may during coverture be modified or rescinded with the full and free consent of the parties thereto, provided the rights of third parties have not intervened. *In re Greenleaf's Estate,* 169 Kan. 22, 217 P. 2d 275, 280; *O'Dell v. O'Dell,* 238 Iowa 434, 26 N.W. 2d 401; 41 C.J.S., Husband and Wife, Sections 93 and 109; 26 Am. Jur., Husband and Wife, Sections 302 and 317.

It is well settled law that the parties to a contract, no rights of third parties having intervened, may rescind it, or substitute another contract for it, by making a new contract inconsistent therewith. *Redding v. Vogt,* 140 N.C. 562, 53 S.E. 337, 6 Anno. Cas. 312. The making of a second contract dealing with the same subject matter does not, however, necessarily abrogate the former contract. *Bank v. Supply Co.,* 226 N.C. 416, 38 S.E. 2d 503.

A new contract between the same parties which contains nothing inconsistent with the older one does not discharge the latter. *Drown v. Forrest,* 63 Vt. 557, 22 A. 612, 14 L.R.A. 80; 12 Am. Jur., Contracts, Sec. 433; 17 C.J.S., Contracts, p. 885.

A new contract consistent with, or supplementary to, a prior contract does not discharge the prior contract. *Orpheus Vaudeville Co. v. Clayton Inv. Co.*, 41 Utah 605, 128 P. 575; *Uhlig v. Barnum*, 43 Neb. 584, 61 N.W. 749; Note to 6 Anno. Cases, p. 316; 17 C.J.S., Contracts, Sec. 394.

We said in *Bank v. Supply Co., supra:* "To have the effect of rescission, it" (the second contract) "must either deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution (citing authorities), or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. . . . Before the new contract can be accepted as discharging the old, the fact that such was the intention of the parties must clearly appear. . . . We must, of course, keep within the bounds of the writings, but the circumstances surrounding their execution, the relation of the parties and the object to be accomplished, are all to be consulted in arriving at the intent."

Whether a prior contract is discharged by a new contract depends on the intention of the parties. 17 C.J.S., Contracts, p. 885.

The principles of construction applicable to antenuptial contracts and to contracts generally are the same. *Collins v. Phillips,* 259 Ill. 405, 102 N.E. 796, Anno. Cases 1914C 188; *Seuss v. Schukat, supra.*

The terms of the antenuptial agreement and of the deed of separation are plain and explicit. The court will determine their legal effect. *Howland v. Stitzer,* 240 N.C. 689, 696, 84 S.E. 2d 167.

In both the antenuptial agreement and the deed of separation Ruth U. Turner released her right of dower in the real estate of E. F. Turner. The provision in the deed of separation that she would sign such deeds and papers as might be necessary to enable E. F. Turner to sell, assign or deal with his property was merely a provision consistent with, and supplementary to the antenuptial agreement: its obvious purpose was that she would release her right of dower by her signature to a deed in case the validity of a deed to bar her right of dower might be questioned by anyone. The release of her rights to E. F. Turner's personal property at his decease in the deed of separation is merely supplementary to the antenuptial agreement.

If Ruth U. Turner and E. F. Turner had not resumed conjugal cohabitation, there is nothing in the two contracts to render the performance of both impossible, so that the two could not stand together. Considering the relationship of the parties and the object to be accomplished in both contracts, it seems plain that it was not the intention of the parties that the deed of separation should discharge the antenuptial agreement, but that the intention of the parties was that the deed of

separation should be consistent with, and supplementary to, the antenuptial agreement. Such being the clear intent of the parties—and "the heart of a contract is the intention of the parties," *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295—no legal inference of substitution of the deed of separation for the antenuptial agreement arises.

The learned and experienced judge below ruled correctly that the deed of separation did not discharge or rescind the antenuptial agreement, that the antenuptial agreement was in full force and effect at the time of E. F. Turner's death, and that Ruth U. Turner by the plain terms of her antenuptial agreement had no dower in the realty of her deceased husband.

The case of *Hewlett v. Almand* (Court of Appeals of Ga. Division No. 2), 103 S.E. 173, relied upon by the appellant is distinguishable: in that case two antenuptial agreements were before the court.

The judgment entered below is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. WILLIE PHELPS.

(Filed 21 September, 1955.)

1. Automobiles § 28a—

A person whose culpable negligence proximately causes death of another is guilty of manslaughter, or, under some circumstances, of murder.

2. Same—

Culpable negligence in the law of crimes is such recklessness or carelessness, proximately resulting in injury or death of another, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and is more than mere actionable negligence in the law of torts.

3. Same—

An intentional, willful or wanton violation of a statute or ordinance designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.

4. Automobiles § 28b—

In a prosecution for manslaughter mere proof of culpable negligence does not establish proximate cause, and the State must show that the culpable negligence relied on was a proximate cause of death in order to convict the tort-feasor of manslaughter.

5. Same—

Culpable negligence of defendant need not be the immediate cause of the death in order to hold defendant guilty of manslaughter, but defendant may be accountable if the direct cause of death is the natural result of his criminal act.

6. Same—

Contributory negligence is no defense in a prosecution for manslaughter predicated upon culpable negligence, but contributory negligence is relevant and material solely upon the question of whether the culpable negligence was the proximate cause of the death.

7. Automobiles § 28e—Evidence held sufficient to sustain conviction of defendant of manslaughter based upon culpable negligence in operation of automobile.

The testimony of witnesses as to speed, and the testimony of defendant that he struck the deceased as he walked from behind a passing truck, but did not know from which side deceased came nor which way he was going, together with the physical facts at the scene of the accident, *held* to show that defendant was driving 75 to 80 miles per hour in violation of G.S. 20-141 (4), that he struck a pedestrian from the rear when defendant's left wheels were on or over the center of the highway in violation of G.S. 20-146, and that defendant was not keeping a reasonably careful lookout in the direction he was traveling, and the evidence is sufficient to overrule defendant's motion to nonsuit in a prosecution for manslaughter for the death of the pedestrian proximately resulting from the accident.

8. Criminal Law § 81b—

Where the charge of the court is not in the record it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by G.S. 1-180.

9. Criminal Law § 42f—

The fact that the State offers in evidence an exculpatory statement of defendant does not prevent the State from showing that the facts were otherwise.

10. Criminal Law § 52a (4)—

Where the exculpatory statement of defendant offered by the State is contradicted by the State's evidence as to the physical facts at the scene and is further contradicted by, or repugnant to, other statements of defendant offered in evidence, nonsuit is properly denied upon the conflicting evidence.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Clifton L. Moore, J.*, March Term 1955 of GATES.

Criminal prosecution for manslaughter.

Verdict: Guilty. Judgment: Imprisonment in the State's Prison.

Defendant appeals, assigning error.

William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.

Carter Jones and John B. McMullan for Defendant, Appellant.

PARKER, J. The defendant introduced no evidence. He has one assignment of error: the failure of the Trial Court to sustain his motion for judgment of nonsuit made at the close of the State's case.

James Edward Monds, a 16 year old boy, lived about a mile north of the village of Corapeake on North Carolina State Highway No. 32. After 6:00 p.m. on 8 December 1954, he left home to walk to Corapeake to obtain a ride with some of his classmates to Sunbury High School. Woodrow Polson driving a truck on this highway to Corapeake passed Monds about 6:20 p.m. Monds was walking south on the east side of the pavement about 3 feet from the shoulder. About an hour and a half later Polson saw Monds' dead body lying on the west side of the highway, a good distance from where he saw him walking.

State Highway No. 32 is one of the main roads of travel from North Carolina to Virginia. Joe Eason's home is on the east side of this highway about a mile north of Corapeake. Between 6:30 and 7:00 p.m. on the same night he was in his back yard about 50 or 75 feet from the highway, and saw two automobiles travelling south about 75 or 80 miles an hour each and about 100 yards apart. On cross-examination he said he was guessing at the speed. He watched these automobiles until they reached a wooded area 400 to 500 yards south, which blocked his vision. After he lost sight of the automobiles he heard "a slam" in the direction where he last saw the automobiles. He ran to the highway, and saw down the highway to the south an automobile with tail lights burning parked on the west side of the highway. After he heard the "slam" two automobiles passed his house going south. About 30 minutes later he went south on the highway to the place where he saw the parked automobile and heard the "slam," and saw lying on the west side of the highway the dead body of Monds. Eason lives about one-half mile north from where he saw the body.

The night was clear and cold: snow was in the highway ditch, but the pavement and shoulder were clear and the road dry. Between 7:15 and 7:30 p.m. A. S. Godwin, a State Highway Patrolman, arrived at the scene, and saw Monds' dead body lying on the west shoulder at the edge of the pavement. At that point the highway was straight for one-half mile in each direction. The pavement was 20 feet wide and the shoulders 7 feet. Upon arrival Godwin saw the defendant Phelps and his 1954 Pontiac automobile parked in the west lane of traffic pointed south and 77 feet north of Monds' body. A Ford automobile belonging to Sidney Parker was parked on the west shoulder of the highway about 25 feet south of

the body. A leakage of antifreeze could be traced back in a northerly direction from the Pontiac about 180 feet. The antifreeze first "hit" the highway 3 feet to the left of the center line and for 50 or 60 feet this antifreeze was in the east lane of traffic. 185 feet north from where the leakage of antifreeze began, there were easily seen blood spots in the center line of the highway in an easterly direction. There was a shoe on the pavement in the east lane of traffic south of the blood spots, and about 85 feet north of the point where the antifreeze leakage began, and a button with a piece of apparel attached, matching a missing button from Monds' shirt, in the same lane of traffic about 35 feet south of the shoe. A key was found on the east shoulder 18 inches from the pavement and 250 feet north of the parked Pontiac. Monds' mother identified the shoe and key as her son's property. The distance from the beginning of the blood spots to the parked Pontiac was 365 feet. Godwin found undercoating from under the left front fender of the Pontiac 18 inches on the left or east shoulder 268 feet north of where the Pontiac was parked: the undercoating was east and south of the blood spots. Undercoating was found missing under the left front fender of the Pontiac.

The left front fender of the Pontiac had been hit with sufficient impact to move it back enough to close the side door, so it could not be opened on the driver's side. The hood was bent. The grille was pushed back into the radiator, and the radiator into the fan puncturing it. Around the damaged area there was a considerable amount of blood in spots. Blood spots were visible on the front fender, bumper, grille, hood, the lower left side of the windshield, and down the left side all the way to the tail light.

There was no damage to the front or side of the Ford. The only visible signs on the Ford were blood spots underneath and around the vicinity of the left front wheel on the undercarriage. The left front wheel had a considerable amount of blood on the inside. None of its mechanism was bent or damaged.

There were no skid marks made by the tires of the Pontiac so that its course could be traced. Patrolman Godwin testified: "I found no evidence that Phelps' car had been to the left of the center of the highway north of the point where I found the blood spots. The only physical evidence which I found that Willie Phelps' car was at any time on the left of the center of the highway was south of the blood spots, and between the blood spots and where his car was parked."

H. E. Butcher, an embalmer from Suffolk, Virginia, examined Monds' body the night he was killed. He testified that Monds had two compound fractures on both legs with the bones protruding through the skin out forward about two inches from the knee: evidently, he was struck

in the back to force the bones out that way. He had a broken neck, indication of a fractured skull and a bruise on his buttocks.

The defendant Phelps made the following statement to Patrolman Godwin: He was driving his Pontiac south, he was alone in the car, and a car 200 to 300 yards behind had been following him several minutes. He was meeting a truck travelling north which dimmed its lights. That Monds walked from behind the truck, he did not know from which side he came, nor where he was going, and that he struck him in his right lane, west lane, near the center line. That the first time he saw Monds was immediately following the passing of the truck, and that Monds appeared from behind the truck immediately after it passed. That he was right on Monds when he first saw him, and stopped as soon as possible. That his car was practically new and nothing was wrong with it. Parker's Ford passed him on the left after he struck Monds. That when his Pontiac came to a stop Monds' body was in the position where it was when Godwin arrived, and Monds was dead. At no time did he cross the center line into the east lane of traffic.

There was evidence tending to show that Monds' body was dragged by Parker's Ford from a point far northwardly on the highway to where it came to rest. There were blood smears for 225 feet on the pavement caused by dragging the body. The beginning of the dragging started off with small blood spots and shoe marks and there was a shoe close by. A warrant was sworn out against Parker for manslaughter, which is pending.

The shoe, button, key and undercoating from the Pontiac were north and east of the skidmarks of Parker's Ford.

Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances guilty of murder. *S. v. Cope*, 204 N.C. 28, 167 S.E. 456; *S. v. Wooten*, 228 N.C. 628, 46 S.E. 2d 868; *S. v. Norris*, 242 N.C. 47, 86 S.E. 2d 916.

Culpable negligence in the law of crimes necessarily implies something more than actionable negligence in the law of torts. *S. v. Stansell*, 203 N.C. 69, 164 S.E. 580; *S. v. Cope, supra; S. v. Becker*, 241 N.C. 321, 85 S.E. 2d 327.

"Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. . . . An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *S. v. Cope, supra.*

Mere proof of culpable negligence does not establish proximate cause. To culpable negligence must be added that the act was a proximate

cause of death to hold a person criminally responsible for manslaughter. *S. v. Everett,* 194 N.C. 442, 140 S.E. 22; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; *S. v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638.

We said in *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844: ". . . the act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is the natural result of the criminal act." See also 26 Am. Jur., Homicide, Sec. 48.

G.S. 20-146 provides that "upon all highways of sufficient width, except upon one way streets, the driver of a vehicle shall drive the same upon the right half of the highway . . ."

In December 1954 it was unlawful to drive a passenger car at a speed in excess of 55 miles per hour. G.S. 20-141(4).

Statutes regulating the operation of automobiles were designed to prevent injury to persons and property and to guard against collisions resulting in injuries and death. *S. v. Swinney,* 231 N.C. 506, 57 S.E. 2d 647.

Contributory negligence is no defense in a criminal action. *S. v. Cope, supra; S. v. Eldridge,* 197 N.C. 626, 150 S.E. 125. It is however, relevant and material on the question whether the defendant is guilty of negligence. *S. v. Oakley,* 176 N.C. 755, 97 S.E. 616.

The State's evidence, and the reasonable inferences to be drawn therefrom, considered in the most favorable light, present this case: The defendant's automobile passed Eason's house at the dangerous and unlawful speed of 75 to 80 miles per hour, and in less than one-half mile his car struck Monds. The defendant said he struck Monds as he walked from behind a passing truck. The defendant also said he did not know from which side Monds came, nor which way he was going. The statement of Eason on direct examination that the speed of the car, in his opinion, was 75 to 80 miles per hour, and his statement on cross-examination that he was guessing at the speed, is a matter of credibility. The mute evidence of extensive damage to the front end of the defendant's car, of the blood spots on the front of the car extending down its left side to the tail light and of his car coming to rest 365 feet down the road from where the blood spots began, tends to show that the defendant had not slackened his speed of 75 to 80 miles per hour up to the moment of striking Monds, and that he was violating G.S. 20-141(4). 365 feet north from where the defendant's car stopped blood spots were easily visible in the center line of the highway in an easterly direction—these were the first blood spots on the highway—, which would indicate that at the time defendant's car struck Monds it was travelling with its left wheels on the center line on the pavement, or over this line to the east, in violation of G.S. 20-146. This makes

out a case of culpable negligence. *S. v. Webber,* 210 N.C. 137, 185 S.E. 659; *S. v. Swinney, supra.*

The defendant testified that his car struck Monds as he walked from behind the passing truck, and that his car did not cross the center line into the east lane of traffic. The defendant did not say how far the truck had gone, when Monds walked from behind it. He did say, however, he did not know from which side Monds came or which way he was going, which would seem to negative the proposition that the defendant was keeping a reasonably careful lookout in the direction he was travelling. Be that as it may, the physical evidence of the first blood spots easily seen in the center line of the pavement in an easterly direction tends to show that the defendant's car had its left wheels on, or over the center line to the east at the moment of impact. The evidence tends to show that Parker's Ford dragged Monds' body 225 feet, and that the beginning of the dragging started off where there were small blood spots and shoe marks with a shoe close by. The shoe was found on the pavement about 85 feet north of the point where the antifreeze leakage from the defendant's car began. This leakage began about 180 feet north of where the Pontiac stopped, and the blood spots in the center line of the pavement in an easterly direction were about 185 feet north of the leakage. The above facts would seem to indicate that the defendant's car carried Monds' body some 100 feet after striking it, before Parker's car began dragging it, that the defendant was not keeping a reasonably careful lookout in the direction he was travelling to avoid striking Monds, who was not in the lane of traffic of the defendant when struck, and that the impact of defendant's car with Monds was a proximate cause of his death.

The court's charge has not been brought forward in the record. Therefore, it is presumed that the jury was charged correctly as to the law arising upon the evidence, as required by G.S. 1-180. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481.

The State offered in evidence the statement of the defendant, but that does not prevent the State from showing that the facts were different. *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904. The defendant's statement standing alone may tend to exculpate, but the State's case does not rest entirely on such statements. The physical facts, in conflict with the defendant's statements, and the defendant's statement that "he did not know from which side he (Monds) came, nor which way he was going" in contradiction to his statement that "the Monds boy walked from behind the truck" undoubtedly carried considerable weight with the jury.

When the substantive evidence offered by the State is conflicting, some tending to incriminate and some seeming to exonerate the defend-

ant, it is sufficient to repel a motion for judgment of nonsuit. *S. v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201; *S. v. Robinson,* 229 N.C. 647, 50 S.E. 2d 740.

The jury found the defendant guilty. There is evidence to support the findings. *S. v. Cope, supra; S. v. Stansell, supra; S. v. Satterfield, supra.* The motion for judgment of nonsuit was properly overruled. We find

No Error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

J. R. GOMER AND WIFE, MARY FRANCES GOMER, AMOS J. GOMER AND WIFE, EUNICE H. GOMER, R. G. GOMER AND WIFE, LILLIAN J. GOMER, ETHEL G. RYDER AND HUSBAND, W. T. RYDER, BERNICE G. BENTON AND HUSBAND, W. W. BENTON, ELLIOTT R. HORTON AND WIFE, MARY A. HORTON, W. HAGAR HORTON AND WIFE, MARGUERITE HORTON, WALTER E. HORTON AND WIFE, VIRGINIA J. HORTON, R. B. PIERCE AND WIFE, LYDIA H. PIERCE, MINNIE H. HOBBS AND HUSBAND, JAMES W. HOBBS, DEMPSEY HORTON AND WIFE, KATHERINE C. HORTON, ELSIE H. BARNHILL AND HUSBAND, S. C. BARNHILL, PLAINTIFFS, v. M. P. ASKEW, DEFENDANT.

(Filed 21 September, 1955.)

1. Executors and Administrators § 12b—

The will in suit provided that the executor should "come down & take an inventory of my chattel property & real estate," bequeathed the home tract to testator's wife for life, and further provided that after her death it should be "sold & divided (as all of my other property) equally between all of my children." *Held:* It was the intent of testator that all of his property, with the exception of the home tract, should be sold forthwith and the proceeds equally divided between his children.

2. Wills § 33c—

Where the will devises certain lands to testator's wife with provision that after her death the lands should be sold and the proceeds divided between testator's children, the children take vested remainder interest in the land with the right to immediate enjoyment being postponed for the benefit of the life estate of the widow.

3. Wills § 40—

The widow's dissent from the will terminates her interest in lands devised to her for life and accelerates the right of the remaindermen to immediate enjoyment, and she takes nothing under the will, but is entitled to dower based upon all the real property of which her husband died seized, and a child's part in the personalty, with allowances for a year's support

for herself and children under 15 years of age. The fact that dower is allotted in the same lands which were devised to the widow for life is a mere coincidence and does not affect the principles of law applicable.

4. Same—

If the testator is regarded as charged with knowledge of the statute law defining the widow's right to dissent, he must be regarded also as charged with knowledge that if she exercises such right, the dissent accelerates the rights of the remaindermen.

5. Executors and Administrators § 12b—

Where land is devised to be sold and the proceeds divided among heirs or designated beneficiaries, nothing else appearing, the executor has no implied power to make the sale, but where realty and personalty are to be sold for division, nothing else appearing, the power of the executor to sell the realty involved in making division of the realty and personalty, is implied. These are rules of construction, to aid in the ascertainment of testator's intention, and must yield if the provisions of the will manifest a contrary intent.

6. Same—

The will devised certain lands to testator's widow for life with further provision that at her death the property, as well as all his other property, real and personal, be sold, and the proceeds equally divided between his children. The widow dissented from the will. *Held:* The dissent of the widow accelerated the vesting of the right of immediate enjoyment in the remainder, and the executor had authority to sell all the personalty and realty, subject to the widow's dower, for division of the proceeds among testator's children.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Clifton L. Moore, J.*, March Term, 1955, of GATES.

Civil action to determine ownership of a 65-acre tract of land. Upon waiver of jury trial, the court heard the evidence. Unchallenged findings include the facts stated below.

Dempsey Gomer died testate on some undisclosed date between 2 May, 1908, the date of his Will, and 25 August, 1911, the date his Will was probated.

The dispositive provisions of his Will are these:

"This is the last will and testimony of Dempsey Gomer, being of sound mind feeble health I hear by maketh Dr. E. F. Corbell Executor of my estate after my death, I want him to see that I recave a decent burial beside my first wife Lida. Then I want Dr. E. F. Corbell to come down & take an inventory of my chattel property & real estate— the home track known as the 'Jackey Jones track' which I bequeath to my wife Lizzie Gomer during her natural life after her death to be sold

& divided (as all of my other property) equally between all of my children.

"I bequeath to Charles Parker one hundred dollars or a horse of the same value for faithful services rendered me for the past 12 years. If my wife or any one else should charge my minor children board then my Executor shall become Guardian & shall board them elsewhere."

Testator owned both real and personal property. His realty included the "Jackey Jones" tract referred to in the Will. He was survived by his widow (Lizzie) and by his seven children, three by his first marriage to Lida and four (then minors) by his second marriage to Lizzie.

On 25 August, 1911, when the Will was probated, Dr. Corbell qualified as executor. On 9 September, 1911, the widow dissented from the Will. On 28 December, 1911, the 65-acre tract now in controversy, being the identical land referred to in the Will as the "Jackey Jones" tract, was allotted as the widow's dower tract.

The executor sold all personalty and all realty, subject to the widow's dower in the 65-acre tract. Upon final settlement, the executor, after payment of debts, costs of administration and the Parker legacy, paid to the widow as her distributive share in the personalty the sum of $271.54 and paid to each child or his guardian the sum of $506.34, *i.e.*, one-seventh of the residue made available from the sales of realty and personalty. Final settlement was made by the guardian with each child as he or she became 21, the settlement with the youngest child having been made in 1926.

The 65-acre tract in controversy and an adjoining 25-acre tract were sold together, subject to the widow's dower in said 65-acre tract; and on 3 February, 1912, the executor, upon receipt of the purchase price of $1,068.00, executed and delivered a deed therefor to Martin Branton, the highest bidder at public sale. On 22 February, 1912, Lizzie, the widow of Dempsey Gomer, married W. H. Branton, brother of Martin Branton. On 4 March, 1912, Martin Branton and wife, for the recited consideration of $593.00, conveyed the 65-acre tract, subject to the widow's dower therein, to W. H. Branton. On 25 November, 1918, W. H. Branton and wife, Lizzie Gomer Branton, sold and conveyed the 65-acre tract by fee simple warranty deed, without reservation or exception; and, after *mesne* conveyances, the 65-acre tract was conveyed to defendant in 1930 and he has had possession since then.

Lizzie Gomer Branton and her second husband, W. H. Branton, sold out and moved away from the 65-acre tract in 1918. She died 18 February, 1952. W. H. Branton died 16 April, 1952. On 28 November, 1952, plaintiffs instituted this action.

Plaintiffs' case is grounded upon the allegation that the deed from Corbell, executor, to Martin Branton, in respect of the 65-acre tract,

was void because the executor had no power to sell and convey any interest therein. There is no question but that defendant's title is good if the executor's deed was a valid conveyance of this 65-acre tract subject to the widow's dower therein. No questions arise as to (1) the adequacy of sale price, or (2) the accounting and settlements made by the executor and by the guardian.

Defendant pleaded the validity of the executor's deed to Martin Branton; also, defendant pleaded facts alleged to constitute an estoppel and bar to plaintiffs' action.

Judgment was entered by the court below, adjudging that defendant was owner of the 65-acre tract in controversy, that plaintiffs were not entitled to recover anything by their action and that plaintiffs pay the costs of the action. Plaintiffs excepted and appealed.

W. D. Boone and J. Carlton Cherry for plaintiffs, appellants.
T. W. Costen and Worth & Horner for defendant, appellee.

BOBBITT, J. The testator contemplated that his wife and children would have and take the benefits provided for them in his Will. He devised a part of his real property, the "Jackey Jones" tract, to his wife, Lizzie Gomer, during her natural life. He directed that, after her death, the "Jackey Jones" tract be *sold and* (the proceeds) *divided* equally between all of his children. Further, he directed that all his other property, real and personal, be *sold and* (the proceeds) *divided* equally between all of his children. He expressed the desire that Dr. Corbell, the executor, "come down & take an inventory of my chattel property & real estate." We think the testator's intent was that all his property, real and personal, other than the "Jackey Jones" tract, be sold forthwith and the proceeds divided equally between his seven children.

The beneficial interest of the seven children of the testator in the "Jackey Jones" tract were vested remainder interests, their right to immediate enjoyment being subject to no condition precedent save the termination of the life estate of the widow. *Trust Co. v. McEwen,* 241 N.C. 166, 84 S.E. 2d 642. The intent of the testator in so postponing his children's right to immediate enjoyment in respect of this tract was for the benefit of the life estate of the widow. *Trust Co. v. McEwen, supra.*

When the widow dissented, she had "the same rights and estates in the real and personal property of her husband as if he had died intestate." Revisal of 1905, sec. 3081. Having made her election, she took nothing under the Will; but she was entitled to dower in the real property (Rev., sec. 3083 *et seq.*), a child's part in the personal property

(Rev., sec. 132 (2)) and allowances for a year's support for herself and her three children then under 15 years of age (Rev., sec. 3091 *et seq.*). (So far as the record discloses, such allowances were not claimed or paid.) Her right of dower related to all real property of the decedent, without distinction between the "Jackey Jones" tract and other realty.

The widow's dissent terminated the life estate in the "Jackey Jones" tract devised to her by the testator. This accelerated the vesting in the testator's children of their (previously postponed) right to immediate enjoyment of their interests in this particular tract. *Trust Co. v. McEwen, supra,* and cases cited.

If the testator is regarded as charged with knowledge of the statute law defining the widow's right to dissent, *Thomsen v. Thomsen,* 196 Okla. 539, 166 P. 2d 417, 164 A.L.R. 1426, cited in *Trust Co. v. Johnson,* 236 N.C. 594, 73 S.E. 2d 468, he must be regarded also as charged with knowledge that, if she exercised such right to dissent, under the decisions of this Court such dissent accelerated the rights of the remaindermen. *University v. Borden,* 132 N.C. 476, 44 S.E. 47.

The result of the widow's dissent was that the real property, subject to the widow's dower, and the entire personal estate, were to be sold and (the proceeds) divided between his seven children, subject to the payment of the debts, costs of administration, the Parker legacy, and the payment to the widow of her distributive share in the personalty.

By whom was this sale for division to be made? It seems plain that the testator intended that Dr. Corbell, the executor, take complete charge of *all* his property, "my chattel property & real estate." There is a single provision in which direction is given that all his property be sold and divided, without distinction between realty and personalty; and the implication is that the same person is to sell both realty and personalty. *Saunders v. Saunders,* 108 N.C. 327, 12 S.E. 909. It is noteworthy that four of testator's children were minors and thus unable to make sale except through a next friend or guardian. The interesting provision, "if my wife or any one else should charge my minor children board then my Executor shall become Guardian & shall board them elsewhere," suggests that the testator contemplated that the executor would have in his hands funds to be paid to or for the benefit of the minor children derived from the sale of his property.

True, the Will conferred no express power of sale on the executor. Is such power reasonably implied?

Where land is devised, to be sold for division among heirs or designated beneficiaries, nothing else appearing, the executor has no implied power to make the sale. *Broadhurst v. Mewborn,* 171 N.C. 400, 88 S.E. 628; *Epley v. Epley,* 111 N.C. 505, 16 S.E. 321; *Gay v. Grant,* 101 N.C. 206, 8 S.E. 99. But where both realty and personalty are to be sold for

division, a different rule applies. Since the statute (G.S. 28-73, Rev., sec. 62) vests in the executor the power to sell the personalty, and the fund to be divided consists of the proceeds to be derived from the sale of both realty and personalty, nothing else appearing, the power of the executor to sell the realty involved in making the division is implied. *Council v. Averett,* 95 N.C. 131; *Vaughan v. Farmer,* 90 N.C. 607. The authority of these cases is fully recognized in the *Broadhurst, Epley* and *Gay cases,* as well as in the later case of *Dulin v. Dulin,* 197 N.C. 215, 148 S.E. 175.

These are rules of construction, to aid in the ascertainment of the testator's intention. *Vaughan v. Farmer, supra.* They must yield if the provisions of the will manifest a contrary intent. *Lumber Co. v. Swain,* 161 N.C. 566, 77 S.E. 700.

The rule applied in *Vaughan v. Farmer, supra,* and cases to like effect, is applicable to the case at hand. Its application here seems in full accord with the testator's intent.

Consequently, we reach the conclusion that the executor had implied power to sell all of testator's real property (as well as all of his personal estate), subject to the widow's dower. This was done.

When the widow's dower was allotted it so happened that the "Jackey Jones" tract was allotted to her as her dower tract. We assume that the value of this tract was one-third of the value of all of testator's realty. Be that as it may, the fact that the "Jackey Jones" tract became the "dower tract" is a coincidence, without legal significance; and the law applicable is the same as if the widow's dower had been allotted in other realty.

Since we hold that the executor's deed was a good and sufficient conveyance of the land in controversy, subject to the widow's dower, we refrain from discussing the facts and law bearing upon other defenses interposed by defendant.

For the reasons stated, the judgment is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

JOHN A. HYDER v. ASHEVILLE STORAGE BATTERY COMPANY, INC.

(Filed 21 September, 1955.)

1. Automobiles § 18j—

In determining whether there is sufficient evidence of contributory negligence to be submitted to the jury, the evidence must be considered in the light most favorable for defendant.

2. Automobiles § 8i—

A motorist faced with a municipal traffic control signal showing red is required to stop before entering the intersection.

3. Same—

Where a motorist stops in obedience to the red signal of a traffic control system, he is warranted, upon the signal turning green, in entering the intersection, and, in the absence of anything sufficient to give him notice to the contrary, is not under duty to anticipate that a motorist approaching along the intersecting street facing the red light will fail to stop, but nevertheless he is under duty to anticipate and expect the presence of others and to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection, and may not go blindly forward in sole reliance on the traffic control signals.

4. Automobiles §§ 18h (3), 18j—Evidence held sufficient to require submission of issue of contributory negligence to jury, but not to warrant nonsuit on that issue.

The evidence favorable to defendant tended to show that plaintiff stopped in obedience to a red traffic control signal at an intersection, waited for the light to turn green, and then entered the intersection and was struck when the front of his car had reached the center lane of the one-way intersecting street by a truck approaching from his right along the intersecting street. The evidence further tended to show that the traffic control signal was out of order so that facing plaintiff the green light would appear several seconds before the full interval for changing lights, and both the red and green lights would appear momentarily at the same time on the side facing plaintiff, that plaintiff moved into the intersection immediately upon seeing the green light facing him without looking to his right or paying any heed to the traffic, and that had he looked he could have seen the approaching truck in time to have avoided the collision. *Held:* The evidence is sufficient to require the submission of the issue of contributory negligence to the jury, but does not justify nonsuit on the issue of contributory negligence as a matter of law.

5. Trial § 6—

The provisions of G.S. 1-180 prohibiting expressions of opinion by the trial judge as to the sufficiency of the evidence are not confined to formal instructions to the jury but include the expression of any opinion at any time during the trial which is calculated to prejudice either party.

6. Same—

The evidence in this case was sufficient to require the submission of the issue of contributory negligence to the jury. *Held:* Remarks of the trial

court, in the hearing of the jury, to the effect that the court saw no sufficient evidence of contributory negligence to be submitted to the jury, and, later, that the court had some doubt about the issue, but would submit it, must be held for prejudicial error as an expression of an opinion by the court as to the sufficiency of the evidence.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Pless, J.*, at January Term 1955 of HENDERSON.

This was an action to recover damages for injury to property resulting from a collision of motor vehicles, alleged to have been caused by the negligence of the defendant.

The collision occurred in a business district in the city of Asheville, at the intersection of College Street and Lexington Avenue, about 2:30 p.m. on a clear day, 29 September, 1954. College Street is an east-west thoroughfare, 36 feet wide with 3 traffic lanes, one-way west. Lexington Avenue runs north and south and is 18 feet wide south of College Street. Business buildings close to the street are on both corners of Lexington Avenue. Over its intersection hung an electric traffic control light.

Plaintiff with his wife beside him was driving a Dodge automobile north on Lexington Avenue. As he approached the intersection with College Street, he testified he observed the signal light facing him was red and he stopped just south of the cross-walk lines; that when he saw the light turn green he started across and had moved but a short distance when his wife exclaimed, "Look out, that truck is 'going to hit us' "; that he jammed his brakes and saw defendant's Ford pick-up truck coming from the east on College Street at 40 or 50 miles per hour. The driver of the truck swerved sharply to the right but the rear fender of the truck struck the front of plaintiff's automobile causing substantial damage. The front of plaintiff's automobile was in the center lane of College Street when struck,—17 feet from the south curb of College Street.

There was some evidence tending to show that the traffic control light as it would appear to one traveling north on Lexington Avenue was at the time out of order, so that "every third or fourth time it would not work—the light would stay green on College and would be red and green on Lexington at same time . . . the light came on 7 seconds too early."

Plaintiff testified that as soon as he saw the green light come on he drove forward. When asked on cross-examination whether he saw the traffic light facing him show both red and green at the same time for several seconds, he replied, "I could not answer that; all I know the

light changed and I was not paying any more particular attention than to know it was green on my side and seeing the reflection of red on the other side, naturally not expecting anything like that was not paying too much attention and according to law I moved off."

During the taking of testimony, and in the presence and hearing of the jury, the court made inquiry as to the issues, and when counsel for the defendant suggested the "usual issues" of negligence and contributory negligence, the court said: "Frankly, Mr. Meekins, I do not see any evidence in the case that would warrant the submission of an issue of plaintiff's contributory negligence. The Court is of the opinion that the evidence relating to the defective signal light relates more to the issue of the negligence of your client, the defendant, than it has any bearing on an issue of contributory negligence. I just don't think an issue of contributory negligence arises in the case. I would like to hear you on that." . . . "Gentlemen of the jury, you will understand that we are discussing a matter of law and that it does not concern the merits of the case."

Later, at the close of all the evidence the court said: "I have been thinking about it, and while the court has some doubt about an issue of contributory negligence being proper, I will give you the benefit of the doubt, Mr. Meekins."

The jury for their verdict answered the issue as to defendant's negligence "Yes": As to plaintiff's contributory negligence "No," and assessed plaintiff's damages at $600.00.

From judgment on the verdict defendant appealed.

Arthur J. Redden and L. B. Prince for plaintiff, appellee.
Meekins, Packer & Roberts for defendant, appellant.

DEVIN, J. It is not controverted that there was evidence of negligence on the part of the driver of defendant's truck, but the appellant contends the comments of the trial judge, spoken in the presence and hearing of the jury, with respect to the sufficiency of the evidence to warrant submission of an issue as to plaintiff's contributory negligence, constituted an expression of opinion as to the evidence, prohibited by G.S. 1-180.

The plaintiff takes the position, however, that there was no evidence of contributory negligence on his part sufficient to be submitted to the jury, and hence the judge's comments even if they be considered improper (which is not conceded) were in no wise prejudicial to the defendant.

Was there evidence of any negligence on the part of the plaintiff proximately contributing to the injury complained of?

For the determination of this question, under the rule, the evidence must be considered in the light most favorable for the defendant.

There was evidence tending to show that on the occasion alleged the plaintiff driving his automobile north on Lexington Avenue approached the intersection with College Street, a three-lane thoroughfare, over which the city maintained electrically controlled traffic signals, and in obedience to the warning of a red light stopped before entering the intersection. As soon as the green light appeared plaintiff moved forward, and the front of his automobile had reached the center lane of College Street when it was struck by defendant's truck coming from his right being driven at a speed variously estimated at from twenty-five to fifty miles per hour.

The defendant's evidence tended to show that at the time the defendant's truck approached the intersection the light on College Street was green. As College Street was a one-way much traveled street, the duty would be imposed upon the motorist approaching the intersection from the south on Lexington Avenue to anticipate that vehicles would be approaching the intersection from his right. From the defendant's evidence and such of plaintiff's evidence as was favorable to the defendant the inference is permissible that the plaintiff failed to look to his right or to pay heed to the traffic before moving into the intersection, when by looking he could have seen the approaching truck in time to avoid collision. The front of plaintiff's automobile had reached the center lane of College Street when it was struck by the oncoming truck. It would seem from plaintiff's testimony that he moved into the intersection without paying any attention to traffic and did not see defendant's truck until he heard his wife's exclamation. Significant also is the evidence from city employees that the signal light facing the street on which plaintiff was moving was found to be out of order so that at times when the red light was on, the green light would also appear several seconds before the full interval for changing lights, resulting in both red and green lights appearing on the side facing plaintiff.

Unquestionably it is the duty of the driver of an automobile approaching a street intersection, when faced with a municipally maintained traffic signal showing red, to stop before entering. It is also true that if faced with a green light the driver is warranted in moving into the intersection, unless the circumstances are such as to indicate caution to one of reasonable prudence. Notwithstanding the driver is faced with green light, however, the duty rests upon him to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection. *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25; *Seiner v. Toye Bros. Yellow Cab Co.*, 18 So. 2d 189.

"Automobile drivers may not, ordinarily, assume that the intersection is clear simply because of appearance of green traffic signal light." *Duke v. Gaines,* 224 Ala. 519.

The duty of a driver at a street intersection to maintain a lookout and to exercise reasonable care under the circumstances is not relieved by the presence of electrically controlled traffic signals, which are intended to facilitate traffic and to render crossing less dangerous. He cannot go forward blindly even in reliance on traffic signals. 4 Blashfield, p. 244. The rule is well stated in 60 C.J.S. 855 as follows:

"A green traffic light permits travel to proceed and one who has a favorable light is relieved of some of the care which otherwise is placed on drivers at intersections, since the danger under such circumstances is less than if there were no signals. However, a green or 'go' light or signal is not an absolute guarantee of a right to cross the intersection solely in reliance thereon without the necessity of making any observation and without any regard to traffic conditions at, or other persons or vehicles within, the intersection. A green or 'go' signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated. In other words, notwithstanding a favorable light, the fundamental obligation of using due and reasonable care applies."

"The fact that the operator of a motor vehicle may have a green light facing him as he approaches and enters an intersection where traffic is regulated by automatic traffic control signals, does not relieve him of the legal duty to maintain a proper lookout, to keep his vehicle under reasonable control . . ." *Cox v. Freight Lines, supra.*

The driver of an automobile is under no duty to anticipate negligence on the part of others in the absence of anything which should give notice to the contrary, and the law does not impose on a driver facing a green light the duty to anticipate that one approaching along the intersecting street facing a red light will fail to stop. But this does not absolve him from keeping a reasonable lookout for vehicles in or approaching the intersection at excessive speed. The rule of ordinary prudence prevails. He must anticipate and expect the presence of others.

After giving due consideration to the evidence set out in the record, and without discussing it further, we reach the conclusion that the defendant was entitled to have the issue of contributory negligence submitted to the jury without unfavorable comment from the court as to the sufficiency of the evidence to support it.

The defendant's motion for judgment of nonsuit on the ground that contributory negligence affirmatively appeared from plaintiff's evidence was properly overruled. The question was one for the jury. *Hampton*

v. Hawkins, 219 N.C. 205, 13 S.E. 2d 227; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637.

The provisions of G.S. 1-180 prohibiting expressions of opinion by the trial judge as to the sufficiency of the evidence are not confined to formal instructions to the jury but include the expression of any opinion at any time during the trial which is calculated to prejudice either party. *S. v. Oakley,* 210 N.C. 206, 186 S.E. 244; *Bailey v. Hayman,* 220 N.C. 402, 17 S.E. 2d 520; *Starling v. Cotton Mills,* 171 N.C. 222, 88 S.E. 242; *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855.

While the able and experienced trial judge was doubtless inadvertent to the fact at the time that the members of the jury were listening to and probably influenced by his remarks, nevertheless we think they were prejudicial, and that the defendant is entitled to a

New trial.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

THE BOARD OF EDUCATION OF HAYWOOD COUNTY v. THE TOWN OF WAYNESVILLE AND J. H. HOWELL, GLEN C. PALMER, HILDA WAY GWYN, FRED DOUTT, WILLIAM MEDFORD AND JAMES L. KILPATRICK, JR., TRUSTEES OF THE HAYWOOD COUNTY PUBLIC LIBRARY.

(Filed 21 September, 1955.)

1. Schools § 6c—Title to school property in question held vested in county board of education by virtue of G.S. 115-352.

Findings of fact to the effect that a county board of education assumed payment of the bonded indebtedness of a municipality incurred therein for school purposes and took possession of all public school property and operated the schools in the municipality, that the county thereafter assumed the payment of all indebtedness of the special taxing district of the municipal township, and that the property in controversy was continuously used by the county board of education for school purposes until shortly before the commencement of the action, and that the trustees of the municipal graded school district ceased to function in their capacity as trustees subsequent to the formation of the special taxing district, *held* sufficient to support the court's adjudication that title to the property was vested in the board of education by virtue of Chapter 358, Public Laws of 1939 (G.S. 115-352).

2. Same—

Title to school property in the municipality in question was vested in the county board of education by virtue of G.S. 115-352. Thereafter a statute (ch. 952, Session Laws of 1953) was passed vesting in substituted trustees of the graded schools of the municipality "whatever title to the property"

was vested in the former board of trustees of the graded schools of the municipality. The substituted trustees conveyed the property to defendants. *Held:* Since the former board of trustees of the school district of the municipality had no title, no title was vested in the substituted trustees by the statute, and therefore deed of the substituted trustees conveyed no title.

8. Appeal and Error § 8—

Where it is alleged in the complaint and admitted in the answer that the board of trustees of the graded schools of a municipality was vested with title to the property in suit, and the case is tried under the admitted theory that both parties claim title from such board of trustees, appellant may not contend on appeal that the deed to such board of trustees failed to convey title, since the theory of trial in the lower court must prevail in considering an appeal and in interpreting the record and determining the validity of the exceptions.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Moore (Dan K.), J.*, at May Term, 1955, of HAYWOOD.

W. R. Francis and Felix E. Alley, Jr., for plaintiff, appellee.
Morgan & Ward and Wm. Medford for defendants, appellants.

JOHNSON, J. This is a civil action involving title to real estate, brought by the Board of Education of Haywood County against the Town of Waynesville and the Trustees of the Haywood County Public Library. The case was heard below on an agreed statement of facts, with stipulation that the court should find additional facts, without jury trial, and enter judgment.

The property in controversy was owned originally by the Board of Trustees of Waynesville Graded Schools. This Board was created as a body corporate by Chapter 433, Private Laws of 1913, and invested with the title to all property previously acquired for the Waynesville Graded Schools.

The plaintiff, Board of Education of Haywood County, claims title by virtue of Section 5, Chapter 358, Public Laws of 1939, now codified as the last paragraph of G.S. 115-352, which reads as follows:

"In all cases where title to property has been vested in the trustees of a special charter district which has been abolished and has not been reorganized, title to such property shall be vested in the county board of education of the county embracing such special charter district."

It is the contention of the plaintiff that the Waynesville Graded School Special Charter District was abolished prior to 1939 and never reorganized, and that by operation of law, pursuant to Chapter 358,

Public Laws of 1939 (G.S. 115-352), the title to the property owned by the Board of Trustees of the Waynesville Graded Schools became vested in the Board of Education of Haywood County upon ratification of the Act of 1939.

The defendants claim title by virtue of deeds dated 7 August, 1953, made by J. H. Woody and others, as Trustees of the Waynesville Graded Schools. One of these deeds purports to convey a small portion of the land in controversy to J. H. Howell and others, Trustees of the Haywood County Public Library; the other deed purports to convey the rest of the land to the Town of Waynesville. Each deed recites that it is made by a substituted board of trustees of the Waynesville Graded Schools, pursuant to Chapter 952, Session Laws of 1953.

The court below found and concluded that as contended by the Board of Education of Haywood County title passed to it under Chapter 358, Public Laws of 1939 (G.S. 115-352), and that the recent deeds made by the substituted Board of Trustees of the Waynesville Graded Schools are ineffectual to convey title to the defendants. The judgment entered decrees that the plaintiff is the owner and entitled to the immediate possession of the lands in controversy, and that the deeds to the defendants be set aside and canceled of record as clouds on the plaintiff's title.

The pertinent findings which support the adjudication that title passed to the Board of Education of Haywood County are summarized below:

1. Prior to 1923 the Town of Waynesville incurred indebtedness and issued bonds in the amount of $38,000 for the erection of school buildings and the purchase of equipment placed on the property in controversy.

2. Immediately after ratification of Chapter 350, Public-Local Laws of 1923, the Board of Education of Haywood County assumed payment of the bonded indebtedness of the Town of Waynesville incurred for school purposes and "took possession . . . of all public school property in Waynesville Township and operated schools therein," including the school property in controversy; that continuously since that time the property has been used for school purposes by the Board of Education of Haywood County, until a few months before the commencement of this action.

3. In 1924 a special taxing district was organized for Waynesville Township, and from 1925 until 1933 the County of Haywood levied special taxes for school purposes in Waynesville and other special taxing districts in the County.

4. Pursuant to statute (see Chapters 299 and 562, Public Laws of 1933), the County of Haywood in 1933 assumed the payment of all indebtedness of the special taxing district, including the special taxing

district of Waynesville Township, and thereafter the County ceased levying special taxes in special taxing districts.

5. The school property here in controversy was used for high school and elementary grades until after the organization of the township special taxing districts in 1924, and thereafter the Trustees of the Waynesville Graded School District ceased to function in their capacity as trustees. It was stipulated below that after the township special taxing district was organized in 1924, "the duties of the Trustees were assumed by the County Board of Education . . .; that no other trustees were appointed for the Special District and no other Trustees functioned as Board of Trustees . . ., and that at the time of the passage of the Act in 1953, all the original Trustees were dead and no additional Trustees were named until after the Act of 1953."

6. ". . . that the property in controversy is not now, and never has been, embraced within any city administrative unit as organized under the school laws of North Carolina."

None of the foregoing findings are controverted by the defendants except the recitals of Paragraph 6. The defendants except to that paragraph, and contend it contains a conclusion of law and not a finding of fact. Conceding, without deciding, that the defendants' contention is correct, even so, it is observed that the defendants neither alleged nor offered evidence tending to show that the property here involved has ever been embraced within a city administrative unit organized under our school laws. (Sec. 4, Chapter 562, Public Laws of 1933, G.S. 115-352.) In this state of the record we are inclined to the view, and so hold, that the unchallenged findings of fact—particularly those set out in paragraphs numbered 2, 4, and 5—sustain the conclusion that the property in controversy has never been embraced in a city administrative unit within the meaning of our school laws.

We conclude, therefore, that the record sustains the conclusion of the lower court that title to the property became vested in the Board of Education of Haywood County by statutory mandate, Chapter 358, Public Laws of 1939 (G.S. 115-352).

This being so, the remaining question for decision is, whether the deeds of 7 August, 1953, made by the substituted Trustees of the Waynesville Graded Schools are operative as conveyances of title to the defendants. We are constrained to the view that the deeds are inoperative for these reasons: The substituted Trustees were appointed by the Clerk of the Superior Court of Haywood County pursuant to Chapter 952, Session Laws of 1953. The substituted Trustees derive their power to convey solely from the foregoing Act. And the Act purports only to vest in the substituted Trustees for purposes of convey-

ance "whatever title to the property" was vested in the former Board of Trustees of the Waynesville Graded Schools.

As previously pointed out, no title was vested in the former Board of Trustees. Its title had previously passed to the Board of Education of Haywood County under Chapter 358, Public Laws of 1939 (G.S. 115-352). It necessarily follows that no title passed to the defendants by virtue of the deeds executed 7 August, 1953, by the substituted Trustees, and the court below correctly decreed that the deeds be set aside as clouds on the plaintiff's title.

It is noted that the court below did not reach for decision, nor do we, the question whether Chapter 952, Session Laws of 1953, is unconstitutional.

There is no merit in defendants' further contention that the deed to part of the property made in 1913 by the Mayor and Board of Aldermen of the Town of Waynesville to the Board of Trustees of Waynesville Graded Schools failed to convey title because the deed was not executed and acknowledged in the corporate name of the Town of Waynesville. As to this, we note it is alleged in the complaint and admitted in the answer of the Town of Waynesville that title to all public school property in the Waynesville Special Charter School District was vested in the Board of Trustees of the Waynesville Graded Schools by virtue of Chapter 433, Private Laws of 1913. Besides, the judgment below contains an agreed finding that the Town of Waynesville conveyed the parcels of land in question to the Board of Trustees of the Waynesville Graded Schools. Thus, under the admitted theory of the trial, all parties claim title from a common source, namely: the Board of Trustees of the Waynesville Graded Schools. The rule is that the theory upon which a case is tried in the lower court must prevail in considering the appeal and in interpreting the record and determining the validity of the exceptions. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Leggett v. College,* 234 N.C. 595, 68 S.E. 2d 263.

The defendants' other exceptions have been examined and found to be without substantial merit.

The judgment below is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. ENNIS JONES.

(Filed 21 September, 1955.)

1. Appeal and Error § 40l—

The Supreme Court will not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the court below.

2. Same—

The Supreme Court will not pass upon constitutional questions, even when properly presented, if there appears some other ground upon which the case may be decided.

3. Indictments § 9—

Ordinarily an indictment should not charge the offense in the alternative, but this rule does not apply when the charges are synonymous and one term is used only to explain or illustrate the other, or the statute commands the performance of a positive duty and the use of the disjunctive does not result in uncertainty.

4. Health § 5—

An indictment charging that defendant did unlawfully and willfully "build or install" a septic tank and cover same without first having the inspection and approval of the county board of health, and did unlawfully "build or install" a septic tank without first obtaining a permit from the health officer, in violation of ordinance, *is held* not subject to quashal on the ground of duplicity.

5. Indictment § 11—

An indictment is sufficient if it expresses the charge against the defendant in a plain, intelligible, and explicit manner and contains sufficient matter to enable the court to proceed to judgment. G.S. 15-153.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by the State from *Bone, J.*, May Term, 1955, of PAMLICO.

Criminal prosecution in which the bill of indictment contains two counts. The first count charges that the defendant on 23 February, 1955, "did unlawfully and wilfully build or install a septic tank and nitrification or tile bed for said septic tank and did cover the same without first having them inspected and approved by the Pamlico County Health Department, in violation of rules, regulations, of the Pamlico Board of Health duly adopted July 17, 1951," etc. The second count charges that the defendant on 23 February, 1955, "did unlawfully, with force and arms, at and in the County aforesaid build or install a septic tank and nitrification or tile bed for said septic tank without first obtaining a permit from the Health Officer or his duly authorized representative, in violation of the aforesaid ordinance," etc.

Upon the call of the case for trial, the defendant, through his counsel, moved to quash the bill of indictment and that the case be dismissed for that the same does not charge a crime.

The pertinent parts of the judgment entered below read as follows: "The defendant, in support of his motion to quash, contended that the aforesaid ordinance was unconstitutional and therefore void. In addition to the aforesaid ground for quashing the Bill of Indictment, it is observed by the court that the offense is alleged in the alternative, for that the Bill charges that the defendant did 'build or install a septic tank and nitrification or tile bed for said septic tank' and that the second count also charged the offense in the alternative in that it contains the language, 'build or install a septic tank and nitrification or tile bed for said septic tank.'

"After hearing the argument of the solicitor and counsel for defendant, and after considering the matter, the court is of the opinion that the motion to quash the Bill of Indictment should be allowed, and thereupon, it is ORDERED THAT THE INDICTMENT BE QUASHED.

"Let the defendant be discharged."

The State appeals, assigning error.

Attorney-General Rodman, Assistant Attorney-General Love, and Harvey W. Marcus, Member of Staff, for the State, appellant.

Robert G. Bowers for defendant, appellee.

DENNY, J. From an examination of the record in this cause we are unable to ascertain whether the court sustained the motion to quash on the ground that the ordinance of the Board of Health of Pamlico County is unconstitutional, or upon the ground that the offense charged in the respective counts in the bill of indictment is alleged in the alternative. Therefore, in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below. *In re Parker,* 209 N.C. 693, 184 S.E. 532. Moreover, appellate courts will not pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be decided. *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22; *Reed v. Madison County,* 213 N.C. 145, 195 S.E. 620; *S. v. Ellis,* 210 N.C. 166, 185 S.E. 663; *In re Parker, supra.*

Therefore, the question for determination on this appeal is simply this: Should the bill of indictment, charging that the defendant did unlawfully and wilfully build or install a septic tank and nitrification or tile bed for said septic tank, without procuring a permit and having the tank inspected as required by law, be quashed on the ground that

the offense charged is alleged in the alternative? "The general rule is well settled that an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him. . . . As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative. But where terms laid in the alternative are synonymous, the indictment is good; and where a statute in defining an offense, uses the word 'or' in the sense of 'to-wit,' that is, in explanation of what precedes, making it signify the same thing, the indictment may follow the words of the statute. An indictment is not vitiated by an alternative statement in matter which may be rejected as surplusage." 31 C.J., Indictments and Informations, section 181, page 663, *et seq.*

In *S. v. Van Doran,* 109 N.C. 864, 14 S.E. 32, this Court held that the use of the words "practice or attempt to practice" did not vitiate the indictment, and that the use of "or" is "only fatal when the use of it renders the statement of the offense uncertain, and not so when one term is used only as explaining or illustrating the other . . ." *S. v. Ratliff,* 170 N.C. 707, 86 S.E. 997; *S. v. Loesch,* 237 N.C. 611, 75 S.E. 2d 654.

Webster defines the word "build" as meaning "to erect or construct, as a dwelling place; hence, to form by uniting materials into a regular structure." He also defines the word "install" as meaning "to set up or fix, as a lighting system, for use or service."

The ordinance creating the offense charged in the instant case states that it shall be unlawful to "build or install a septic tank under the provisions thereof without first obtaining a permit from the Health Officer or his duly authorized agent." It also prohibits the covering up of said septic tank until the same shall have been inspected and approved by the Pamlico County Health Department.

In our opinion, any distinction that may be drawn between the words "build" and "install" constitute a mere play on words and is not determinative of the question before us. Therefore, we hold that in the sense in which they were used in the ordinance, the violation of which is alleged in the bill of indictment, the words are synonymous. But, on the other hand, if they were construed otherwise, we cannot see how their use in the alternative could possibly prejudice the defendant or leave him in doubt as to the offense charged. This is bound to be so, since the offense charged is not made to depend on whether the defendant built the septic tank piece by piece, or bought it and set it into place and then built his nitrification or tile bed for it. The gist of the offense charged in the respective counts of the bill of indictment is the failure of the defendant to get a permit to build or install the septic

tank and the nitrification or tile bed, and his failure, upon completion thereof and before covering them up, to have the same inspected and approved by the Health Department of Pamlico County.

In the case of *S. v. Schriber,* 185 Ore. 615, 205 P. 2d 149, the Supreme Court of Oregon, in considering a statute in which the identical legal question that is now before us was raised, said: "The statute in question differs from prohibitory ones, in that it commands that certain things shall be done and provides a penalty for the nonperformance thereof. Consequently, a complaint brought thereunder must charge a defendant with inaction where action is commanded. The reason that the use of the word 'or' is inadmissible in complaints charging a defendant with the violation of prohibitory statutes is because it tends to leave the averment uncertain as to which of two or more things charged is meant. . . . Therefore certainty is the prime requisite. But in a complaint charging the violation of a statute in which action is commanded the use of the conjunctive word 'and' instead of the disjunctive 'or' would not make the allegation more certain." A similar conclusion was reached in the cases of *S. v. Smith,* 29 R.I. 513, 72 A. 710, and *Smith v. State,* 140 Tex. Cr. 217, 144 S.W. 2d 281.

All that we require in a bill of indictment is for it to be sufficient in form and to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment. G.S. 15-153; *S. v. Loesch, supra,* and cited cases.

We hold that the bill of indictment is not bad for duplicity, and that the motion to quash should have been overruled.

The judgment of the court below is

Reversed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

OLIVIA B. JONES, EXECUTRIX OF THE WILL OF DAVID A. JONES, DECEASED, v. MRS. EDNA JONES CALLAHAN AND HUSBAND, H. G. CALLAHAN.

(Filed 21 September, 1955.)

1. Descent and Distribution § 2—

Where a will disposes of certain designated property and then directs that all the other property, both real and personal, owned by testator should descend and be considered as though testator had died intestate, *held,* testator died testate as to his entire estate, the descent and distribu-

tion of the residue of the estate in accordance with the rules of intestacy being by direction of the will.

2. Wills § 31—

In construing a will, the primary inquiry is to ascertain the testator's intent.

3. Wills § 36—

A bequest of all testator's household and kitchen furniture, jewelry, clothing, and other articles of personal property used in and around his home, to his wife, does not include, nothing else appearing, an automobile owned by testator at the time of his death, but the car passes under the residuary clause.

4. Estates § 16: Wills § 32½—

U. S. War Bonds, Series E, registered in testator's name, payable on death to his daughter, purchased prior to testator's second marriage, and in his possession at the time of death, belong to the daughter not under the will, but under the terms of the bonds, and are not to be considered in the settlement of testator's estate in the absence of any provision in the will in regard thereto.

5. Descent and Distribution § 13—

Where testator purchases war bonds payable upon his death to his daughter, but dies in possession of the bonds, the bonds may not be considered an advancement in the settlement of the estate in accordance with the statute of distribution under directions of the will, since an advancement must be a gift *in presenti.*

6. Executors and Administrators § 15g—

The right of a widow to a year's support for herself and children is solely statutory, G.S. 30-15, and the statute does not apply unless the husband dies intestate or the widow dissents from his will.

7. Dower § 3—

Where the wife joins in her husband's deeds in fee simple, duly executed and acknowledged, she conveys her inchoate right of dower, and upon his death she may not contend that her right of dower in the lands conveyed should be taken into consideration in determining her share of the estate.

8. Wills § 31—

Nothing else appearing, it must be presumed that testator intended to dispose only of the property owned by him at the time of his death.

9. Dower § 2—

Testator owned two tracts of land. He devised one of them to his wife, and provided that the other tract and his personalty should descend and be distributed in accordance with the applicable rules of descent and distribution as in case of *intestacy. Held:* The widow is entitled to dower as to the second tract.

10. Costs § 4b—

Where the controversy involves the rights of two persons in the distribution of an estate, and the final adjudication upholds the contentions of

neither in their entirety, direction that the costs be paid as a part of the costs of administration is not prejudicial, since the cost so taxed ultimately will fall equally on each.

11. Appeal and Error § 11—

Where both parties appeal and the judgment is affirmed, the costs in the Supreme Court will be taxed one half against each party.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEALS by plaintiff and defendants from *Fountain, Special Judge,* May Term, 1955, of BEAUFORT.

Controversy without action under G.S. 1-250, submitted upon an agreed case "containing the facts upon which the controversy depends."

David A. Jones died 13 July, 1954. Olivia B. Jones is his widow and executrix of his Will. Mrs. Edna Jones Callahan, his only child, is the child of his first wife, from whom he was divorced. These are the only persons who have any interest in his estate. What are their respective interests?

The Will of David A. Jones contained these provisions:

"ITEM II: I will and bequeath all of my household and kitchen furniture, jewelry, clothing and other articles of personal property used in and around my home that I may own at my death to my beloved wife, Olivia B. Jones, absolutely and in fee simple.

"ITEM III: I will, devise and bequeath the house and lot located on the South side of New Street in South Creek, North Carolina; it being one-half of an acre, more or less, and the house being the one in which my wife, Olivia B. Jones and I presently reside, to my beloved wife, Olivia B. Jones, absolutely and in fee simple.

"ITEM IV: It is my will and desire, with respect to all of my other property of whatsoever nature and wheresoever situate, both real and personal, that it descend and be considered as if I had died intestate under the laws of intestacy."

The assets identified in the agreed case are:

Real property: The residence devised to the widow in ITEM III. Admittedly, she is the sole owner thereof as devisee. The only other real property is a lot, approximately an acre, value undisclosed.

Personal property: (1) Bank deposits aggregating $5,186.75; (2) a 1950 two-door secondhand Ford automobile; (3) an old gas boat; (4) an old outboard motor and several used fishing nets; and (5) 19 U. S. War Bonds, Series E, each in the maturity value of $50.00, registered in the name of David A. Jones, payable on death to Miss Edna L. Jones (his said daughter), all of which have matured.

The questions posed for decision will be stated in the opinion. From the judgment, both plaintiff and defendants appealed, excepting to and assigning as error the portions thereof adverse to their respective contentions.

Grimes & Grimes for plaintiff, appellant.
Carter & Ross for defendants, appellees.

BOBBITT, J. David A. Jones died *testate*. His Will disposed of all assets *constituting his estate*. Our primary inquiry is to ascertain the testator's intent. *Trust Co. v. Miller*, 223 N.C. 1, 25 S.E. 2d 177. With this in mind, we consider each item in controversy.

PLAINTIFF'S APPEAL.

1. *Ford car.* The agreed case states simply that the testator "had one 1950 two-door secondhand Ford automobile." Nothing else appearing, the Ford car is not comprehended in the bequest to the widow in ITEM II of "all of my household and kitchen furniture, jewelry, clothing and other articles of personal property *used in and around* my home." (Italics added.) On the contrary, it passed under ITEM IV, which comprehended all undesignated property. The court below so ruled.

2. *War Bonds.* The agreed case gives no information as to when or by whom the bonds were purchased. From the facts (1) that they were purchased before Mrs. Callahan was married, and (2) that they have matured, we may well infer that they were purchased years ago. Be that as it may, the testator had possession thereof until his death. He could have cashed them at any time. No delivery thereof was made to Mrs. Callahan during the testator's life. The executrix properly delivered these bonds to Mrs. Callahan; for, upon the testator's death, she became the sole owner thereof, not under the Will but under the terms of the bonds. *Ervin v. Conn*, 225 N.C. 267, 34 S.E. 2d 402; *Watkins v. Shaw, Comr. of Revenue*, 234 N.C. 96, 65 S.E. 2d 881.

Plaintiff's contention that Mrs. Callahan must account for the value of these bonds as an advancement is untenable. These bonds, retained by the testator until his death, do not fall within the definition of an advancement, to wit, "an *irrevocable* gift *in presenti* of money or of property, real or personal, to a child by a parent, to enable the donee to *anticipate* his inheritance or succession to the extent of the gift." (Italics added.) *Thompson v. Smith*, 160 N.C. 256, 75 S.E. 1010.

Mrs. Callahan's ownership of the bonds is not affected by the Will. They are not to be considered in the settlement of testator's estate. The court below so ruled.

3. *Year's Support.* The widow claims, for herself (G.S. 30-15) and for her child by a former marriage (G.S. 30-17), allowances for a year's support. The right to such allowances is statutory. *Broadnax v. Broadnax,* 160 N.C. 432, 76 S.E. 216. G.S. 30-15, by its express terms, is applicable only to the "widow of an intestate, or of a testator from whose will she has dissented." Here the widow did not dissent, but elected to take under the Will. *Perkins v. Brinkley,* 133 N.C. 86, 45 S.E. 465. As to the widow's child (by a former marriage), a statement of the contentions of plaintiff furnishes our only information concerning this child. The agreed case contains no statement of facts as to her status. Even so, G.S. 30-17 has no application; for this statute, by its terms, its history, and when considered with the other provisions of G.S. Ch. 30, Art. 4, has reference only to the estate of an *intestate* or at most to an estate where the widow dissents from the Will. The court below so ruled.

4. *Dower.* The widow contends, not only that she is entitled to dower in the undesignated lot passing under ITEM IV, but that in the allotment of dower certain land previously conveyed by David A. Jones and wife, Olivia B. Jones, must be taken into account. This land was sold and conveyed to a purchaser in January, 1953, by fee simple warranty deed, duly executed and acknowledged. This deed conveyed the husband's title and the wife's inchoate right of dower. G.S. 30-7.

Decisions such as *Chemical Co. v. Walston,* 187 N.C. 817, 123 S.E. 196, and *Brown v. McLean,* 217 N.C. 555, 8 S.E. 2d 807, have no application. In these cases, the lands involved were owned by the decedent at his death and constituted a part of his estate; and the wife's joinder in a mortgage or deed of trust then outstanding was deemed a conveyance of her inchoate right of dower only as security for the decedent's debt. Hence, the widow was entitled to have the assets of her husband's estate applied to the payment of *his* debts without impairment of her right of dower.

The land so conveyed in 1953 was not owned by the testator when he died. Since he did not own it, the suggestion that he intended that it be considered in the settlement of his estate is without merit. Nothing else appearing, it must be presumed that a testator intends to dispose only of property owned by him. *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14. The court below properly ruled that this previously conveyed land should not be considered in the allotment of dower.

For the reasons stated, plaintiff's assignments of error are overruled.

DEFENDANTS' APPEAL.

The sole basis of defendants' appeal is the court's ruling that the widow is entitled to dower in the lot passing under ITEM IV.

Decedent died testate as to his entire estate. The proper construction of his will, in our opinion, is that he intended that the assets not designated in any bequest or devise should descend and be distributed according to the applicable rules of descent and distribution in case of intestacy. Thus, as to undesignated real property, Mrs. Callahan takes as testator's lineal descendant, G.S. 29-1, Rule 1, subject to the widow's right of dower therein, G.S. 30-5; and as to undesignated personal property, this is to be equally distributed between the testator's widow and his only child. G.S. 28-149 (1).

For the reasons stated, defendants' assignments of error are overruled.

The judgment below provides that the costs be paid by the executrix as part of the costs of administration. If this ruling is erroneous, no prejudicial error is made to appear; for under the decision there and here, the costs so taxed ultimately will fall equally upon the widow (plaintiff) and the child (*feme* defendant). Since the judgment is affirmed, in respect of both appeals, the costs in this Court will be taxed one-half to the widow and one-half to the child.

On plaintiff's appeal: Affirmed.

On defendants' appeal: Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

LESTER GROSSMAN, T/A LESTER GROSSMAN COMPANY, v. M. J. JOHNSON, INDIVIDUALLY, AND M. J. JOHNSON AND DORIS JOHNSON, T/A COLONIAL MOTOR COURT, AND DORIS JOHNSON, INDIVIDUALLY.

(Filed 21 September, 1955.)

1. Sales § 27—

The measure of damages for breach of warranty in the sale of personal property is the difference between the market value of the goods at the time and place of delivery, as delivered, and such value if the goods had complied with the warranty, together with such special damages as were within the contemplation of the parties.

2. Same—

Where, upon counterclaim for breach of warranty, the purchaser offers no evidence as to the value of the goods, as delivered, at the time and place of delivery, the purchase price must be regarded as the actual value, and, in the absence of allegation of special damages, nonsuit on the counterclaim is proper, and further, the balance due on purchase price being admitted, a directed verdict against the purchaser for the balance due must be upheld.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

GROSSMAN *v.* JOHNSON.

APPEAL by defendants from *Judge Clifton L. Moore,* March Term, 1955, of CAMDEN.

The plaintiff instituted this action to recover a balance of $387.25, due and unpaid on an account for merchandise sold and delivered to the defendants for an agreed consideration of $2,720.10. The defendants admitted the receipt of the goods as alleged and did not deny that they agreed to pay the consideration therefor, as alleged in the complaint. They further admitted the payment of $2,332.85 on the account. They did aver, however, in their answer, that the true value of the goods delivered was less than $2,720.10, and set up a counterclaim alleging breach of warranty and asked for damages in the amount of $1,265.85.

The evidence tends to show these facts: The plaintiff is in the retail carpet and furniture business in Norfolk, Virginia. The defendants operate the Colonial Motor Court at South Mills, North Carolina. From 8 March, 1951, to 27 February, 1952, the plaintiff sold to the defendants certain furniture, bedding, pillows, mattresses and box springs, for which they agreed to pay $2,720.10. According to the testimony of the defendant M. J. Johnson, he purchased from the plaintiff seventeen Simmons Simfoam mattresses and twelve Simmons Simfoam Box Springs, at the wholesale price of $48.50 each, a total of $1,406.50; that Beautyrest mattresses and box springs could have been purchased from the plaintiff for $46.50 each. That the plaintiff told him the Simfoam mattresses were guaranteed for ten years; that he did not notice any defect in the mattresses until a short time after 22 January, 1952, when upon an examination thereof he found that all of them were defective. He immediately requested the plaintiff to inspect them.

The plaintiff testified that he inspected the mattresses and that some of them were defective; that nothing was mentioned about a guarantee at the time these mattresses were sold to the defendants. That he agreed on behalf of the Simmons Company to exchange all of the Simfoam mattresses for Beautyrest mattresses, but would not agree to exchange the box springs as they were identical with the Beautyrest box springs, except for the ticking, and that "we offered to put new ticking on the box springs." The defendants refused to accept the Beautyrest mattresses in exchange for the Simfoam mattresses unless the plaintiff would also exchange the box springs for new springs. The defendants admitted that this offer was made and refused for the reasons stated by the plaintiff.

At the close of all the evidence, the court, *ex mero motu,* nonsuited the defendants' counterclaim and submitted the following issue:

"1. In what amount, if any, are the defendants indebted to the plaintiff? Answer: $387.25."

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

Robert B. Lowry and Gerald F. White for appellee.
J. T. Chaffin for appellants.

DENNY, J. This appeal requires an answer to these questions: 1. Did the court below commit prejudicial error by entering on its own motion a judgment as of nonsuit on the defendants' counterclaim? 2. Did the court err in giving peremptory instruction on the issue submitted?

The defendants alleged in their counterclaim that the "29 Simmons Simfoam mattresses and box springs were at the time of delivery to the defendants of the value of $140.65, or some other nominal sum; that they would have been of the value of $1,406.50 if they had answered to said warranty."

The correct rule as to the measure of damages for breach of warranty of personal property is the difference in the market value at the time and place of delivery, between the goods as they were and as they would have been if they had complied with the warranty, with such special damages as were within the 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; *Harris v. Canady,* 236 N.C. 613, 73 S.E. 2d 559; *Hendrix v. Motors, Inc.,* 241 N.C. 644, 86 S.E. 2d 448. But, where there is no evidence as to the value of the goods at the time and place of delivery, the purchase price will be regarded as the actual value. *Cable Co. v. Macon, supra;* 35 Cyc., page 648; 55 C.J., Sales, section 844, page 856; 77 C.J.S., Sales, section 367, page 1305.

It is not necessary for us to consider or discuss the question of special damages since no such damages were alleged.

In the trial below, the defendants offered no evidence whatever as to the difference between the reasonable market value of the mattresses as warranted (if it be conceded they were warranted), and as delivered. Therefore, the court had no alternative other than to regard the purchase price of the goods sold and delivered as the true value thereof. Hence, in our opinion, the judgment as of nonsuit on the defendants' counterclaim should be upheld.

The defendants also except to and assign as error the instruction given to the jury on the issue submitted, which was as follows: "The Court instructs you that if you believe the evidence in this case and find by the greater weight thereof, the facts to be as the evidence tends to show, bearing in mind that the burden is upon the plaintiff, as already explained by the court, then it would be your duty to answer this issue:

$387.25. If the plaintiff has failed to so satisfy you, then it would be your duty to answer it in a lesser amount, or nothing."

It is clear that the plaintiff, upon the evidence adduced in the trial below, was entitled to a judgment for the balance of the purchase price. *Price v. Goodman,* 226 N.C. 223, 37 S.E. 2d 592. Therefore, since the amount of the purchase price of the goods has never been disputed by the defendants, nor the amount of the unpaid balance thereon, the instruction must be upheld. *Price v. Goodman, supra.*

We have carefully considered the remaining exceptions and assignments of error, and in view of the conclusions we have reached on the questions heretofore considered, in our opinion the additional matters complained of and assigned as error could not possibly have affected the result of the trial below.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. WILLEY JAMES TYSON.

(Filed 21 September, 1955.)

1. Homicide § 17—

Where there is testimony that defendant fired several shots in the direction of the door of a room, evidence that a bullet hole was found in the door and that a bullet was found lying on the sill below the hole, is competent for the purpose of corroboration.

2. Criminal Law § 81c (3)—

The exclusion of evidence cannot be held prejudicial when the same witness immediately thereafter testifies to substantially the same facts, and further, the evidence is merely cumulative of other testimony.

3. Criminal Law § 78d (3): Trial § 15—

Where only part of the answer of a witness is objectionable as hearsay, the objecting party should single out the objectionable part of the answer and make only that part the subject of his motion to strike.

4. Criminal Law § 81c (3)—

Where only part of the answer of a witness, elicited on defendant's cross-examination, is objectionable as hearsay, the refusal of a motion to strike will not be held for prejudicial error when the same witness thereafter testifies to the same facts without objection, and in view of all the testimony, the hearsay statement is too insignificant to have affected the result.

5. Criminal Law § 53f: Trial § 31e—

An instruction by the court to the effect that the court had not undertaken to recite all the evidence but only the substance of the evidence on both sides necessary to enable the court to explain and apply the law, but that it was the duty of the jury to remember and consider all of the evidence on both sides, and if its recollection differed from the court's statement, to be guided by its own recollection, *is held* not to contain an expression of opinion on the evidence by the court, but to be in strict compliance with G.S. 1-180.

6. Homicide § 27f—

Where the evidence discloses that the fatal encounter was provoked by an insult or assault made upon the woman escorted by the deceased, and there is ample evidence tending to show that defendant used excessive force and continued to shoot after deceased had attempted to turn and run out the door, there is sufficient evidence to justify the jury in finding that defendant was not without fault, and therefore it is proper for the court to charge the jury that a defendant cannot justify a slaying on the ground of self-defense unless he is without fault.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Bone, J.*, April Criminal Term, 1955, PITT. No error.

Criminal prosecution under a bill of indictment in which it is charged that defendant did feloniously kill and murder one Henry Daniels.

The evidence for the State tends to show that on the night of 29 October 1954 the defendant and the deceased were guests at a "juke joint" in Pitt County known as the "Honey Hush," which is composed of two rooms connected by a hall. When Ardelia Cox, Leon Gilbert, and the deceased entered the back room, the defendant was there. He pulled Ardelia Cox's coat, and this resulted in an exchange of blows between her and the defendant. He then left the back room and entered the front room.

Shortly thereafter, the deceased, Ardelia Cox, and Leon Gilbert entered the front room. The deceased said something to the defendant, and the defendant approached Ardelia and drew his hand back as if to slap her. The deceased then struck the defendant on the head with a piece of wood, knocking him down. "When he (defendant) got up, he got up shooting." He shot four times. When he began to shoot, the deceased fell up against the wall and attempted to run out the door, but fell in the doorway. "He (defendant) was shooting out that way."

Defendant's evidence tends to show that he was in the back room of the Honey Hush at the time the deceased, Ardelia Cox, and Leon Gilbert arrived. The defendant testified he had never seen the deceased before, but he did know Ardelia Cox, and was teasing her when he

pulled her coat. He admitted that Ardelia Cox struck him as the result of his pulling her coat. He then walked out of the back room and into the front room. At this time, he was struck on the head by some hard object. As he fell to the floor, a pistol fell out of his belt. He grabbed the pistol and started firing at the man who had struck and who was approaching him in a threatening manner.

The jury rendered a verdict of guilty of manslaughter. The court pronounced judgment on the verdict and defendant appealed.

Attorney-General Rodman, Assistant Attorney-General Giles, and William P. Mayo of Staff for the State.

Albion Dunn for defendant appellant.

BARNHILL, C. J. There was evidence that a bullet hole was found in the door, and a bullet was found lying on the sill below the hole. Exception thereto is without merit. The testimony tends to show that the defendant was shooting in that direction, and this evidence was merely corroborative of that testimony.

One of the witnesses for defendant, in describing the assault made by deceased upon the defendant, testified: "He hit him across the head and broke the round; stooped down and picked a piece of it up, looked like he was going to hit him again." Objection thereto was sustained and defendant excepted. Of course the first part of the answer was competent. No doubt the exception was directed to that part of the answer which the State contends was the mere expression of an opinion, to wit, "looked like he was going to hit him again."

This exception is feckless. Whether the statement made by the witness constitutes the expression of opinion or a shorthand statement of a fact is debatable. It is at least on the border line. However, even if we consider it a shorthand statement of fact, the same witness testified to substantially the same facts immediately thereafter. *S. v. Humbles*, 241 N.C. 47, 84 S.E. 2d 264; *S. v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323; *S. v. Werst*, 232 N.C. 330, 59 S.E. 2d 835; *S. v. King*, 225 N.C. 236, 33 S.E. 2d 590. He testified that the deceased "hit him across the head, broke the round, picked the other part up and walked to the door. . . . After he struck him he tried to pick the round up, going to hit him with it again, I reckon." Furthermore, the testimony was cumulative. A reading of the record leaves no doubt that deceased struck the defendant and then attempted to strike him a second time, or at least picked up the stick in preparation to do so. On the facts appearing in this record, this exception cannot be sustained.

A State's witness, on cross-examination, gave an answer which included the hearsay statement—"William Barrett told me they were the

holes put in there that night." The defendant objected and moved to strike the answer. Objection was overruled and the defendant excepted. This exception is without substantial merit for two reasons: (1) The defendant moved to strike the whole answer, a part of which was competent. He did not single out the hearsay statement and make that alone the subject matter of his motion; and (2) Under the facts in this case, the hearsay statement is so insignificant that it gives us no reason to believe that its exclusion would have produced a different result. Furthermore, the answer was elicited by the defendant.

Thereafter, the same witness testified to substantially the same facts without objection. This cured the error in admitting the hearsay statement, even if defendant's exception had been directed solely to the incompetent part of the answer. (See cases heretofore cited.)

There was evidence that the defendant, while inside the building, shot four times. The defendant admitted that he shot at least three times. The bullet holes were "fresh." In view of this testimony which was admitted without exception, the hearsay statement as to what Barrett said is too insignificant to warrant a new trial.

The statute, G.S. 1-180, now requires the judge to state only such evidence as is necessary to explain and apply the law to the facts in the case. In complying with this statute, the judge stated to the jury: "Now, gentlemen of the jury, I have not undertaken to recite the evidence of each and every witness, but I have only stated that part of the substance of the evidence on both sides as seems to me to be necessary to enable me to explain and apply the law." He was careful, however, to caution the jury that it was their duty in deciding the issue of guilt or innocence "to remember and consider all of the evidence on both sides, whether I have called it to your attention or not, and if your recollection of the evidence differs from the manner in which I have stated it, it is your duty to disregard my recollection of the evidence and be guided by your own." The excerpt first quoted does not constitute the expression of opinion but is in strict compliance with the statute, G.S. 1-180. Exception thereto is without merit.

The defendant further excepts for that the court charged the jury in substance that a defendant cannot justify a slaying on the grounds of self-defense unless he is without fault. This exception is likewise without merit. There was testimony tending to show that the deceased was the uncle by marriage of Ardelia and was one of her companions and escorts at the time. Defendant knew, or ought to have known, that any insult directed at, or any assault made upon, the woman would provoke the resentment and the possible assault of her male companion. Hence, there was sufficient evidence to justify the jury in finding that defendant was not without fault. There is likewise ample evidence

tending to show that he used excessive force. He continued to shoot after deceased had attempted to turn and run out the door. This was not the conduct of a man who was merely fighting in his own necessary self-defense.

The other assignments of error are without merit.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

WILLIAM CARTER, JR., v. CONTINENTAL INSURANCE COMPANY OF NEW YORK, A CORPORATION (ORIGINAL PARTY DEFENDANT), AND DICEY S. CARTER (ADDITIONAL PARTY DEFENDANT).

(Filed 21 September, 1955.)

Insurance § 24d: Husband and Wife §§ 15a, 15c—

A fire insurance policy was issued in the name of the husband alone on property held by entirety, but in the sole possession of the husband. Upon the destruction of the property by fire, insurer paid the amount of the policy into court. *Held:* The husband had an insurable interest in the property, constituting an inseparable part of the single-entity title held in unity by him and his wife, and thus covering the entire estate as owned by both. Therefore, upon the estate by entirety being later severed by absolute divorce, each is entitled to one-half the proceeds of the insurance moneys.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant Dicey S. Carter from *Fountain, Special Judge,* at April Term, 1955, of MARTIN.

Civil action to recover on a policy of fire insurance covering a dwelling house which was destroyed by fire.

The house was owned by William Carter, Jr., and wife, Dicey S. Carter, as an estate by the entirety. However, they were living separate and apart at the time the policy was written and also when the fire occurred. William Carter, Jr., was in possession of the property at both times. He applied for the policy. It was issued in his name only, and he paid the premium. The amount of the policy was $4,000. The value of the house is not disclosed. The record shows only that the fire caused a loss in "excess of $4,000." The plaintiff, William Carter, Jr., made demand on the Insurance Company for the full amount of the policy. Dicey S. Carter made demand for half of the insurance moneys. Both

demands were refused. This action was then instituted by William Carter, Jr., against the Insurance Company. Thereafter, by consent of all parties concerned, the Insurance Company was permitted to pay into court the sum of $4,000 in full discharge of its liability, and Dicey S. Carter was substituted as defendant and was allowed to set up her claim for half of the moneys.

By decree of absolute divorce, signed after the fire but before the commencement of the instant action, Dicey S. Carter was granted an absolute divorce from William Carter, Jr.

Upon an agreed statement of facts substantially as herein set out, the court below rendered judgment decreeing that the plaintiff is entitled to the entire proceeds of $4,000. From the judgment so entered the defendant, Dicey S. Carter, appeals.

R. L. Coburn and John R. Jenkins, Jr., for plaintiff, appellee.
LeRoy Scott for defendant, appellant.

JOHNSON, J. This appeal presents the question whether a husband's interest in an estate by the entirety is insurable for his benefit alone, as a separate moiety apart from the entire estate owned by him and his wife. The court below held that the husband's interest is so insurable. The appeal challenges the correctness of this ruling.

The question presented is one of first impression with us. Counsel have cited no case from any other jurisdiction involving the same factual situation, and our research has disclosed none. Nevertheless, decision takes shape and mold from application of the fundamental principles governing this peculiar estate of husband and wife. These principles are concisely stated by the late *Chief Justice Stacy* in the notable opinion in *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566. The following excerpts from that opinion suffice to shape decision here:

1. "This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person."

2. "These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof. They are seized of the whole, because at common law they were considered but one person; and the estate thus created has never been destroyed or changed by statute in North Carolina."

3. "As between them (husband and wife) there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and of every part and parcel thereof."

4. "The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, *but also by virtue of the grant which vested the entire estate in each grantee.*" (Italics added.)

5. "There can be no partition during the coverture, for this would imply a separated interest in each; . . ."

6. " 'He (the husband) is entitled to the use and possession of the property during the joint lives of himself and wife.' "

7. "An absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common. . . ."

By the terms of Chapter 378, Session Laws of 1945, now codified as G.S. 58-180.1, it is provided that where fire insurance is issued to the husband or to the wife on a building owned by them by the entirety, either party in interest named as insured or as beneficiary is sufficient to effect coverage of the entire property, and in the absence of fraud the policy shall not be void for failure to disclose the interest of the other tenant.

Here the insurance policy appears to be a standard form policy. It designates the husband as the insured and as the beneficiary. Nowhere in the policy is there any special provision purporting to limit coverage to the interest of the husband, to the exclusion of the wife. The Insurance Company has raised no question about the nondisclosure of the wife's interest in the property. It concedes liability under the policy as written and has paid into court the full amount thereof.

It may be conceded that the plaintiff husband had an insurable interest in the property of which he and his wife were seized as tenants by the entirety. However, since the proprietary interest of the husband was an inseparable part of the single-entity title held in unity by him and his wife, his insurable interest ran to the whole of the property and covered the entire estate. See 29 Am. Jur., Insurance, Sec. 332, and cases cited under footnote 13; Annotation: 27 A.L.R. 2d 1059, 1061. We conclude that the insurance policy as written and the loss benefits created thereby inured to the benefit of the entire estate as owned by both husband and wife.

Since the entire estate, as so insured, was severed by absolute divorce after the fire, it necessarily follows that the defendant wife is entitled to receive half the proceeds of the insurance moneys paid into court, and the judgment below excluding her from the benefits must be held for error. It is so ordered. Let the judgment entered below be modified accordingly. The costs will be taxed against the plaintiff.

Modified and affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. BURRELL WARREN.

(Filed 21 September, 1955.)

1. Homicide § 16: Assault § 11—

Where an intentional killing with a deadly weapon is admitted or established in a homicide prosecution, the law presumes malice, constituting the offense murder in the second degree, with the burden upon defendant to satisfy the jury of self-defense when relied upon by him; but in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, no presumption arises from the use of a deadly weapon, and the burden rests upon the State throughout the trial to prove defendant guilty beyond a reasonable doubt.

2. Assault § 14b—

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, an instruction that the law of self-defense in case of homicide applies equally in case of assault with intent to kill, together with an instruction that a person cannot *excuse* taking the life of an adversary upon the grounds of self-defense unless the killing is or reasonably appears to be necessary to protect himself from death or great bodily harm, must be held for prejudicial error as placing the burden upon defendant to prove self-defense.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Judge Dan K. Moore,* February Term, 1955, of HAYWOOD.

Criminal prosecution tried upon a bill of indictment charging that the defendant did unlawfully, wilfully and feloniously assault Hall Warren with a deadly weapon, to wit: a pistol, with the intent to kill and murder said Hall Warren, inflicting serious injuries, not resulting in death.

The State's evidence tended to show an assault with a pistol upon the person of Hall Warren, the defendant's son, wherein Hall Warren was shot and seriously injured. The defendant admitted the shooting, but testified that he did it in self-defense.

Verdict: Guilty of a felonious assault as charged in the bill of indictment.

Judgment: Imprisonment in the State's prison for a term of not less than five nor more than seven years.

The defendant appeals, assigning error.

Attorney-General Rodman, Assistant Attorney-General Bruton, and William P. Mayo, Member of Staff, for the State.

John M. Queen and Frank D. Ferguson, Jr., for defendant.

DENNY, J. The defendant assigns as error the following excerpts from the charge:

"It is undoubtedly law that a person cannot excuse taking the life of an adversary upon the grounds of self-defense unless the killing is or reasonably appeared to be necessary to protect himself from death or great bodily harm." Exception No. 22.

"An unsuccessful attempt to kill cannot be justified unless the homicide had been excusable had death ensued. It follows that where an accused has inflicted a wound upon another with intent to kill, he may be absolved from criminal liability from so doing on the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of each (such) other person." Exception No. 23.

These excerpts were taken almost verbatim from the opinion in the case of *S. v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895. In that case the court charged the jury as follows: "One is permitted to fight in self-defense or kill in self-defense when it is necessary for him to do so in order to avoid death or great bodily harm." It was held that the instruction given denied the accused the right to "fight in self-defense" in the absence of an actual necessity for so doing even though he may have honestly and reasonably believed from the circumstances surrounding him at the time that the prosecuting witness was about to take his life or to do him great bodily harm. Thus, it erroneously limited the right of self-defense to actual or real danger alone.

The Court, speaking through *Ervin, J.,* then pointed out that the excerpt from the charge is objectionable in another view. That while it is undoubted law that a person cannot excuse taking the life of an adversary upon the ground of self-defense unless the killing is, or reasonably appears to be, necessary to protect himself from death or great bodily harm, it was improper in that case since the defendant had not taken human life. A new trial was granted. Therefore, we disapproved the inclusion of the law of self-defense with respect to homicide in a charge where a defendant is being tried upon a bill of indictment for an assault with a deadly weapon, with intent to kill, inflicting serious injuries, not resulting in death.

It will be noted that his Honor in charging the jury in the instant case, in the last sentence of his charge, preceding the second excerpt quoted above, stated: "The law of self-defense in case of homicide applies *equally* in case of an assault with intent to kill." (Emphasis added.)

It is true that the law of self-defense may be available in case of homicide and in case of assault with intent to kill, but the presumption with respect to such plea is not the same. When a defendant admits that he intentionally killed another, or an intentional killing is established, the law presumes malice from the use of a deadly weapon and the defendant is guilty of murder in the second degree, unless he can satisfy the jury, not beyond a reasonable doubt, nor by the greater weight of the evidence, but simply satisfy the jury of facts which justify his act or mitigate it to manslaughter, and the burden is on the accused in such case to establish such facts to the satisfaction of the jury unless the facts in mitigation are established by the State's evidence. *S. v. Todd*, 224 N.C. 358, 30 S.E. 2d 157; *S. v. Prince*, 223 N.C. 392, 26 S.E. 2d 875; *S. v. Beachum*, 220 N.C. 531, 17 S.E. 2d 674.

On the other hand, when a defendant is charged with an assault with a deadly weapon, with intent to kill, inflicting serious injury, not resulting in death, although the defendant may admit that he inflicted the injury with a deadly weapon, the law does not raise the presumption that it was done with malice and thereby shift the burden to the defendant to satisfy the jury that his conduct was justified. In a prosecution for assault with a deadly weapon in which the defendant's evidence tends to show that he acted in self-defense, the burden of proof rests on the State throughout the trial to prove the defendant guilty beyond a reasonable doubt. *S. v. Cephus*, 239 N.C. 521, 80 S.E. 2d 147; *S. v. Carver*, 213 N.C. 150, 195 S.E. 349. On such a charge, "a defendant's plea of not guilty clothes him with a presumption of innocence which continues to the moment the State offers evidence sufficient to rebut the presumption and to show beyond a reasonable doubt that the defendant in fact committed the crime charged, or some lesser degree thereof." *S. v. Cephus, supra.*

The question of the burden of proof was not raised in the case of *S. v. Anderson, supra.* And while the charge in this case purports to place the burden of proof on the State, if the law of self-defense in the case of homicide applies equally in case of an assault with intent to kill, then there is an implication that the burden is shifted to the defendant to show facts in mitigation of the offense charged. Therefore, we think the defendant is entitled to a new trial.

In view of the conclusion we have reached with respect to the charge, we will not discuss the remaining assignments of error.

New trial.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

H. S. ELLER AND WIFE, MAUDE J. ELLER, v. THE BOARD OF EDUCATION OF BUNCOMBE COUNTY.

(Filed 21 September, 1955.)

1. Schools § 4b—

While a county board of education is a body corporate, G.S. 115-45, as amended, and may sue and be sued in its corporate name, this fact standing alone is not determinative as to what actions may be maintained against it.

2. Same—

A county board of education is immune from liability for torts of its members or agents, except such liability as may be established under the Tort Claims Act, G.S. 143-291, as amended, but an action against it will lie for depreciation in the value of land contiguous to a school resulting from the maintenance of a nuisance on the school grounds, since such action is not in tort, but is to recover for the taking of private property for a public use.

3. Eminent Domain § 2—

When private property is taken for public use just compensation must be paid. Constitution of N. C., Art. I, sec. 17.

4. Eminent Domain § 3—

In order to constitute a "taking" of private property for a public purpose within the principle of eminent domain, it is not necessary that there be an actual seizure, but it is sufficient if the creation and maintenance of a government project constitutes a nuisance substantially impairing the value of private property.

5. Schools § 4b—

A complaint alleging that the county board of education constructed and maintained on school property adjacent to plaintiffs' land a septic tank so constructed and operated as to cause sewage to flow or seep onto plaintiffs' land and, by reason of such continuous pollution and the noxious odors emanating therefrom, plaintiffs' spring was rendered unfit for use and their dwelling rendered unfit for habitation, states a cause of action against the county board of education for a taking of plaintiffs' property to the extent of impairment of the value of plaintiffs' land.

6. Eminent Domain § 22½—

G.S. 40-11, *et seq.*, are applicable only to instances where the condemnor acquires title and right to possession of specific land, and where the value of private property has been impaired as a result of the maintenance of a nuisance on adjoining public property, the private owners may maintain an action for compensation for such taking, and the contention that their sole remedy is by petition before the clerk is untenable.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Nettles, J.*, May Term, 1955, of BUNCOMBE.

The hearing was on defendant's demurrer to complaint.

Plaintiffs' allegations may be summarized as follows:

1. Defendant owns land adjoining that of plaintiffs and has constructed a school building thereon.

2. Plaintiffs resided in a dwelling on their land, their water supply consisting of a natural spring located on their land. Water flowed from this spring into a branch, the branch being the dividing line between plaintiffs' land and that of defendant.

3. Incident to excavations on its property, defendant "pushed large quantities of dirt, rock and stone" into said branch, a natural drain, "thereby impeding the natural flow of the water, causing water and mud to accumulate and back up on the plaintiffs' property."

4. Defendant constructed and maintains on its property, near said dividing line, "a large septic tank, cesspool or sewage disposal device," and has dumped all sewage therein; that said device is so constructed and maintained that raw sewage and sewage water have flowed therefrom into the branch and have permeated and saturated plaintiffs' land; that such emanations and the noxious and offensive odors therefrom have contaminated the spring and rendered it unfit for use and have rendered plaintiffs' dwelling uninhabitable; and that such emanations and odors constitute a continuing nuisance and invasion of their property rights, depreciating the value of their property to the extent of $4,000.00.

5. Plaintiffs have given proper written notice to defendant of their claim, which defendant has ignored.

Defendant demurred to the complaint on the ground that it did not allege facts sufficient to constitute a cause of action, with emphasis upon the position that plaintiffs cannot sue defendant in tort.

Defendant appeals from judgment overruling demurrer.

E. L. Loftin for plaintiffs, appellees.

Harry C. Martin for defendant, appellant.

BOBBITT, J. Plaintiffs' action is to recover compensation in the amount of $4,000.00 on account of the partial taking or appropriation of their property.

Defendant, under the provisions of G.S. 115-45, amended by S.L. 1955, ch. 1372, subch. II, Art. 5, sec. 10, is a body corporate. While it may sue and be sued in its corporate name, this fact, standing alone, is not determinative as to what actions may be maintained against it. See *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E. 2d 322.

Our decisions are to the effect that a county board of education has immunity from liability for torts of its members or agents (*Benton v.*

Board of Education, 201 N.C. 653, 161 S.E. 96; *Hansley v. Tilton,* 234 N.C. 3, 65 S.E. 2d 300; *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783), except such liability as may be established under our Tort Claims Act. G.S. 143-291, as amended by S.L. 1955, chs. 400, 1102 and 1361. But our construction of the complaint, which is in accord with the statement of plaintiffs' counsel on oral argument, is that plaintiffs have neither alleged nor attempted to allege a cause of action in tort.

When private property is taken for public use, just compensation must be paid. This principle is deeply imbedded in our constitutional law. It was incorporated in the Bill of Rights of the Federal Constitution. U. S. Const., Amend. V. While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the "law of the land" within the meaning of Art. I, sec. 17. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440.

In *Price v. Trustees,* 172 N.C. 84, 89 S.E. 1066, the distinction is drawn between liability to individuals for injuries tortiously inflicted and liability for the payment of compensation when private property is appropriated under right of eminent domain. See also, *Sandlin v. Wilmington,* 185 N.C. 257, 116 S.E. 733.

"The creation and maintenance of a government project so as to constitute a nuisance substantially impairing the value of private property, is, in a constitutional sense, a taking within the principle of eminent domain." *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396, and cases cited. There need not be a seizure, whereby the owner is dispossessed. It is a sufficient taking to require payment of compensation if the value is substantially impaired. In such case, the compensation to be paid is based on the impairment of value caused by the injury so inflicted. *McKinney v. High Point, supra; Sandlin v. Wilmington, supra.* This is in accord with the weight of authority elsewhere. 29 C.J.S., Eminent Domain, sec. 110.

If defendant impeded the natural flow of the spring branch and caused water and mud to accumulate and back up on plaintiffs' property, as alleged, whether this constituted a taking would seem to turn on whether the value of plaintiffs' property was effectually and appreciably impaired thereby. 18 Am. Jur., Eminent Domain, sec. 134. But apart from that, if the sewage disposal device was constructed and operated so as to cause sewage to flow or seep onto plaintiffs' land and, by reason of such continuous pollution and the noxious odors emanating continuously therefrom, plaintiffs' spring was rendered unfit for use and their dwelling was rendered unfit for habitation, as alleged, such would constitute a taking to the extent of the impairment in value of plaintiffs' land caused thereby. *Sandlin v. Wilmington, supra; Clinard v. Kernersville,* 215 N.C. 745, 3 S.E. 2d 267; *Young v. Asheville,* 241 N.C. 618,

86 S.E. 2d 408; 29 C.J.S., Eminent Domain, sec. 118; 18 Am. Jur., Eminent Domain, sec. 135; Lewis, Eminent Domain, 3rd Ed., sec. 236.

Defendant further contends that plaintiffs' sole remedy is by petition before the clerk under G.S. 40-12. Defendant has not undertaken to condemn plaintiffs' property under G.S. 115-85, under G.S. 40-11 *et seq.*, or otherwise; nor has it taken possession thereof for school purposes. It does not claim plaintiffs' land. Presumably, it had no intention to "take" or pay for plaintiffs' land or any rights therein. G.S. 40-12 *et seq.*, with provisions for commissioners, appraisal, viewing the premises, etc., are applicable only to instances where the condemnor acquires title and right to possession of specific land. They have no application here.

On demurrer, the facts alleged are deemed admitted. Hence, judgment overruling demurrer is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

GLENDALE MANUFACTURING COMPANY, A CORPORATION, v. NICK BONANO, ROSEMARY COPPOLA, HELEN HARPER, ELIZABETH BRANCH, JESSIE BAILEY, ELIZABETH WOLFE, ADDIE HENSON AND INTERNATIONAL LADIES GARMENT WORKERS UNION.

(Filed 21 September, 1955.)

1. Contempt of Court § 2b—

The evidence in this case *is held* sufficient to support the court's finding, on the hearing of the order to show cause, that defendants had notice and knowledge of the contents of a restraining order theretofore issued in the action restraining mass picketing, acts of violence and intimidation of persons entering the plant during a strike, and that each defendant had willfully violated the restraining order by certain specified acts, and judgment holding defendants in contempt is upheld.

2. Same—

Where the judgment in contempt fully states the facts found and the conclusions of law based thereon, adjudging defendants in contempt for a willful disobedience of an order lawfully issued by the Superior Court having jurisdiction, G.S. 5-1 (4), exception on the ground that the court did not specifically denominate his conclusions of law as such cannot be sustained.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by the defendants Coppola and Pitts from *Nettles, J.*, June Term, 1955, of BUNCOMBE.

The appellants Rosemary Coppola and William Pitts were found to have violated the provisions of a restraining order and judgment was rendered imposing punishment for contempt of court.

The plaintiff is engaged in the manufacture of garments at its plant in Buncombe County near Asheville and employs 125 persons. As the result of a labor dispute a number of plaintiff's employees went out on strike, while others continued to work. There were disorders and threats of violence. Thereupon an action was instituted by the plaintiff against the named defendants, and upon verified complaint filed alleging that the defendants and others were engaged in acts of violence, threats of violence, abuse and intimidation of its employees, and obstructing access to the plant, the court issued a restraining order restraining mass picketing, and the acts of violence and intimidation alleged in the complaint. This order was served on the defendant Coppola and other defendants, and notices thereof were posted on each of the three entrances to plaintiff's plant.

Thereafter on affidavits filed alleging violation of the restraining order by the defendants and others, including defendant William Pitts, and setting forth the particular acts complained of, notice to show cause was issued, made returnable before Judge Nettles, and served on the defendants, appellants.

At the hearing before Judge Nettles, evidence was offered by plaintiff and defendants and from this evidence Judge Nettles made findings of fact and upon these findings held a number of persons, including the appellants, guilty of contempt of court for willful disobedience of the restraining order.

As only Rosemary Coppola and William Pitts appealed, the case will be stated and considered only as it relates to these appellants.

Judge Nettles found that Rosemary Coppola and William Pitts had notice and knowledge of the contents of the restraining order issued in the cause, and that these appellants had willfully violated the restraining order under the circumstances and conditions shown by the evidence as follows: "(a) William Pitts, by throwing paper and black pepper upon Lexie Corbett and other employees and visitors of plaintiff, by threatening and intimidating Lexie Corbett and other businessmen and visitors of the plaintiff; by systematically following employees of the plaintiff in an automobile while plaintiff's employees were on their way home.

"(b) Rosemary Coppola, by throwing paper and black pepper on Lexie Corbett and other employees and business visitors of the plaintiff,

and by threatening and intimidating Lexie Corbett and other employees and business visitors of the plaintiff."

Upon these findings and conclusions the court entered judgment that Rosemary Coppola and William Pitts each be imprisoned for 30 days and fined $250.

Prayer for judgment was continued as to the other persons named in the order.

Defendants Coppola and Pitts appealed.

Herbert L. Hyde and Harkins, Van Winkle, Walton & Buck for plaintiff, appellee.

George Pennell for defendants, appellants.

DEVIN, J. From an examination of the record and the evidence offered it is apparent that the findings of Judge Nettles, in so far as they refer to the appellants, were supported by the evidence, and that the judgment holding them to have willfully violated the provisions of the restraining order must be upheld. See *Royal Cotton Mill v. Textile Workers Union,* 234 N.C. 545, 67 S.E. 2d 755; *Erwin Mills v. Textile Workers,* 235 N.C. 107, 68 S.E. 2d 813; *Safie Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577.

Appellants' exception on the ground that the court did not specifically denominate his conclusions of law as such, cannot be sustained. While the judgment might have been stated more orderly, it sufficiently appears that the facts found were fully stated and that the conclusions of law were based thereon. The judgment sufficiently adjudicated the guilt of the appellants for willful disobedience of an order lawfully issued by the Superior Court having jurisdiction. G.S. 5-1 (4). *Dailey v. Ins. Co.,* 208 N.C. 817, 182 S.E. 332.

Judgment affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

GLENDALE MANUFACTURING COMPANY, A CORPORATION, v. NICK BONANO, ROSEMARY COPPOLA, HELEN HARPER, ELIZABETH BRANCH, JESSIE BAILEY, ELIZABETH WOLFE, ADDIE HENSON, AND INTERNATIONAL LADIES GARMENT WORKERS UNION.

(Filed 21 September, 1955.)

Contempt of Court § 2b—

Upon the hearing of an order to show cause why defendants should not be held in contempt for violating an order theretofore issued restraining defendants from certain specific unlawful acts in regard to mass picketing and intimidation of employees desiring to continue their employment after a strike, the findings of the court *held* supported by evidence, and judgment holding defendants in contempt and imposing punishment is affirmed. G.S. 5-1 (4).

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Whitmire, J.*, May Term 1955, of BUNCOMBE.

This was a citation for contempt of court for willful disobedience of a restraining order.

From judgment holding defendants in contempt and imposing punishment the defendants appealed.

Harkins, Van Winkle, Walton & Buck and Herbert L. Hyde for Plaintiff Appellee.

George Pennell for Defendants Appellants.

PER CURIAM. Following a labor dispute in plaintiff's manufacturing plant, a number of the employees went out on strike, and these, with others, engaged in mass picketing and threats of violence and other means of intimidation to deter those employees who desired to continue their employment. Thereupon plaintiff instituted this action, and upon its verified complaint the court issued a restraining order restraining the defendants from certain specific unlawful acts. Thereafter upon affidavits filed alleging violation of the restraining order, order to show cause was issued, and after notice the court heard the evidence offered by plaintiff and defendants and found the facts. Upon the facts so found the court concluded that the defendants were guilty of contempt of court for willful disobedience of specified provisions of the restraining order, and imposed punishment therefor.

From an examination of the record and the evidence offered, it appears that the facts found by the court are supported by the evidence, and that the conclusions of law were properly predicated thereon. The

judgment holding the defendants in contempt of court for willful disobedience of a lawful order of the court will be upheld. G.S. 5-1 (4).

Judgment affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

ELIZABETH WHITESIDE v. RALSTON PURINA COMPANY AND W. JACK FAIRCLOTH.

(Filed 21 September, 1955.)

Appeal and Error § 20—

Where the case on appeal, settled by agreement of counsel, contains the evidence in question and answer form, rather than in narrative form as required by Rule 19 (4), Rules of Practice in the Supreme Court, the judgment will be affirmed and the appeal dismissed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Pless, J.*, at April-May Term, 1955, of HENDERSON.

Civil action to recover for sickness and death of plaintiff's chickens, alleged to have been caused by the defendants' negligence and breach of contract in using improper serum in inoculating the chickens to prevent Fowl Pox and New Castle Disease.

The defendants' motion for judgment of nonsuit, made at the close of the plaintiff's evidence, was allowed, and from judgment based on such ruling the plaintiff appeals, assigning errors.

Paul K. Barnwell for plaintiff, appellant.

Monroe M. Redden for defendants, appellees.

JOHNSON, J. Practically all the evidence in the case is by question and answer, and not in narrative form as required by Rule 19 (4), Rules of Practice in the Supreme Court, 221 N.C. 544, p. 556.

This Rule provides that the evidence "shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception." Here the instances in which the question and answer form is necessary to point up an exception are nebulous. The Rule further

provides that "If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, . . . the appeal will be dismissed." Here the case was settled by agreement of counsel.

The defendants' motion to dismiss the appeal for failure to narrate the evidence will be allowed. It is so ordered. For the reasons stated in *Anderson v. Heating Co.*, 238 N.C. 138, 76 S.E. 2d 458, the Court has not only found it necessary to adopt Rule 19 (4), but also to enforce it uniformly. The profession has been apprised of the mandatory character of the Rule in recent decisions of the Court. *S. v. McNeill*, 239 N.C. 679, 80 S.E. 2d 680; *Laughinghouse v. Insurance Co.*, 239 N.C. 678, 80 S.E. 2d 457; *S. v. Powell*, 238 N.C. 550, 78 S.E. 2d 343; *Anderson v. Heating Co., supra.* See also *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126.

In accordance with our decisions, the judgment will be affirmed and the appeal dismissed.

Judgment affirmed; appeal dismissed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

CHLOE PRICE GARDNER, HANNAH M. PRICE, HELLEN POTTER PRICE, AND ALICE WALKER PRICE v. JOHN A. PRICE AND WIFE, LILLIAN E. PRICE.

(Filed 21 September, 1955.)

1. Judgments § 10—

A judgment by default final upon a complaint supporting a judgment by default and inquiry only, is not void, but is voidable at the election of defendants, and is valid until vacated in the manner provided by law.

2. Judgments § 26—

Where judgment by default final, rather than a judgment by default and inquiry, is entered, and a motion to set aside the judgment is heard and denied without exception and appeal, a later motion in the cause to set aside the judgment, made some twelve years thereafter, is barred by the lapse of time, the default judgment being irregular but not void.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Nimocks, J.*, December Term, 1954, BEAUFORT. Affirmed.

GARDNER *v.* PRICE.

Civil action to set aside a deed upon the grounds of lack of mental capacity, fraud, undue influence, and failure of consideration, heard on motion to vacate a judgment by default final.

This action was begun 31 December 1941. Complaint was duly filed and copies of summons and complaint were served on the defendants 1 January 1942. No answer was filed within the time provided by law, and, on 9 February 1942, judgment by default and inquiry was entered by the clerk. At the September Term, 1944, judgment by default final was entered. No inquiry was had. On 8 April 1954, the defendants filed a motion to set aside this judgment. This motion in the cause was denied, and the defendants appealed.

Rodman & Rodman, Bryan Grimes, James B. McMullan, and A. W. Bailey for plaintiff appellees.

P. H. Bell and Charles V. Bell for defendant appellants.

BARNHILL, C. J. The appellants in their oral argument rested their case squarely on the contention that the judgment by default final entered in 1944 is void, and that, therefore, they are not barred by lapse of time. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311. This contention cannot be sustained. Where a judge enters a judgment by default final when the complaint will not support anything more than a judgment by default and inquiry, the judgment is irregular and voidable—not void—at the election of the defendants. *Ellis v. Ellis,* 190 N.C. 418, 130 S.E. 7; *Finger v. Smith,* 191 N.C. 818, 133 S.E. 186; *Hinton v. Whitehurst,* 214 N.C. 99, 198 S.E. 579. It is valid until vacated in the manner provided by law.

Furthermore, it is made to appear that in 1942 these defendants employed counsel, appeared, and moved to vacate the judgment here at issue. The motion was heard at the September Term, 1944. Upon said hearing the judge entered judgment denying the motion. Defendants did not except and appeal. They are not entitled to a second bite at the same cherry.

Whether the judgment by default final vacates the deed plaintiff sought to annul is still an open question.

The defendants have slept on their rights—if any they had—and must suffer the consequences. The judgment entered in the court below is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

SHONIE LOU PAVONE BY HER NEXT FRIEND JOHN A. PAVONE v. BETTY JOYNER MERION.

(Filed 21 September, 1955.)

1. Automobiles § 17—

A legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway, and he must anticipate that a child of tender years is likely to run into the street in front of an approaching automobile.

2. Automobiles § 18h (2)—

In this action to recover for injuries to a three-year-old child struck on the highway by defendant's automobile, the evidence *is held* to require the submission of the issue of negligence to the jury.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by the plaintiff from *Bone, J.*, June Term 1955 of CARTERET. Reversed.

Civil action to recover damages for injuries to a 3 year old child resulting from the alleged negligence of the defendant in operating an automobile.

At the close of the plaintiff's evidence the court, upon motion of the defendant, entered a judgment of nonsuit.

From the judgment entered the plaintiff appeals, assigning error.

C. R. Wheatly, Jr., for Plaintiff, Appellant.

Hamilton & McNeill for Defendant, Appellee.

PARKER, J. It is well settled law in North Carolina that a legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Moore v. Powell,* 205 N.C. 636, 172 S.E. 327; *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169.

A motorist must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, that their excursions into a street may reasonably be anticipated, that very young children are innocent and helpless, and that children are entitled to a care in proportion to their incapacity to foresee and avoid peril. *Greene v. Board of Education,* 237 N.C. 336, 75 S.E. 2d 129; *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Yokeley v. Kearns,* 223 N.C. 196, 25 S.E. 2d 602.

"Experience demonstrates that children of tender years in or about streets and highways are likely in obedience to impulse to run into or across such streets and highways suddenly and without warning. Motorists must know and recognize this fact and govern themselves accordingly else the criminal and civil laws must be called upon to turn professor." *Fox v. Barlow,* 206 N.C. 66, 173 S.E. 43. In other words, due care may require a motorist in a certain situation to anticipate that a child of tender years unmindful of danger will dart into a street in front of an approaching automobile. *Hughes v. Thayer, supra.*

Bearing in mind these applicable principles of law, we are of opinion, after a careful study of the evidence, that the plaintiff has made out a case for submission to a jury. We have refrained from stating the evidence to avoid any prejudice to the rights of the parties, when the case is submitted to the twelve.

The judgment of nonsuit is

Reversed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. HALLIE SCOTT.

(Filed 21 September, 1955.)

1. Criminal Law § 81c (1)—

In order to be entitled to a new trial, defendant must not only show error, but also that his rights were prejudiced thereby.

2. Criminal Law § 57a—

Defendant moved for a new trial on the ground that during the trial he discussed the case with one of the jurors before recognizing him as a juror. The court found that defendant had not shown that he was in any wise prejudiced by the occurrence, and denied defendant's motion for a new trial. *Held:* The ruling of the court is not reviewable. G.S. 9-14.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant Hallie Scott from *Bone, J.,* February Term 1955 of CRAVEN.

Criminal prosecution for a felonious assault with a deadly weapon, to wit, a pistol, on George Rogers.

Verdict: Guilty of assault with a deadly weapon.

Judgment: Imprisonment for 18 months in jail to be assigned to work the public roads.

After the jury had returned its verdict, the defendant made a motion in writing to set aside the verdict and for a new trial. The affidavit of the defendant supporting the motion, and the motion, recite the following facts: On Thursday, 17 February 1955, after court had adjourned for the day, and after the judge had instructed the jury not to discuss the case with anyone, one of the jurors, Fred Tippett, requested the defendant to buy for him a bottle of paregoric, and that some discussion of the case was had before the defendant recognized Tippett as a juror. Next morning the defendant reported this incident to his counsel, who notified the judge about it in open court before the rendition of the verdict.

The judge made these findings of fact: During the morning session of court, and while the jury was in its room deliberating upon its verdict, counsel for the defendant informed the judge as to the incident set forth in the written motion and affidavit of defendant. A few minutes thereafter the jury returned its verdict. It had not been informed of the matters set out in the motion and affidavit, until after verdict. The judge made no finding as to the truth of the matters set forth in defendant's affidavit and motion for the reason that the judge is of the opinion that if the same is true, it constitutes no ground for a new trial, in that the defendant has not shown that he was in any wise prejudiced by said occurrence, if it took place.

The motion was denied, and the defendant appeals, assigning error.

W. B. Rodman, Jr., Attorney General, and Robert E. Giles, Assistant Attorney General, for the State.

Cecil D. May for Defendant, Appellant.

PER CURIAM. The defendant has one assignment of error: the failure of the Trial Judge to allow his written motion to set aside the verdict. The defendant has not excepted to the finding of fact of the court that the defendant has not shown that he was in any wise prejudiced by said occurrence. It is hard to conceive that the defendant would have said anything to his hurt in his conversation with juror Tippett. What was said in the conversation does not appear. The evidence supports the finding. To obtain a new trial, it is not sufficient to show error, but the defendant must show that his rights were prejudiced thereby. *S. v. Davis,* 229 N.C. 386, 50 S.E. 2d 37; *S. v. King,* 225 N.C. 236, 34 S.E. 2d 3; *S. v. Beal,* 199 N.C. 278, 303, 154 S.E. 604.

G.S. 9-14 reads in part: The judge "shall decide all questions as to the competency of jurors," and his rulings thereon "are not subject to

review on appeal unless accompanied by some imputed error of law." *S. v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523. The assignment of error presents no reviewable question of law, and is not sustained. *S. v. Suddreth,* 230 N.C. 239, 52 S.E. 2d 924; *S. v. Hill,* 225 N.C. 74, 33 S.E. 2d 470; *S. v. Trull,* 169 N.C. 363, 85 S.E. 133.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

JOHN A. WILLIS AND WIFE, NORA WILLIS, v. HENRY WILLIS.

(Filed 21 September, 1955.)

1. Evidence § 40—

Parol evidence *held* competent to show that the actual consideration for a deed to two lots was an agreement of the grantee to construct a house on each lot and to pay to grantors, so long as either of them lived, the rental from one of the houses.

2. Frauds, Statute of, § 12—

Plaintiffs conveyed to defendant two lots under an agreement that defendant should construct a house on each lot and pay to plaintiffs the rental value from one of the houses. *Held:* The statute of frauds does not apply to the executed contract. G.S. 22-2.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Fountain, Special Judge,* May Term, 1955, of PITT.

Civil action to recover alleged consideration for land conveyed by plaintiffs to defendant.

Plaintiffs, by proper deed, conveyed two vacant lots to defendant. Defendant paid no consideration therefor at or prior to the delivery of the deed.

Plaintiffs alleged that the consideration was defendant's agreement to build a house on each lot, to be rented, and to pay over to plaintiffs, so long as plaintiffs or either of them lived, the rental from one of the houses; that defendant constructed the two houses; that each was rented for $50.00 per month, beginning 1 June, 1954; that defendant has failed and refused to pay over the rents from one of the houses as agreed; and that plaintiffs were entitled to recover from defendant $50.00 per month from 1 June, 1954.

Defendant denied that he made the agreement alleged by plaintiffs, averring that the conveyance was a deed of gift; and defendant pleaded the statute of frauds, G.S. 22-2.

Upon issues arising on these pleadings, the jury found for plaintiffs. Judgment for plaintiffs was entered on the verdict. Defendant appealed.

Lewis & Rouse for plaintiffs, appellees.

C. W. Beaman and K. A. Pittman for defendant, appellant.

PER CURIAM. The determinative issue, whether defendant agreed to pay plaintiffs for the two lots as alleged, was resolved by the jury in plaintiffs' favor. Parol evidence was competent to show the actual consideration for the deed. *Pate v. Gaitley,* 183 N.C. 262, 111 S.E. 339. The statute of frauds, G.S. 22-2, does not apply to an executed contract, such as that here involved. *Keith Bros. v. Kennedy,* 194 N.C. 784, 140 S.E. 721; *Baucom v. Bank,* 203 N.C. 825, 167 S.E. 72. We find no prejudicial error in the conduct of the trial.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

D. M. ROBERSON AND WIFE, ETHEL G. ROBERSON, v. W. D. BOONE, SUBSTITUTED TRUSTEE.

(Filed 21 September, 1955.)

Mortgages § 30g—

Foreclosure may not be enjoined on the ground that the Federal Government had filed a tax lien against the lands, and that therefore the land would not sell at its true value because of the right of the Government to redeem the land under the provision of Title 28, USCA, sec. 2410, at any time within one year from the date of sale. G.S. 45-21.34.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Fountain, Special Judge,* April Term, 1955, of MARTIN.

This is an action instituted on 30 March, 1955, to restrain the defendant W. D. Boone, substituted trustee, from foreclosing a certain deed of trust on the plaintiffs' lands in Tyrrell County, North Carolina, securing an indebtedness in the principal sum of $36,400.00, plus interest, which indebtedness is past due and unpaid.

On 1 October, 1951, the United States Government filed a tax lien in the office of the Register of Deeds of Tyrrell County against the plaintiffs in the principal sum of $63,058.45, plus interest, and on 14 January, 1955, filed an amended tax lien reducing the amount of such lien to $62,624.55, plus interest.

A temporary restraining order was obtained on the alleged ground that, since the United States Government has one year from the date of the sale of lands foreclosed under a lien superior to its lien, to redeem such lands under the provision of Title 28, USCA, section 2410, the land will not sell for its true value at public auction under the power of sale in said deed of trust.

When the cause came on for hearing in the trial below, the court vacated and dissolved the temporary restraining order. The plaintiffs appeal, assigning error.

Peel & Peel and Rodman & Rodman for plaintiffs.

W. D. Boone for defendant.

PER CURIAM. The plaintiffs contend that under the provisions of G.S. 45-21.34, they are entitled to have the ruling of the court below reversed and the temporary restraining order continued to the hearing.

In our opinion, no legal or equitable ground has been shown that would justify the continuance of the temporary restraining order heretofore issued in this cause, pursuant to the provisions of the above statute or otherwise. Hence, the ruling of the court below is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

EDNA HENSLEY v. PRISCILLA HARRIS, PAUL O. LAMB AND PAUL T. LAMB.

(Filed 21 September, 1955.)

Trial § 17—

Exception to the admission of a document on which appeared the summons, affidavit, warrant of attachment, and return of the officers, offered for the purpose of showing that the action was instituted within one year from the accident in order to claim the benefits of G.S. 20-71.1, is not sustained, it appearing that appellant did not move that the admission of the document be limited, and it not appearing that the contents of the writ of attachment were read to the jury.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant Paul T. Lamb from *Nettles, J.*, April Term, 1955, BUNCOMBE.

Civil action to recover compensation for damages to plaintiff's cafe building.

An automobile belonging to the appellant and occupied by the infant defendants, while traveling north on Highway 19-23, cut to the left, crossed the south lane of traffic and the shoulder of the road, and crashed into plaintiff's building. There was judgment for plaintiff and defendant Paul T. Lamb appealed.

E. L. Loftin for plaintiff appellee.

Harkins, Van Winkle, Walton & Buck for defendant appellant.

PER CURIAM. Plaintiff produced ample evidence to require the submission of issues to a jury. *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. To claim the benefits of G.S. 20-71.1, it was necessary for the plaintiff to show that she instituted her action within twelve months after the accident. For this purpose she offered the paper or document on which appeared the summons, the affidavit, the warrant of attachment, and the return of the officers. Appellant did not move that the admission of the document be limited to this purpose, and it does not appear in the record that the contents of the writ of attachment were ever read to the jury. Exception thereto is without merit.

The defendant has had a fair trial in which the court made a commendably accurate application of the provisions of G.S. 20-71.1, and the jury has decided the facts adverse to the defendant. As no reversible error is made to appear, the judgment entered in the court below must be

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA ON THE RELATION OF J. PAUL WILSON, v. LARRY M. PEARSON, JR.

(Filed 21 September, 1955.)

1. Appeal and Error § 40f—

The order of the court in striking or refusing to strike certain allegations of the pleadings will not be disturbed on appeal in the absence of a showing of prejudice.

2. Pleadings § 31: Elections § 18b—

In *quo warranto* proceedings, an allegation that certain ballots were illegal and void states no more than a conclusion, and the trial court should permit the allegation of sufficient facts to remain in the pleading to disclose that the ballots challenged were void for the reason that the voters casting them were nonresidents of the municipality in which the election was held.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by relator and defendant from *Pless, J.*, June Term, 1955, RUTHERFORD.

Quo warranto proceedings to try title to the office of Mayor of Lake Lure, heard on motion to strike allegations contained in the pleadings.

When the cause came on for hearing, the court below allowed the motion in part and denied the same in part. Both relator and defendant excepted and appealed.

B. T. Jones, Jr., for appellant Paul Wilson.

S. P. Dunagan and Hamrick & Jones for defendant appellant.

PER CURIAM. On appeal to this Court from an order entered in the court below on a motion to strike allegations contained in the pleadings, the appellant must show prejudicial error. *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185; *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810.

The complaint contains a prolix statement of evidentiary facts which were stricken by the court below. The allegations which remain in the complaint are sufficient to enable the trial judge to rule on the evidence tendered in the form and manner in which it is offered except in one respect.

The relator alleges in paragraph 10 that two of the ballots cast for the defendant "were illegal and void, said ballots being those cast by Charles R. Yopp and his wife, Mrs. Charles R. Yopp." Standing alone, this is nothing more than a conclusion. Therefore, the court erred in striking that part of the complaint in which the relator alleges that said Yopp and wife lived outside the corporate limits of Lake Lure "and that

they failed to establish a new home or permanent residence in the Town of Lake Lure as required by law to qualify one to vote therein, and had no intent so to do." That is to say, the allegation should be to the effect that the ballots of said Yopp and wife "were illegal and void for the reason that they were nonresidents of the Town of Lake Lure at the time of said election." The court below may permit the relator to amend accordingly.

The judgment entered must be modified in accord with this opinion, and as so modified, it is affirmed.

Modified and affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. SAMUEL J. BROWN.

(Filed 21 September, 1955.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Nettles, J.*, February Term, 1955, of BUNCOMBE.

Upon indictment and trial by jury, defendant was found guilty of larceny as charged. From judgment pronounced, imposing a prison sentence, defendant appealed.

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

W. W. Candler and Cecil C. Jackson for defendant, appellant.

PER CURIAM. It is the unanimous opinion of this Court that defendant's motion for nonsuit was properly overruled.

Two members of the Court, *Winborne* and *Higgins, JJ.*, not sitting, but with *Devin, Emergency Justice,* participating in lieu of *Winborne, J.*, and the six sitting members being equally divided in opinion as to whether prejudicial error in the conduct of the trial has been shown, the judgment of the Superior Court is affirmed, without becoming a precedent. *Allen v. Ins. Co.*, 211 N.C. 736, 190 S.E. 735.

Affirmed.

MID-CONTINENT REFRIGERATOR COMPANY, A CORPORATION, v. S. E. DAVENPORT, TRADING AS LAKE PHELPS GROCERY.

(Filed 21 September, 1955.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Nimocks, J.*, and a jury, at January Term, 1955, of WASHINGTON.

Civil action to recover balance alleged to be due on a conditional sale contract executed by the defendant in purchasing a refrigerator.

The jury, in response to issues submitted on the defendant's cross-demand pleaded as a set-off, returned a verdict in favor of the defendant, finding that he was entitled to the set-off as claimed. From judgment entered on the verdict, decreeing that the plaintiff recover nothing of the defendant, the plaintiff appealed.

W. L. Whitley for plaintiff, appellant.
No counsel contra.

PER CURIAM. Two members of the Court, *Winborne* and *Higgins, JJ.*, not sitting, but with *Devin, Emergency Justice,* participating in lieu of *Winborne, J.*, and the six sitting members being evenly divided in opinion whether prejudicial error has been shown, the judgment of the Superior Court is affirmed, without becoming a precedent. *Allen v. Insurance Co.*, 211 N.C. 736, 190 S.E. 735.

Affirmed.

SAMUEL W. MORGAN v. W. L. SPEIGHT.

(Filed 21 September, 1955.)

Contracts § 26—

Allegations to the effect that plaintiff, owning a part of an island, granted permission to the owner of the other part of the island to use a strip of plaintiff's land for the purpose of depositing material dredged from the adjoining bay, which would greatly increase the value of plaintiff's land, and that defendant, a stranger to the agreement, prevented the deposit of the dredged material on plaintiff's land by threatening, without right, to restrain such operation, *is held* insufficient to show that plaintiff had an enforceable contract, and demurrer was properly sustained.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Bone, J.*, at May Term 1955, of CRAVEN.

George B. Riddle, Jr., for Plaintiff Appellant.
Barden, Stith & McCotter for Defendant Appellee.

PER CURIAM. Plaintiff instituted this action to recover damages for wrongful interference with contract.

The material allegations of the complaint, briefly stated, were that plaintiff owned land on Radio Island, lying between Morehead City and Beaufort, in Carteret County; that Aviation Fuel Terminal, Inc., owned land on west side of said Island; that Aviation Fuel Terminal contracted with Bryan Construction Company to dredge a channel in waters adjoining its land; and that plaintiff gave permission to Aviation Fuel Terminal and the Construction Company to use a strip of his land for the purpose of depositing dredged material in a bay adjoining plaintiff's land, which would have greatly increased the value of his land. He further alleged that defendant, having no right to do so, advised the Construction Company if it proceeded to build up plaintiff's land with dredged material he would sue to restrain the operation. In consequence the company changed its plans and deposited the material elsewhere.

Defendant demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action, for that it appeared from the complaint that plaintiff had no enforceable contract.

The court sustained the demurrer, and in this ruling we concur.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. FRED THOMAS MILLS.

(Filed 21 September, 1955.)

Constitutional Law § 32: Criminal Law § 56—

On appeal from conviction in a county court on a warrant charging possession of whiskey for the purpose of sale, the warrant was amended to charge also possession of nontax-paid liquor, and defendant was convicted on this count alone. The judgment is arrested on authority of *S. v. Hall*, 240 N.C. 109.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

FLEISHEL *v.* JESSUP.

APPEAL by defendant from *Pless, J.*, at June Term 1955, of McDOWELL.

Attorney-General Rodman, Assistant Attorney-General Love, and Lewis Bulwinkle, Member of Staff, for the State.

I. C. Crawford and Lawrence C. Stoker for defendant, appellant.

PER CURIAM. The defendant was tried in the McDowell County Criminal Court on a warrant charging possession of whiskey for the purpose of sale. From conviction and judgment in that court the defendant appealed to the Superior Court. When the case was called for trial in the Superior Court, on motion of the Solicitor, the warrant was amended to charge also unlawful possession of nontax-paid liquor. This was treated as a second count in the warrant. The jury returned verdict of guilty of illegal possession of intoxicating liquor. No verdict was rendered as to the original count. From judgment on the verdict the defendant appealed.

Defendant's motion in arrest of judgment must be allowed for the reasons set out in *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189, and cases there cited.

Judgment arrested.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

C. F. FLEISHEL v. J. C. JESSUP, P. W. JESSUP AND ARNOLD T. JESSUP.

(Filed 21 September, 1955.)

Mortgages § 36—

Defendants executed purchase money notes, secured by deed of trust, for certain lands, machinery and equipment, the parties agreeing on the value of the land at the time of the execution of the notes. The machinery and equipment were damaged or destroyed by fire. *Held:* In an action on the notes, judgment for deficiency, calculated upon the value of the land as agreed upon by the parties at the time of the purchase and sale, is premature, since there can be no deficiency until sale, and only then may the court determine whether the machinery and equipment were affixed to the land and became realty, whether G.S. 45-21.38 applies, and the amount of the deficiency judgment, if any, to which plaintiff is entitled.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Bone, J.,* May Term, 1955, PAMLICO. Error and remanded.

Civil action on purchase money notes in which the plaintiff claims that a planing mill, two boilers, and two brick dry kilns, attached to the realty and which have been destroyed by fire, were personal property. At the time the notes were issued, the parties agreed on the value of the land and the above-enumerated structures. Defendant pleads G.S. 45-21.38 which prohibits deficiency judgments in certain instances. The court below accepted the value of the land as agreed upon at the time of the purchase and sale, deducted that amount from the total amount of the notes, and rendered deficiency judgment for the balance. Defendants appealed.

B. B. Hollowell and R. E. Whitehurst for plaintiff appellee.

Henry A. Grady, Jr., and Raymond E. Dunn for defendant appellants.

PER CURIAM. The action of the court must be held for error. There can be no deficiency until there is a sale. At present all parties are unadvised as to what the land will bring at public sale. The determination of the issue as to whether the enumerated structures were real property or personal property and the value of the land at present must await the sale. It follows that the judgment entered was premature. Judgment entered is vacated, and the cause is remanded to the end that the sale may be had. The court may then determine the amount of the deficiency judgment—if any—to which plaintiff is entitled and the other questions and issues raised by the pleadings.

Error and remanded.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

H. L. SEARS v. F. WOOD BOYCE T/A HOME BEAUTIFUL.

(Filed 21 September, 1955.)

APPEAL by defendant from *Paul, Special Judge,* May Term, 1955, of PASQUOTANK.

The plaintiff instituted this action to recover for personal injuries sustained while riding as a guest passenger in the defendant's ½-ton panel truck on 28 November, 1954. His injuries were allegedly sus-

tained when as a result of the careless and negligent operation of said truck by the defendant, it ran off the highway and was overturned.

The issues of negligence and damages were answered in favor of the plaintiff.

From judgment entered on the verdict, the defendant appeals and assigns error.

J. W. Jennette for plaintiff, appellee.

LeRoy & Goodwin for defendant, appellant.

PER CURIAM. The defendant assigns as error the failure of the court to sustain his motion for judgment as of nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence. A careful examination of the evidence leads us to the conclusion that it was sufficient to require its submission to the jury. Therefore, the judgment will be upheld.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

LESLIE W. HARDISON, INDIVIDUALLY, AND LESLIE W. HARDISON, ADMINISTRATOR OF THE ESTATE OF HAZEL V. HARDISON, v. HARRY L. MARTIN, FANNIE LATHAM MARTIN, WILLIAM MARTIN AND CARL JORDAN MARTIN.

(Filed 21 September, 1955.)

APPEAL by plaintiff from *Fountain, J.*, at April Term 1955, of MARTIN.

H. D. Hardison for Plaintiff, Appellant.

Peel & Peel for Defendants, Appellees.

PER CURIAM. The plaintiff on his own behalf and as administrator of the estate of his deceased wife instituted this action for the recovery of described articles of personal property.

From an adverse verdict and judgment the plaintiff brings the case here for review assigning errors. An examination of the record leads us to the conclusion that there was evidence to support the verdict, and that no substantial error in the rulings of the trial judge has been made to appear.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

IN RE CUSTODY OF PATRICIA DIXON AND MICHAEL DIXON, MINORS.

(Filed 21 September, 1955.)

APPEAL by petitioner from *Nettles, J.*, in Chambers, Asheville, N. C., June 1955.

Ward & Bennett for Petitioner, Appellant.
Geo. Pennell for Respondent, Appellee.

PER CURIAM. Upon the petition of Vincent Joseph Dixon, writ of *habeas corpus* issued to bring before the court his two children, Patricia Dixon and Michael Dixon, aged eleven and eight, respectively, now residing with their mother, petitioner's wife, Juanita Runion Dixon, for the determination of the custody of these children. Petitioner and his wife are separated but not divorced.

Upon return of the writ the matter was fully heard by Judge Nettles, both petitioner and his wife introducing numerous affidavits. After hearing all the evidence Judge Nettles therefrom made findings of fact, and thereupon ordered that the custody of said children be awarded the mother, with right of petitioner to have the children for two months during school vacation and alternately on holidays. The cause was ordered retained for further orders as to the custody of the children. Petitioner appealed.

The facts found by the judge are supported by the evidence and they sustain the judgment entered.

This was a matter for the determination of the presiding judge who in this instance is the resident judge of the District. His judgment will not be disturbed.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

ALBERT LEE DIXON v. McDOWELL INSURANCE AGENCY, A CORPORATION.

(Filed 21 September, 1955.)

APPEAL by plaintiff from *Pless, J.*, February Term 1955 of McDOWELL.

Civil action for damages for the alleged breach of an alleged contract to procure collision insurance upon an automobile.

From judgment of nonsuit entered at the conclusion of the plaintiff's evidence, the plaintiff appeals, assigning as error the entry of the judgment.

John H. McMurray and Sam J. Ervin, III, for Plaintiff, Appellant.

Proctor & Dameron for Defendant, Appellee.

PER CURIAM. A study of the evidence satisfies us that the Trial Court was correct in entering a judgment of nonsuit, upon motion of the defendant, and the said judgment is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

MATILDA RIDDICK WILLIAMS, MARTHA RIDDICK HUNTER, AND WILL RIDDICK, HEIRS, SAME BEING MAVIN RIDDICK, BEATRICE WILLIAMS, MARTHA JANE WILLIAMS AND EMMA GRIFFIN, DECEASED, HEIRS; CHRISTINA DURHAM, EULA ROACH, DOROTHY McDANIEL, RUTH ....., AND GERTRUDE WHITE, DECEASED, HEIRS WHICH ARE DAVID LEE WHITE, ALEXANDER MAE WHITE, JOE LOUIS WHITE, ARTHUR LEE WHITE, EMMA WHITE, AND SAM WHITE; KINNEY RIDDICK, DECEASED, HEIRS, AND C. L. GRIFFIN v. W. D. SHARBER.

(Filed 21 September, 1955.)

APPEAL by plaintiffs from *Clifton L. Moore, Judge*, March Term, 1955, of PASQUOTANK.

Civil action to establish title to 2.4 acres of woodland and to recover damages for trespass.

Robert Riddick's Will, under which both plaintiffs and defendant claim, disposes of the testator's tract of 42.7 acres in these provisions, viz.:

"ITEM FIRST: I give and devise to my beloved wife and her two children all of the land where I now live except that part of the same in wood on the south end of same from my back gate that is next to Milton Eason heirs and the use of wood for firewood purpose of any or all of the woods I now own.

"ITEM SECOND: I give and devise to my three older children, Will Riddick, Martilda Williams (nee Riddick) and Martha Hunter (nee Riddick) all of the remainder of my real estate share and share alike."

Plaintiffs, children of testator's first wife, claim title to the 2.4 acres under ITEM SECOND. Defendant contends that title thereto passed under ITEM FIRST to testator's second wife and her two children; and that he has acquired such title by purchase.

The sole question is whether the 2.4 acres was included in or excepted from the devise made to the second wife and her two children in ITEM FIRST.

Upon waiver of jury trial, the court heard the evidence and found the facts. The findings identify by metes and bounds the lands devised in ITEM FIRST and in ITEM SECOND. Upon these findings, judgment was entered for defendant. Plaintiffs excepted and appealed.

Robert B. Lowry and John H. Hall for plaintiffs, appellants.

Worth & Horner for defendant, appellee.

PER CURIAM. All of testator's land was devised to his wife and her two children by ITEM FIRST *except* "that part of the same in wood on the south end of same from my back gate that is next to Milton Eason heirs." The court, upon competent evidence, found that the land specifically excepted from this devise does not embrace the 2.4 acres but is a different portion of testator's 42.7 acre tract. These findings, which are conclusive, control decision. The judgment predicated thereon is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

WILLIAM A. H. HOWLAND v. AMBER JUSTIZ STITZER, NOW REMARRIED AND KNOWN AS MRS. SHERMAN HAWES, JR., AND FIRST NATIONAL BANK AND TRUST COMPANY IN ASHEVILLE, NORTH CAROLINA, A CORPORATION.

(Filed 21 September, 1955.)

APPEAL by the plaintiff and the defendant First National Bank and Trust Company in Asheville, North Carolina, from *Nettles, J.*, January Term, 1955, of BUNCOMBE.

This is an action which was instituted in the Superior Court of Buncombe County, North Carolina, on 24 January, 1952, for the purpose of having the court declare the separation agreement entered into by and between the plaintiff and the defendant Mrs. Sherman Hawes, Jr. (formerly Mrs. Howland), on 2 April, 1947, null and void.

A previous action involving the same agreement was dismissed by this Court at the Spring Term, 1950. See 231 N.C. 528, 58 S.E. 2d 104. An appeal in the present action was heard at the Fall Term, 1952, and the opinion of the Court on that appeal is reported in 236 N.C. 230, 72 S.E. 2d 583. The case was again appealed to this Court at the Fall Term, 1954, and the opinion disposing of the appeal is reported in 240 N.C. 689, 84 S.E. 2d 167.

When this cause came on for hearing at the January Term, 1955, in the Superior Court of Buncombe County, the defendant Amber Justiz Stitzer, now Mrs. Sherman Hawes, Jr., moved for judgment on the pleadings. The motion was allowed, and from the judgment entered the plaintiff and the corporate defendant appeal, assigning error.

William J. Cocke for plaintiff, appellant.

Adams & Adams for defendant, appellant.

David H. Armstrong for defendant, appellee.

PER CURIAM. The judgment entered in the court below is in accord with the opinion of this Court handed down at the Fall Term, 1954, referred to above. Furthermore, we find nothing in the judgment entered which is in conflict with the terms of the separation agreement involved, and which we have heretofore held to be a valid and enforceable contract between the parties thereto.

The judgment of the court below, in all respects, is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

FRED L. SALE AND JACK WESTALL, TRUSTEES OF THE J. M. WESTALL TRUST, AND MYRTLE SALE, MINNIE W. BOEHM, MARY WESTALL, JACK WESTALL AND ANNIE WESTALL, CESTUIS QUE TRUSTENT, PETITIONERS, v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 28 September, 1955.)

1. Eminent Domain § 2—

The principle that when private property is taken for public use by a governmental agency, just compensation must be paid, is so grounded in natural law and justice that it is a fundamental part of the law of this State and is an integral part of the law of the land within the meaning of Art. I, Sec. 17, of the Constitution of N. C., and the due process clause of the Fourteenth Amendment to the Federal Constitution.

2. Constitutional Law § 20—

The Fourteenth Amendment to the U. S. Constitution is a limitation of the powers of the State and furnishes a guaranty against any encroachment by the State on the fundamental rights belonging to every citizen.

3. Same: Eminent Domain § 2: State § 3—

A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, is not susceptible of impairment by legislation, and, in the absence of an adequate constitutional or statutory remedy in a particular factual situation, may be enforced by an action at common law, as an exception to the principle that the sovereign cannot be sued without its consent.

4. Contracts § 16½—

Ordinarily, when the act to be performed is necessarily dependent upon the continued existence of specific property, the destruction thereof before the performance of the act, without fault of the promisor, will excuse nonperformance, but where the promisor has the care and custody of the property, the promisor in order to excuse nonperformance, has the burden of showing that the destruction of the property was not his fault.

5. Eminent Domain § 22—Landowner may sue State Highway Commission to recover consideration for right-of-way easement.

The petition alleged the execution of an agreement with the State Highway and Public Works Commission under which the Commission acquired an easement over plaintiffs' land by purchase pursuant to G.S. 136-19, and, as consideration therefor, agreed to pay plaintiffs a specified sum and to remove plaintiffs' warehouse from the right of way and reconstruct it on other property of plaintiffs, that while the property was in the custody and control of the Commission, the warehouse was negligently destroyed by fire, and sought recovery of the monetary consideration together with the damages resulting from the fire. *Held:* The action was not against the Commission in contract or in tort, but was to recover the monetary consideration for the right-of-way easement and damages for the failure of the Commission to perform the obligations it contracted to do as a part of the consideration, and demurrer to complaint was properly overruled. *Held further:* The property being in the custody of the Commission, the

burden is upon it to show that the fire preventing performance by it of its agreement was not due to the negligence or fault of it or its agents.

6. Same: Eminent Domain § 14: State § 3—

Where the State Highway and Public Works Commission has failed to pay consideration for a right-of-way easement executed by landowners in accordance with an agreement between them and the Commission, the landowners may bring an action at law in the Superior Court to recover such consideration, and the landowners are not remitted to an action against the State under the provisions of Art. IV, Sec. 9, of the Constitution of N. C., since it affords no adequate remedy, nor, the consideration having been agreed upon, is a special proceeding under G.S. 136-19 and G.S. 40-12 *et seq.*, apposite.

7. Courts § 4c—

Where an action within the proper jurisdiction of the Superior Court is begun by a special proceeding before the clerk and is appealed to the Superior Court, the appeal carries the entire proceeding into the Superior Court, and the Superior Court has jurisdiction to hear and determine the whole matter. G.S. 1-276.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by respondent, State Highway and Public Works Commission, from *Nettles, J.*, April Civil Term 1955 of BUNCOMBE.

This is a special proceeding instituted before the Clerk of the Superior Court of Buncombe County under the authority of G.S. 136-19 and G.S. 40-12 *et seq.* to recover the money consideration of a right-of-way agreement executed and delivered by the petitioners to the State Highway and Public Works Commission granting to the Commission an easement of right-of-way over their lands, for the construction of a bridge over the French Broad River in the relocation of U. S. Highways Nos. 19 and 23 in the city of Asheville, and also to recover damages for failure to perform the work it contracted to do in the removal and reconstruction of certain buildings owned by petitioners on the right-of-way granted, such removal and reconstruction being a part of the consideration for the right-of-way agreement.

A previous case involving the same parties and the same subject matter was before this Court at the Fall Term 1953, and is reported in 238 N.C. 599, 78 S.E. 2d 724. That case was a special proceeding instituted by the petitioners here by virtue of G.S. 136-19 and G.S. 40-12 *et seq.* before the Clerk of the Superior Court of Buncombe County to recover compensation for the alleged taking of an easement of right-of-way over the property of the petitioners—the same right-of-way involved in the present case—for the construction of the same bridge in the city of Asheville over the French Broad River referred to in this proceeding, and for depreciation and damages to the remaining land of

petitioners. In the trial of the previous case in the Superior Court before a jury, petitioners introduced in evidence the right-of-way agreement here showing that the Commission acquired the easement of a right-of-way from petitioners by purchase pursuant to G.S. 136-19. Petitioners in the right-of-way agreement released the Commission from all claims for damages by reason of said right-of-way across their lands, and of the past and future use thereof by the Commission, its successors and assigns, for all purposes for which the Commission is authorized to subject such right-of-way. In the previous case in the lower court, and here, the Commission contended that the proceeding should be nonsuited, because the Commission had acquired the easement of right-of-way by purchase, not by taking, and the authority of the property owner to bring an action in condemnation under G.S. 136-19 and G.S. 40-11 is predicated upon the inability of the owner and the Commission to agree upon the purchase price of real estate, and further because there is no authority to give any court jurisdiction over an action for failure of the Commission to comply with the terms of a contract made by the Commission.

In the previous case we held that where a petition seeks compensation for the taking of land, and the evidence supports a recovery for failure to pay the money compensation and to perform certain obligations, as set forth in the right-of-way agreement, and that the payment of such money and the performance of such obligations was the consideration for the right-of-way agreement, nonsuit for variance should be allowed. Pursuant to the opinion of the Supreme Court a judgment of nonsuit was entered in the lower court. This proceeding was instituted within one year next following the nonsuit.

The petition, and the amendment thereto, allege in substance the following: On 14 May 1948 petitioners gave the Commission an option to purchase the easement of a right-of-way over their lands, that the Commission exercised such option, and that in July 1948 petitioners executed and delivered to the Commission a right-of-way agreement, pursuant to the option. This is the consideration for the right-of-way agreement:

"The State Highway Commission is to remove at its expense one two-story frame warehouse and such portion of lumber shed as is within the right of way limits of project from the right of way, and pay to the undersigned a consideration of $3,622.50, which amount shall be in full settlement for the above described right of way, 24 x 40′ frame garage, and any and all damage to the property due to construction of this project. Buildings on right of way, other than the frame garage, to be reconstructed on property belonging to the trust without prejudice to

occupancy and rights of tenants, under the general contract and at the expense of the State Highway Commission."

The Commission entered into a contract with Bowers Construction Company for the construction of a bridge in Asheville over the French Broad River, and for the removal of buildings belonging to petitioners on the right-of-way easement purchased by the Commission. These provisions appear in that contract:

"1. Buildings or structures shall be prepared for, removed and be placed in their new locations, as shown on the plans or as designated by the engineer, left plumb and level and in as good condition in all respects as they were before moving.

"3. Payment will not be made for this item until an owners' release is secured from the property owner or owners certifying that the work has been performed to the property owners' satisfaction and that the State Highway & Public Works Commission and the contractor are released from all responsibility in connection with this work."

The Bowers Construction Company sublet the removal of petitioners' buildings on the right-of-way to G. E. Crouch. Crouch entered upon the granted right-of-way, tore down the fence surrounding the property, removed the locked gates, and left petitioners' buildings exposed to the hazards of fire. That for long periods Crouch quit work on the removal of the buildings. That he kept no watchman there. That petitioners repeatedly urged the Commission to take steps to protect their buildings from the hazard of fire. While the buildings were in process of removal, but before the removal had been completed, they were completely destroyed by fire on 13 September 1948, and property on adjacent property of the petitioners was damaged or destroyed by the fire. That the removal and reconstruction of the buildings upon the right-of-way was part of the consideration for the right-of-way agreement, and that because of the destruction of these buildings by fire proximately caused by the negligence of the Commission, and its agents, that part of the agreement became impossible of fulfillment, and the petitioners are entitled to be paid the money value of said buildings located as agreed in their contract with the Commission. That the Commission has taken, condemned and appropriated petitioners' property without payment of just compensation. That petitioners and the Commission have been unable to agree as to the amount of compensation and damages.

The petitioners pray that they have and recover from the Commission: 1. The money consideration agreed upon of $3,622.50; 2. $9,489.00 for the loss of the buildings on the right-of-way by fire; 3. $1,251.00 loss and damage to buildings on adjacent property caused by the fire and for the cost of removing debris resulting from the fire.

The Commission demurred to the petition upon three grounds:

One. The petition, and the amendment thereto, do not allege facts constituting a taking of land by the Commission.

Two. The allegations of the petition, and the amendment thereto, are allegations of negligence and of a breach of contract, and there is no authority under the law to sue the Commission on such grounds.

Three. The court has no jurisdiction over a civil action in negligence or breach of contract against the Commission, an unincorporated agency of the State, which can be sued only for such causes and in such manner as authorized by statute.

The Clerk of the Superior Court of Buncombe County entered an order overruling the demurrer. On appeal by the Commission in the Superior Court the Presiding Judge entered a similar order.

Defendant appeals, assigning error.

Uzzell & Dumont for Petitioners, Appellees.

R. Brookes Peters, General Counsel State Highway and Public Works Commission, and McLean, Gudger, Elmore & Martin for Respondent, Appellant.

PARKER, J. The State Highway & Public Works Commission was authorized by G.S. 136-19 to acquire the easement of a right-of-way over petitioners' lands from them by purchase. The consideration for the right-of-way agreement was the payment of $3,622.50 and the removal at the Commission's expense of one two-story frame warehouse and such portion of a lumber shed as is in the right-of-way limits from the right-of-way, and the buildings on the right-of-way, other than the frame garage, to be reconstructed on property belonging to the trust, under the general contract and at the expense of the Commission. The general contract of the Commission with Bowers Construction Company provided how the buildings should be placed after the removal. In the opinion in *Sale v. Highway Commission,* 238 N.C. 599, 78 S.E. 2d 724, which involved the same parties and the same subject matter here, we said: "The identical contracts offered in evidence in this case by the petitioners were before this Court in *Brown v. Construction Co.,* 236 N.C. 462, 73 S.E. 2d 147. In that case Brown and wife trading as Rock Wool Insulating Company sought to recover damages for the loss by fire of goods stored in the warehouse referred to in this case. This Court held in referring to the contracts that 'the matter of the removal and reconstruction of the buildings is made a part of the consideration to be paid by the State Highway & Public Works Commission.'"

We said in *Sale v. Highway Commission, supra,* that the Commission cannot be sued in contract, nor in tort. We also said in that case, "it

has never been held in this jurisdiction that the State or its agencies can take private property for public use without just compensation, citing authorities."

This Court said in *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717: "Under Article I, Section 17, of the State Constitution, no person can be deprived of his property except by his consent or the law of the land. The law of the land and due process of law are interchangeable terms."

This Court said in *Eller v. Board of Education, ante,* 584, 89 S.E. 2d 144: "When private property is taken for public use, just compensation must be paid. . . . While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' within the meaning of Art. I, Sec. 17."

This principle is so grounded in natural law and justice that it is part of the fundamental law of the State, *Ivester v. City of Winston-Salem,* 215 N.C. 1, 1 S.E. 2d 88, and imposes upon a governmental agency taking or appropriating private property for public use a correlative duty to make just compensation to the owner of the property appropriated. *Proctor v. Highway Com.,* 230 N.C. 687, 55 S.E. 2d 479; *Sanders v. R. R.,* 216 N.C. 312, 4 S.E. 2d 902.

While practically every state in the Union, North Carolina excepted, contains an express constitutional prohibition against the taking of private property for public use without the payment of just compensation, Jahr, Eminent Domain, Sec. 36, yet North Carolina recognizes this fundamental right to just compensation as founded on natural justice. *Raleigh v. Hatcher,* 220 N.C. 613, 18 S.E. 2d 207; *Shute v. Monroe,* 187 N.C. 676, 683, 123 S.E. 71; *Johnston v. Rankin,* 70 N.C. 550.

The Fourteenth Amendment to the U. S. Constitution provides: "Nor shall any state deprive any person of life, liberty or property, without due process of law." This amendment is a limitation on the powers of the State. *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563. It adds nothing to the rights of one citizen against another. It simply furnishes a guaranty against any encroachment by the State on the fundamental rights belonging to every citizen. *U. S. v. Cruikshank,* 92 U.S. 542, 23 L. Ed. 588, 592.

A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation. *People ex rel. Wanless v. Chicago,* 378 Ill. 453, 38 N.E. 2d 743, 138 A.L.R. 1298; *People ex rel. Markgraff v. Rosenfield, Director of Public Works and Buildings,* 383 Ill. 468, 50 N.E. 2d 479; *State Highway Com. v. Mason,* 192 Miss. 576, 6 So. 2d 468; *Parker v. State Highway Com.,* 173 Miss. 213, 162 So. 162; *Virginia Hot*

Springs Co. v. Lowman, 126 Va. 424, 101 S.E. 326; *Nelson County v. Loving,* 126 Va. 283, 101 S.E. 406; *Angelle v. State,* 212 La. 1069, 34 So. 2d 321, 2 A.L.R. 2d 666; *Schmutte v. State,* 147 Neb. 193, 22 N.W. 2d 691; *Rose v. State,* 19 Cal. 2d 713, 123 P. 2d 505; *Tomasek v. State,* 196 Or. 120, 248 P. 2d 703; *Milhous v. State Highway Dept.,* 194 S.C. 33, 8 S.E. 2d 852, 128 A.L.R. 1186; 16 C.J.S., Constitutional Law, p. 102.

"When the provisions of a constitution, as does ours, . . . forbids damage to private property, and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." *Swift v. City of Newport News,* 105 Va. 108, 52 S.E. 821, 3 L.R.A. (N.S.) 404.

In *Angelle v. State, supra,* the Court said: "Where private property has been appropriated by the State 'for public purposes' the right of the owner to recover adequate compensation will be entertained by the courts as an exception to the principle that the sovereign cannot be sued without its consent."

This Court said in *Sandlin v. Wilmington,* 185 N.C. 257, 116 S.E. 733: "An action against a municipality for damages to property resulting from the performance of a governmental duty cannot be maintained on the theory of a trespass in the absence of statutory or legislative authority conferring such right of action, but this principle does not apply to an action brought to recover damages for property appropriated without due compensation."

When Article I, Section 17, of the North Carolina Constitution provides that "no person ought to be . . . in any manner deprived of his life, liberty or property, but by the law of the land," and when the fundamental law of this State, based on natural justice and equity, prohibits the taking or acquisition of private property for public use without the payment of just compensation, or its equivalent, and the North Carolina Constitution points out no remedy, and if no statute affords an adequate remedy for the depriving an owner of private property for public use without just compensation, under a particular fact situation, the common law which provides a remedy for every wrong will furnish the appropriate action for the adequate redress of such grievance. *Swift v. Newport News, supra; Roe v. Cook County,* 358 Ill. 568, 193 N.E. 472; *Parker v. State Highway Com., supra; Tremayne v. City of St. Louis,* 320 Mo. 120, 6 S.W. 2d 935; *Tomasek v. State, supra; Angelle v. State, supra;* 16 C.J.S., Constitutional Law, Sec. 49.

In this State when a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation. The entry of a judgment is not sufficient.

Sanders v. Railroad, supra; Mount Olive v. Cowan, 235 N.C. 259, 69 S.E. 2d 525; *People ex rel. Wanless v. Chicago, supra;* 29 C.J.S., Eminent Domain, p. 1088.

The courts of the land to preserve the liberty and rights and property of the people, must adhere to the plain stipulations of the fundamental law, and it will be a tragic day in the history of our democratic constitutional form of government, if the courts should ignore the clear mandates of the organic law.

In the obligations assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes the breach. In *Navigation Co. v. Wilcox,* 52 N.C. 481, *Pearson, C. J.,* said for the Court: "One who prevents the performance of a contract, or makes it impossible by his own act, shall not take advantage of the nonperformance."

This Court said in *Steamboat Co. v. Transportation Co.,* 166 N.C. 582, 82 S.E. 956: "Where parties contract with reference to specific property and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it. . . . Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part. For this reason, and further because, by the terms of the present contract, the care and custody of the property was left with plaintiff, if it is established that plaintiff has failed to further perform the executory features of this agreement, the burden would be on plaintiff to show that the steamer was destroyed by fire and that the plaintiff and its agents were in the exercise of proper care at the time." The quoted part of the opinion relates to a counterclaim set up by defendant against plaintiff by reason of failure to perform on its part.

In the absence of an express contract provision, if the act to be performed is necessarily dependent on the continued existence of a specific thing, the destruction thereof before the performance of the act *without the fault of the promisor,* will excuse nonperformance of the contract. *Stagg v. Land Co.,* 171 N.C. 583, 89 S.E. 47; Annos. 12 A.L.R., p. 127 *et seq.;* 74 A.L.R., p. 1290 *et seq.;* 12 Am. Jur., Contracts, p. 944; Williston on Contracts, Rev. Ed., Sec. 1946.

It is our opinion that the obligations assumed by the Commission to remove and reconstruct the buildings on the purchased right-of-way clearly contemplated the continued existence of these buildings. If these buildings were destroyed by fire by reason of the negligence of the Commission, the Commission will be responsible in damages for its negligence. To hold otherwise would permit the Commission to take

advantage of the nonperformance of its contract obligations caused by its negligent act.

In the present case there is no allegation in the petition that petitioners were damaged by the negligent manner in which the work was done. Their allegations in substance are that they have been damaged by the Commission's failure without lawful excuse to perform the work they contracted to do in the removal and reconstruction of the buildings on the right-of-way it purchased from them, its failure being that the nonperformance of the Commission's obligations was due to the destruction by fire of the buildings caused by the negligence of the Commission, or its agents.

The consideration of the contract for the purchase of the right-of-way was a payment of $3,622.50, and the removal and reconstruction of the buildings on the right-of-way by the Commission. The Commission is in the possession of the easement of the right-of-way it purchased from petitioners, and it is in use as an integral part of the public road system of the State.

The Commission contends that no statute permits it to be sued for the facts alleged in the petition and that its demurrer should be sustained; that this is an action upon contract or for tort, and that we have held that it cannot be sued in contract or in tort. We do not agree with this contention. This is an action to recover the money consideration for the right-of-way easement, and for damages for the failure of the Commission to perform the obligations it contracted to do as a part of the right-of-way consideration, its nonperformance being caused by its negligence. On demurrer we take the case as made by the complaint. *Barber v. Wooten*, 234 N.C. 107, 66 S.E. 2d 690. The petitioners can maintain their action. To hold otherwise would be depriving petitioners of their property without just compensation in violation of the fundamental law of this State grounded, as we have said time after time, on natural justice and equity, which "is regarded as an integral part of the 'law of the land' within the meaning of Art. I, Sec. 17," of the North Carolina Constitution, and in violation of the 14th Amendment to the U. S. Constitution.

We said in our former opinion in this case, *Sale v. Highway Commission, supra:* "If the petitioners can allege, and prove their contention . . . that they have been damaged by the respondent's failure without lawful excuse to perform any of the work it contracted to do they can recover such damages in a special proceeding under G.S. 136-19 and G.S. 40-12 *et seq.*, provided the petitioners and respondent are unable to agree as to the amount of such damages, if any." In our opinion, upon additional thought, and in accord with what this Court said in *Steamboat Co. v. Transportation Co., supra,* the above quoted statement of

law should be corrected so as to read: If the petitioners can allege, and prove, they have been damaged by the respondent's failure to perform any of the work it contracted to do as a part of the consideration for the right-of-way agreement, they can recover such damages, unless the respondent, the burden being upon it, can show that the buildings were destroyed by fire, or otherwise, and it, or its agents, were in the exercise of due care. After proof of the execution of the contract and breach by the promisor, the burden is on the promisor to show an excuse for the breach. *U. S. v. Huff,* 165 F. 2d 720, 1 A.L.R. 2d 854; 17 C.J.S., Contracts, p. 1231; Williston on Contracts, Rev. Ed., Sec. 1979. This statement of the law of this case on the former appeal as herein more correctly stated, constitutes the law of the case, is supported by well settled law, and is binding on this appeal. *Cherry v. Andrews,* 231 N.C. 261, 56 S.E. 2d 703; *Howle v. Express, Inc.,* 238 N.C. 676, 78 S.E. 2d 775.

Article IV, Section 9, of the North Carolina Constitution, reads: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action." By the express terms of this constitutional provision the decision of this Court upon a claim against the State, which it shall hear in the exercise of this jurisdiction, is merely recommendatory. *Dredging Co. v. State,* 191 N.C. 243, 131 S.E. 665. Under this constitutional provision this Court cannot enforce its decision. The General Assembly of North Carolina alone has the power to determine whether the decision shall be paid. *Rotan v. State,* 195 N.C. 291, 141 S.E. 733. It is perfectly obvious that Article IV, Section 9, of the North Carolina Constitution, gives no adequate remedy to a person who has been deprived of his private property for public use without adequate compensation by the Highway Commission. To hold that these petitioners must institute their suit here in the North Carolina Supreme Court would violate the rights guaranteed to them by the 14th Amendment to the U. S. Constitution, by Article I, Section 17, of the State Constitution, as construed by this Court, and by the fundamental law of this State, based on natural justice and equity.

Upon a fuller consideration of the petitioners' remedy we have come to the conclusion that the proper procedure is not a special proceeding under G.S. 136-19 and G.S. 40-12 *et seq.*, that no statute of the State gives an adequate remedy, and that the State Constitution points out no adequate remedy. Therefore, in accordance with the principles of law we have stated above, we hold that the common law gives the petitioners a remedy in permitting them to bring an action at law in the

Superior Court, and that it is not necessary for petitioners to allege and prove before institution of action that the petitioners and respondent are unable to agree as to the damages, if any.

Acting under our former opinion petitioners instituted this case as a special proceeding before the Clerk. Upon appeal respondent carried the proceeding into the Superior Court before the judge. Therefore, the Superior Court has jurisdiction to hear and determine the whole matter. G.S. 1-276; *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810; *Bradshaw v. Warren,* 216 N.C. 354, 4 S.E. 2d 883; *Spence v. Granger,* 207 N.C. 19, 175 S.E. 824. The Superior Court will retain this case for determination as an action at law.

The demurrer was properly overruled.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

PEARL CULBERTSON, ADMINISTRATRIX, v. MARK ROGERS, O. J. ROGERS, R. B. ROGERS AND RAYMOND ROGERS.

(Filed 28 September, 1955.)

1. Bill of Discovery § 1a—

Sec. 2, Chapter 760, Session Laws of 1951, provides that G.S. 1-569, 1-570, 1-571, shall apply to the completion or use of any examination of an adverse party commenced or taken prior to the effective date of the 1951 Act.

2. Same—

G.S. 1-569, *et seq.,* provide two separate remedies for the examination of an adverse party: (1) before filing a pleading, to obtain information necessary to draft the pleading, and (2) after the pleadings have been filed, to procure evidence to be used at the trial.

3. Bill of Discovery § 1b—

An examination to obtain information necessary to file pleadings may be had only by leave of court, obtained upon applicant's making it to appear under oath that such order is necessary, that the evidence sought to be elicited is material and not otherwise available, and that application is made in good faith.

4. Bill of Discovery § 6—

The relevancy and competency of evidence is determined by the issues arising on the pleadings in the case in which the evidence is offered, and therefore evidence obtained upon examination of a defendant, prior to the filing of the complaint, to obtain information necessary to enable plaintiff to draft the complaint, is not admissible in evidence at the trial. The provision of G.S. 1-571, that the examination may be read by either party on

the trial, refers only to an examination to procure evidence for use at the trial. G.S. 1-570. *McGraw v. R. R.*, 209 N.C. 432, expressly overruled to the extent of conflict.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants Mark Rogers and O. J. Rogers from *Fountain, Special Judge,* June Term, 1955, of BUNCOMBE.

This is a civil action instituted on 13 January, 1948, by the plaintiff, the duly appointed and acting administratrix of the estate of Jeff Rogers, late of Buncombe County, who died on or about 1 November, 1945. Plaintiff was appointed administratrix of said estate on 19 November, 1947.

This action was brought for the purpose of recovering from the defendants the sum of $21,625.00 cash, which the plaintiff alleges the defendants have in their possession, or under their control, belonging to the estate of the said Jeff Rogers, which the plaintiff is entitled to recover as administratrix of said estate for the purpose of administering the same according to law.

According to the record, the plaintiff, on 10 January, 1948, signed an affidavit requesting the Clerk of the Superior Court to enter an order appointing a commissioner before whom she might examine the defendants for the purpose of obtaining information to enable her to file her complaint. Accordingly the order was signed by the Clerk on 13 January, 1948. On the same day the commissioner issued a notice to the defendants to appear at her office in the Jackson Building in Asheville, North Carolina, on the 23rd day of January, 1948, at 10:00 a.m., to be examined by the plaintiff for the purpose of obtaining information to enable her to file a complaint in said action.

The time for filing the complaint was extended until twenty days after the report of the commissioner was filed in the office of the Clerk of the Superior Court of Buncombe County.

On 16 January, 1948, the summons and order extending the time for filing the complaint were served on Mark Rogers, O. J. Rogers, R. B. Rogers and Raymond Rogers by the Sheriff of Buncombe County, together with copies of the affidavit and order and notice of the examination referred to in the above order.

At the time and place fixed in the notice, the defendant R. B. Rogers appeared with his counsel, T. O. Pangle, and was examined. None of the other defendants appeared, but later, on 13 March, 1948, without further notice to the other defendants, Raymond Rogers appeared with counsel and submitted himself to an examination. The commissioner made her report on 7 September, 1948. The plaintiff filed a complaint

and Raymond Rogers filed his answer on 18 September, 1948, and the appealing defendants filed their answer on 26 October, 1948. R. B. Rogers filed no answer.

In the course of the trial below the plaintiff was permitted, over the objection of the appellants, to introduce in evidence on her behalf the examination of Raymond Rogers, taken on 13 March, 1948.

Raymond Rogers died prior to the time of the trial in the court below, and as soon as the plaintiff introduced his examination taken on 13 March, 1948, she took a voluntary nonsuit as to him and each of his children who had been made parties to this action.

From an adverse verdict, the defendants Mark Rogers and O. J. Rogers appeal, assigning error.

Don C. Young for plaintiff, appellee.
Cecil C. Jackson and J. W. Haynes for defendants, appellants.

DENNY, J. The real question for determination on this appeal is whether or not the court committed error in permitting the plaintiff to introduce in evidence the examination of Raymond Rogers, taken for the purpose of enabling the plaintiff to frame her complaint. The admissibility of this evidence must be determined in light of the provisions of G.S. 1-569, 1-570 and 1-571 which were in effect prior to July 1, 1951, and the decisions of this Court construing the same.

The present statutes governing the examination of witnesses before trial were enacted by the General Assembly, Chapter 760, 1951 Session Laws of North Carolina and have been codified as G.S. 1-568.1 through G.S. 1-568.27. It is provided, however, in section 2 of the 1951 Act that, "G.S. 1-568 through 1-576, inclusive, and all other laws and clauses of laws in conflict with this Act, are hereby repealed, except that they shall remain in force and apply to the completion *or use of any examination commenced or taken prior to the effective date of this* Act." (Emphasis added.)

It is elementary that no evidence is admissible upon the trial of a case which is not relevant and competent. The relevancy and competency of evidence is determined by the issues arising on the pleadings in the case in which the evidence is offered. In fact, the character of the case is determined by the pleadings. Consequently, it is difficult to understand how the defendants could have intelligently interposed objections to the testimony taken before the commissioner before any complaint was filed, had they been present when the examination was taken. Likewise, how could these appellants have cross-examined their codefendant intelligently when no pleadings had been filed and no issues joined?

The statutes under consideration, while not clear and explicit in themselves, have been construed by this Court to provide for two types of examination, to wit: first, to procure information in framing the complaint; and second, to procure evidence for trial.

In the case of *Chesson v. Bank,* 190 N.C. 187, 129 S.E. 403, the plaintiffs made a motion in the cause for an order pursuant to the authority of C.S. 900, *et seq.,* to procure information for the drafting of their complaint. *Stacy, C. J.,* speaking for the Court, said: "According to the decisions, dealing directly with the subject, it has been held that, after the commencement of an action, a preliminary examination of the defendant may be had by the plaintiff, (1) before filing complaint, if it be made to appear that such is necessary to enable the plaintiff to draft his complaint (*Holt v. Warehouse Co.,* 116 N.C. 480); and (2) after pleadings have been filed, the plaintiff may cause the defendant to be examined, to the end that he may procure evidence for the trial. *Vann v. Lawrence,* 111 N.C. 32.

"Likewise, the defendant may have the plaintiff examined (1) before filing answer, if it be made to appear that such is necessary to enable the defendant to draft his answer, especially if an affirmative defense or counterclaim is to be set up; and (2) after pleadings have been filed, the defendant may cause the plaintiff to be examined, to the end that he may procure evidence for the trial. *Jones v. Guano Co.,* 180 N.C. 319."

In *Ogburn v. Sterchi Brothers Stores, Inc.,* 218 N.C. 507, 11 S.E. 2d 460, the defendant assigned as error the refusal of the court to strike out an order for the examination by the plaintiff of its credit manager after the complaint had been filed and before the answer was filed. The Court, in sustaining the assignment of error, said: "The purpose of the statutes, C.S. 900 and 901, allowing an examination of an adverse party, in so far as they relate to the plaintiffs, is twofold: first, to procure information in framing the complaint, and second, to procure evidence for trial. Since the complaint has been filed the order granting the commission to examine the adverse party was not obtained for the first purpose, and since the answer has not been filed it is obvious that the application for the order for the second purpose is premature, since no issues have yet been joined. *Pender v. Mallett,* 123 N.C. 57. 'This proceeding (for examination of adverse party) may be permitted to the plaintiffs to procure information to frame complaint, *Holt v. Warehouse Co.,* 116 N.C. 480; or after answer is filed the plaintiff may cause the defendant to be examined to procure evidence, *Helms v. Green,* 105 N.C. 251; *Vann v. Lawrence,* 111 N.C. 32.' *Jones v. Guano Co.,* 180 N.C. 319." *Fox v. Yarborough,* 225 N.C. 606, 35 S.E. 2d 885.

We held in *Flanner v. Saint Joseph Home,* 227 N.C. 342, 42 S.E. 2d 225, that the plaintiff by motion in the cause was not entitled to an order for the examination of the defendant to ascertain whether the defendant (1) was protected by liability insurance; and (2) was a commercial rather than an eleemosynary corporation. The plaintiff asserted that such information was necessary to enable her to file her complaint. The Court held, however, that the existence of liability insurance was not a fact to be pleaded and that the financial operations of the defendant corporation were not relevant or material to the plaintiff's cause of action. *Barnhill, J.,* now *Chief Justice,* in writing the opinion, said: "G.S. 8-89, provides a method for obtaining inspection of books, papers, and documents 'containing evidence relating to the merits of the action . . .' But procedure thereunder, for the purpose of obtaining evidence, is permissible only after issue joined, and it must be made to appear that the information desired relates to the merits of the controversy in an action pending and at issue. *McGibboney v. Mills,* 35 N.C. 163; *Branson v. Fentress,* 35 N.C. 165; *Sheek v. Sain,* 127 N.C. 266; *Chesson v. Bank,* 190 N.C. 187, 129 S.E. 413; *Ogburn v. Sterchi Brothers Stores, Inc.,* 218 N.C. 507, 11 S.E. 2d 460."

In *Nance v. Gilmore Clinic,* 230 N.C. 534, 53 S.E. 2d 531, the plaintiff, upon proper affidavit, sought an order for the examination of the defendants and the production by them of certain specified papers and documents, as information necessary to the filing of the complaint. The Clerk of the Superior Court granted the requested order from which the defendants appealed to the Superior Court. On the hearing in the Superior Court, the judge interpreted the opinion in *Flanner v. Saint Joseph Home, supra,* to mean that G.S. 8-89 is not available, under any circumstances, in seeking information to enable the plaintiff to draft his complaint. We reversed, and held that "to construe it (the statute) that way would, by redefinition, put the Court in opposition to prior precedent and recognized practice. *Holt v. Warehouse,* 116 N.C. 480, 21 S.E. 919; *Abbitt v. Gregory,* 196 N.C. 9, 144 S.E. 297." Further, with respect to what the *Flanner case* held, we said, "Only in respect to discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent."

There is one decision by this Court which holds that the examination of a permissible party to obtain information for the purpose of filing a complaint is likewise admissible as evidence in the trial of the cause. This case is *McGraw v. R. R.,* 209 N.C. 432, 184 S.E. 31. The Court, in considering the admissibility of such an examination as evidence for the plaintiff, merely said: "The defendants say, 'We think that the examination taken by the plaintiff before complaint is filed, may be

used by the plaintiff only as information to enable the plaintiff intelligently to frame a complaint and may not be offered by the plaintiff at the trial of the cause.' We cannot nullify the clear language of the statute, 'and may be read by either party on trial.'" The Court cited no authority except the quoted excerpt from the statute. At the time this case was decided the Court consisted of five members. *Devin, J.*, took no part in the consideration or decision of the case, and *Stacy, C. J.*, dissented.

It does not appear that this Court has held that the right to examine a party-defendant to obtain information for the purpose of filing a complaint, is limited to the authority contained in G.S. 1-569 and G.S. 8-89, or that G.S. 1-570 was limited to the right to examine parties for the purpose of obtaining evidence to be used at the trial. In this connection, however, we think it is significant that the evidence taken in an examination that "may be read by either party on the trial," is expressly limited by G.S. 1-571 to examination "as provided in G.S. 1-570," and that G.S. 1-570 authorizes an examination at any time before the trial "at the option of the party claiming it." This certainly refers to an examination to procure evidence for use at the trial, since an examination to procure information to enable a plaintiff to file complaint or a defendant to file answer, may not be obtained at the option of the party claiming it. An examination to obtain information necessary to file pleadings may be had only after leave of court has been obtained, and such leave will not be given unless it has been made to appear under oath that such an order is necessary; that the evidence sought to be elicited is material and not otherwise available, and that the application is made in good faith. *Bailey v. Matthews,* 156 N.C. 78, 72 S.E. 92; *Monroe v. Holder,* 182 N.C. 79, 108 S.E. 359; *Chesson v. Bank, supra; Washington v. Bus, Inc.,* 219 N.C. 856, 15 S.E. 2d 372.

We are of the opinion that the above quoted excerpt from G.S. 1-571 refers only to evidence obtained in an examination which is to be used at the trial of the cause. We think this is so because it has been clearly established by the decisions of this Court that after a complaint has been filed in an action, no examination by the plaintiff or the defendant, of adverse parties or witnesses, may be had for the purpose of obtaining evidence to be used at the trial, until the answer is filed and the issues joined. *Helms v. Green,* 105 N.C. 251, 11 S.E. 470, 18 Am. St. Rep. 893; *Vann v. Lawrence,* 111 N.C. 32, 15 S.E. 1031; *Pender v. Mallett,* 123 N.C. 57, 31 S.E. 351; *Sheek v. Sain,* 127 N.C. 266, 37 S.E. 334; *Chesson v. Bank, supra; Abbitt v. Gregory,* 196 N.C. 9, 144 S.E. 297; *Swainey v. Tea Co.,* 204 N.C. 713, 169 S.E. 618; *Ogburn v. Sterchi Brothers Stores, Inc., supra; Fox v. Yarborough, supra; Flanner v. Saint Joseph Home, supra; Nance v. Gilmore Clinic, supra.*

In light of our many decisions construing the statutes under consideration, we hold that the examination of Raymond Rogers, obtained for the purpose of enabling the plaintiff to file her complaint, was inadmissible as evidence at the trial of the action. Consequently, so much of *McGraw v. R. R., supra,* as is in conflict with this opinion, is expressly overruled.

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

New trial.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

RUSSELL L. PEED AND J. M. BOOTH v. BURLESON'S, INC., E. C. BURLESON, CHARLES R. PINKSTON AND RICHARD A. BROWN.

(Filed 28 September, 1955.)

1. Bailment § 10—

The bailor may maintain an action for the recovery of his property converted by third parties while in the hands of a bailee.

2. Same—

The bailee has such an interest in the bailed property in his possession as entitles him to maintain an action against a third party for damage to or conversion of such property.

3. Trover and Conversion § 2—

Ordinarily, co-owners of personalty may maintain a joint action for the conversion of the property.

4. Parties § 1—

The interests of parties plaintiff must be consistent, but the common law requirement of unity or identity of interests no longer obtains. G.S. 1-68.

5. Bailment § 10—Bailor and bailee may maintain joint action for the wrongful conversion of the property.

Bailor and bailee instituted joint actions against the driver of the bailee's truck and the parties to whom the driver sold the bailed property for the wrongful conversion of the property, the bailee alleging that he had paid bailor damages for the nondelivery of the property in accordance with their agreement, and was subrogated to bailor's rights *pro tanto. Held:* Only one cause of action for the wrongful conversion of the property was alleged, and the bailor and bailee each have an interest in the property entitling them to maintain a joint action for the conversion, irrespective of the allegation of subrogation, and therefore, demurrer for misjoinder of parties and causes of actions was properly overruled, plaintiffs' causes having arisen out of the same transaction or transaction connected with

the same subject of action, and both having an interest in obtaining the relief demanded, notwithstanding that their interests may not be common or identical.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Moore (Clifton L.), J.*, February Term, 1955, BEAUFORT. Affirmed.

Civil action in tort to recover the value of a shipment of potatoes allegedly converted to their own use by the defendants, heard on demurrer on the grounds of misjoinder of parties and causes of action.

The essential allegations contained in the complaint are in substance as follows: (1) On 2 July 1954, plaintiff Peed owned 320 bags of Irish potatoes he desired to ship to Licek Potato Chip Company at Decatur, Illinois; (2) he contracted with plaintiff Booth to transport the potatoes to Decatur and to deliver them to Peed's consignee; (3) plaintiff Booth "procured" a tractor and trailer van with driver (defendant Brown) from Paul Bullock to transport the potatoes, and the potatoes were loaded upon the trailer; (4) whereupon Brown departed with the truck and trailer with Decatur as his ostensible destination; (5) on 3 July 1954, upon arriving in Mount Airy, Brown had some trouble in respect to his registration certificates; (6) having straightened out this trouble, Brown departed from the regular route to Decatur, went to Asheville, and conspired with the other defendants to purchase said potatoes and to pay him at the rate of $1 per bag; (7) in the contract between plaintiffs, Booth agreed to pay Peed, in the event of nondelivery, damages in the sum of $3.25 per bag; (8) upon the nondelivery of the potatoes, Booth paid Peed the sum of $1040; (9) the sum paid by Booth "was tendered in part settlement of any claims that the plaintiff Peed might have against the plaintiff Booth and was accepted by the plaintiff Peed as such to be used as a credit upon whatever sum the plaintiff Booth might owe by nondelivery of the said potatoes;" (10) "in consequence thereof the plaintiff Booth is subrogated to the extent of his said payment, to wit: $1040.00 to whatever recovery the plaintiff Peed may be entitled."

Plaintiff Peed further alleges that the potatoes were reasonably worth $5.50 per bag, and that the conversion of said potatoes by defendants has caused him damage in the sum of $1600. On behalf of Booth it is alleged that he has paid plaintiff Peed in part, to wit, $3.25 per bag, on account of the wrongful conversion of the potatoes by the defendants and the nondelivery thereof to the consignee, as he had contracted to do, and that he is entitled to be subrogated to the rights of plaintiff Peed *pro tanto* and to receive out of the recovery herein the

amount paid by him to reimburse him for said payment under the doctrine of subrogation. Both plaintiffs pray that they recover of the defendants the sum of $1600 with interest and costs.

The demurrer was overruled and defendants appealed.

John A. Wilkinson for plaintiff appellees.

J. W. Haynes and Zebulon Weaver, Jr. and Rodman & Rodman for defendants Burleson's Inc., E. C. Burleson, and Charles R. Pinkston.

BARNHILL, C. J. Only one cause of action is stated in the complaint, and that is the cause of action against the defendants for the wrongful conversion of the shipment of potatoes.

We have here, in the first instance, a case of bailment in which the respective rights of the bailor and the bailee to recover for the conversion of the bailed property is at issue.

Of course the bailor, being the owner of the property, can maintain an action for the recovery of the bailed property converted by third parties while the property was in the hands of the bailee. That right is not challenged in this action.

It is equally true that the bailee has such an interest in the property in his possession as entitles him to maintain an action against third parties for damage to or conversion of the property. *R. R. v. Baird,* 164 N.C. 253, 80 S.E. 2d 406; 6 A.J. 400, sec. 302 *et seq.*

"It has been uniformly held that the bailee has a right of action against a third party, who by his negligence causes the loss of or an injury to the bailed articles, and this right has been held to be the same, even though the bailee is not responsible to the bailor for the loss. (Citing cases.)" *Hopkins v. Colonial Stores, Inc.,* 224 N.C. 137, 29 S.E. 2d 455; 6 A.J. 403.

The question here presented is this: May the bailor and bailee jointly maintain an action for the conversion of the bailed property? Our statute answers in the affirmative: "All persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided." G.S. 1-68; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750; McIntosh, N.C.P.&P. 213, sec. 229.

"In a proper case, of course, an action for conversion may be maintained jointly by two or more persons. Indeed, all courts recognize the propriety of a joint action by all co-owners of personalty who have been injured in their rights by the tort of another." 53 A.J. 929.

". . . Where, through trespass of a third person during the continuance of a bailment, the bailed property is converted, lost, or injured, not only does the bailee in possession have a right of action for the

interference with his right of possession or special property, but there exists, in general, a concurrent right in the owner or bailor to recover for the interference with his general property rights or reversionary interest in the subject of the bailment." 6 A.J. 403.

In order to justify the joinder of parties plaintiff, the interest of the plaintiffs must be consistent. However, the unity or identity required by common law is not necessary. *Burton v. Reidsville,* 240 N.C. 577, 83 S.E. 2d 651; 53 A.J. 929.

To authorize two parties to join as plaintiffs in one action against third parties for the conversion of bailed property, it must be made to appear that (1) the causes of action of the plaintiffs both arose out of the same transaction or a transaction connected with the same subject of action, or (2) both plaintiffs have an interest in the subject of the action and in obtaining the relief demanded. ". . . The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. 47 C.J. 59." *Wilson v. Motor Lines, supra.* These conditions are met in this cause. Hence there is no misjoinder of parties plaintiff. Even though Booth may not be a necessary party, he is a proper party plaintiff to this action. Had either plaintiff Peed or plaintiff Booth instituted the action in his own name alone he would hold the recovery in trust for the other party to the extent of the interest of such party in the property converted.

Strictly speaking, in respect to the rights of Booth, the doctrine of subrogation is not pertinent here. He is joined as a party plaintiff by reason of his special interest in the property converted. This the statute permits.

This action is clearly distinguishable from the line of cases which hold "Two or more persons injured by the same wrongful act must sue separately since each injury is a separate cause of action." McIntosh, N.C.P.&P. 214, sec. 230; *Fleming v. Light Co.,* 229 N.C. 397, 50 S.E. 2d 45. In that line of cases the causes of action were several. Here the interests of plaintiffs are joint.

We conclude, therefore, that there is no misjoinder of causes of action or parties. Therefore the judgment entered in the court below must be

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

D. M. ROBERSON AND WIFE, ETHEL G. ROBERSON, v. P. D. PRUDEN AND WIFE, LILLIAN L. PRUDEN.

(Filed 28 September, 1955.)

1. Mortgages and Deeds of Trust § 40: Trusts § 2a—

Allegations and evidence in this case to the effect that prior to the foreclosure sale by the trustee, the *cestuis* and defendant, a stranger to the instrument, agreed that the defendant should purchase the property at the sale, and hold the title in trust for the *cestuis* for five years, and convey the property to the *cestuis* at any time within the five-year period upon repayment of the amount defendant had invested, considered in the light most favorable to the *cestuis*, *is held* sufficient to be submitted to the jury in this action to establish an express parol trust.

2. Same—

While a parol trust in favor of grantor cannot be engrafted upon a deed in fee simple unless otherwise indicated in the deed, a parol trust may be enforced in favor of a stranger to the deed when the grantee takes title to the property under an express agreement to hold the property for his benefit. This rule applies to an agreement between a *cestui* in a deed of trust and a stranger to the instrument who agrees to purchase at the foreclosure sale for the benefit of the *cestui*.

3. Equity § 2b: Specific Performance § 3—

In this action to enforce an express parol trust, defendants allege that the agreement was made for the purpose of defeating the Federal tax lien on the land. *Held:* The Federal Government had one year from date of sale within which to redeem, since the tax lien was subsequent to the lien of the deed of trust under which defendant purchased, 28 USCA Sec. 2410, and defendants' defense that plaintiffs did not come into a court of equity with clean hands, was determined in favor of plaintiffs under a correct charge of the court.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Hubbard, S. J.,* June Term, 1955, of WASHINGTON.

This was a suit to establish a parol trust in land.

Plaintiffs alleged that in January 1946 they purchased from the Scuppernong Livestock Association the tract of land known as the Belgrade Farm, 274 acres, and to secure the balance of the purchase money executed note and deed of trust to W. D. Boone trustee in sum of $8,000; that thereafter the note and deed of trust passed into the hands of defendant P. D. Pruden; that in May 1946 one-half interest in the land was sold to J. W. Rasor and released from the lien of the deed of trust, $2,000 being credited on the debt. Plaintiffs further allege that in May 1953, W. D. Boone trustee advertised and sold the

land for $8,000; that prior to the sale defendant P. D. Pruden agreed with plaintiffs to buy the land at the sale, take title to the one-half undivided interest and hold the title thereto in trust for plaintiffs for five years, and to convey the land to the plaintiffs upon repayment of the amount he had invested.

Plaintiffs alleged that under this agreement defendant Pruden bought the land and took title in himself in trust for plaintiffs; that plaintiffs are ready, able and willing to carry out their agreement, have offered to pay the full amount defendant had invested, and have demanded that defendant execute deed to plaintiffs; that defendant has refused to do so, and has repudiated the contract. Plaintiffs instituted this action 16 October, 1954.

The defendants answering denied that P. D. Pruden had made any such agreement or that he holds the title for the plaintiffs; and further that subsequent to his purchase of the land plaintiffs and defendant P. D. Pruden entered into the relation of landlord and tenant. Defendants also plead the statute of fraud as to any alleged parol contract, or tenancy for more than three years.

Defendants subsequently filed an amendment to their answer in which they alleged that if there were a parol agreement or trust between plaintiffs and defendants relative to the foreclosure of the deed of trust as alleged, which is denied, the same was entered into for the purpose of fraud and conspiracy to defeat the federal tax lien which had then been docketed as a lien on said land.

Plaintiffs' testimony on the trial tended to support the allegations of the complaint. Plaintiff D. M. Roberson testified that acting for his wife and himself he asked defendant P. D. Pruden to have the land advertised and sold under the deed of trust, and to buy it in and hold it in trust for the plaintiffs with right to redeem at any time within 5 years. This the defendant agreed to do and to hold the title for the plaintiffs, the plaintiffs to remain in possession and to pay as rental $7.50 per acre of cleared land, plus taxes and insurance on building. He testified that defendant P. D. Pruden agreed to let plaintiffs have the land back upon the terms stated; that the land was sold under the deed of trust in May 1953 and bought by defendant for $8,000; that in 1954 the plaintiffs offered to pay the full amount defendant had invested and to comply with the agreement in all respects, and demanded that defendants execute deed, but defendants refused to do so, repudiated the contract, and sought to evict the plaintiffs.

Plaintiff testified that he first asked defendant Pruden to buy the land and hold it as he had the Shepherd land, but that later they changed this and made the agreement whereby the defendant was to buy the land and hold for plaintiffs on the terms alleged in the com-

plaint. The plaintiff D. M. Roberson testified that the agreement they had with defendant P. D. Pruden in 1953 to buy in the land at the sale and hold for the plaintiffs, and the foreclosure sale made pursuant thereto, were after the United States had filed and docketed in 1951 a tax lien against the plaintiffs for $63,000. Plaintiffs own other lands than those described in this action.

The defendant P. D. Pruden testified that D. M. Roberson asked him to foreclose the deed of trust, but did not ask him to buy it in for plaintiffs before the sale. He testified, however, that after the sale he told them if they wanted the land they could have it for what he had in it plus the expenses, but that due to other obligations and commitments he was not now willing to sell it back to plaintiffs, and that he and Rasor, who owned one-half interest in the farm, had a buyer for the whole farm for $25,000.

The court submitted issues which were answered by the jury as follows:

"1. Did the defendant, P. D. Pruden, agree at, or before receiving the deed from W. D. Boone, Trustee, to take title to Belgrade Farm, described in the pleadings, in trust for the plaintiffs, as alleged in the complaint? Answer: Yes.

"2. If so, was the agreement procured by the plaintiffs for the purpose and with the intent to wrongfully defeat the tax due under the lien of the United States? Answer: No."

From judgment on the verdict the defendants appealed, assigning errors.

Peel & Peel and Bailey & Bailey for plaintiffs, appellees.

Norman & Rodman and W. D. Boone for defendants, appellants.

DEVIN, J. The defendants assign as error the ruling of the trial judge in denying their motion for judgment of nonsuit, but after a careful examination of all the evidence shown by the record before us, we reach the conclusion that the motion was properly denied.

True, some portion of plaintiffs' evidence might justify the inference that the agreement entered into between the parties before the sale of the land was merely a parol agreement to purchase coupled with an option to repurchase, as was held in *Gunter v. Gunter,* 230 N.C. 662, 55 S.E. 2d 81. However, when the entire evidence is considered in the light most favorable for the plaintiffs, as required by the rule on a motion for nonsuit, we think the evidence sufficient to make a case for the jury on the question whether the defendant P. D. Pruden agreed before the sale to buy the land at the sale and to take title thereto in trust for the plaintiffs as alleged in the complaint.

The finding by the jury on this question, in the light of all the evidence under the charge of the court, was sufficient to bring this case within the category of an express trust arising by virtue of the agreement between the parties and enforceable in equity for the purpose of carrying out the intention of the parties, when it is made to appear from the circumstances that the grantee was not intended to take beneficially. *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775; *Taylor v. Addington,* 222 N.C. 393, 23 S.E. 2d 318; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289.

"It is not now an open question that when a party agrees before the sale to purchase property about to be sold under execution against a party and to give such party the benefit of the purchase, the agreement is binding and will be enforced." *Sandfoss v. Jones,* 35 Cal. 481, quoted by *Walker, J.,* in *Avery v. Stewart, supra.*

It is well settled that a parol trust in favor of the grantor cannot be engrafted upon a deed conveying title in fee, unless otherwise indicated in the deed. "However," said *Denny, J.,* in *Carlisle v. Carlisle, supra,* "since the seventh section of the English Statute of Frauds, which forbids the creation of a parol trust in land, has never been enacted in this jurisdiction, parol trusts may be enforced when the grantee takes title to the property under an express agreement to hold the property for the benefit of another." A number of authorities in support are cited.

The defendants in an amendment to their answer alleged that if there were an agreement between the plaintiffs and defendants before the sale whereby the defendants were to buy and hold the land in trust for the plaintiffs, this was done with intent wrongfully to defeat the Federal tax lien. Since the tax lien of the United States was subsequent to the lien of the deed of trust, under the statute the United States would have one year from date of sale within which to redeem. Tit. 28 U.S.C.A. Sec. 2410; *Roberson v. Boone, ante,* 598. It was contended that plaintiffs did not come into a court of equity with clean hands. However, an issue addressed to this allegation was submitted to the jury and answered in favor of the plaintiffs. The defendants' exception to a portion of the judge's charge on this issue is without merit.

The other exceptions noted by defendants during the trial and brought forward in their assignments of error have been considered but we find no error which would justify upsetting the verdict and judgment below.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

FRED E. MERRELL v. J. L. JENKINS AND WIFE, NOVELLA JENKINS.

(Filed 28 September, 1955.)

1. Appeal and Error § 6c (3)—

A general exception to the judgment and an assignment of error that the court erred in signing and entering the findings of fact and the judgment, present for review the single question of whether the facts found support the judgment, and do not bring up for review the findings of fact or the evidence on which they are based.

2. Highways § 12—

A cartway established under Section 18, Chapter 328, Public Laws of 1923, does not preclude the owners of the servient estate from erecting gates across the cartway if the gates are constructed and operated so as not unreasonably to interfere with the right of passage.

3. Appeal and Error § 40d—

Where it appears that the case was tried under a misapprehension of the pertinent principles of law, the court's findings supporting the judgment are not conclusive, but the cause will be remanded for further hearing.

4. Appeal and Error § 6c (3)—

Where there is only a broadside exception to the findings of fact, exceptions relating to rulings upon the evidence are not presented.

5. Appeal and Error §§ 1, 6c (1)—

The Supreme Court will not consider a question which has not been adjudicated in the court below and not presented by assignment of error.

6. Highways § 11—

Section 7, Chapter 145, Public Laws of 1931 (G.S. 136-51), discloses no legislative intent to withdraw from the Board of Commissioners of Buncombe County jurisdiction over cartway proceedings under Section 18, Chapter 328, Public-Local Laws of 1923.

7. Appeal and Error § 6c (3)—

Where defendant does not except to findings that plaintiff was awarded and acquired a statutory easement for a cartway, defendants' exception to allowing plaintiff to amend to allege that defendants were estopped to deny the validity of the cartway, is rendered moot.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Nettles, J.*, at Regular May Term, 1955, of BUNCOMBE.

Civil action to enjoin the defendants from interfering with the plaintiff's use of an alleged cartway leading from his land over and across that of the defendants to a public road, submitted to the Judge and heard by consent on waiver of jury trial (G.S. 1-184; 1-185).

These in gist are the pertinent facts found by the trial court: (1) that on or about 20 February, 1939, when the defendants' land was owned by Fate Mitchell, the plaintiff "was awarded and acquired a cartway over the land," as shown by the records of the County Commissioners in Book 23, at page 111, reference being made to the "plat and record for a more complete" description of the cartway; (2) that in July, 1954, the defendants placed gates upon the cartway and closed them, thereby interfering with the plaintiff's right to use the cartway; and (3) that the defendants "have refused to remove said gates and have refused to desist from interfering with" the plaintiff's "use of said cartway."

The judgment entered below decrees that the defendants "be permanently enjoined from interfering in any way with" the plaintiff's use of the cartway, and "that all gates and any other obstructions be immediately removed . . ."

From the judgment so entered, the defendants appeal, assigning errors.

McLean, Gudger, Elmore & Martin for plaintiff, appellee.
W. M. Styles for defendants, appellants.

JOHNSON, J. The defendants' only exception to the findings of fact is the general exception to the judgment noted in the appeal entries. The single assignment of error relating to the findings of fact is: "The Court erred in signing and entering the findings of fact and the judgment."

The assignment of error is broadside. It does not bring up for review the findings of fact or the evidence on which the findings are based. *Heath v. Mfg. Co.*, 242 N.C. 215, 87 S.E. 2d 300; *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351. The general exception to the judgment and broadside assignment of error bring here for review the single question whether the facts found support the judgment. *Suits v. Ins. Co.*, 241 N.C. 483, 85 S.E. 2d 602, and cases cited.

As to this, the crucial question is whether the findings support the decree, which permanently enjoins the defendants from interfering in any way with the plaintiff's use of the cartway, and directs that "all gates . . . be immediately removed." We conclude that the decree so entered is not supported by the facts found. The decree presupposes that the plaintiff has acquired an easement entitling him to an open cartway across the defendants' lands, free of gates and free of interference of any kind. But the facts found below support no such postulate. The facts found disclose that in February, 1939, the plaintiff was

awarded and acquired a statutory cartway over the lands now owned by the defendants, under the procedure prescribed by Section 18, Chapter 328, Public-Local Laws of 1923. This statute contains no provision that a cartway acquired thereunder shall be an open one, free of gates. And in the absence of such provision, we are inclined to the view that the easement acquired by the plaintiff does not necessarily preclude the defendants, owners of the servient estate, from erecting gates across the cartway. We conclude, and so hold, that the defendants may erect and maintain gates if they are constructed and operated so as not unreasonably to interfere with the plaintiff's right of passage. This is in accord with the decision in *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906, which involved a way acquired by prescription. We think the rule announced in the *Chesson case* equally applicable to a cartway easement acquired under the statute, and the weight of authority elsewhere supports this view. 17 Am. Jur., Easements, Sec. 121.

The record discloses no findings of fact below bearing on the crucial question whether the gates about which the plaintiff complains are so constructed and operated as to amount to an unreasonable interference with his right of passage. It thus appears that the case was tried under a misapprehension of the pertinent principles of law. This being so, the restraining order is dissolved, the decree vacated, and the cause will be remanded for further hearing on the question whether the gates amount to an unreasonable interference with the plaintiff's right of passage. It is so ordered. *Morris v. Wilkins,* 241 N.C. 507, 85 S.E. 2d 892; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477.

The defendants' failure to challenge the findings of fact, except by broadside exception thereto, precludes review of the exceptions relating to evidentiary rulings below. *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51; *Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; *Burnsville v. Boone, supra* (231 N.C. 577). The *obiter* statement *contra* appearing in *Blades v. Trust Co.,* 207 N.C. 771, 178 S.E. 565, we treat as unauthoritative.

Nor does the appeal present the question whether the Board of Commissioners of Buncombe County had jurisdiction to entertain the proceeding under which the plaintiff alleges he obtained the cartway easement. The record discloses that the cartway proceeding was before the Board of County Commissioners pursuant to Section 18, Chapter 328, Public-Local Laws of 1923. The defendants contend here that this Act was repealed by Section 7, Chapter 145, Public Laws of 1931, now codified as G.S. 136-51. The record discloses no ruling on this question below, and no assignment of error presents it here. *Bank v. Caudle,* 239 N.C. 270, 79 S.E. 2d 723; *S. v. Dew,* 240 N.C. 595, 83 S.E. 2d 482. However, since the case goes back for further hearing, we deem it not amiss to

say that our perusal of the Act of 1931 discloses no legislative intent to withdraw from the Board of Commissioners of Buncombe County jurisdiction over these cartway proceedings. See *Rogers v. Davis*, 212 N.C. 35, 192 S.E. 872.

The defendants, by exception duly entered and assigned as error, make the contention that the court erred in allowing the plaintiff to amend and allege that the defendants are estopped to deny the existence or validity of the cartway proceeding. The defendants contend that the amendment brought into the case a new cause of action not previously included in the complaint. The question raised by this exception is rendered moot by the unchallenged finding that the plaintiff was awarded and acquired a cartway easement under the statutory procedure. It is unnecessary for an appellate court, after having determined the merits of the case, to examine exceptions not affecting decision reached.

Error and remanded.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. PEB BOSTIC, ALIAS F. O. BOSTIC.

(Filed 28 September, 1955.)

1. Criminal Law § 78e (1): Appeal and Error § 6c (5)—

Exceptions to the charge denoted only by the word "Exception" in parenthesis at the end or in the middle of a paragraph of the charge, and an assignment of error that the court erred in improperly stating the nature of the charges against defendant, fail to point out the alleged errors in the charge with the definiteness and certainty required by Rule 19 (3).

2. Criminal Law § 81c (2)—

In a prosecution for possession of tax-paid whiskey for the purpose of sale, and selling tax-paid whiskey, an inadvertence in the charge referring to the whiskey as nontax-paid whiskey, immediately corrected by the court, is not prejudicial, since the offenses are not dependent upon whether the whiskey was tax-paid or untax-paid.

3. Criminal Law § 62f—

Where defendant's counsel gives notice of appeal immediately upon the pronouncement of a suspended sentence, modification of the sentence is necessary and appropriate because of the refusal of the defendant to consent thereto, and such modification will not be held for error when there is no suggestion that defendant was being penalized for announcing his intention to appeal.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Clarkson, J.*, at April Term, 1955, of GASTON.

The defendant was charged in two bills of indictment with the unlawful possession and sale of intoxicating liquor.

The bills of indictment were identical in language except for the dates of the offenses charged, one being on 25 February, 1955, and the other 13 April, 1955. Both bills charged on the respective dates:

(a) Unlawful possession of tax-paid whiskey;

(b) Possession of tax-paid whiskey for the purpose of sale;

(c) Sale of tax-paid whiskey;

(d) Possession for sale and selling liquor purchased from legal liquor store.

The court submitted to the jury only two counts in each bill, viz.: Possession of tax-paid whiskey for the purpose of sale, and selling tax-paid whiskey.

The jury returned verdict of guilty as charged in both cases.

Judgment was rendered in manner and form following:

"In 9277 let the defendant be confined to the Gaston County Jail and assigned to work the roads under the supervision of the State Highway & Public Works Commission for a term of six months.

"In Case No. 9278, let the defendant be confined in the County Jail of Gaston County and assigned to work the roads under the supervision of the State Highway & Public Works Commission for a term of twelve months, to commence at the expiration of the sentence in 9277. This sentence, however, to be suspended, by and with the consent of the defendant and that of his counsel, upon the following conditions: That the sentence be suspended for a period of five years, conditioned upon the defendant's paying a fine of $1,000.00 and the costs of this action, plus the sum of $10.00 for the general fund for law enforcement purposes in the County of Gaston; on the further condition that the defendant not have in his possession during the term of the suspension any intoxicating beverages of any kind."

"Mr. Childers: The defendant gives notice of appeal."

"Court: Well, if the defendant and his counsel do not agree to the suspended sentence, I cannot give him a suspended sentence with those conditions attached, unless they agree to it."

"Mr. Childers: We do not agree to it, and give notice of appeal."

"Court: Strike out the latter judgment, and let the record show that the court finds the following facts: That after the Court had announced the sentence in 9277, he proceeded to announce the sentence in 9278,

and suspended it, thinking that the defendant and his counsel were consenting to the terms, but when counsel for defendant announced to the Court that they would not and the defendant would not consent to the imposition of a suspended sentence, the Court ordered the same stricken out, and the Court further finds as a fact that the suspension was never consented to by counsel for defendant, nor the defendant, and that prior to the announcement of the suspended sentence the active sentence in 9277 had already been announced; also that after the Court had indicated it would change the amount of the fine from $1,000 to $500 in 9278, counsel for defendant were allowed to retire and consult their client to see if he would consent, and they returned and said that he would not consent. Whereupon the Court entered the following and final judgment as follows: Strike out sentence in both cases and enter the following judgment: The cases, Nos. 9277 and 9278, are consolidated for judgment. The Judgment of the Court is that the defendant be confined in the Gaston County jail and assigned to work the roads under the supervision of the State Highway & Public Works Commission for a term of not less than nine nor more than twelve months."

Defendant appealed assigning errors.

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

Max L. Childers and Hugh W. Johnston for defendant, appellant.

DEVIN, J. The defendant noted exception in several instances to the ruling of the trial judge with respect to the testimony offered, and has brought these forward in his assignments of error. We have examined each of these exceptions and conclude that none of them can be sustained. Likewise defendant's motion for judgment as of nonsuit was properly denied.

Defendant assigns error in the court's charge to the jury in several aspects, set out more fully in his brief. We note, however, from the record that the particular portions of the charge to which the defendant desires to except, and as to which he assigns error, are not definitely pointed out, save that at the end or in the middle of a paragraph appears in parenthesis the word "Exception," while the assignment of error merely sets forth, *e.g.*, "that the court erred in improperly stating the nature of the charges against the defendant." Objectionable instructions are not "pointed out with the definiteness and certainty required by Rule 19 (3)." *S. v. Norris*, 242 N.C. 47, 86 S.E. 2d 916; *S. v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322.

Nevertheless we have examined the entire charge of the court and find that in no respect was it unfair or prejudicial to the defendant.

The defendant complains that the court's instructions as to the different counts in the two bills were confusing to the jury, but we think the court clearly pointed out the two charges in each bill which he was submitting for their decision. These were possession of tax-paid whiskey for the purpose of sale, and selling tax-paid whiskey. The court sufficiently protected the rights of the defendant by charging that the jury could return verdicts of guilty or not guilty as to each of these counts, as they should find the facts from the evidence, the burden being on the State to satisfy them in each instance of the guilt of the defendant beyond a reasonable doubt. True, the court inadvertently referred to the bills as charging possession and sale of nontax-paid whiskey, instead of tax-paid whiskey, but immediately corrected himself and stated the charge accurately. As the possession of whiskey for the purpose of sale and the sale thereof, whether tax-paid or untax-paid, is unlawful under the statutes except as authorized by the Alcoholic Beverage Control Acts, no harm resulted to the defendant.

In none of the particulars called to our attention do we perceive any prejudicial error of which the defendant can justly complain.

The exception noted by the defendant to the action of the court in changing the sentence in the second case after the defendant had given notice of appeal cannot avail the defendant on this appeal. The record does not sustain the suggestion that the defendant was being penalized for announcing his intention to appeal, as was the case in *S. v. Patton*, 221 N.C. 117, 19 S.E. 2d 142. On the contrary the refusal by the defendant to consent to the terms rendered the modification necessary and appropriate. *S. v. Cagle*, 241 N.C. 134, 84 S.E. 2d 649.

In the trial and judgment we find

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

DR. PAUL BOLIN v. NELL WALKER BOLIN.

(Filed 28 September, 1955.)

1. Divorce and Alimony § 12—

A plea of adultery, even if found by the court to be true, does not preclude the court from allowing the wife reasonable counsel fees for the prosecution or defense of a divorce action. G.S. 50-16.

2. Appeal and Error § 40f—

Notwithstanding that a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling

will not be disturbed on appeal in the absence of abuse of discretion. G.S. 1-153. Where, in an action for divorce on the ground of two years' separation, plaintiff's plea of adultery of defendant remains in his pleadings, for whatever purpose it may serve in connection with any motion for alimony *pendente lite*, G.S. 50-15, plaintiff is not prejudiced by the action of the court in striking out allegations elaborating his plea of adultery.

3. Divorce § 5a—

Under the amendments of G.S. 50-8 by Chapter 165, Session Laws of 1947, and Chapter 590, Session Laws of 1951, verification of the complaint in an action for divorce in substantial compliance with G.S. 1-145 is all that is required.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Parker, J.*, April Term, 1955, of DUPLIN.

This is an action for absolute divorce on the ground of two years' separation, instituted by the plaintiff on 22 July, 1954.

The defendant filed an answer admitting the material allegations of the complaint but alleged in her further answer that "the plaintiff is not providing adequate support for the defendant in spite of the separation agreement entered into between the parties on June 2, 1952," and also alleged the plaintiff is able to pay reasonable counsel fees to the defendant for the defense of this action, and further that he is able to pay reasonable subsistence to the defendant. However, in her prayer she only asked for reasonable counsel fees in order to defend the action.

The plaintiff, instead of filing a reply, filed what he called an "Answer to the Defendant's Further Defense and Counterclaim." In his pleadings he denies the allegations contained in the defendant's further answer and pleads "as another and further defense to defendant's action," in paragraph one thereof, the adultery of the defendant; and in paragraph two thereof, he amplifies her unfaithful conduct. He then prays that the defendant's counterclaim be dismissed and that he be granted an absolute divorce either upon the ground of two years' separation or upon the ground of adultery.

The defendant demurred to the new matter in the reply of plaintiff, which is labeled "Answer to Defendant's Further Defense and Counterclaim," on the ground that it sets up a new cause of action; also that the complaint is not verified as required by law.

When the cause came on for hearing, the defendant moved to strike the new matter alleged, as set out in the demurrer; that the court require the plaintiff to correct typographical errors appearing in his pleadings, and to verify his complaint as required by law. The motion was granted except that the court only struck out paragraph two of the

plaintiff's reply, erroneously called, "Answer to the Defendant's Further Defense and Counterclaim," and entered an order accordingly.

From this order the plaintiff appeals, assigning error.

Grady Mercer for plaintiff, appellant.

Seavy A. Carroll and Lemuel M. Williford for defendant, appellee.

DENNY, J. It is difficult to understand why the plaintiff appealed from the ruling of the court below on the defendant's motion to strike. He still has in his pleadings his plea with respect to acts of adultery committed by the defendant, for whatever purpose it may serve in connection with any motion that might be made for alimony *pendente lite.* G.S. 50-15; *Medlin v. Medlin,* 175 N.C. 529, 95 S.E. 857; *Oldham v. Oldham,* 225 N.C. 476, 35 S.E. 2d 332. A plea of adultery, however, if found by the court to be true, does not preclude the court from allowing the wife reasonable counsel fees for the prosecution or defense of an action for divorce. G.S. 50-16; *Oldham v. Oldham, supra; Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436.

The plaintiff contends, however, that no part of his pleadings could be stricken since the motion to strike was not made prior to the filing of the demurrer, citing G.S. 1-153. The appellant seems inadvertent to the fact that when a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Tucker v. Transou,* 242 N.C. 498, 88 S.E. 2d 131; *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299.

The plaintiff excepts to and assigns as error that portion of the order of the court requiring him to verify his complaint as required by law. Evidently, the court had in mind G.S. 50-8 before it was amended. The complaint has been verified in substantial compliance with G.S. 1-145. This is all that is now required in actions for divorce by G.S. 50-8, as amended by Chapter 165 and Chapter 590 of the 1947 and 1951 Session Laws of North Carolina respectively. Hence, the exception seems to be well taken. Therefore, the order will be modified in this respect and affirmed as to the remainder thereof.

Modified and affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

VIRGINIA PIERCE BASNIGHT v. T. G. BASNIGHT, JR.

(Filed 28 September, 1955.)

1. Divorce § 16—

Judgment of contempt for wilful refusal of defendant to make payments to his wife in compliance with a former order of the court is erroneous when it directs that defendant be committed to jail for an indefinite period rather than for thirty days as prescribed by statute, G.S. 5-4.

2. Appeal and Error § 38—

Where the Supreme Court is unanimous in opinion that the judgment should be modified, but is evenly divided in opinion as to whether prejudicial or reversible error otherwise has been shown, the judgment will be modified and affirmed.

APPEAL by defendant from *Bone, J.*, at May Term, 1955, of PITT.

Contempt proceedings in civil action for subsistence under G.S. 50-16.

The court below, on facts found, concluded and adjudged that the defendant is in contempt of court for wilful and contumacious failure and refusal to make payments to his wife in compliance with a former order of the court. The judgment decrees that the defendant be confined in jail "until he shall have complied" with the former order, "or until he is otherwise discharged according to law."

From the judgment so entered, defendant appeals.

James & Speight for plaintiff, appellee.

James & Hite for defendant, appellant.

PER CURIAM. Two members of the Court, *Winborne* and *Higgins, JJ.*, not sitting, but with *Devin, Emergency Justice,* participating in lieu of *Winborne, J.*, and the Court being of the unanimous opinion that the judgment entered below is erroneous in directing that the defendant be committed to jail for an indefinite period rather than for thirty days as prescribed by statute, G.S. 5-4, but with the six sitting members of the Court being evenly divided in opinion whether prejudicial or reversible error otherwise has been shown, the judgment below will be modified so as to limit the defendant's confinement in jail to thirty days. Subject to this modification, the judgment is affirmed in accordance with the precedents which require a majority vote to overthrow a judgment of the Superior Court. *Alexander v. Autens Auto Hire,* 175 N.C. 720, 95 S.E. 850.

Modified and affirmed.

DELILAH EMILY SMITH v. JATHA BOYD SMITH.

(Filed 28 September, 1955.)

1. Appeal and Error § 23—

An assignment of error that the judge had no jurisdiction to hear the motion and sign the judgment, without exception in the record, requires dismissal of the appeal, since the rule that an assignment of error not supported by an exception will be disregarded, is mandatory and will be enforced *ex mero motu*.

2. Judges § 2a—

The judge holding the courts of a district as then constituted has jurisdiction to hear a motion under G.S. 50-16. The statute increasing the number of judicial districts did not go into effect until from and after 1 July 1955. Session Laws 1955, Chapter 129.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Bone, J.*, presiding over the June Term 1955 of CRAVEN. JONES.

Civil action instituted in accordance with G.S. 50-16 for reasonable subsistence for plaintiff and the one-year-old child born of the marriage and for counsel fees in the Superior Court of Jones County. The plaintiff in the complaint requested the custody of the child. The defendant filed an answer raising issues of fact. The defendant was properly served with notice that the plaintiff at 2:00 p.m. on 6 June 1955 in the courthouse in New Bern would make application before Judge Bone, presiding judge of the 5th Judicial District, and presiding that day over the Superior Court of Craven County, for reasonable subsistence for herself and child and for counsel fees.

The defendant appeared, pursuant to the notice, and both plaintiff and defendant offered evidence. Judge Bone entered an order that the defendant pay to plaintiff $50.00 a month for the maintenance and support of plaintiff and their child pending the final determination of the action, pay $100.00 counsel fees to her lawyer, and awarded the custody of the child to plaintiff pending the final determination of the action.

The defendant did not except to the judgment. The defendant has no exception in the record.

Defendant appeals, assigning as error that Judge Bone had no jurisdiction to hear the motion, and to sign the judgment over defendant's protest.

Donald P. Brock for Plaintiff, Appellee.

Charles L. Abernethy, Jr., for Defendant, Appellant.

PER CURIAM. Defendant's single assignment of error is not supported by an exception. It is thoroughly well settled law in this State that an assignment of error not supported by an exception will be disregarded. The rule is mandatory, and will be enforced *ex mero motu*. *Barnette v. Woody, ante,* 424, 88 S.E. 2d 223; *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602.

Judge Bone was holding the Superior Courts of the district in which the action was brought—Jones County in June 1955 was in the 5th Judicial District—and had jurisdiction to hear the motion by the express language of G.S. 50-16. The statute increasing the number of judicial districts did not go into effect until from and after 1 July 1955. Session Laws 1955, Chapter 129.

Appeal dismissed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

EUGENE MOORE, EMPLOYEE, v. SUPERIOR STONE COMPANY, EMPLOYER, AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER.

(Filed 28 September, 1955.)

1. Master and Servant §§ 40c, 55d—

Where there is sufficient circumstantial evidence in the record to sustain the finding of the Industrial Commission to the effect that claimant was injured in an explosion of a number of dynamite caps resulting when he idly or out of curiosity attempted to set off a single dynamite cap during his lunch hour, and that therefore the injuries did not arise out of his employment, the Superior Court is without power to reverse.

2. Master and Servant § 50—

The burden rests upon claimant in a proceeding under the Workmen's Compensation Act to show that his injuries arose out of his employment.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Parker (Joseph W.), J.,* June Term 1955, ONSLOW. Reversed.

Proceeding before Industrial Commission for compensation for personal injuries received by plaintiff employee.

Plaintiff was injured when 300 dynamite caps exploded. He was then alone in the "doghouse" for the purpose of eating his lunch. The Commission found the facts which included the following: "8. That in

the absence of the other employees as above set out, the plaintiff . . . out of curiosity or for reasons unknown, wired the blasting machine . . . and in his attempt to set off a single dynamite cap ignorantly and accidentally detonated the 300 dynamite caps beside the doghouse resulting in a terrific explosion and in the injuries which he sustained," and concluded "that the injury (suffered by plaintiff) did not arise out of the employment."

Upon such finding and conclusion the Commission denied the claim. On appeal the court below reversed and defendants appealed.

Hughes & Abbott for plaintiff appellee.

Barden, Stith & McCotter for defendant appellants.

PER CURIAM. We are constrained to concur in the conclusion of the full Commission that there is sufficient circumstantial evidence in the record to sustain the finding of fact No. 8 made by the Commission and its conclusion based thereon. Since the testimony contains evidence sufficient to support the finding made by the full Commission, the court below was without authority to reverse.

Furthermore, the burden rested upon the claimant to show that his injuries arose out of his employment, and there is implicit in the positive findings and conclusions of the Commission the further finding that the plaintiff had failed to carry the burden placed on him by law. Hence, the judgment entered in the court below must be

Reversed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

JAMES HERBERT BROWN v. JOBIE WILLIAMS AND HESTER JOHNSON.

(Filed 28 September, 1955.)

Injunctions § 8—

Where there is sufficient evidence to support the trial court's findings that there was probable cause that plaintiff would be able to establish title to the *locus in quo* and that the continuance of the cutting of timber by defendants during the litigation would produce injury, judgment continuing the restraining order to the hearing will be affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Carr, J.*, May Term 1955, of BERTIE. In Chambers.

John R. Jenkins, Jr., and Pritchett & Cooke for Plaintiff Appellee.

E. R. Tyler and Gillam & Gillam for Defendant Appellants.

PER CURIAM. This was an action to recover damages for trespass and timber cutting, and to restrain the defendants.

Based on the complaint, temporary restraining order was issued and made returnable before Judge Carr. On the return day the plaintiff offered deeds and affidavits tending to fit description in the deeds to cover the *locus*, and to show possession by those under whom he claims for more than 60 years.

The defendants admitted cutting the timber but alleged title thereto in the defendant Johnson. Defendants offered no evidence but contended that plaintiff's evidence was insufficient to identify the land or to fit the description in the deeds to the land as described in the complaint.

From the evidence offered Judge Carr made findings of fact and concluded that there was probable cause that plaintiff would be able to establish the right asserted by him in his complaint and that continuance of cutting timber by defendants during the litigation would produce injury. G.S. 1-485. *Lance v. Cogdill*, 238 N.C. 500, 78 S.E. 2d 319. Accordingly the restraining order was continued to the final determination of the action.

There was evidence to support the findings of the judge and his conclusion after considering the evidence that the restraining order should be continued will be upheld. As the final termination of the litigation must await the trial in term, we deem it unnecessary to discuss the evidence or the questions of law debated on the argument and by brief.

Judgment affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

A. E. WHITFIELD AND WIFE, MARY ELLEN WHITFIELD, v. LOUIS HARVARD AND WIFE, ROSA HARVARD.

(Filed 28 September, 1955.)

APPEAL by defendants from *Parker, J.*, at February, 1955, Civil Term of SAMPSON Superior Court.

Motion in the cause by defendants to set aside a consent judgment for want of consent thereto.

The court below found as a fact that the defendants consented to the judgment and overruled the motion.

From the order entered in accordance with the foregoing ruling, the defendants appeal.

Wright T. Dixon, Jr., for defendants, appellants.

Woodrow H. Peterson and David J. Turlington, Jr., for plaintiffs, appellees.

PER CURIAM. Our examination of the record discloses that the crucial finding of consent is supported by the evidence. This works an affirmance of the order.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

EDWIN COURTNEY HUDSON; LUTHER JEFFERSON DEVANE; WILLIAM RUSH CHISHOLM; JOE MARION TILLEY; HERBERT LEWIS DARDEN; THOMAS ALFRED SHEPARD, JR.; IRVIN ELDRIDGE RACKLEY; JOHN HUBERT SHANNON; CLARK WELDON POISSON; JOHN MONROE BINKLEY; FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER EMPLOYEES OF ATLANTIC COAST LINE RAILROAD COMPANY IN NORTH CAROLINA WITH A COMMON OR GENERAL INTEREST, v. ATLANTIC COAST LINE RAILROAD COMPANY; INTERNATIONAL ASSOCIATION OF MACHINISTS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS & HELPERS OF AMERICA; INTERNATIONAL BROTHERHOOD OF BLACKSMITHS, DROP FORGERS AND HELPERS; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; BROTHERHOOD OF RAILWAY CARMEN OF AMERICA; INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS; BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; THE ORDER OF RAILROAD TELEGRAPHERS; BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA; HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION; AMERICAN TRAIN DISPATCHERS ASSOCIATION.

(Filed 12 October, 1955.)

1. Master and Servant § 1e—

The common law rule that a closed shop or union shop agreement is valid, has been abrogated in this State by valid and constitutional statute

G.S. 95-78, *et seq.*), providing that union membership shall not be required or forbidden as a condition of employment or continuation thereof, that no employer shall require, as a condition of employment, the payment of any dues or other fees to any labor union, and that any agreement between an employer and labor union requiring such membership or payments as a condition of employment shall be unlawful.

2. Constitutional Law §§ 8a, 10a—

The desirability or wisdom of legislation regulating collective bargaining and closed or union shops is a matter of public policy within the province of the General Assembly, and is not the concern of the courts.

3. Master and Servant § 1e—

State constitutional and legislative provisions relating to closed and union shops are valid except to the extent they conflict with an Act of Congress enacted within the orbit of Congressional authority.

4. Same: Courts § 12—

The Union Shop Amendment to the Railway Labor Act, 45 USCA sec. 152, Eleventh, does not invalidate Chapter 328, Session Laws of 1947, except to the extent that Congress, in enacting labor legislation related to interstate commerce, has pre-empted the field.

5. Same—

The Union Shop Amendment to the Railway Labor Act, 45 USCA sec. 152, Eleventh, expressly authorizes a carrier and labor union, duly designated and authorized to represent employees in accordance with the Act, to enter into a union shop agreement and exempts such union shop agreements from nullification by other statutes or laws, and the Federal statute is valid and supersedes Chapter 328, Session Laws of 1947, to the extent of conflict, and therefore a union shop agreement, complying in all respects with provisions of the Union Shop Amendment to the Railway Labor Act, is not rendered void by the State statute.

6. Constitutional Law § 30—

The Constitution of the United States, Article I, Section 8, Clause 3, confers on Congress the power to regulate commerce among the several states; and legislation enacted by Congress, within the power so granted, supersedes state statutes and laws in conflict therewith.

7. Master and Servant § 1e—

A proposed union shop agreement may not be challenged on the ground that it discriminates against plaintiff employees when such ground of attack is not supported by allegation.

8. Same—

A collective bargaining agent, duly designated and authorized to represent employees in accordance with the Railway Labor Act, is not required to ascertain by referendum the wishes of the employees of the craft or class it represents before making demands for a union shop agreement with the railroad employer. 29 USCA secs. 151 *et seq.*

9. Constitutional Law §§ 8a, 10a: Master and Servant § 1e—

The advisability of legislation requiring a referendum either prior or subsequent to the making of a union shop agreement under the Railway Labor Act and the promulgation of provisions in that Act differing from such provisions in the National Labor Relations Act, are determinable in the legislative sphere, and the task of the courts is merely to ascertain the intent of Congress as expressed in the statutes.

10. Constitutional Law § 18—

The classification of railroad employees under USCA 45 sec. 152, Eleventh (c), into operating and nonoperating employees, and exempting an operating employee under a union shop agreement from joining the particular union certified as collective bargaining agent for his craft provided such employee shall hold or acquire membership in any one of the National Labor organizations, is not an unreasonable discrimination in violation of the Fifth Amendment to the Federal Constitution.

11. Appeal and Error § 40l—

The Supreme Court will not undertake to determine whether an Act of Congress is invalid because violative of the Constitution of the United States except on a ground definitely drawn into focus by plaintiffs' pleadings.

12. Constitutional Law § 15½—

The right to work is guaranteed to every person, but employment of one person by another is not guaranteed.

13. Injunctions § 3—

Injunctive relief will be granted only when irreparable injury is both real and immediate.

14. Appeal and Error § 1—

Even though an appeal may be decided upon procedural grounds, where the questions involved are of public importance, the Supreme Court may decide the appeal upon its merits.

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

PARKER, J., dissents.

APPEAL by defendant unions from *Hubbard, Special Judge,* Special November Term, 1954, of NEW HANOVER.

Action to enjoin defendant unions and defendant carrier from entering into any union shop agreement whereby membership in a labor union is made a condition of employment of the named plaintiffs and fellow employees similarly situated.

On 23 April, 1953, when this action was commenced, a temporary order, restraining the negotiation of such an agreement and the calling of a strike in support of demands therefor, was signed; and this remained in effect until the final hearing.

Undisputed facts include the following:

Defendant carrier is a "carrier" as defined in the Railway Labor Act.

The thirteen (13) defendant unions are standard labor organizations, under the Railway Labor Act. They are the duly designated, authorized and recognized bargaining representatives of the nonoperating employees of defendant carrier in their respective crafts or classes. Since 1946, no election for bargaining representatives has been conducted by the National Mediation Board among the employees of any of these crafts nor has any request or demand for such an election or change in certification of bargaining representatives been made. The plaintiffs and defendant carrier fully recognize these unions and in no way challenge their right to negotiate collective bargaining agreements as to "rates of pay, rules, working conditions or any other matters which are not prohibited by law, . . ."

The ten (10) named plaintiffs bring this action in their own behalf and on behalf of "their fellow employees of a class whom they represent and who are similarly situated, (who) are either regular members of one or the other of the defendant labor organizations or are eligible for membership therein, and will be covered and bound by the terms of any agreement entered into between the aforesaid defendant labor organizations and the defendant Atlantic Coast Line."

The ten (10) named plaintiffs are members of or eligible for membership in five (5) of the thirteen (13) defendant unions, viz.:

Hudson is a member of the American Train Dispatchers Association. Binkley is a member of the Brotherhood of Railway Carmen of America. Rackley is a member of the Order of Railroad Telegraphers. DeVane is a member of, and Tilley, Shepard, Chisholm, Darden and Shannon are eligible for membership in, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. Poisson is eligible for membership in the Brotherhood of Maintenance of Way Employees.

As to Chisholm, the court found that, while eligible to become a member, his position was excepted "from the bulletin and displacement rules of the collective bargaining agreement"; that, on account thereof, he would not be required to join the union by the terms of the proposed union shop agreement; and the court made its conclusion of law that "Chisholm is not a proper party and the action should be dismissed as to him." As to Poisson, there is the further finding that he "is not employed by the Defendant Carrier, but retains seniority rights in the class represented by the Brotherhood of Maintenance of Way Employees."

The named plaintiffs' present rights under employment, on account of seniority or otherwise, are based upon collective bargaining agreements

concerning rates of pay, rules, and working conditions, entered into between defendant carrier and defendant unions.

From 5 February, 1951, defendant unions sought to obtain from defendant carrier a union shop agreement within the terms of the Union Shop Amendment (10 January, 1951) to the Railway Labor Act. Defendant carrier declined to enter into a union shop agreement. On 22 April, 1953, at 2:30 p.m., at a conference arranged for further negotiations, defendant unions presented to defendant carrier a proposed union shop agreement identical in substance to that previously made between defendant unions and the Pennsylvania Railroad and other carriers. Defendant unions, at such conference, made known their determination to continue negotiations until defendant carrier signed a union shop agreement such as that presented, or one embodying substantially the same terms, or until defendant carrier refused to do so; and that, in the event of such refusal, defendant unions would refer, by ballots previously prepared and printed, the question, to strike or not to strike for such union shop agreement, to their respective members. At the conference on the afternoon of 22 April, 1953, the discussion consisted largely of inquiries by the representative of defendant carrier as to the meaning of various provisions of the proposed union shop agreement. No agreement having been reached, the conference was recessed until the next day; but further discussion and negotiation were stayed by the restraining order obtained by plaintiffs.

The original complaint, upon which the restraining order was issued, attacked the proposed union shop agreement (1) as being in violation of the North Carolina statute, sometimes called the Right to Work Act, Session Laws of 1947, ch. 328, G.S. 95-78 *et seq.*, and (2) as being contrary to the expressed wishes and interests of a large number of employees of defendant carrier. No reference was made to the Union Shop Amendment to the Railway Labor Act nor was it alleged that the proposed union shop agreement would deny to any plaintiff any right guaranteed to him by the Constitution of the United States or by any federal statute.

On or about 7 May, 1953, the defendant unions removed the cause to the United States District Court for the Eastern District of North Carolina. Later, in the Superior Court of New Hanover County, an amended complaint, verified 30 September, 1953, was filed, in which plaintiffs alleged that such filing was "prior to the expiration of the period for the defendants to answer the original complaint (the period having been extended by the pendency of the Motion to Remand in the United States District Court)."

In their amended complaint, plaintiffs set forth their original allegations; and thereupon new matter, (1) that the efforts of defendants to

obtain a union shop agreement constitutes a breach of trust, being contrary to the expressed wishes and interests of a large number of employees, etc., and (2) that "the negotiations referred to constitute a serious threat to their individual property rights and liberties protected and guaranteed by and under the Constitution of the United States, the Constitution of the State of North Carolina, and the Federal and State laws and statutes." The only specification of denial of rights guaranteed by the Constitution of the United States, or by any federal statute, is that the Union Shop Amendment to the Railway Labor Act "is invalid, null and void as being in violation of the Fifth Amendment to the Constitution of the United States inasmuch as Congress in enacting the said amendment arbitrarily, discriminatorily, unreasonably and capriciously accorded less favorable treatment to nonoperating railroad employees with respect to the rights of individual employees in connection with union shop agreements than is accorded to other employees in occupations affecting commerce."

In answering the amended complaint, defendant unions aver that, upon the *second* removal of this cause to the District Court of the United States for the Eastern District of North Carolina, following the filing of the amended complaint, the plaintiffs filed in said court a motion to remand, stating in answer to the allegations of the removal petition, "It is denied that the plaintiffs based their claim for relief upon the Constitution and laws of the United States." Defendant unions further aver that, induced by plaintiffs' disclaimer as to reliance upon rights arising under the Constitution and laws of the United States, the District Court was induced to remand the cause, the second time, to the Superior Court of New Hanover County, upon the ground that, "The cause is one arising under the North Carolina statute and the plaintiffs must prevail, if at all, through the effectiveness of such statute."

Plaintiffs filed a reply, but no reference was made to the allegations of defendant unions summarized in the preceding paragraph. However, the record before us is barren as to evidence, documentary or otherwise, stipulations, findings of fact, etc., as to what occurred in the course of the two visits made by this cause to the District Court. The only data in this record advising us of these events is gleaned from the references in the pleadings as set out above.

Uncontradicted evidence is to the effect that defendant carrier had 19,026 employees; that prior to the conference arranged for the afternoon of 22 April, 1953, petitions expressing opposition to a union shop agreement were circulated among the employees; and that some 1,580 nonoperating employees signed such petitions. The total number of nonoperating employees is not shown. Nor, *except as stated below,*

does the evidence show the number of employees in the respective crafts, the number of union members as compared with the number of nonunion employees in the respective crafts, or the number within each craft who so expressed opposition to a union shop agreement. It does appear that in April, 1953, there were approximately 77 employees of the defendant carrier who were members of, *or eligible for membership in,* the American Train Dispatchers Association; and further, that 53 of these employees had expressed opposition to a union shop agreement. How many of the 77 or the 53 were union members is not shown.

Defendant carrier admits in substance the allegations of fact set forth in the amended complaint and concurs in plaintiffs' position as to the applicable law; and, since the North Carolina statute upon which plaintiffs rely creates a criminal offense, defendant carrier seeks an adjudication as to whether the making of such a union shop amendment would constitute a criminal act.

Defendant unions controvert certain allegations of fact, but contend primarily that a union shop agreement such as that proposed by them to defendant carrier, and their efforts to obtain such agreement, were in all respects legal and proper.

The union shop agreement proposed by defendant unions complies in all respects with the provisions of the Union Shop Amendment to the Railway Labor Act.

Upon waiver of jury trial, the court below, upon testimony and documentary evidence, made and set forth findings of fact and conclusions of law. Findings of fact, and evidence in support thereof, other than stated above, in so far as deemed relevant to decision, will be discussed in the opinion.

A final decree was entered, making "perpetual and permanent" the restraining order of 23 April, 1953, and adjudging that defendants pay the costs. Defendant unions, in apt time, filed exceptions to certain of the findings of fact, to all of the conclusions of law, and excepted to the final decree or judgment and appealed therefrom; and upon appeal they assign errors.

L. P. McLendon, Thornton H. Brooks, and R. S. McClelland for plaintiffs, appellees.

M. V. Barnhill, Jr., and Alan A. Marshall for defendant Atlantic Coast Line Railroad Company, appellee.

Lester P. Schoene, Milton Kramer, and George Rountree, Jr., for defendant unions, appellants.

BOBBITT, J. Is a union shop agreement, complying in all respects with the provisions of the Union Shop Amendment to the Railway

Labor Act, Act of Congress, Jan. 10, 1951, ch. 1220, 64 Stat. 1238, 45 USCA sec. 152, Eleventh, hereinafter called Union Shop Amendment, void under the North Carolina statute, sometimes called the Right to Work Act, Session Laws of 1947, ch. 328, G.S. 95-78 *et seq.*, hereinafter called the 1947 Act or the North Carolina statute? This question, of primary importance to decision, must be answered, "No." The reasons are stated below.

A closed shop agreement, *a fortiori* a union shop agreement, has been recognized as valid in most jurisdictions unless abrogated or restricted by statute. 31 Am. Jur. 876, Labor, sec. 108, 1954 Cumulative Supplement, p. 99; 56 C.J.S. 192, Master and Servant, sec. 28 (40). In the absence of statute, Restatement of the Law of Torts, Vol. IV, sec. 788, under the caption, "Closed Shop," gives the generally accepted rule as follows: "Restriction of employment by an employer throughout his business, or on specified jobs within it, to workers who are members of a labor union, or of a particular union, is a proper object of concerted action by his employees."

It was so decided in North Carolina in *S. v. Van Pelt*, 136 N.C. 633, 49 S.E. 177, 68 L.R.A. 760, 1 Ann. Cas. 495. The court's opinion by *Connor, J.*, and the concurring opinion of *Clark, C. J.*, set forth cogently the reasons in support of this view. As expressed succinctly by *Clark, C. J.*: "It was not unlawful for the carpenters' union to try to induce the prosecutor to employ none but members of their union, neither illegal threats nor violence or other unlawful means being used; nor was it forbidden by any law to publish the fact of his refusal and to ask those friendly to their organization not to patronize him."

But the common law in North Carolina as so declared by this Court in 1904 was abrogated by the 1947 Act of our General Assembly, which declared the public policy of North Carolina to be "that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association." Specifically, the 1947 Act provides (1) that union membership shall not be required or forbidden as a condition of employment or continuation therein; (2) that no employer shall require, as a condition of employment, the payment of dues or other fees to any labor union; and (3) that any agreement between an employer and a labor union requiring such membership or payments as a condition of employment shall be unlawful. The 1947 Act, challenged as violative of provisions of the Federal and State Constitutions, was held by this Court a valid and constitutional exercise of legislative power by our General Assembly. *S. v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860; *S. v. Bishop*, 228 N.C. 371, 45 S.E. 2d 858. See, also, *In re Port Publishing Co.*, 231 N.C.

395, 57 S.E. 2d 366, 14 A.L.R. 2d 842. In *S. v. Bishop, supra,* it was held that an act in violation of the statute was a misdemeanor.

The *Whitaker case* and a Nebraska case, involving substantially the same questions, were considered together, upon appeals to the Supreme Court of the United States; and the citation to the reported decision bears the caption of the Nebraska case. The decision of this Court was affirmed. *Lincoln Fed. L. U. v. Northwestern I. & M. Co.,* 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212. See also, *American Fed. of Labor v. American Sash & Door Co.,* 335 U.S. 538, 69 S. Ct. 258, 93 L. Ed. 222, 6 A.L.R. 2d 481.

The 1947 Act of our General Assembly embodied substantially the provisions of constitutional amendments and legislative enactments adopted in some seventeen states. Persuasive arguments were and are urged in favor of and against this legislation. It was not for this Court to say whether such legislation was desirable, appropriate or wise. Nor did this Court undertake to approve or disapprove the public policy of North Carolina as expressed in the 1947 Act. But it was determined, as stated by *Seawell, J.,* that it is for the legislative power to delineate "the area within which two factions with largely conflicting aims may wage their disputes without transgressing the public welfare."

In the *Whitaker case, Seawell, J.,* for this Court, and *Mr. Justice Black,* for the Supreme Court of the United States, reviewed the history of labor legislation and related court decisions. A restatement thereof is unnecessary. Suffice it to say that the conclusion reached was that state constitutional and legislative provisions, such as those embodied in our 1947 Act, are valid except to the extent they conflict with an Act of Congress enacted within the orbit of Congressional authority.

It is clear that the proposed union shop agreement is in direct conflict with the 1947 Act. Nothing else appearing, such agreement would be void. It is equally clear that the Union Shop Amendment does not invalidate the 1947 Act. Except to the extent Congress, in enacting labor legislation related to interstate commerce, has pre-empted the field, the 1947 Act is in full force and effect. *Local Union No. 10, A. F. of L. v. Graham,* 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946. Our attention, therefore, must turn to the Union Shop Amendment.

Upon adoption of the Railway Labor Act, 20 May, 1926, ch. 347, 44 Stat. 577, Congress "made a fresh start toward the peaceful settlement of labor disputes affecting railroads." *Virginia Ry. Co. v. System Federation No. 40,* 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789. This Act, as amended, is now codified as 45 USCA secs. 151 *et seq.* The basic principle underlying this Act is embodied in these provisions: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of

employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter." 45 USCA sec. 152, Fourth. In the case cited, the Supreme Court of the United States sustained the constitutionality of the Railway Labor Act, both under the commerce clause and as to the Fifth Amendment, in relation to the requirement that the carrier treat exclusively with the employees' duly chosen bargaining representative. As stated by *Mr. Justice Stone* (later *Chief Justice*): "The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. . . . It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here."

As enacted in 1926, the Railway Labor Act contained no provision as to union shop agreements. But, as amended by Act of 21 June, 1934, 48 Stat. 1185, it was provided that no carrier should require any employee to join or not to join any labor organization as a condition of employment nor should any carrier deduct from the wages of employees any dues, etc., payable to labor organizations. 45 USCA sec. 152, Fourth and Fifth.

It is of interest to note that the 1934 amendments were supported by labor organizations because of the prevalence then of so-called "company-dominated" unions. The labor organizations sought to restrict the ban on union shop agreements to such local unions or associations, but Congress saw fit to make the provision apply to all unions. Report No. 2811, 7 August, 1950, Committee on Interstate and Foreign Commerce, 81st Congress, 2d Session, House Miscellaneous Reports, Vol. VI; Report No. 2263, 9 August, 1950, Committee on Labor and Public Welfare, 81st Congress, 2d Session, Senate Miscellaneous Reports. Vol. V. As intended, the 1934 legislation invalidated union shop agreements theretofore in effect. *Brotherhood of R. Shop Crafts v. Lowden*, 86 F. 2d 458, 108 A.L.R. 1128, *certiorari* denied 300 U.S. 659, 57 S. Ct. 435, 81 L. Ed. 868.

When the 1947 Act was adopted, the Railway Labor Act prohibited a union shop agreement between *a carrier* and a labor organization; and the 1947 Act prohibited such an agreement between *any employer* and a labor union. There was no conflict.

This continued until 10 January, 1951, when Congress enacted the Union Shop Amendment (45 USCA sec. 152, Eleventh), which, in pertinent part, provides:

"Eleventh. Notwithstanding any other provisions of this chapter, or *of any other statute or law* of the United States, or Territory thereof, or *of any State,* any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership . . .

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended." (Italics added.)

Appellees contend that the effect of this Union Shop Amendment goes no further than to remove the ban previously placed on union shop agreements by 45 USCA sec. 152, Fourth and Fifth, thus disclaiming a national policy hostile to such agreements. Therefore, they contend, the federal prohibition gone, the validity of such agreements is determinable in relation to applicable state law. For this position they rely upon *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.,* 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691.

The *Algoma case* is distinguishable. Under a Wisconsin statute, a union shop agreement was declared an "unfair labor practice" unless affirmatively authorized by at least two-thirds of the employees voting secretly in a referendum. For reasons not material here, the employer entered into a union shop agreement that had not been so authorized. An employee was discharged for failure to pay union dues. Upon complaint to the Wisconsin Employment Relations Board, this action was held an "unfair labor practice," the employee was ordered reinstated and the employer required (1) to compensate him for the loss of pay, and (2) to cease and desist from giving effect to the maintenance-of-membership clause. The question presented was whether the controversy was in the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act. 29 USCA sec. 160 (a).

The cited statute (as worded when relevant to the *Algoma case*) empowered the National Labor Relations Board "as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise." It was held that this statute was applicable only to the unfair labor practices listed in Section 158; and the inquiry narrowed to Section 158 (3), which contained this proviso: "That nothing *in . . . this title or in any other statute of the United States,* shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made." (Italics added.) The Supreme Court of the United States affirmed the Wisconsin courts in holding that the Wisconsin statute was not superseded by the quoted provisions of the National Labor Relations Act. *Mr. Justice Frankfurter* said: "The short answer is that sec. 8 (3) (29 USCA 158 (3)) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from *the choice of the words* 'nothing *in this Act . . .* or *in any other statute of the United States,*' and it is confirmed by legislative history." (Italics added.) After the decision of the Wisconsin board, and before consideration on appeal, the National Labor Relations Act was amended 23 June, 1947, 61 Stat. 151, 29 USCA sec. 164 (b), so as to provide expressly that "nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." There is no such provision in the Railway Labor Act.

But the Union Shop Amendment does more than remove the previous ban on union shop agreements. While it does not require, it expressly *permits, i.e., authorizes,* a carrier and a labor union duly designated and authorized to represent employees in accordance with the Railway Labor Act to enter into such an agreement if they see fit to do so, "notwithstanding any other provisions of this Act, or *of any other statute* or *law . . . of any State, . . .*" (Italics added.) The decision in the *Algoma case* (1949) would seem to explain, at least in part, the choice of words used in the Union Shop Amendment (1951) to the Railway Labor Act, *i.e.,* the explicit reference to any *statute* or *law of any State.* In the legislative debates preceding the enactment of the Union Shop

Amendment, the state Right to Work statutes and constitutional provisions were much discussed; and it was made quite plain that a union shop agreement made under authority expressly granted would override conflicting state laws and that it was so intended. Congressional Record, Vol. 96, Part 12, 81st Congress, 2d Session, pp. 16262, 16270, 16280, 16323, 16327—and 16376, where the defeat in the Senate of the Holland amendment is recorded; pp. 17055, 17056, 17057, 17058, 17059—and 17061, where the defeat in the House of the motion to recommit is recorded. In short, the Union Shop Amendment, as stated by *Judge Learned Hand,* exempts union shop agreements "from nullification by other statutes or laws." *Otten v. Baltimore & O. R. Co.,* 205 F. 2d 58 (C.C.A. 2d 1953).

The Constitution of the United States, Article I, Section 8, Clause 3, confers on Congress the power to regulate commerce among the several states; and legislation enacted by Congress, within the power so granted, supersedes state statutes and laws in conflict therewith. *Napier v. Atlantic Coast Line R. Co.,* 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432.

The conclusion reached is that a union shop agreement, between a carrier and a labor organization duly designated, authorized and recognized as the bargaining representative of a craft or class of the carrier's employees, to the extent it embodies terms expressly sanctioned by the Union Shop Amendment is not invalid; for in such case and to such extent the federal statute supersedes the state statute. The union shop agreement, proposed by defendant unions, embodies terms sanctioned by the federal statute.

The conclusion stated is in accordance with that reached in the following cases: *International Ass'n of Machinists v. Sandsberry,* 277 S.W. 2d 776, Court of Civil Appeals of Texas, Amarillo, appeal now pending in the Supreme Court of Texas; *Moore v. Chesapeake & Ohio Ry. and Ward v. Seaboard Air Line Railroad Company,* Richmond (Va.) Hustings Court, 34 LRRM* 2667, appeal now pending in the Supreme Court of Appeals of Virginia; *In re Florida East Coast Ry. Co.,* U. S. District Court for Southern District of Florida, 32 LRRM* 2533; *Hanson v. Union Pacific R. R. Co.,* 160 Neb. 669, 71 N.W. 2d 526.

Appellees cite decisions, *e.g., Steele v. Louisville & Nashville R. R. Co.,* 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173, to the effect that a collective bargaining agent must act fairly and impartially in behalf of all employees whom it represents, union members and nonmembers alike. Suffice it to say that there is no allegation or suggestion that the collective bargaining agreements, negotiated by defendant unions with defendant carrier, covering rates of pay, rules and working conditions, in

*Refers to Labor Relations Reference Manual, an unofficial reporter published by Bureau of National Affairs, Inc., Washington, D. C. Cases cited by reference to LRRM are not published in an official reporter. Hence, the original texts were obtained and examined.

any respect are discriminatory against plaintiffs or any other employees of the defendant carrier, union members or nonmembers.

Appellees further contend, and the court found as facts, that defendant unions, through their chief officers, acted arbitrarily and in disregard of the wishes of the employees of the respective crafts or classes. In last analysis, the only evidence supporting these findings is to the effect that the chief officers of defendant unions, notwithstanding known opposition of some employees to the making of a union shop agreement, made demands on defendant carrier for such agreement without ascertaining by referendum or otherwise the wishes of a majority of the employees within the respective crafts. Admittedly, defendant unions since 5 February, 1951, had been endeavoring to negotiate a union shop agreement with defendant carrier. The evidence dispels any suggestion that defendant unions' efforts to obtain a union shop agreement were conducted in secrecy; rather, the conclusion is inescapable that the opposing expressions by petition arose from the fact that the efforts of the bargaining agents were well known. The demands therefor, and the opposition to, a union shop agreement were well known and communicated to the defendant carrier prior to the conference on 22 April, 1953.

The inquiry narrows to this question: Must the bargaining agent, before making demands for a union shop agreement, first ascertain the wishes of the employees of the craft or class it represents with reference thereto and be governed by the wishes of the majority as expressed in a referendum or otherwise?

We are constrained to hold that such referendum was not required. By Act of 23 June, 1947, 61 Stat. 136 *et seq.*, Congress amended Section 8 (a) of the National Labor Relations Act (29 USCA sec. 151, *et seq.*) by providing in Section 8 (a) (3) thereof "that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement"; and amended Section 9 (e) so as to provide the procedure and conditions for the conduct of such referendum. But such requirement for a referendum as a condition precedent to the making of such an agreement was eliminated by Act of 22 October, 1951, 65 Stat. 601, now codified as 29 USCA sec. 158 (a) (3) and sec. 159 (e), so that a union shop agreement is permissible as provided unless "within one year preceding the effective date of such agreement," an election is called on application of "30 per centum or more of the employees in a

bargaining unit covered by such agreement" and "a majority of the employees eligible to vote in such election" have voted by secret ballot to rescind the authority of such labor organization to make such an agreement. The Senate and House reports relating to Senate Bill 1959, which became the Act of 22 October, 1951, explain the reason for the elimination of the precedent referendum in these words: "Such elections have imposed a heavy administrative burden on the Board, have involved a large expenditure of funds, and have almost always resulted in a vote favoring the union shop." U. S. Code Congressional and Administrative Service, 82nd Congress, First Session 1951, Vol. 2, p. 2381.

The significance of the foregoing is that the same Congress which eliminated the necessity for a referendum under the National Labor Relations Act passed the Union Shop Amendment (1951) to the Railway Labor Act; and the question of whether provision should be made for a referendum was considered but proposal for such requirement was rejected. House Report No. 2811, 7 August, 1950, on Bill Amending Railway Labor Act, *supra;* Congressional Record, Vol. 96, Part 12, 81st Congress, 2d Session, pp. 17055 and 17056. No provision for any referendum was incorporated in the Union Shop Amendment or appears elsewhere in the Railway Labor Act.

It must be concluded that the intent of Congress, as presently expressed in the Railway Labor Act, is that the employees in a collective bargaining unit, having selected their representative, authorized such representative to negotiate and act for them; and the Union Shop Amendment, by its terms, recognizes the negotiation of a union shop agreement as a proper subject for collective bargaining by the representative of such collective bargaining unit. The union membership requirement is obligatory under a union shop agreement only as long as the union so selected remains such bargaining agent. Should a majority of the collective bargaining unit desire to choose another bargaining agent, or none, the procedure therefor is available. 45 USCA sec. 152. The new representative so chosen is at liberty to reopen and renegotiate any collective bargaining agreement, eliminating the union shop provision. The injunction in this case has been in effect since 23 April, 1953. Plaintiffs and others similarly situated have had ample time to choose new representatives, if such was desired by a majority of the respective crafts. But no demand for a redetermination of bargaining representatives has been made since 1946. The conclusion reached is in accord with *Goodin v. Clinchfield R. R. Co.*, 125 F. Supp. 441 (E.D. Tenn. 1954); *Austin v. Southern Pac. Co.*, 50 Calif. App. 2d 292, 123 P. 2d 39.

It is not for us to review the arguments of considerable weight both for and against the wisdom of provisions requiring a referendum either prior or subsequent to the making of a union shop agreement. Nor is it for us to say that, in respect of union shop agreements, the provisions of the National Labor Relations Act are preferable to the provisions of the Railway Labor Act, or *vice versa*. Nor is it for us to say that the differentiating factors between carriers and industry generally, in the field of labor relations and otherwise, are not sufficient to warrant the differences between these two Acts. These matters are determinable in the legislative sphere. In the past, from time to time, experience has indicated the advisability of legislative changes. Further experience may indicate the advisability of further legislative changes. Much will depend upon the fairness and maturity of those clothed with the exercise of power as bargaining agents. Our task is one of statutory construction, *i.e.*, to ascertain the intent of Congress as presently expressed.

Appellees now contend, and the court below held, that "the agreement proposed on 22 April, 1953, by the Defendant Unions to the Defendant Carrier, if consummated, would deprive the plaintiffs, and members of the class whom they represent in this action, of individual property rights of value and liberties protected and guaranteed by and under the Constitution of the United States, the Constitution of the State of North Carolina, and federal and state laws, statutory and common." It is noteworthy that the court below did not indicate any particular provision of the Constitution of the United States it deemed violated.

Had the plaintiffs based their action upon rights arising under the Constitution of the United States, defendant unions were entitled to a removal thereof to the United States District Court for the Eastern District of North Carolina. It was subject to remand only upon the ground that plaintiffs predicated their position solely upon the North Carolina statute. *Allen v. Southern Ry. Co.*, 114 F. Supp. 72. Since the record is silent as to what occurred in the District Court, we cannot accept as established fact the allegations of defendant unions that, when the amended complaint was before that court, plaintiffs affirmatively disclaimed reliance upon the Constitution and laws of the United States and asserted that they rested their case solely on the North Carolina statute. Even so, plaintiffs' attack upon the constitutionality of the Union Shop Amendment must be limited to the grounds of such attack alleged in their amended complaint.

As set forth in the statement of facts, the only specific constitutional ground on which plaintiffs attacked the Union Shop Amendment is that it unreasonably discriminates as between operating employees and non-operating employees in violation of the Fifth Amendment. The basis for this position is the provision as to operating employees, 45 USCA

sec. 152, Eleventh (c), that, in a union shop agreement affecting operating employees, such an employee is exempt from joining the particular union certified as the collective bargaining agent for his craft "if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement . . . shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership." The option thus given operating employees, but denied to nonoperating employees, is the basis for the charge of unreasonable discrimination in violation of the Fifth Amendment. As stated by *Wenke, J.*, speaking for the Supreme Court of Nebraska: "Classification of railroad employees into operating and nonoperating groups is traditional on railroads, and certainly is reasonable as a basis of classification for purposes of railroad legislation." We are in accord with the reasoning of the Nebraska court, based upon authorities cited, that the Union Shop Amendment is not subject to successful attack on the ground assigned by plaintiffs herein. *International Ass'n of Machinists v. Sandsberry, supra; Moore v. Chesapeake & Ohio Ry. and Ward v. Seaboard Air Line Railroad Company, supra; Hanson v. Union Pacific R. R. Co., supra.*

Admittedly, the Union Shop Amendment removes the North Carolina Act as a road block in the path of making a union shop agreement drawn in compliance with its terms. Even so, the Act of Congress does not compel or require a union shop. As pointed out by *Judge Learned Hand,* it is "permissive," not "self-operative." On the ground that the first ten amendments to the Constitution of the United States protect against congressional action and are not limitations upon the acts of private parties, *Corrigan v. Buckley,* 271 U.S. 323, 46 S. Ct. 521, 70 L. Ed. 969, it has been held, as against challenge on constitutional grounds not alleged herein, that a railroad employee's constitutional rights are not infringed by the Union Shop Amendment. *Otten v. Baltimore & O. R. Co., supra; Wicks v. Southern Pac. Co.,* 121 F. Supp. 454 (S.D. Calif.). Too, *Senn v. Tile Layers Protective Union,* 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229, is persuasive authority for the view that the Act of Congress authorizing a union shop agreement does not violate the Fifth Amendment. The laws of Wisconsin permitted a union to endeavor to induce an employer, not only to unionize his shop but to refrain from working in his business with his own hands, although none of his employees was a member of the union. *Mr. Justice Brandeis* says: "Whether it was wise for the State to permit the unions to do so

is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it."

True, the Nebraska case cited reached the conclusion that the Union Shop Amendment violated the Fifth Amendment. This conclusion was based on the view that the initiation fees, dues and assessments employees may be required to pay under a permitted union shop agreement may be used for purposes such employees do not approve, *i.e.*, the amount thereof is not limited to a proportionate share of the cost of obtaining the benefits they receive from collective bargaining agreements negotiated in their behalf. In this aspect, the Nebraska court regarded the Union Shop Amendment as a denial of due process.

"But we do not wish to express an opinion upon it until the question is brought directly before us," to use the words of *Battle, J.*, in *S. v. John,* 30 N.C. 330. In the case before us, the Union Shop Amendment is not challenged as unconstitutional on that ground. Moreover, there is neither allegation nor evidence that the initiation fees, dues or assessments of any of the defendant unions are unreasonable or disproportionate to the amount necessary, in the phrase of *Mr. Justice Holmes,* "to establish the equality of position between the parties in which liberty of contract begins." Dissenting opinion, *Coppage v. Kansas,* 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441, L.R.A. 1915C, 960. Suffice it to say, we will not undertake to determine whether an Act of Congress is invalid because violative of the Constitution of the United States except on a ground definitely drawn into focus by plaintiffs' pleadings.

Various documents, consisting of membership application blanks, constitutions and by-laws, etc., of defendant unions were identified by stipulation. In their brief, plaintiffs assert that employees will be required, on penalty of the loss of their jobs, to subscribe to statements of belief, to take oaths, to make pledges, etc., offensive to them and contrary to their honest convictions; that they will be required to choose between loss of employment by defendant carrier and stultifying themselves by false statements and involuntary commitments; and that this constitutes a denial of their individual liberties and property rights under the Constitution of the United States. Here, again, plaintiffs attempt to proceed on a new course. For the complaint does not allege nor does the evidence show that any of the named plaintiffs made any reference to any of these documents as the basis of his objection to the proposed union shop agreement. Nor does the complaint challenge the constitutionality of the Union Shop Amendment on any ground related to such documents. We defer consideration of such matters until a specific factual situation is presented by allegation and evidence. A union may waive any requirement that is offensive to the scruples of a member or prospective member. Moreover, both under

the Union Shop Amendment and the explicit provisions of the proposed union shop agreement, if membership is *denied* or *terminated* for any reason other than failure to pay or tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership, such denial or termination of membership is not a ground for discharge. In this connection, see *Otten v. Baltimore & O. R. Co., supra; Wicks v. Southern Pac. Co., supra;* also, the committee reports to the 81st Congress, 2d Session, *supra.*

Beyond question, the right to work is guaranteed to every person. But employment of one person by another is not so guaranteed. In the absence of limitation by legislation, an employee's rights depend upon the terms of his employment contract; and it can be provided that the employee might be discharged for any reason or none. The original concept was such that the Supreme Court of the United States struck down as unconstitutional both federal and state *statutes* (not the contract provision) which made unlawful a provision in an employment contract by which an employee would be discharged if he joined a union. *Adair v. U. S.*, 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; *Coppage v. Kansas, supra.* The ground assigned therefor was what the court then considered the constitutional right of liberty of contract both of employer and employee. Under that concept, the parties were considered *free* to negotiate that an employee be discharged for union membership, nonmembership or other ground. Later, this view was rejected, *Lincoln Fed. L. U. v. Northwestern I. & M. Co., supra,* and cases cited therein. For it became apparent, as *Mr. Justice Holmes* had observed, that real liberty of contract exists only when there is substantial equality of position between the parties. Legislation was then recognized as valid which took from no person the right to work but defined limitations within which the right of freedom to contract as to employment might be exercised. As of now, Congress has defined such limitations as to employees of carriers in interstate commerce. Except as defined by Congress within the orbit of its authority, the North Carolina statute controls. To the extent they are in irreconcilable conflict, the Act of Congress prevails. The wisdom of the legislation, either of Congress or of the General Assembly, is not our concern.

A well established rule of this Court is that injunctive relief will be granted only when irreparable injury is both *real* and *immediate. Wilcher v. Sharpe*, 236 N.C. 308, 72 S.E. 2d 662, and cases cited.

Defendant carrier has signed no union shop agreement. It has manifested no desire or intent to do so. If it should sign such agreement, the nonmember plaintiffs and other nonmembers would have sixty (60)

days within which to bring suit to restrain the enforcement thereof. If defendant carrier refuses or fails to sign such agreement, no strike can be called unless and until at least a majority of union members of each respective craft vote therefor. If the opposition to the union shop principle is as strong as plaintiffs contend, it would appear likely that in some, if not all, of the crafts represented by defendant unions, the majority vote of the union members of defendant carrier would ban the calling of a strike for a union shop agreement. In any event, it would seem that plaintiffs are somewhat removed from real and immediate irreparable injury; and that, if the apprehended events occur, they would have ample time to invoke the injunction procedures of the court.

Attention is called to the fact that had defendant carrier entered into a union shop agreement with defendant unions, such as that proposed, and if the action were one to restrain the discharge of plaintiffs, there is strong authority that the validity and interpretation of the union shop agreement would be matters for determination in the first instance by the National Railroad Adjustment Board before resort to the courts. *Alabaugh v. Baltimore and Ohio Railroad Company,* 222 F. 2d 861 (CCA 4th), in which *Parker, Chief Judge,* reviews the cases dealing with this subject.

Do those plaintiffs who are presently members of a defendant union have such interest as to entitle them to attack the attempted negotiation of a union shop agreement? Are the eight defendant unions in which none of the named plaintiffs is either a member or eligible for membership entitled to a dismissal of the action on the ground that a plaintiff may not sue on behalf of a class to which he does not belong? Since they do not go to the entire case, we refrain from discussing these serious questions.

Conceding that there are strong reasons why the judgment might be vacated on procedural grounds, *i.e.,* a failure of plaintiffs to show real and immediate irreparable injury, we have decided to deal with the basic questions here presented; for the matter is one of public importance and both defendant carrier and defendant unions would seem entitled to know whether, under the pleadings and evidence herein, the making of a union shop agreement, in compliance with the provisions of the Union Shop Amendment, would be deemed by this Court invalid and a criminal offense under the North Carolina statute.

For the reasons stated, the judgment of the court below is reversed and the restraining order is dissolved.

Reversed.

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

PARKER, J., dissents.

L. L. DAVIS, TRADING AND DOING BUSINESS AS DAVIS' DRIVE-IN; JOSEPH ANTOON AND RAYMOND KALEEL, PARTNERS, TRADING AND DOING BUSINESS AS THE STORK DRIVE-IN; JAMES CASTANAS AND GEORGE CASTANAS, PARTNERS, TRADING AND DOING BUSINESS AS THE BOAR'S HEAD DRIVE-IN; J. S. BLACKWELDER, TRADING AND DOING BUSINESS AS BLACKWELDER'S BARBECUE; LEM LONG, JR., TRADING AND DOING BUSINESS AS SOUTHSIDE DRIVE-IN GRILL; ALONZO MACKINS, TRADING AND DOING BUSINESS AS OAK'S GRILL; JOHN P. TRIANTIS, TRADING AND DOING BUSINESS AS LITTLE WHITE HOUSE DRIVE-IN; L. E. BOYD AND V. L. TOWE, PARTNERS, TRADING AND DOING BUSINESS AS PLAZA GRILL; LYNDY'S GRILL, INC.; CHICKEN BOX, INC., v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; FRANK N. LITTLEJOHN, CHIEF OF POLICE OF THE CITY OF CHARLOTTE; AND HENRY C. SEVERS, CHIEF ENFORCEMENT OFFICER OF THE ABC BOARD OF MECKLENBURG COUNTY.

(Filed 12 October, 1955.)

1. Injunctions § 4g—

While ordinarily the validity of a municipal ordinance creating a criminal offense may not be tested by injunction, injunctive relief may lie when it is manifest that otherwise property rights or the rights of persons would suffer irreparable injury.

2. Municipal Corporations § 5—

A municipal corporation is a creature of the General Assembly and may exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those given.

3. Municipal Corporations § 36—

Municipal ordinances must harmonize with the general laws of the State, and when there is a conflict between a general State statute and a municipal ordinance, the ordinance must yield to the State law.

4. Municipal Corporations § 38: Intoxicating Liquor § 2—

Since the State regulations for the sale of beer make no distinction between on the premises sale of beer by a licensee inside his building and outside his building, a municipal ordinance prohibiting an on the premises licensee from selling beer outside his building, but on his premises, by "car hops," waitresses or other employees, is invalid as being in conflict with the State law.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

DAVIS *v.* CHARLOTTE.

APPEAL by defendant City of Charlotte from *McKeithen, Special Judge*, 11 July, 1955, Special Term, of MECKLENBURG.

Civil action to restrain the enforcement of certain ordinances adopted 15 June, 1955, by the City Council of the City of Charlotte.

A temporary order, issued *ex parte* by Rudisill, J., when this action was commenced, to wit, 24 June, 1955, restrained the defendants from the enforcement of all provisions of certain ordinances adopted 15 June, 1955, until the hearing on return of an order to show cause. At such hearing, before McKeithen, Special Judge, a jury trial was waived; and, after hearing the evidence, the judge made and stated separately his findings of fact, conclusions of law and entered judgment thereon.

The judgment *dissolved* the temporary restraining order: (1) as to Section 29, Article I, Chapter 19, of the City Code of Charlotte, which relates to the sale of beer and wine to, and to the purchase thereof by, minors under 18 years of age; and (2) as to Section 17-A, Article I, Chapter 19, of the City Code of Charlotte, which declares it to be unlawful "for any person, firm or corporation licensed to sell beer and/or wine, to sell or offer for sale, by curb service and/or car hop, any beer and/or wine, in the corporate limits of the City of Charlotte from the hour of 11:30 P.M. on each Saturday until 7:00 A.M. on the following Monday." (It is noted that said Section 17-A was adopted in the exercise of authority conferred by G.S. 18-107, which, in part, provides: "The governing bodies of all municipalities in the State shall have, and they are hereby vested with, the full power and authority to regulate and prohibit the sale of beer and/or wine from eleven-thirty p.m. on each Saturday until seven a.m. on the following Monday.") Hence, these ordinance provisions are not involved in this appeal.

The only ordinance provision as to which the temporary restraining order was continued and made permanent is Section 17-B, Article I, Chapter 19, of the City Code of Charlotte, which reads as follows:

"Section 17. B. SALE OF BEER AND WINE PROHIBITED BY CAR HOP AND/OR CURB SERVICE. At all times other than as provided in Section A hereof no beer or wine shall be sold to and/or delivered to the purchaser or anyone else by car hop and/or curb service."

The findings of fact made by the trial judge, to which no exception was taken, are as follows:

"1. That each of the plaintiffs is engaged in one of the types of business mentioned and described in G.S. 18-72 (1), and that each of the plaintiffs holds a valid license from the City of Charlotte and all other licenses required by law, known as 'on premises' licenses within the purview of G.S. 18-74 (1) to sell at retail beverages as defined in G.S. 18-64 (a).

"2. That each of the plaintiffs has, at considerable expense, prepared on a portion of his or its premises, for which said 'on premises' licenses have been issued, a proper, suitable and convenient parking area upon which members of the public may drive their automobiles and thereupon purchase and receive from the plaintiffs, and their agents, servants and employees, food and beverage, including beer, and which articles are delivered and served to the general public upon the premises of the plaintiffs by their agents, servants, and employees.

"3. That the agents, servants, and employees of the plaintiffs, commonly called 'car hops,' and so designated in the ordinances involved herein, are paid base salaries by the plaintiffs and said 'car hops' also have the privilege of receiving and accepting tips from the customers of the plaintiffs and to retain the money received in tips as their own, in the same way and manner as is customary with the employees of persons engaged in serving food and beverage; and such 'car hops' are not skilled employees.

"4. That the food and beverages sold and served by the plaintiffs are sold and served both on the inside of their buildings and on their parking lot premises on the outside of their buildings, and they dispense food and beverages during portions of the day and night; beer being dispensed only during the hours permitted by law.

"5. That the parking areas are lighted at night, but the lights in these areas are less brilliant than the lights on the inside of the buildings. However, it is generally brighter on the outside during the daytime than on the inside.

"6. That on June 15, 1955, the City Council of the City of Charlotte adopted and passed the ordinances and amendments of ordinances," referred to above, "and the law enforcement officers of the City of Charlotte have threatened and intend to enforce the provisions of said ordinances strictly in accordance with the terms thereof, as to the plaintiffs.

"7. That the Charter of the City of Charlotte provides in Section 31 (13) as follows: 'To pass ordinances for the due observance of Sunday and for maintenance of order in the vicinity of churches and schools.'

"8. That Section 31 (32) of said Charter contains a provision giving said City power to pass ordinances as follows:

" 'To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.'

"9. That after the passage of said ordinances and prior to the issuance of the temporary restraining order herein, said ordinances adversely affected the business and income of the plaintiffs and caused the

gross income of the plaintiffs and their means of livelihood to be substantially reduced, and that the 'car hop' sales of the plaintiffs were reduced by approximately 50% during the period from June 16, 1955, to June 24, 1955, the date of the temporary restraining order in this cause; and that such losses as were suffered by the plaintiffs cannot be recovered in a court of law.

"10. (Analysis of affidavits submitted by five of plaintiffs disclosing losses sustained when ordinances were being enforced.)

"11. That no evidence was introduced by the defendants and nothing was offered by the defendant City to show the necessity or occasion for the passage of Section 17-B of said ordinances, or to show that said Section 17-B was passed to correct a situation which was injuriously affecting the health, safety, morals, good order, or general welfare of the community."

The judgment entered was adverse to the position of the appellant, City of Charlotte, only in one respect, namely, it restrained the enforcement of Section 17-B, Article I, Chapter 19, of the City Code of Charlotte, "as far as said Section 17-B relates to the sale of beer by car hops on the private property of the plaintiffs," other than within the period from the hours of 11:30 p.m. on each Saturday until 7:00 a.m. on the following Monday. The City of Charlotte excepted to and appealed from this provision of the judgment, this being the basis of its only assignment of error.

No counsel for plaintiffs, appellees.

John D. Shaw for defendant City of Charlotte, appellant.

BOBBITT, J. Ordinarily, the validity of a municipal ordinance purporting to create a criminal offense may be challenged and tested only by way of defense to a criminal prosecution based thereon. Equity will not interfere by injunction to restrain the enforcement of such municipal ordinance on the ground of its alleged invalidity *except* when it is manifest that otherwise property rights or the rights of persons would suffer irreparable injury. *Lanier v. Warsaw,* 226 N.C. 637, 39 S.E. 2d 817; *Loose-Wiles Biscuit Co. v. Sanford,* 200 N.C. 467, 157 S.E. 432. The court below, upon the facts found, concluded that injunctive relief was necessary to protect plaintiffs from irreparable injury to their property rights. No exception or assignment of error is addressed to this conclusion of law. Indeed, appellant specifically requests that the validity of the ordinance be considered on this appeal. Under these circumstances, the procedural question requires no further discussion. Compare: *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650.

We come now to consider Section 17-B, Article I, Chapter 19, of the City Code of Charlotte. The court below adjudged this ordinance invalid and restrained its enforcement to the extent stated above. In our opinion, the judgment entered is correct and must be affirmed.

A municipal corporation is a creature of the General Assembly. *Ward v. Elizabeth City,* 121 N.C. 1, 27 S.E. 993. Municipal corporations have no inherent powers but can exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given. *S. v. Ray,* 131 N.C. 814, 42 S.E. 960; *S. v. McGee,* 237 N.C. 633, 75 S.E. 2d 783.

"Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict the ordinance must yield to the State law." *S. v. Freshwater,* 183 N.C. 762, 111 S.E. 161, and cases cited therein. A decision of this Court in 1883 applied this well established principle when there was conflict between a general State statute and a municipal ordinance of the City of Goldsboro, both dealing with the sale of intoxicating liquor on Sunday. *S. v. Langston,* 88 N.C. 692.

It may be conceded that the City of Charlotte, under its charter provisions and under G.S. 160-52 and G.S. 160-200 (6) (7) (10), had implied authority to adopt the ordinance in controversy *in the absence* of legislation enacted by the General Assembly dealing directly with the subject. *Bailey v. Raleigh,* 130 N.C. 209, 41 S.E. 281; *Paul v. Washington,* 134 N.C. 363, 47 S.E. 793. But it is quite plain that the City of Charlotte cannot, by ordinance, make criminal or illegal any conduct that is legalized and sanctioned by the General Assembly. The ordinance, to the extent it conflicts with the general State law, is invalid. *Lee v. Chemical Corp.,* 229 N.C. 447, 50 S.E. 2d 181; *Eldridge v. Mangum,* 216 N.C. 532, 5 S.E. 2d 721; *S. v. Prevo,* 178 N.C. 740, 101 S.E. 370.

The Turlington Act prohibited the sale of beer. Public Laws of 1923, ch. 1; G.S. 18-1 *et seq.* Modifications thereof include the Beverage Control Act of 1939. Public Laws of 1939, ch. 158; G.S. 18-63 *et seq.* The sale of "beer" as defined in G.S. 18-64 (a), by persons who are licensed to do so, is expressly authorized. G.S. 18-65, G.S. 18-75, G.S. 18-77.

State statutes fix the hours when the sale and consumption of beer on the licensee's premises are permitted. G.S. 18-105, G.S. 18-106, G.S. 18-141.

G.S. 18-72 provides: "Character of license.—License issued under authority of sec. 18-64, subsection (a) shall be of two kinds:

"(1) 'On premises' license which shall be issued for *bona fide* restaurants, cafes, cafeterias, hotels, lunch stands, drug stores, filling stations,

grocery stores, cold drink stands, tea rooms, or incorporated or chartered clubs. Such license shall authorize the licensee to sell at retail beverages for consumption on the premises designated in the license, and to sell the beverages in original packages for consumption off the premises.

"(2) 'Off premises' license which shall authorize the licensee to sell at retail beverages for consumption only off the premises designated in the license, and only in the immediate container in which the beverage was received by the licensee.

"In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a 'premises' license under the terms of this article, and outside of municipalities such determination shall be by the board of commissioners of the county."

The licensee must pay both a State license tax and a license tax to the municipality. G.S. 18-79, G.S. 18-74.

The first finding of fact, quoted above, establishes that each of the plaintiffs has a valid "on premises" license. This being true, the plaintiffs are authorized to sell beer on their private premises as long as they do so in compliance with the law governing such sales. Nothing in the applicable State statutes suggests that the law is different depending upon whether sale *or* delivery "on premises" of the licensee is made by "car hops," waitresses, other lawful employees, or by the manager or proprietor in person. And, in the absence of a restrictive statutory definition, the word "premises" when applied to a Drive-In restaurant must be held to include the entire private property area designed for use by patrons while being served. The extent of the legislative authority conferred upon a municipality by G.S. 18-107 is "to regulate and prohibit" the sale of beer from 11:30 p.m. on each Saturday until 7:00 a.m. on the following Monday.

If the present State statutes make difficult the detection and prosecution of conduct prohibited by G.S. 18-78.1, such as sales to persons under 18 years of age, sales to intoxicated persons, etc., the General Assembly alone can determine what change, if any, should be made.

The enforcement of the ordinance provision is restrained only as to sales made on the private property, that is, "the premises," of the plaintiffs. Section 17-B, Article I, Chapter 19, of the City Code of Charlotte was adjudged legal, valid and enforceable, "as far as it affects and regulates the sale of beer at the curb of city streets to any person who, at the time of such purchase, is standing on, or in a car parked on, any portion of the city street."

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

SOUTHERN RAILWAY COMPANY v. AKERS MOTOR LINES, INC., AND W. P. ELLIS.

(Filed 12 October, 1955.)

1. **Railroads § 4—Evidence held to show contributory negligence as a matter of law on part of motorist in crossing accident.**

The evidence tended to show that defendant employee was thoroughly familiar with the railroad grade crossing in question, that he looked in the direction from which plaintiff's train was approaching when 100 feet from the crossing, at which place he could see 100 feet up the track, that he did not look again until he was about 35 feet from the crossing, when he saw the train but was too close to the track to stop his vehicle before reaching the crossing, and that he then pressed the accelerator in an attempt to clear the crossing before the train. There was no evidence that the train was traveling at excessive speed. *Held:* The evidence discloses contributory negligence on the part of defendant employee barring recovery on the employee's and employer's cross-actions against the railway company.

2. **Same—**

The duty of a motorist to look and listen before driving upon a railroad grade crossing requires him to do so at a time when the precaution will be effective.

3. **Same—**

It is error for the court to charge upon a party's contention as to the negligence of a railway company in failing to maintain gates or gongs or other signaling devices at a crossing without referring to the statute (G.S. 136-20) giving the State Highway and Public Works Commission exclusive jurisdiction to decide whether a railway company should maintain gates, gongs, signals or other approved safety devices at a particular crossing.

4. **Evidence § 26: Negligence § 18—**

Evidence of other conditions or events may be used, within limits, to prove a habit or custom under like conditions, or to show the standard of care to which it is claimed a party ought to have conformed, but did not, but in order for such evidence to be competent, there must be a substantial similarity in the other conditions or events.

5. **Railroads § 4—**

Evidence of protective devices maintained by a railroad at crossings within the bounds of a municipality, where noises or diversions exist, traffic is congested, and trains move frequently, is incompetent to show that the railway company was negligent in failing to maintain such protective devices at a crossing in a rural portion of the county on tracks upon which only one train daily passes.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *McKeithen, Special J.*, May Term, 1955, GASTON.

Civil action to recover damages sustained by plaintiff in a train—tractor-trailer railroad crossing collision in which each defendant pleads a cross action.

The grade crossing at which the collision occurred is the intersection of U. S. 158 and the branch of plaintiff railroad extending from Oxford to Henderson. The intersection is north of Henderson and outside its corporate limits and is approximately at right angles. At this particular point the railroad extends in a north-south direction and the highway in an east-west direction. Plaintiff's train was traveling south, and the tractor-trailer was traveling in a westerly direction.

Defendants' evidence tends to show that there is a grove of trees along the eastern side of the railway which stops 84 feet north of the highway. Some 134 feet east of the railway and beginning at a point about 63 feet north of the highway were two outdoor advertising billboards. The highway approaches the crossing at a slight grade, and the crossing is substantially on the crest. To the east of the crossing 445 feet, along U. S. 158 was a North Carolina highway railroad crossing sign, and the standard railroad crossing warning was 17 feet east of the crossing. No automatic signals or warning devices were maintained by the plaintiff at the crossing.

The individual defendant, the employee of the corporate defendant, who was operating the tractor-trailer, passed over this crossing four to six times a week for two years prior to the accident. He stated he had never seen a train at this crossing prior to the one which hit him.

At about 1:30 p.m. on 23 October 1952, the individual defendant, operating a tractor-trailer of the corporate defendant, approached the crossing from the east. He testified that at a point 100 feet away from the crossing he could see about 100 feet up the railroad track. Other witnesses for the defendants testified that at a point 150 feet east of the crossing one could see 150 feet up the track, north of the crossing. Ellis testified that he was not less than 100 feet from the track when he looked to the right and left and did not see the plaintiff's train. He testified that while he would not say that the bell did not ring or the whistle did not blow, he did not hear either. As he did not hear any bell or whistle, when he reached the foot of the rise he picked up speed and arrived at the crossing at about 20 m.p.h. When he was about 30 or 35 feet from the crossing he saw the train approaching from the north. It would have taken about 150 feet to stop his vehicle traveling

at 20 m.p.h. So, "I just kept mashing the gas and thought maybe I could beat him across."

The plaintiff offered substantial evidence tending to show that the engineer of plaintiff rang the bell and blew the whistle as he approached the crossing, and that one traveling west on the highway could see to the north in ample time to stop his vehicle before reaching the zone of danger. There is no evidence that the train was traveling at a high rate of speed. Indeed, some of the witnesses fixed its speed at about five miles per hour.

Issues were submitted to and answered by the jury in favor of the defendants and against the plaintiff. From judgment on the verdict, plaintiff appealed.

W. T. Joyner, James Mullen, and Mason & Mason for plaintiff appellant.

Jones & Small, L. B. Hollowell, and Basil Whitener for defendant appellees.

BARNHILL, C. J. The history of the occurrence which is the subject matter of this action is graphically stated by Ellis himself as follows:

"I was doing 35 to 40 miles per hour as I approached the bottom of the incline leading to the crossing, but I started slowing down as I approached the crossing . . . As I completed the rise and approached closer to the crossing, I started to slow up. I looked to the left toward Henderson and did not see any train or hear any whistle. I then looked to the right and did not see any train or hear any whistle.

"When I finished looking and listening I was less than 100 feet from the track. I proceeded forward, put my foot on the accelerator to go ahead and cross the tracks, and I looked and saw this train coming out from behind the trees and billboard and hit my tractor . . . I did not see any train until I was less than 100 feet from the crossing. At that time I was doing about 20 miles per hour. When I saw the train, I had my foot on the gas, and I looked and saw this train right on me. I did not have time to stop, so I just kept mashing the gas and thought maybe I would beat him across. I could not have stopped my tractor-trailer after the train came out from behind the trees. . . ."

"I had crossed this crossing four to six times a week and saw the tracks every time. At a point 100 feet away from the crossing you can see about 100 feet up the railroad. . . . I was not less than 100 feet from the track when I looked to the left and then to the right and didn't see any train . . . At that time I was maybe 150 to 200 feet away. Seeing nothing, I stepped on the accelerator and picked up a little bit of speed. I arrived at the crossing at about 20 miles per hour . . .

When I first saw the train, I couldn't stop the tractor. I would say I was 25 or 30 feet from the track. It takes about 150 feet to stop the tractor and trailer at 20 miles an hour with good condition . . . The first time I saw the train was right there just before it hit my tractor."

Thus it appears from the evidence offered by the defendants that Ellis was thoroughly familiar with the crossing at which the accident occurred. He had used the crossing four to six times per week over a period of two years. He knew that if he looked to the north within approximately 100 feet of the track he could see a train approaching 100 feet up the track. Yet he looked first at a time when he says he could not see and then looked no more until he was within 30 or 35 feet of the track. He knew he was approaching a zone of danger. Yet he failed to look until it was too late for him to stop before reaching the crossing. Likewise, when he looked the second time and saw the train approaching, he had failed to bring his vehicle under such control that he could stop it before reaching the zone of danger. Instead, he stepped on the accelerator and attempted to "beat him across."

Thus it clearly appears that his conduct constitutes contributory negligence as a matter of law, and decision on the motion of plaintiff for judgment of nonsuit on the cross actions of the defendants is controlled by *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370, and the cases there cited.

It does not suffice to say that Ellis looked and listened. "His looking and listening must be timely, *McCrimmon v. Powell, supra* (221 N.C. 216, 19 S.E. 2d 880), so that his precaution will be effective. *Godwin v. R. R., supra* (220 N.C. 281, 17 S.E. 2d 137). It was his duty to 'look attentively, up and down the track,' in time to save himself, if opportunity to do so was available to him. (Citing authorities.) Here the conditions were such that by diligent use of his senses he could have avoided the collision. His failure to do so bars his right to recover. *Godwin v. R. R., supra.*" *Parker v. R. R., supra.*

His negligence likewise bars the right of the corporate defendant to recover damages to its tractor-trailer.

It follows that there was error in the ruling of the court denying plaintiff's motion to dismiss the cross actions as in case of involuntary nonsuit.

The defendants relied upon the failure of plaintiff to maintain gates or gongs or other like signaling devices at the crossing as evidence of its negligence. The court instructed the jury as to defendants' contentions in respect thereto and undertook to state the applicable law. This must be held for reversible error committed on the first issue as to the negligence of the defendants for the reason the court overlooked and failed to make reference to the provisions of G.S. 136-20. By the enact-

ment of this section of the Code the Legislature has taken from the railroads authority to erect gates or gongs or other like signaling devices at railroad crossings at will and has vested exclusive discretionary authority in the State Highway and Public Works Commission to determine when and under what conditions such signaling devices are to be erected and maintained by railroad companies. This section works such a radical change in the law in this respect that we are constrained to quote the material portion of the statute in full. It is as follows:

"(a) Whenever any road or street forming a link in or a part of the State highway system, whether under construction or heretofore or hereafter constructed, shall cross or intersect any railroad at the same level or grade, or by an underpass or overpass, and in the opinion of the chairman of the State Highway and Public Works Commission such crossing is dangerous to the traveling public, or unreasonably interferes with or impedes traffic on said State highway, the Commission shall issue notice requiring the person or company operating such railroad to appear before the Commission . . . and show cause, if any it has, why such railroad company shall not be required to alter such crossing in such way as to remove such dangerous condition and to make such changes and improvements thereat as will safeguard and secure the safety and convenience of the traveling public thereafter . . .

"(b) Upon the day named, the Commission shall hear said matter and shall determine whether such crossing is dangerous to public safety, or unreasonably interferes with traffic thereon. If it shall determine that said crossing is, or upon the completion of such highway will be, dangerous to public safety and its elimination or safeguarding is necessary for the proper protection of the traffic on said State highway, the Commission shall thereupon order the construction of an adequate underpass or overpass at said crossing or it may in its discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of said Commission upon the hearing as aforesaid the public safety and convenience will be secured thereby. . . .

"(f) *The jurisdiction over and control of said grade crossings and safety devices upon the State highway system herein given the Commission shall be exclusive.*" (Italics supplied.)

The court likewise erred in permitting the defendants to introduce evidence with reference to the location of other crossings in and around Henderson and the protective devices maintained thereat.

Where evidence of conditions is offered to prove a habit or custom under such conditions, the circumstances of the conditions must not be so dissimilar that the evidence is without probative value. Stansbury, N. C. Evidence, 168, sec. 89. II Wigmore on Evidence, 316, sec. 379,

states the principle as follows: ". . . it is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons *under similar circumstances.*" (Italics supplied.)

It is true that other conditions or events can be used, within limits, to show a standard of care under which it is claimed a party ought to have conformed but did not. But there must be more substantial similarity than exists in this case.

The intersections about which evidence was offered were within the bounds of the City of Henderson where noises and diversions exist, traffic is congested, and trains move frequently. Here the intersection is in the rural portion of the county, and only one train passes the crossing daily.

On plaintiff's cause of action there must be a new trial. The judgment entered on the cross actions of the defendants must be reversed.

On plaintiff's cause of action

New trial.

On defendants' causes of action

Reversed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

NASH JOHNSON AND WIFE, MARY SUE JOHNSON; EMMA C. JOHNSON; OPHELIA J. CARLTON; CARSON JOHNSON; FLETCHER JOHNSON; CORA JANE JOHNSON BOSTIC AND HUSBAND, RAEFORD BOSTIC; DOROTHY JOHNSON LANE AND HUSBAND, LESTER LANE; MAUDE JOHNSON HODGES AND HUSBAND, GEORGE HODGES; MAYE JOHNSON SORRELL AND HUSBAND, J. L. SORRELL; ARCHIE A. McMILLAN INDIVIDUALLY, AND ARCHIE A. McMILLAN, GUARDIAN FOR MARY IRENE McMILLAN, INCOMPETENT; MARY LOU WALLACE BONEY AND HUSBAND, JOHNNIE BONEY; LUCY WALLACE COOKENMASTER AND HUSBAND, CLYDE COOKENMASTER, v. VIRGINIA J. SCARBOROUGH; FLETCHER WALLACE AND WIFE, RENA WALLACE, AND BESSIE WALLACE BALKCUM.

(Filed 12 October, 1955.)

1. Pleadings §§ 10, 15—

Where the pleader demands affirmative relief upon allegations contained in his further answer, the further answer constitutes in reality cross-actions, and a demurrer is the proper procedure to test whether the further answer is bad for misjoinder of parties and causes.

2. Pleadings § 19b—Demurrer for misjoinder of parties and causes held properly sustained.

In this special proceeding for partition, respondents filed an answer setting up a cause of action against one of petitioners to cancel for fraud certain instruments and deeds executed to him and another, a second against the same petitioner for an accounting in respect to rents and profits received by him and another, since deceased, in the operation of a number of farms of another estate, a third cause of action against the same petitioner to cancel for fraud certain other deeds executed to that petitioner and another, a fourth cause against the parties to a special proceeding to partition the lands of a third estate, and to have the special proceeding in that partition proceeding declared void in so far as it affected respondents' interest, a fifth for an accounting against the administratrix and the same petitioner as administrator of the such other estate for rents and profits belonging to the estate, a sixth against the partner of one of the deceased ancestors for an accounting, and a seventh against the purchaser of such partner's interest for an accounting, and requesting the joinder of additional parties. *Held:* The cross-actions do not affect all of the parties, and the facts alleged do not constitute a connected series of transactions connected with the same subject of action, and therefore demurrer to the cross-actions for misjoinder of parties and causes of action was properly sustained.

3. Pleadings § 20½—

A misjoinder of parties and causes of actions in defendants' cross-actions is fatal, and the demurrer to such cross-actions requires dismissal.

WINBORNE, JOHNSON, and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by the respondents Fletcher Wallace and wife, Rena Wallace, from *Joseph W. Parker, J.*, March Term 1955 of DUPLIN.

Special proceeding to partition real property of Norman V. Johnson, deceased, heard on a demurrer to the further answer seeking affirmative relief.

The petition alleges that petitioners and respondents are the heirs at law of Norman V. Johnson, deceased, and are entitled to have his lands sold, and the proceeds of the sale divided between them, since an actual partition cannot be made without injury to the parties interested. The petition alleges that Norman V. Johnson was sole owner of Tract One; that Tract Two consists of an interest in the real property of E. M. Johnson devised to Norman V. Johnson by the last will and testament of E. M. Johnson, deceased; and that Tract Three comprises a 1/11 undivided interest in the real property of B. D. Johnson, which Norman V. Johnson inherited as one of his heirs at law. It would seem from the petition, though it is not clear, that the interest of the heirs at law of Norman V. Johnson in the real property of E. M. Johnson is a 1/12 undivided interest.

The petition does not allege whether Norman V. Johnson died testate or intestate: the answer alleges he died intestate.

The respondents Fletcher Wallace and wife, Rena Wallace,—there is no answer by the other respondents in the record—filed answer denying the material allegations of the complaint, and praying that there be an actual partition of the real property described in the petition to the heirs at law, as their interests appear in the answer.

The respondents in their answer allege a further defense and a request for affirmative relief, which takes up over 24 pages in the record, and alleges in effect seven cross-actions, though they are not stated separately.

First cause of action. A cause of action to set aside as null and void all agreements, deeds and other documents, however designated, executed and delivered by respondents Fletcher Wallace and wife, and Bessie Wallace Balkcum, and petitioners Lucy Wallace Cookenmaster and husband, to Nash Johnson and B. D. Johnson, now deceased, and conveying, or purporting to convey, to Nash Johnson and B. D. Johnson their interest in the real and personal property of E. M. Johnson, deceased, as devisees and legatees under his last will and testament, on the ground that such agreements, deeds and other documents were procured by the fraud of Nash Johnson and B. D. Johnson.

Second cause of action. A cause of action for an accounting against Nash Johnson on the ground that he and B. D. Johnson, now deceased, operated jointly a number of farms which E. M. Johnson, now deceased, died seized and possessed of, after E. M. Johnson's death, and up to B. D. Johnson's death, and that Nash Johnson received the rents and profits from these farms, and fraudulently converted them to his own use to the injury and damage of these respondents as devisees of E. M. Johnson and as heirs at law of the interest of Norman V. Johnson, deceased, in the estate of E. M. Johnson; and on the further ground that Nash Johnson and B. D. Johnson, prior to his death, following the death of E. M. Johnson, sold timber in at least the amount of $25,000.00 from the lands of E. M. Johnson, deceased, devised to respondent Fletcher Wallace and his "co-devisees" under the last will of E. M. Johnson, with intent to cheat and defraud the answering respondents and to their damage.

Third cause of action. A cause of action to set aside as null and void three deeds executed and delivered by these answering respondents and others, conveying in the first two deeds a part of their interest as heirs at law in the estate of B. D. Johnson, deceased, to Nash Johnson, and conveying in the third deed a part of their interest in the same estate to other persons, whose names are not alleged, on the grounds that the execution of these deeds were procured by the fraud of Nash

Johnson. The answer does not describe the property conveyed in these deeds, nor does it name the grantees in the third deed, though it refers to Nash Johnson as a co-grantor in the third deed.

Fourth cause of action. A cause of action to have declared null and void so far as it adversely affects the interests of the answering respondents a special proceeding partitioning the lands of E. M. Johnson, deceased, instituted in Duplin County in 1948, which partition has been confirmed by the court.

Fifth cause of action. A cause of action for an accounting against Ophelia J. Carlton, administratrix, and Nash Johnson, administrator, of the estate of B. D. Johnson, deceased, for rents and profits collected by them belonging to the estate, and for the sale of at least $200,000.00 of timber belonging to the estate, and that they as administratrix and administrator be made parties to this action.

Sixth cause of action. A cause of action for an accounting against J. R. Croom, and that he be made a party to this proceeding, on the ground that he and E. M. Johnson, deceased, were partners in certain real estate and that he, after E. M. Johnson's death, collected rents and profits therefrom: the answering respondents being interested as devisees of E. M. Johnson.

Seventh cause of action. A cause of action for an accounting against J. T. Taylor, Jr., and that he be made a party to this proceeding, on the ground that he purchased the interest of J. R. Croom in the partnership property owned by Croom and E. M. Johnson, subsequent to Johnson's death, and should account for the rents and profits accruing therefrom after he took possession.

The further answer and defense alleges that Nash Johnson as administrator of the estate of Norman V. Johnson, deceased, is a necessary party and should be made such, because the heirs at law of Norman V. Johnson inherit his property, subject to his debts and the costs of the administration of the estate.

The further answer and request for affirmative relief fails to give the names of the makers and grantors in the instruments and deeds the answering respondents seek to have declared void by reason of fraud, nor are the interests of the answering respondents in these instruments and deeds described with any definiteness.

The petitioners demurred to the further answer and request for affirmative relief upon the grounds of a misjoinder of parties and causes, which grounds are specified in the written demurrer filed.

The court sustained the demurrer, and the answering respondents excepted and appealed, assigning error.

Hubert E. Phillips and Butler & Butler for Petitioners, Appellees.

Jones, Reed & Griffin for Fletcher Wallace and wife, Rena Wallace, Respondents, Appellants.

PARKER, J. We are concerned here with a question of proper pleading. The allegations in the further defense for affirmative relief are in reality cross-actions, and a demurrer is the proper procedure to test the question as to whether or not there is a misjoinder of parties and causes. *Bank v. Angelo,* 193 N.C. 576, 137 S.E. 705; *Beam v. Wright,* 222 N.C. 174, 22 S.E. 2d 270.

The respondents have incorporated, what are in reality seven cross-actions, in one further answer. The first is against Nash Johnson to have declared void by reason of his fraud certain instruments and deeds conveying to him and B. D. Johnson respondents' interest in the E. M. Johnson estate. The second is against Nash Johnson for an accounting in respect to rents and profits received by him in the operating of a number of farms of the E. M. Johnson estate by him and B. D. Johnson, and in respect to the sale of timber of the E. M. Johnson estate, which rents and profits, and proceeds from the sale of the timber, he fraudulently converted to his own use. The third is against Nash Johnson and unnamed grantees to have declared void by reason of fraud three deeds; two deeds conveying to Nash Johnson and one deed conveying to these unnamed persons a part, or all, of respondents' interest in the B. D. Johnson estate. The fourth is against the parties to a special proceeding to partition the lands of E. M. Johnson, deceased, instituted in Duplin County in 1948, which partition has been confirmed by the court, to have the special proceeding declared void so far as it adversely affects respondents' interests. The fifth is for an accounting against Ophelia J. Carlton, administratrix of the estate of B. D. Johnson, deceased, and against Nash Johnson, administrator of the same estate, for rents and profits received belonging to the estate, and for the sale of at least $200,000.00 of timber belonging to the estate. The sixth is against J. R. Croom for an accounting as a partner of E. M. Johnson in certain real property. The seventh is against J. T. Taylor, Jr., for an accounting on the ground that he purchased Croom's interest in the lands owned by Croom and E. M. Johnson, and collected rents and profits from the real property.

In the third cause of action the grantees in the third deed are not named in respondents' answer, but they alleged that the deed bears the date of 11 April 1951, and is recorded in Book 475, page 316, in the Office of the Register of Deeds for Duplin County. In the demurrer it appears that the grantees in this deed are Rebecca Wilson for life, with remainder in fee to V. D. Wilson. The answer alleges Nash Johnson was a "co-grantor" in this deed.

It is obvious that the seven cross-actions do not affect all the parties to the cross-actions. The facts alleged in these cross-actions do not constitute a connected series of transactions connected with the same subject of action so as to invoke the rule laid down in *Trust Co. v. Peirce,* 195 N.C. 717, 143 S.E. 524; *Barkley v. Realty Co.,* 211 N.C. 540, 191 S.E. 3; *Leach v. Page,* 211 N.C. 622, 191 S.E. 349; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382; *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832. The seven cross-actions in the further answer are bad as against a demurrer. *Bank v. Angelo, supra; Atkins v. Steed,* 208 N.C. 245, 179 S.E. 889; *Holland v. Whittington,* 215 N.C. 330, 1 S.E. 2d 813; *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706; *Utilities Com. v. Johnson,* 233 N.C. 588, 64 S.E. 2d 829. Such a misjoinder is fatal, and causes a dismissal of respondents' cross-actions. *Atkins v. Steed, supra; Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *Utilities Com. v. Johnson, supra.*

In the drafting of pleadings it would be well for counsel to consider what this Court said in *R. R. v. Hardware Co.,* 135 N.C. 73, 47 S.E. 234: "There must be at least substantial identity between the causes of action before they can be united in one suit, because, if there is not, the several causes of action may, for their decision, depend upon very different facts and principles of law, which would tend to confusion and uncertainty in the trial of the case and result in great prejudice to some, if not all, of the parties."

The first question debated in respondents' brief is not presented for decision by their assignments of error.

The ruling of the court below in sustaining the demurrer is

Affirmed.

WINBORNE, JOHNSON, and HIGGINS, JJ., took no part in the consideration or decision of this case.

ARCADY FARMS MILLING COMPANY, A CORPORATION, v. J. FRANK WALLACE AND JAMES E. WALLACE, INDIVIDUALLY AND TRADING AND DOING BUSINESS AS WALLACE POULTRY HOUSE, AND BESSIE WALLACE AND HELEN WALLACE.

(Filed 12 October, 1955.)

1. Guaranty § 2—

A guaranty of payment is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the obligation of the guarantor, as distinguished from that of a surety, is separate and independent of the obligation of the principal debtor, giving the creditor a cause of

action against the guarantor immediately upon failure of the principal debtor to pay the account at maturity.

2. Guaranty § 4—

The male defendants were sued on their trade acceptances. Their respective wives were sued on a continuing, absolute guaranty of payment executed by the wives. *Held:* While the guarantors are not in any sense parties to the trade acceptances, the cause of action on the guaranty arose out of the same transactions or transactions connected with the same subject of action, rests upon the same proof, and all defendants may be joined in one action for a complete determination of the questions involved. G.S. 1-123, G.S. 1-69.

3. Pleadings § 2—

G.S. 1-123 will be liberally construed to effectuate its purpose for the judicial determination of actions with reasonable promptness and a minimum of cost to the litigants.

4. Husband and Wife § 12b—

The wife's guaranty of payment of the husband's trade acceptances is not a contract between husband and wife within the purview of G.S. 52-12, and the rule that a wife may execute a primary obligation as surety for her husband's debt without complying with the provisions of G.S. 52-12, applies with equal force to the execution by her of a collateral obligation as guarantor of his debt.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants Bessie Wallace and Helen Wallace from *Nettles, J.*, August Civil Term 1955 of BUNCOMBE.

Civil action to recover jointly and severally from all the defendants $8,515.52 with interest, by reason of four trade acceptances made, accepted and delivered to plaintiff for the purchase of goods by the defendants J. Frank Wallace and James E. Wallace, and jointly and severally guaranteed by their respective wives, the defendants Bessie Wallace and Helen Wallace, heard on demurrer filed by the *feme* defendants on the grounds of a defect of parties, a misjoinder of parties and causes of action, and that the contract of guaranty of married women with a third party for the benefit of their husbands was void for failing to comply with G.S. 52-12.

The complaint's basic allegations are these: J. Frank Wallace and James E. Wallace, residents of Buncombe County, were partners trading and doing business as Wallace Poultry House in Asheville. In 1952 the defendants J. Frank Wallace and James E. Wallace for goods purchased from the plaintiff made, accepted and delivered to plaintiff four trade acceptances, payable at the First National Bank & Trust Company in Asheville, in the total amount of $8,515.52. On 3 June 1952,

according to the complaint—on 3 June 1950, according to the guaranty of payment attached to the complaint, and made a part thereof—the defendants Bessie Wallace and Helen Wallace executed under their hands and seals, and delivered to plaintiff a letter stating:

"In consideration of your supplying merchandise upon credit to James E. Wallace and Frank Wallace co-partners doing business as Wallace Poultry Company, Asheville, North Carolina, in such amounts as you in your sole discretion may from time to time determine, we the undersigned Bessie Wallace, wife of the said James E. Wallace, and Helen Wallace, wife of the said Frank Wallace, jointly and severally guarantee to you, your successors and assigns, the due and punctual payment when due of such sum or sums of money as at any time and from time to time shall be owed you by said co-partners for merchandise so supplied by you."

Demand was made by plaintiff for payment of the four trade acceptances, which was refused. A receiver was appointed for the Wallace Poultry House on 7 April 1953, and the records in the receivership indicate that it is insolvent, and no disbursement of any kind will be made to unsecured creditors. The plaintiff prays that it have and recover jointly and severally from the defendants the sum of $8,515.52 with interest.

This action was instituted in the General County Court of Buncombe County. There the demurrer of the *feme* defendants was overruled, and they appealed to the Superior Court. In the Superior Court the order overruling the demurrer in the General County Court was affirmed.

The *feme* defendants appealed, assigning error.

Lee & Lee for Plaintiff, Appellee.

McLean, Gudger, Elmore & Martin for Bessie Wallace and Helen Wallace, Defendants, Appellants.

PARKER, J. At the beginning it is to be noted that the male defendants are sued upon their trade acceptances, and that the *feme* defendants are sued upon their guaranty contract, specially set forth and pleaded.

The obligation of a surety is primary, and the surety becomes bound as an original debtor is bound. He is directly and equally bound with his principal. *Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334, 84 A.L.R. 725; *Bond Co. v. Krider*, 218 N.C. 361, 11 S.E. 2d 291; *Dry v. Reynolds*, 205 N.C. 571, 172 S.E. 351; *Rouse v. Wooten*, 140 N.C. 557, 53 S.E. 430.

A guaranty of payment is an absolute promise to pay the debt at maturity, if not paid by the principal debtor. The obligation of the guarantor is collateral. *Trust Co. v. Clifton, supra; Chemical Co. v. Griffin,* 202 N.C. 812, 164 S.E. 577; *Cowan v. Roberts,* 134 N.C. 415, 46 S.E. 979.

The *feme* defendants, as guarantors of the trade acceptances, cannot be sued *as original promisors* on the trade acceptances with the male defendants. *Trust Co. v. Clifton, supra;* 38 C.J.S., Guaranty, Sec. 84. Their contract of guaranty is their own separate contract jointly and severally to pay the debts of the male defendants when due, if not paid by the male defendants, to plaintiff: they are not in any sense parties to the trade acceptances. *Coleman v. Fuller,* 105 N.C. 328, 11 S.E. 175.

The guaranty in this case is a continuing guaranty, *Novelty Co. v. Andrews,* 188 N.C. 59, 123 S.E. 314; 24 Am. Jur., Guaranty, Sec. 18, but it is also an absolute guaranty of "the due and punctual payment when due of such sum or sums of money as at any time and from time to time shall be owed you (plaintiff) by said co-partners for merchandise so supplied by you." The right to sue upon this absolute guaranty of payment arises immediately upon the failure of the principal debtors, the male defendants, to pay their trade acceptances at maturity. *Trust Co. v. Clifton, supra; Chemical Co. v. Griffin, supra; Jones v. Ashford,* 79 N.C. 172.

In 38 C.J.S., Guaranty, p. 1265, it is said: ". . . in some jurisdictions, where a contract of guaranty is considered separate and distinct from, or secondary to, the principal contract, a joint action cannot be maintained against the principal obligor and the guarantor," and in support of the text in note 35 it cites the case of *Trust Co. v. Clifton, supra.* The pertinent part of the opinion in that case is: "A surety may be sued as a promisor with the principal debtor; a guarantor may not; his contract must be especially set forth or pleaded." The statement of law in the *Clifton case* is that a guarantor cannot be sued *as an original promisor on the principal contract with the principal debtor:* it does not state that a joint action cannot be maintained against the principal debtor, as the original promisor on the principal contract, and against the guarantor upon his special contract of guaranty specially declared on. The *Clifton case* does not support the text quoted above from C.J.S.

In 24 Am. Jur., Guaranty, pp. 880-881, it is said: "The surety may be joined with his principal in an action to enforce the obligation by which both are equally bound; a guarantor, being bound by a contract which is independent of the obligation of the principal debtor, may not be joined as a party to an action against the latter unless his joinder has been authorized by statutory enactment." In support of the state-

ment in the text that a guarantor may not be joined as a party to an action against the principal debtor the case of *Trust Co. v. Clifton, supra,* is cited in note 18, which case does not support that part of the text as we have set forth above.

It seems that the authorities are not in accord as to whether a joint action can be maintained against the principal debtor and the guarantor. The statutes of the particular jurisdiction are frequently decisive. 38 C.J.S., Guaranty, Sec. 92 (b).

G.S. 1-123 reads in part: "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—1. The same transaction, or transaction connected with the same subject of action."

G.S. 1-123 will be liberally construed to effectuate its purpose for the judicial determination of actions with reasonable promptness and a minimum of cost to the litigants. *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382.

G.S. 1-69 reads in part: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved."

The guaranty of the *feme* defendants being absolute, the causes of action against the male defendants and the *feme* defendants arise out of the same transactions, or transactions connected with the same subject of action, rest upon the same proof against all defendants, and may be joined for a complete determination of the questions involved. The complaint does not set forth two independent causes of action. *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832; *Leach v. Page,* 211 N.C. 622, 191 S.E. 349; *Daniels v. Fowler,* 120 N.C. 14, 26 S.E. 635.

The lower court correctly ruled that there was no misjoinder of parties and causes of action.

The *feme* defendants contend that their contract of guaranty is void, because of a failure to comply with the provisions of G.S. 52-12, which applies to contracts between husband and wife during their coverture affecting the *corpus* or income of her estate.

We held in *Royal v. Southerland,* 168 N.C. 405, 84 S.E. 708, that a wife, by becoming surety on the obligations of her husband, creates a direct and separate liability to the creditor of the husband, which makes her personally responsible without requiring the statutory formalities necessary to the validity of certain contracts made directly between the husband and wife. The rationale of the opinion being that such a contract is not primarily a contract between husband and wife, but so far as G.S. 52-12 is concerned, is to be properly considered as one between the husband and wife on the one part and the creditor on the other.

In *Thrash v. Ould,* 172 N.C. 728, 90 S.E. 915, the plaintiff and his wife were controlling owners of a private corporation to whom defendant sold goods, with plaintiff and his wife as guarantors of payment under their letter of credit, given and accepted in good faith. The letter of credit was not executed by the wife in compliance with G.S. 52-12. This Court, citing *Royal v. Southerland, supra,* held that the wife was responsible on her contract of guaranty.

The obligation of a surety is primary: the obligation of a guarantor is collateral. The reasoning in *Royal v. Southerland, supra,* that a wife can bind herself as surety with her husband on his contract without complying with the requirements of G.S. 52-12, applies with equal force to a wife binding herself as a guarantor of her husband's contract. G.S. 52-12 has no application to the *feme* defendants' guaranty of payment of their husbands' trade acceptances.

One of the grounds of the demurrer was a defect of parties. Defendants' counsel in their brief ignore this ground of demurrer. It would seem they have abandoned this contention. No defect of parties is made to appear.

The judgment below overruling the demurrer is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

J. L. RAYFIELD v. VERGIE GORDON RAYFIELD.

(Filed 12 October, 1955.)

1. Divorce and Alimony § 16½—

While a consent judgment for alimony entered with the sanction of the court is a contract between the parties and cannot be amended without their consent, a decree of alimony granted in conjunction with a divorce *a mensa et thoro,* is subject to modification by the court from time to time as changed circumstances of the parties may reasonably require, and an order of the court increasing the subsistence upon the court's finding of changed conditions, supported by evidence, is within the sound discretion of the court. G.S. 50-14.

2. Divorce and Alimony § 15—

While permanent alimony may not be awarded in this State upon a decree of divorce *a vinculo,* by express provision of G.S. 50-11, a decree of absolute divorce on the ground of two years separation does not impair or destroy the wife's right to receive alimony under a judgment or decree rendered before the commencement of the proceeding for absolute divorce.

The 1955 amendment to G.S. 50-11, enlarging this proviso, *held* not applicable by reason of its express language.

3. Divorce and Alimony § 13—

In rendering a decree of divorce *a mensa et thoro*, the court has power to decree that the husband should pay permanent alimony for the subsistence of the wife and their infant children. G.S. 50-14.

4. Same—

The amount of alimony and counsel fees decreed upon a divorce *a mensa et thoro*, is a matter of judicial discretion.

5. Divorce and Alimony § 16½—

A motion in the cause is a proper procedure to obtain an increase for changed conditions in the amount of subsistence allowed a wife upon a decree of divorce *a mensa et thoro*.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Clarkson, J.*, August "B" Civil Term 1955 of MECKLENBURG.

Motion in the cause to punish the plaintiff for contempt of court in wilfully failing to pay alimony for the support of his wife and children, as required by a judgment entered at the November Term 1941 of the Superior Court of Mecklenburg County, and to increase the amount of alimony, due to changed conditions.

In 1941 plaintiff instituted in Mecklenburg County an action for divorce *a vinculo* upon the alleged ground of a two-year separation. The defendant filed answer denying a two-year separation, and setting up a cross-action for divorce *a mensa et thoro*, for alimony and counsel fees.

At the November Term 1941 of the Superior Court of Mecklenburg County this action was heard upon the defendant's cross-action. The plaintiff failed to appear, and his action was nonsuited and dismissed. The verdict of the jury was that the parties were married, as alleged, that the plaintiff wilfully and maliciously, and without just cause, abandoned the defendant, and failed to provide adequate support for his wife and children begotten by him on her, and that both parties had been residents of North Carolina for two years prior to the commencement of the action. Judgment was entered on the verdict granting the defendant a divorce *a mensa et thoro*, and ordering the plaintiff to pay $15.00 per week for the support of defendant and the seven minor children born of the marriage, whose custody was awarded to her, and to pay counsel fees to her lawyer.

Subsequent to 1941 the defendant instituted, and procured a divorce *a vinculo* from plaintiff on the ground of a two-year separation.

The plaintiff filed an answer to the motion in the cause, which was served upon him, and the motion came on to be heard before Judge Clarkson. In the order entered Judge Clarkson found these facts: The plaintiff is not now in arrears in the payment of alimony, and is not in contempt of court. That of the seven children born of the marriage only two reside presently with defendant: that of these two, the eldest, who is 18 years of age, has had a job and will soon have another, which will be sufficient to support him, and the court does not at present undertake to compel plaintiff to support him. The youngest of the two children residing with defendant is 15 years old. In 1954 plaintiff had a gross income of $25,749.10, a net income of about $2,996.94, took an exemption in 1954 in his Federal Income Tax Return of $2,400.00, owns real property, a 1955 Oldsmobile automobile, a 1955 Ford automobile, a truck and other equipment, which he uses in his business. Plaintiff is a painting contractor, and is an able-bodied man. In view of the change in conditions since 1941, plaintiff is able to earn and to pay more alimony than $15.00 a week, and is earning and able to pay $25.00 a week for the support of defendant and their youngest child, which the court finds is reasonable and commensurate with plaintiff's ability to earn and pay. That defendant's counsel has rendered valuable services in representing her in the two hearings on this motion, and that $100.00 is a reasonable allowance for his services. Whereupon the court ordered that the plaintiff pay alimony for the support of defendant and their youngest child living with her $25.00 a week, and pay her counsel a fee of $100.00.

During the hearing before Judge Clarkson the parties admitted that the defendant had not remarried, and that all the children born of the marriage, except the 15-year old child living with defendant, had become self-supporting.

Plaintiff excepted to Judge Clarkson's order, and appealed, assigning error.

Wm. H. Booe for Defendant, Appellee.

Hugh M. McAulay for Plaintiff, Appellant.

PARKER, J. The appellant has no exceptions to the findings of fact of the court.

This single question of law is presented for decision: Can an award of subsistence for defendant and the children born of the marriage, decreed by the court under G.S. 50-14 in conjunction with a divorce *a mensa et thoro,* before the commencement of a proceeding by the wife for a divorce *a vinculo* under the provisions of G.S. 50-6, which she obtained, be increased in amount by the court in its discretion, on her

motion in the action when and where subsistence was awarded, when changed circumstances of the parties reasonably require it?

In the case of alimony granted in conjunction with a divorce *a mensa et thoro* it is practically the undisputed rule that such alimony provisions are subject to such modification by the court from time to time as changed circumstances of the parties may reasonably require. *Rogers v. Vines,* 28 N.C. (6 Ired. L.) 293; *Taylor v. Taylor,* 93 N.C. 418, 53 Am. Rep. 460; *Crews v. Crews,* 175 N.C. 168, 95 S.E. 149; *Barber v. Barber,* 217 N.C. 422, 427, 8 S.E. 2d 204; *Gloth v. Gloth,* 154 Va. 511, 153 S.E. 879, 71 A.L.R. 700 (an excellent opinion, citing many cases); Annos.: 71 A.L.R. 724, 127 A.L.R. 742; 17 Am. Jur., Divorce and Separation, Sec. 644.

When a consent judgment for alimony is entered with the sanction of the court, it is a contract binding between the parties, and cannot be amended without their consent. *Lentz v. Lentz,* 193 N.C. 742, 138 S.E. 12; *Morris v. Patterson,* 180 N.C. 484, 105 S.E. 25; 17 Am. Jur., Divorce and Separation, Sec. 649.

Whether an award of alimony rendered in connection with a divorce *a vinculo* can be modified is not before us for consideration for two reasons: one, in this jurisdiction permanent alimony is not awarded in a divorce *a vinculo, Feldman v. Feldman,* 236 N.C. 731, 73 S.E. 2d 865; *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; *Hobbs v. Hobbs,* 218 N.C. 468, 11 S.E. 2d 311; *Duffy v. Duffy,* 120 N.C. 346, 27 S.E. 28, and two, no such facts are before us. As to that question see: Annos.: 71 A.L.R. 726, 127 A.L.R. 742; 17 Am. Jur., Divorce and Separation, Sec. 645.

The General Assembly of North Carolina enacted a statute, set forth in G.S. 50-11, which was in full force and effect in 1941, and reads in part: "Provided further, that a decree of absolute divorce upon the ground of separation for two successive years as provided in G.S. 50-5 or G.S. 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce."

In 1953 the General Assembly, 1953 Session Laws, Chapter 1313, enlarged the proviso set forth above by providing that "a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce."

The amendment to G.S. 50-11 by the General Assembly in 1955 Session Laws, Chapter 872, by its express language, is not applicable to defendant's judgment for subsistence rendered in 1941.

The court had the power when it rendered the judgment granting defendant a divorce *a mensa et thoro* to decree in the judgment that the plaintiff should pay permanent alimony for the subsistence of defendant and their infant children. G.S. 50-14; *Silver v. Silver,* 220 N.C. 191, 16 S.E. 2d 834; *Jenkins v. Jenkins,* 225 N.C. 681, 36 S.E. 2d 233; *Norman v. Norman,* 230 N.C. 61, 51 S.E. 2d 927.

The General Assembly has provided in the explicit language of G.S. 50-11 that defendant's judgment for permanent alimony survives the judgment of absolute divorce, obtained in an action commenced after the rendition of the judgment decreeing the payment of alimony to her. *Simmons v. Simmons,* 223 N.C. 841, 28 S.E. 2d 489; *Howell v. Howell,* 206 N.C. 672, 174 S.E. 921.

In *Rogers v. Vines, supra, Ruffin, C. J.,* speaking for the Court used these words, which is practically undisputed law: "Moreover, the decree for alimony vests in the wife no absolute right to the allowance, . . . it may be changed from time to time, and reduced or enlarged, in the discretion of the court." This language is quoted with approval in *Taylor v. Taylor, supra.*

This Court said in *Crews v. Crews, supra:* "A judgment for alimony is never final in the sense that it is always and forever enforceable and cannot be modified on motion and sufficient evidence."

The amount of alimony and counsel fees decreed is a matter of judicial discretion. *Davidson v. Davidson,* 189 N.C. 625, 127 S.E. 682; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492; *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745.

The lower court, in its sound discretion, after a hearing at which plaintiff and defendant were present with their attorneys, and both offered evidence, found from sufficient evidence that the changed circumstances of the parties reasonably required that the payment of subsistence entered at the November Term 1941 should be increased, and entered an order to that effect. The plaintiff makes no contention that there was not sufficient evidence before the court for it to make its finding that the changed circumstances of the parties reasonably required that the amount of payment of subsistence should be increased, but contends that the judgment was final, and the court had no power to modify it. The law is otherwise. Under the facts found the court did have the power to increase the amount to be paid by plaintiff under the judgment for subsistence. For us to rule otherwise would be "to impair . . . the right of the wife to receive alimony" under the judgment entered in November 1941, because it is practically undisputed law that a court in the exercise of its sound discretion can reduce or enlarge the amount of alimony decreed in conjunction with a divorce

a mensa et thoro to meet changing circumstances of the parties, and to nullify the plain and express language of G.S. 50-11.

The plaintiff in his brief makes no reference to the part of the order requiring the payment of counsel fees to defendant's lawyer, though he has an exception to it. "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 562; *Reynolds v. Earley,* 241 N.C. 521, 85 S.E. 2d 904.

A motion in the action in which the judgment of subsistence was rendered was the proper procedure. *Barber v. Barber,* 216 N.C. 232, 4 S.E. 2d 447.

The order of the lower court is

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

ROBERT FRANKLIN DELLINGER v. MRS. WILLIE CATHERINE HAYNES BOLLINGER.

(Filed 12 October, 1955.)

1. Appeal and Error § 6c (2)—

The want of assignment of error in the record does not warrant dismissal by the Supreme Court *ex mero motu,* since an exception to the judgment and an appeal therefrom present the questions whether the facts found support the judgment and whether any fatal error of law appears on the face of the record.

2. Evidence § 2—

The courts will take judicial notice of the counties comprising a judicial district at the time of the rendition of judgment, and that the resident judge was assigned by statute to hold the courts of the district during a particular term.

3. Judges § 2a: Statutes § 10—

Where a county is in the district of a particular resident judge at the time of the hearing of a motion in chambers and the rendition of judgment in the cause, the validity of the judgment is not affected by the fact that subsequent thereto such county is removed from the district of such judge, since Chapter 129, Session Laws of 1955, by its express terms, did not become effective until 1 July, 1955, and further, the General Assembly could not invalidate by subsequent legislation a judgment valid at the time of its entry.

4. Appearance § 2b—

Defendant's appearance and demurrer *ore tenus* to the petition constitutes a general appearance which waives any defect in or nonexistence of a summons.

5. Judgments § 19—

Where the cause comes before the court at chambers upon notice to defendant to appear prior to the filing of answer, the court, upon overruling defendant's demurrer and motion to dismiss, may not proceed to render final judgment on the merits without giving defendant an opportunity to answer, G.S. 1-399, G.S. 1-125, and such final judgment is a defect appearing on the face of the record requiring the vacation of the order.

6. Bastards § 11: Parent and Child § 2—

The putative father of an illegitimate child, irrespective of statute, has such interest in the child as to authorize him to maintain a suit for its custody, and also has the statutory right to maintain such proceeding, G.S. 49-1 and G.S. 49-2 being construed *in pari materia* with G.S. 50-13.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Rudisill, J.*, in Chambers at Newton, 26 March 1955, LINCOLN.

Special proceedings to determine the custody of a child.

Plaintiff is the putative father of an illegitimate child born to the defendant in February 1952. Plaintiff filed a petition under the provisions of G.S. 50-13 in which he seeks an order awarding him custody of said child. Said petition, together with a notice to appear before Rudisill, J., on 26 March 1955, at Newton, N. C., was served upon the defendant. No summons was issued. On the return date of the notice the defendant made what purports to be a special appearance, demurred to the petition, and moved to dismiss the same for the various reasons set out in her written motion filed, among which are (1) the putative father may not maintain an action for the custody of his child, and (2) want of jurisdiction of the court for the reason that Lincoln County is not now a part of the resident district of Rudisill, J. The court heard the evidence offered in affidavit form, overruled the demurrer and motion to dismiss, and entered judgment awarding the custody of said child to the plaintiff. Defendant excepted and appealed.

Sheldon M. Roper for petitioner appellee.

Bruce F. Heafner for respondent appellant.

BARNHILL, C. J. While the appellant sets forth in her brief numerous exceptions and assignments of error, the only exceptions contained in

the record are the exceptions (1) to the refusal of the court to sustain the demurrer *ore tenus*, (2) to the denial of defendant's motion to dismiss, and (3) to the signing of the judgment. There is no assignment of error in the record. Even so, we may not dismiss the appeal *ex mero motu*.

An exception to a judgment and an appeal therefrom present to this Court two questions, and two questions only, for decision: (1) Do the facts found support the judgment, and (2) does any fatal error of law appear upon the face of the record? *Bond v. Bond*, 235 N.C. 754, 71 S.E. 2d 53, and cases cited; *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128.

The Court will take judicial notice of the fact that at the time this cause was heard, on 26 March 1955, the Sixteenth Judicial District included Lincoln County, and that Rudisill, J., was the Resident Judge of said district, and that he was assigned by statute to hold the courts of said district during the Spring Term of 1955.

Chapter 129, Session Laws of 1955, increasing the number of judicial districts and changing the boundaries thereof, by the express terms therein contained, became effective 1 July 1955. Its enactment could in no wise affect the validity of a judgment theretofore lawfully entered by a Judge of the Superior Court having jurisdiction of the parties and the subject matter of the action. The Legislature—even if it had attempted so to do—is without authority to invalidate, by subsequent legislation, a judgment which was valid at the time of its entry. Hence there is no merit in the contention of the defendant that the court was without jurisdiction to hear this cause for the reason that said Act of 1955 had been adopted by the Legislature, effective 1 July 1955, at the time the judgment herein was entered.

Civil actions and special proceedings are begun by the issuance of summons. Here no summons was issued. Even so, this is not a fatal defect for the reason that defendant's appearance and demurrer *ore tenus* to the petition constituted a general appearance which waived any defect in or nonexistence of a summons. *Wilson v. Thaggard*, 225 N.C. 348, 34 S.E. 2d 140; *Credit Corp. v. Satterfield*, 218 N.C. 298, 10 S.E. 2d 914.

There is, however, a defect appearing on the face of the record which requires us to vacate the order entered and to remand the cause for further proceedings. The court, having overruled defendant's demurrer and motion to dismiss, proceeded to hear the evidence and to render final judgment on the merits as he found them to be, without giving the defendant an opportunity to answer. G.S. 1-399. The statute, G.S. 1-125, expressly provides that a defendant shall have thirty days after the denial of a motion such as the one here entered within which to answer. To this right defendant is now entitled.

The defendant interposed a demurrer *ore tenus* in this Court. The demurrer raises only one question for decision, to wit: Is the putative father of an illegitimate child a parent within the meaning of G.S. 50-13 so as to entitle him to institute a special proceeding to determine the custody of the child?

We have heretofore held that the mother of an illegitimate child is its natural guardian and may maintain a proceeding under G.S. 50-13 to determine its custody. *In re Cranford,* 231 N.C. 91, 56 S.E. 2d 35; *Browning v. Humphrey,* 241 N.C. 285, 84 S.E. 2d 917, and cases cited. But whether the putative father may likewise maintain such an action is a question of first impression in this jurisdiction.

At common law an illegitimate child was *nullius filius,* but it has long since been the policy of this State to recognize the relationship of parent and child as between a putative father and his illegitimate offspring and to require the putative father to maintain and support his child. We first had the old bastardy statute which was superseded by Chapter 49 of the General Statutes, which Act, by the terms thereof, is to be known as "An act concerning the support of children of parents not married to each other." G.S. 49-2 further provides that "Any parent who wilfully neglects or who refuses to support and maintain *his* or her illegitimate child shall be guilty of a misdemeanor . . ."

The word "parents" in G.S. 49-1 and the word "parent" in G.S. 49-2 and the word "parents" as used in G.S. 50-13 all relate to the rights and duties of parents in respect to their children. They are *in pari materia.* And G.S. 49-2 clearly recognizes that the putative father of an illegitimate child is now deemed to be the father thereof within the eyes of the law.

Furthermore, G.S. 50-13 provides that the procedure therein provided may be used in "controversies respecting the custody of children not provided for by this section or section 17-39 of the General Statutes of North Carolina." Certainly this provision is sufficiently broad and comprehensive to include this proceeding which is a controversy respecting the custody of a child.

Even though he may be a fit and suitable person to have the custody of his illegitimate child, perhaps it may not be said that his right thereto is paramount as in case of a father of a legitimate child. Even so, under the law he has such an interest as entitles him to seek to provide voluntarily the support and maintenance which the law will compel him to provide.

The second paragraph of G.S. 50-13 was adopted in 1949, c. 1010, S.L. 1949, and was designed (1) to meet the decision of this Court in *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906, in which we held that the juvenile court has exclusive jurisdiction, and (2) to simplify pro-

ceedings to determine the custody of children in cases not arising under G.S. 17-39. It is, as heretofore noted, very comprehensive in its terms, as evidenced by the language, "controversies respecting the custody of children not provided for by this section or section 17-39 of the General Statutes . . ."

Aside from our statutory provisions, we are constrained to hold that the interest of a putative father in the welfare of his illegitimate offspring is sufficient to authorize him to maintain a proceeding under the provisions of G.S. 50-13 to have the child removed from environment detrimental to its welfare. In so doing, he may request the court to award the custody of the child to him so that he may provide the support and maintenance required by law.

The demurrer *ore tenus* is overruled. The order entered will be considered only as an order awarding the custody of the child *pendente lite*. The cause is remanded to the end that the defendant may have an opportunity to file an answer and plead her defenses to the petition filed by plaintiff. Thereafter, the court may hear the evidence and render such judgment as the facts found by him may justify.

Error and remanded.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE v. DONALD G. COOK.

(Filed 12 October, 1955.)

1. Burglary and Unlawful Breaking § 4—

The essential elements of the offense described in the first part of G.S. 14-54, are: (1) an unlawful breaking or entering (2) of the dwelling house of another (3) with the intent to commit a felony or other infamous crime therein.

2. Burglary and Unlawful Breaking § 11—

Evidence tending to show that defendant unlawfully broke or entered by trespass the sleeping quarters of one or more nurses, that a nurse awoke, and saw him, entirely nude, standing in the room, inquired what he wanted, that defendant informed her he was looking for a named girl, and, upon being told that she was gone for the week end, and that he had better leave, defendant tip-toed out of the room, without taking anything with him, *is held* insufficient to sustain conviction under G.S. 14-54 for absence of any evidence of defendant's intent to commit a felony. The offense was committed prior to the effective date of the amendment of Ch. 1015, Session Laws of 1955.

3. Same—

Where defendant unlawfully enters a dwelling house in the nighttime and flees upon being discovered, without making any explanation of his presence or of his intent, the jury may infer an intent to steal although no theft is actually committed, but this inference does not pertain when defendant explains his presence or intent, and leaves upon demand without any attempt at larceny.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Froneberger, J.*, July Term, 1955, of GASTON.

Criminal prosecution tried upon a bill of indictment charging that the defendant, Donald G. Cook, in the nighttime, on the 8th day of May, 1955, did feloniously and burglariously break and enter the dwelling house of one North Carolina Orthopedic Hospital Nurses' Home, and then and there occupied by one Shirley Wiggins, with intent to steal and carry away the goods and chattels of Shirley Wiggins in the said dwelling house then and there being, etc. The second count in the bill charged larceny of certain goods belonging to Shirley Wiggins of the value of more than $100.00.

When the case was called, the solicitor announced that the State would not seek a conviction for burglary but for breaking and entering, with intent to commit a felony.

The defendant entered a plea of not guilty.

Miss Shirley Wiggins testified for the State: "I work at the North Carolina Orthopedic Hospital. I was working at the hospital on the 8th day of May. I know Donald G. Cook when I see him. . . . I saw him on the night of the 8th day of May, 1955. About 3:30 a.m., when I woke up and looked at the foot of my bed, I saw a nude boy, and I lay there for a few minutes trying to determine whether I was awake or asleep, and I finally asked him what he was doing, and he said, 'Where is Joyce?' I said, 'She has gone home for the week-end.' He said, 'Is she not coming back?' I said, 'No, . . . she will be back Monday.' I asked him who it was, and he said 'Alvin.' Again I asked what he wanted, and he said, 'Joyce.' Then I asked him to leave, and I said, 'You had better get out of here.' He pointed his finger at me and said, 'When she comes back, tell her that Alvin came,' and with that he tip-toed out of the room and went down the hall and went down the stairs. He did not have on any clothes at all."

On cross-examination this witness testified, "we found a window screen raised from the outside . . . and we found a big handprint on the bed in a vacant room, right under the window." That she saw Donald G. Cook the following day and he admitted that he was the one

in her room and stated that he would like to see a psychiatrist. This witness further testified that Joyce is not her roommate but that she stayed close to her room. That the defendant did not appear to be drinking; that she did not smell any alcohol; that no property was taken or missing from her room.

Officer E. H. Groves, a witness for the State, testified that on the morning of the 8th day of May, 1955, he received a report that someone had entered the Nurses' Home at the Orthopedic Hospital; that he went out to the hospital and talked to Miss Wiggins and several nurses. That Miss Wiggins told him about what had happened, and they went down to the lower floor and found where a window had been opened. It was in a vacant room that had a bed in it, and you could see the prints of someone's hands where they appeared to have crawled across the bed. That as a result of certain information, he picked up Donald G. Cook who finally admitted that he was the one who had gone in the hospital; that he had parked his car near the hospital; that he had kind of blacked out; that he removed his clothing and had gone in the hospital. He said he didn't know why he removed his clothing and that he didn't know how he got into the hospital. The defendant did say that he had had several quarts of beer that night.

The defendant offered no evidence.

Verdict: Guilty.

Judgment: That the defendant be confined in the Gaston County jail for a period of eighteen months, to be assigned to work under the supervision of the State Highway and Public Works Commission.

From the judgment entered, the defendant appeals, assigning error.

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

Childers & Johnston for defendant, appellant.

DENNY, J. The offense described in the first part of G.S. 14-54, contains the following essential elements: (1) an unlawful breaking or entering (2) of the dwelling house of another (3) with the intent to commit a felony or other infamous crime therein.

We concur in the State's contention to the effect that its evidence tends to show both an unlawful breaking or entry by trespass of the sleeping quarters of one or more nurses in the North Carolina Orthopedic Hospital. Even so, the only question for determination is whether or not the evidence adduced in the trial below was sufficient to carry the case to the jury on the question of an intent to commit the crime charged in the bill of indictment.

In order to convict a defendant under G.S. 14-54, of a felony or other infamous crime, it is necessary to show that the breaking or entering the dwelling or other building described in the statute, was done "with the intent to commit a felony or other infamous crime therein." *S. v. Spear,* 164 N.C. 452, 79 S.E. 869; *S. v. Crisp,* 188 N.C. 799, 125 S.E. 543; *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751. However, Chapter 1015 of the 1955 Session Laws of North Carolina, which became effective on the 17th day of May, 1955, amended G.S. 14-54 by adding at the end thereof the following: "Where such breaking or entering shall be wrongfully done without intent to commit a felony or other infamous crime, he shall be guilty of a misdemeanor." But, the provisions contained in this amendment are not applicable to this case since they were enacted after the conduct complained of occurred.

It is true that some of our cases are to the effect that where a defendant enters a dwelling in the nighttime, he having no right to be there, and flees when discovered, without making any explanation of his presence or of his intent, the jury may infer an intent to steal although no theft was actually committed. *S. v. McBryde,* 97 N.C. 393, 1 S.E. 925; *S. v. Spear, supra; S. v. Hargett,* 196 N.C. 692, 146 S.E. 801; *S. v. Oakley,* 210 N.C. 206, 186 S.E. 244.

In the instant case, however, the defendant did not flee when he was discovered, but upon inquiry as to what he wanted, he inquired about Joyce, a girl who worked at the hospital and who had gone home for the week-end. Her room was located near that of Miss Wiggins. Nothing was taken, and when the defendant was requested to leave, "he tip-toed out of the room and went down the hall and went down the stairs."

We know of no decision of this Court upholding a conviction under G.S. 14-54 for larceny, where all the State's evidence tended to negative the intent to commit the crime charged, as it does here.

As reprehensible as the conduct of the defendant was, we do not think the evidence of the State is sufficient to support a conviction of the crime charged. Hence, the defendant's motion for judgment as of nonsuit will be sustained.

Reversed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

MRS. ARMIDA R. GENTILE v. MRS. ROSE RAY WILSON.

(Filed 12 October, 1955.)

1. Automobiles §§ 8e, 18i—

The charge of the court in this case as to the duty of the defendant, in backing her car, not only to look before attempting the movement, but to keep a reasonably careful lookout in the direction of travel, *held* without prejudicial error.

2. Automobiles § 18i: Negligence § 20—

The charge of the court in this case as to foreseeability as an essential element of proximate cause *is held* without error.

3. Same—

Where there is no evidence of concurring negligence, an instruction that the burden was on plaintiff to satisfy the jury from the evidence and by its greater weight that the negligence on the part of defendant was "the" proximate cause of the injury instead of "a" proximate cause of the injury, is not prejudicial.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

BARNHILL, C. J., and BOBBITT, J., concur in result.

APPEAL by plaintiff from *Patton, J.*, April Term, 1955, of MECKLENBURG.

This was an action to recover damages for a personal injury suffered by the plaintiff as result of having been struck by an automobile which was alleged to have been negligently driven by the defendant.

The incident out of which this action arose occurred on South Tryon Street in the city of Charlotte, August 28, 1951, about 8:20 a.m. On this occasion the plaintiff had been driven by her husband north on South Tryon Street to a point on the east side of the street between 3rd and 4th Streets, opposite the Johnston Building where plaintiff was employed. The Johnston Building is on the west side of South Tryon Street. This street is divided into six traffic lanes. Plaintiff stepped out of her husband's automobile onto the street, 2 or 3 feet from the curb, opposite Thacker's Restaurant, on the east side of the street, and her husband immediately drove off. Near the place where plaintiff got out of the automobile there was a hydrant and an open space marked off around the hydrant. There were several automobiles parked in line along the curb on the east side of the street north of the open space about the hydrant, and the automobile of the defendant was parked immediately north and nearest the space into which plaintiff stepped from the automobile. Plaintiff testified that when she got out of the

automobile she stepped back two or three steps, and, facing the street, stood there a moment as she looked to the right and to the left to watch for passing traffic. "I might have been intending to go across the street . . . That building (Johnston Building) is approximately opposite . . . That's where I was ultimately going." At this instant the defendant backed her automobile slowly and struck the plaintiff's knee causing her to fall. She was not run over. She did not see the defendant's automobile moving. There was evidence that plaintiff suffered a serious injury as result of being struck and caused to fall.

Defendant's evidence tended to show that she had parked her automobile at the curb on the east side of the street opposite Thacker's Restaurant, and gone shopping; that she returned to her automobile accompanied by her daughter and two other ladies; that there was an automobile parked immediately in front; that she walked around the rear of her automobile and got in on the left or west side; that she saw no one in the space immediately behind her automobile; that before starting she looked through the rear-view mirror and saw no one; that her daughter and another lady on the back seat at her request looked through the back window and reported they saw no one in the rear. Defendant testified she moved back slowly and had gone about 4 feet when she felt a bump, stopped, got out and found the plaintiff had been struck and had fallen.

The court submitted to the jury three issues: (1) Was the plaintiff injured by the negligence of the defendant as alleged, (2) Did the plaintiff by her own negligence contribute to her injury, (3) What amount is plaintiff entitled to recover?

The jury answered the 1st issue "No." The court entered judgment that plaintiff recover nothing.

Plaintiff excepted and appealed assigning errors.

Helms & Mullis, James B. McMillan, and Wm. H. Bobbitt, Jr., for plaintiff, appellant.

Kennedy, Kennedy & Hickman and Frank H. Kennedy for defendant, appellee.

DEVIN, J. The plaintiff assigns error in the rulings of the trial judge in the admission of testimony over plaintiff's objection, but we perceive no substantial harm which could have resulted from these rulings or that the jury was improperly influenced thereby.

Plaintiff noted numerous exceptions to the court's charge to the jury. It is contended that the court failed to state correctly and sufficiently the duty incumbent upon the defendant in attempting to move her automobile backward under the circumstances of this case. But when

the charge is examined contextually no prejudicial error appears. On this point we note the court charged: "When Mrs. Wilson undertook to back her automobile, the requirements of prudent operation were not necessarily satisfied by her looking prior to or at the beginning of the movement back. It was her duty not merely to look, but to keep a reasonably careful outlook in the direction in which her vehicle was travelling and she, under the law, was held to the duty of seeing what she ought to have seen, and it was her duty to keep an outlook behind to see whether the movement of a pedestrian, movement of another vehicle, was likely to be affected by her movement backward." Thus the court seems to have stated the duty of the defendant to "keep looking" with reasonable clearness. See also *Stovall v. Ragland,* 211 N.C. 536, 190 S.E. 899; *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115.

The defendant assigns error in the following portion of the charge: "(D) Now, under the law in this State, as the court understands it, injuries resulting from events taking place without one's foresight or expectation or an event which proceeds from an unknown cause or is an unusual effect of a known cause and, therefore, in the exercise of ordinary care, not expected, must be borne by the unfortunate sufferer, that is, a person who might be injured. The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable in the exercise of due care, the person whose conduct is under investigation is not under the law answerable therefor. Under the law, persons are held liable for the consequences or occurrences which they can and should foresee and by reasonable care and prudence guard against. Foreseeable injury is a requisite of proximate cause and proximate cause is a requisite for actionable negligence and actionable negligence is a requisite for a recovery for an action for personal injury especially for an act negligently inflicted. (D)"

This portion of the charge seems to have been quoted by the learned judge from decisions of this Court collected and approved by *Denny, J.,* in *Hiatt v. Ritter,* 223 N.C. 262, 25 S.E. 2d 756.

The plaintiff also assigns as error that the court charged the jury that in order to constitute actionable negligence the plaintiff must show failure on the part of the defendant to exercise due care in the performance of some legal duty owed the plaintiff under the circumstances, and that such negligent breach of duty was the proximate cause of the injury complained of. It is contended that the phrase "the proximate cause" used by the court was likely understood by the jury to mean the sole or only proximate cause of the injury, whereas there may be more than one proximate cause, and that thus an additional and undue burden was placed on the plaintiff to negative contributory negligence. It is urged that the court should have said "a" proximate cause, or "one of the" proximate causes.

However we think what this Court said in *Harris v. Montgomery Ward & Co.*, 230 N.C. 485, 53 S.E. 2d 536, renders this exception unavailing on this record. We quote: "It is sufficient on the issue of primary negligence for a plaintiff to satisfy the jury from the evidence and by its greater weight that the negligence on the part of the defendant was a proximate cause or one of the proximate causes of his injury, where the evidence also tends to show that the negligence of some other person or agency concurred with the negligence of the defendant in producing plaintiff's injury (citing cases). But when there is no evidence of such concurring negligence as in this case, then the negligence of the defendant must be the proximate cause of the injury, otherwise the plaintiff is not entitled to recover (citing cases)." *Mintz v. Murphy*, 235 N.C. 304 (312), 69 S.E. 2d 849.

After an examination of the entire charge of the court we are unable to discover prejudicial error in any of the rulings of the court of which the plaintiff can justly complain.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

BARNHILL, C. J., and BOBBITT, J., concur in result.

The foregoing opinion was prepared by DEVIN, Emergency Justice, while he was serving in place of WINBORNE, J., who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

ROY G. HALL v. SINCLAIR REFINING COMPANY, INC.

(Filed 12 October, 1955.)

1. Contracts § 7e—

While contracts exempting persons from liability for negligence are not favored by the law and are to be strictly construed against those relying thereon, such contracts are valid and enforceable unless contrary to some rule of law or public policy.

2. Same—

The general rule that the freedom to contract includes the right to provide contractual exemption from liability for negligence in the performance of a legal duty arising out of the contract, is subject to the limitations that a party may not exempt himself from liability for negligence in the performance of a duty owed to the public or involving the public interest, or

where the public interest requires the performance of a private duty, or where the parties do not have equality of bargaining power so that the one must accept the exemption from liability by the other in order to obtain something of importance to him, which for all practical purposes is not obtainable elsewhere.

3. Same: Pleadings § 19c—Repugnant allegations neutralize each other, and pleading is demurrable when this results in failure to state cause of action.

Plaintiff service station operator sued to recover for damages caused by leakage of gasoline from underground tank and pumping equipment installed by defendant, allegedly resulting from negligence in the installation of the equipment and failure to make repairs. By amendment, contractual provisions were incorporated into the complaint which stipulated that plaintiff was to maintain the tank and pumping equipment in good condition and repair same, and was to indemnify, protect and save harmless defendant from any loss or damage resulting from any leakage caused by installation or maintenance, whether due to negligence or otherwise: *Held:* The contractual provisions incorporated in the complaint neutralized the allegations of the original complaint, and defendant's demurrer *ore tenus* for failure of the amended complaint to state a cause of action was properly allowed, plaintiff having failed to bring himself within any of the recognized limitations upon the general rule permitting a party to exempt himself from liability for negligence.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Parker, J.*, at 28 March, 1955, Term of SAMPSON.

R. Maurice Holland and Nance & Barrington for plaintiff, appellant.
Butler & Butler for defendant, appellee.

JOHNSON, J. This is a civil action brought by the owner-operator of a service station to recover damages for leakage of gasoline from underground tank and pumping equipment installed by the defendant refining company. The case was heard below on defendant's demurrer *ore tenus* to the complaint and motion for judgment on the pleadings.

It may be conceded for purpose of decision that the complaint as originally filed is sufficient to allege actionable negligence against the defendant, both in respect to the installation of the equipment and for failure to make repairs.

The defendant, answering, denied the material allegations of the complaint and set up in bar of plaintiff's right of recovery the Equipment Rental Agreement and the delivery receipts executed by the plaintiff prior to installation of the tank and pumping equipment. By the terms of these instruments the plaintiff agreed to sell the gasoline and

oil products of the defendant refining company, and the defendant agreed to furnish and install the tank and pumping equipment on a rental basis. These stipulations are embodied in the instruments:

1. "Customer (plaintiff), . . . hereby releases, relinquishes and discharges, and agrees to indemnify, protect and save harmless, Sinclair (defendant), . . . from any and all claims, demands and liability for any loss, damage, or injury, . . . to persons (whether they be third persons, Customer, or employees of either of the parties hereto) and to property (whether it be that of either of the parties hereto or of third persons), by reason of any leakage, . . . from any such equipment or any part thereof, . . . or by reason of any defect in the construction or installation of such equipment, . . . or by reason of any other casualty, whether due to the negligence of Sinclair (defendant) or otherwise."

2. "Customer (plaintiff) hereby agrees that it will, . . . maintain such equipment in good condition and repair and pay all costs and expenses in connection therewith; . . ."

After the defendant's answer was filed, the case took this novel procedural turn: The plaintiff moved the court that the exhibits attached to the answer, including the Equipment Rental Agreement and the delivery receipts, be "incorporated into and made a part of the complaint." The motion was allowed. The defendant then demurred *ore tenus* to the complaint as amended for failure to state facts sufficient to constitute a cause of action, and also moved the court for judgment on the pleadings. The court below sustained the demurrer, allowed the motion, and entered judgment dismissing the action.

The plaintiff's appeal presents this question for decision: Do the agreements signed by the plaintiff exempt the defendant from liability for the negligence alleged in the complaint?

While contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon (*Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133), nevertheless, the majority rule, to which we adhere, is that, subject to certain limitations hereinafter discussed, a person may effectively bargain against liability for harm caused by his ordinary negligence in the performance of a legal duty arising out of a contractual relation. *Slocumb v. R. R.*, 165 N.C. 338, 81 S.E. 335; *Singleton v. R. R.*, 203 N.C. 462, 166 S.E. 305; *Burnett v. Texas Co.*, 204 N.C. 460, 168 S.E. 496; *Hill v. Freight Carriers Corp., supra;* Corbin on Contracts, Section 1472; Prosser, Law of Torts (Hornbook), p. 305; Restatement, Contracts, Sections 574 and 575.

The general rule rests on the broad policy of the law which accords to contracting parties freedom to bind themselves as they see fit, subject, however, to the qualification that contractual provisions violative

of the law or contrary to some rule of public policy are void and unenforceable. Under application of the foregoing qualification, "the courts are in complete accord in holding that a public service corporation or a public utility cannot contract against its negligence in the regular course of its business or in performing one of its duties of public service. The limitation is likewise uniformly applied to certain relationships such as that of master and servant." *Insurance Asso. v. Parker,* 234 N.C. 20, 22, 65 S.E. 2d 341, 342.

Also, by the weight of authority the general limitation on the contractual right to bargain against liability for negligence embraces the principle "that a party cannot protect himself by contract against liability for negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or where public interest requires the performance of a private duty." *Insurance Asso. v. Parker, supra.*

A comprehensive monograph on the subject at hand appears in 175 A.L.R., p. 1 *et seq.* This treatise, based on a collation of numerous decided cases from many jurisdictions, discloses that the trend of modern decision is toward placing further limitations on the general rule which allows contractual exemption from liability for negligence. This trend of decision derives from a liberalization of the judicial concept of what constitutes sound public policy.

Also, closely related to the public policy test of determining the validity of these exemption clauses is the factor, applied in some decisions, of giving consideration to the comparable positions which the contracting parties occupy in regard to their bargaining strength, *i.e.,* whether one of the parties has unequal bargaining power so that he must either accept what is offered or forego the advantages of the contractual relation in a situation where it is necessary for him to enter into the contract to obtain something of importance to him which for all practical purposes is not obtainable elsewhere. 12 Am. Jur., Contracts, Sec. 183; Annotation: 175 A.L.R. 1, at p. 16. See also Williston on Contracts (Revised Edition), Sec. 1751C.

The test of relative bargaining power as a relevant factor in determining exemption is recognized in our recent decision in *Insurance Asso. v. Parker, supra* (234 N.C. 20). It is there said in the first paragraph of the opinion: "A provision in a contract seeking to relieve a party to the contract from liability for his own negligence may or may not be enforceable. It depends upon the nature and the subject matter of the contract, the relation of the parties, the presence or absence of equality of bargaining power and the attendant circumstances."

In the case at hand we have contractual provisions by which the plaintiff in clear, unambiguous language contracted to (1) maintain the

tank and pumping equipment in good condition and repair, and (2) "indemnify and save harmless" the defendant from any loss or damage caused by any "leakage" resulting from the installation or use of the same, whether due to negligence or otherwise.

The plaintiff makes no claim that the contract was executed by mistake or induced by fraud or oppression, nor do the plaintiff's allegations raise the question of unequal bargaining power between the parties. He has failed to bring himself within any of the recognized limitations upon the rule which permits exemption from liability for negligence. On the contrary, it is manifest that the plaintiff has effectively bargained against liability for all the elements of damage which he alleges in his original complaint were caused by the defendant.

The contracts, incorporated in the complaint by amendment, have neutralized the allegations of the original complaint and put to naught the cause of action asserted therein. See *Lindley v. Yeatman,* 242 N.C. 145, 87 S.E. 2d 5. Such variance or defect may be raised by demurrer. *Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, top p. 603, 51 S.E. 2d 1, top p. 3; *Laurel Cliffs Mfg. & Distributing Co. v. Pritchard,* 255 Ky. 762, 75 S.W. 2d 491.

The judgment below dismissing the action will be upheld. It is so ordered. See *Lindley v. Yeatman, supra; Dillingham v. Kligerman,* 235 N.C. 298, 69 S.E. 2d 500; *Lassiter v. Adams,* 196 N.C. 711, 146 S.E. 808; McIntosh, North Carolina Practice and Procedure, p. 447.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

W. A. CANNON v. CITY OF WILMINGTON, NORTH CAROLINA, AND NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 12 October, 1955.)

1. State § 3—

The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute.

2. Same: Eminent Domain § 22½—

The rule that the owner of property, in the exercise of his constitutional right, may maintain an action against the State Highway and Public Works Commission to obtain just compensation for lands taken, does not apply to an action against it to remove a cloud on plaintiff's title based upon a mere alleged invalid claim of a right of way.

3. Eminent Domain § 22½: Mandamus § 2a—

The statutory procedure for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made by the State Highway and Public Works Commission, and therefore if the Commission claims a right of way over plaintiff's land, plaintiff may require that it define with particularity the location and extent of the claim, and if the Commission refuses, plaintiff can invoke the remedy of *mandamus*.

4. Municipal Corporations § 48: Quieting Title § 1—

A municipal corporation may be sued to quiet title on the ground that it claims an alleged invalid right of way across plaintiff's land, G.S. 160-2, G.S. 41-10.

5. Pleadings § 19c—

If the complaint alleges facts sufficient to state one cause of action against demurring defendant, the demurrer should be overruled, and it is not necessary to decide whether the complaint is sufficient to allege also another cause of action against the defendant.

6. Appeal and Error § 6c (2)—

The appeal itself is an exception to the judgment and to any other matters appearing upon the face of the record.

7. Appeal and Error § 19—

The pleadings are part of the record proper.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Sink, Emergency Judge,* May Civil Term, 1955, of NEW HANOVER.

The complaint, summarized, alleges: (1) that plaintiff is the owner and *in possession* of a described tract of land in the subdivision known as "Sunset Park," Wilmington, North Carolina; (2) that defendants claim an estate or interest adverse to plaintiff, to wit, a perpetual right of way or easement on and over said land for a city street and State highway, but have not made or attempted to make any use of such right of way or easement except over a described area at the southern end of said tract; (3) that "the said claim of defendants is not valid either in law or in fact because neither of the defendants has, in any manner or way, obtained any valid legal or equitable title thereto, by deed, conveyance, or any process of law, or otherwise, nor have either of the defendants in any way or manner compensated the plaintiff for the said property, estate, or interest therein which they so claim"; (4) that said adverse claims constitute a cloud upon plaintiff's title and on account thereof plaintiff has been damaged in relation to his ability

to use, rent or sell his land; and (5) that "the defendants have done nothing to limit, bound, and describe their said claims."

Plaintiff prays (1) for removal of the cloud on title allegedly caused by defendants' adverse claims, (2) for recovery of damages of $70,000.00 allegedly caused by such adverse claims, if such adverse claims are removed by judgment herein, or (3) in the event defendants' right of way claims are adjudged valid to recover $106,200.00 as compensation for the taking of plaintiff's land for such public use.

Each defendant demurred separately to the complaint.

Upon the hearing below, the court entered separate judgments sustaining the demurrers. Plaintiff appealed from each judgment; and upon appeal plaintiff assigns error as to each judgment.

W. P. Burkhimer for plaintiff, appellant.

Wm. B. Campbell and Louis J. Poisson, Jr., for defendant City of Wilmington, appellee.

R. Brookes Peters, General Counsel, and Louis J. Poisson, Jr., Associate Counsel, for defendant North Carolina State Highway and Public Works Commission, appellee.

BOBBITT, J. The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute. *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182, and cases cited. Hence, the demurrer of the defendant Commission, grounded on the court's lack of jurisdiction to entertain this action against it, was properly sustained.

True, when private property is *taken* under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor. *Sale v. Highway Com., ante*, 612, 89 S.E. 2d 290; *Eller v. Board of Education, ante*, 584, 89 S.E. 2d 144. But this exception to the general rule has no application here.

Here plaintiff alleges expressly, as set out above, that defendant Commission has no valid claim of right of way over plaintiff's land. Rather, plaintiff seeks to remove as a cloud on plaintiff's title defendant Commission's alleged *invalid* adverse claims.

If and when defendant Commission, in the exercise of the power of eminent domain conferred upon it by statute, G.S. 136-19 and G.S. 40-12 *et seq.*, takes plaintiff's land or any interest therein for highway purposes, plaintiff's remedy is by special proceeding as provided in G.S. 40-12.

Plaintiff declares that he is aggrieved because defendants have done nothing "to limit, bound, and describe with particularity the boundaries of their said claims." Certainly, if defendant Commission claims a right of way over plaintiff's land, plaintiff is entitled as a matter of right to require that defendant define with particularity the location and extent of its claim; and, if it refuses or fails to do so, plaintiff can invoke the remedy of *mandamus*. The statutory procedure described in G.S. 40-12 for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made by defendant Commission.

Defendant City of Wilmington demurred for that it appears upon the face of the complaint "that this action has been instituted to determine the taking of and the location of the highway right of way by the defendants over a portion of the area referred to in the Complaint, and that the Court has no jurisdiction of the parties with respect to the alleged cause of action and no jurisdiction of the alleged civil action as set out in the Complaint; and for that it further appears upon the face of the Complaint that the alleged cause of action is based upon trespass by the defendants, who separately and jointly are by law vested with the power of eminent domain."

The contention of defendant City that the court lacks jurisdiction to entertain this action is without merit. The rule applicable to defendant Commission does not apply to a municipal corporation. A municipal corporation may "sue and be sued in its corporate name." G.S. 160-2.

Here plaintiff alleges that defendant City claims, without legal right thereto, a right of way on and over his land, and that such claim is a cloud on his title. The demurrer admits the facts stated in these allegations. Hence, nothing else appearing, the complaint contains allegations of fact sufficient to state a cause of action within the purview of G.S. 41-10, which provides for an action to remove a cloud from title.

Since the complaint states one cause of action against defendant City, this is sufficient ground for overruling its demurrer. *Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660, and cases cited. Hence, we do not discuss whether plaintiff has alleged facts sufficient to constitute a cause of action for damages against defendant City.

The motion by defendant City to dismiss the appeal under Rule 21 is denied. The appeal itself is considered an exception to the judgment and any other matters appearing upon the face of the record. The pleadings are part of the record proper. *Gibson v. Ins. Co.*, 232 N.C. 712, 62 S.E. 2d 320.

The conclusions reached are: the judgment sustaining the demurrer of the defendant Commission is affirmed; and the judgment sustaining the demurrer of the defendant City is reversed. The costs on appeal are to be paid, one-half by the plaintiff and one-half by the defendant City.

As to demurrer of defendant State Highway and Public Works Commission: Affirmed.

As to demurrer of defendant City of Wilmington: Reversed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

ANN S. HAMILTON v. HEATH L. HAMILTON.

(Filed 12 October, 1955.)

1. Appeal and Error § 40f—

The Supreme Court will not disturb the ruling of the trial judge on a motion to strike unless the appellant can show that the retention or deletion of the allegation or allegations complained of would prejudice the rights of such party.

2. Husband and Wife § 12d (4)—Subsequent divorce does not relieve husband of payments under deed of separation unless the agreement so provides.

When the separation agreement between husband and wife provides for cancellation of monthly payments thereunder in the event of the remarriage of the wife, but does not purport to provide for the cancellation of such payments in the event of a subsequent decree of divorce, the wife, in her action to recover payments due under the agreement, is not prejudiced by the refusal of the court to strike allegations in the answer that the husband had obtained a divorce from plaintiff subsequent to the execution of the separation agreement, and the court should sustain plaintiff's demurrer to the answer, since a deed of separation is valid in this State when reasonable and fair to the wife, supported by consideration, and executed in accordance with our statutes, and it will not be held void as being against public policy because it provides for support of the wife for life or until her remarriage.

3. Appeal and Error § 2—

The overruling of a demurrer *ore tenus* is not appealable.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff and defendant from *Patton, Special Judge,* June Term, 1955, of MECKLENBURG.

This is an action instituted by the plaintiff for the purpose of recovering unpaid sums, aggregating $4,300.00, alleged to be due the plaintiff from the defendant under the terms of a separation agreement entered into between the parties on 24 March, 1950.

The separation agreement, in so far as it provides for the support of the plaintiff herein, expressly provides that the defendant shall pay the sum of $100.00 per month for the maintenance and support of Ann Schweikert Hamilton, the wife, the first payment to be made on the 1st day of April, 1950, and a like sum on the first day of each and every month thereafter; subject, however, to the following conditions: "In the event the wife is divorced from the husband and subsequently remarries, the payments of One Hundred Dollars ($100.00) a month for the support and maintenance of said wife shall cease upon the date of said remarriage."

The defendant filed an answer admitting the pertinent allegations of the complaint, including the execution of the separation agreement. However, in answering the allegations of the complaint with respect to the marriage, the separation, and the allegation to the effect that the plaintiff has not remarried, the defendant alleges that he obtained a divorce from the plaintiff in an action instituted by him after the separation agreement was entered into between the parties. The defendant also sets up as a further answer and defense allegations to the effect that since the plaintiff is no longer the wife of the defendant, the separation agreement is null and void and that any payment thereunder would be against public policy.

The plaintiff moved to strike all reference in the answer to the alleged divorce decree obtained by the defendant and the allegations to the effect that the defendant is not the owner of the property seized in the attachment proceedings, instituted in connection with this action, although admitting record title thereto. The plaintiff also demurred to the further answer and defense on the ground that it did not state facts sufficient to constitute a counterclaim or a defense.

The defendant demurred *ore tenus* to the complaint.

The court allowed the motion to strike in paragraph three of the answer, in which the allegations therein with respect to divorce were not raised by the allegations in paragraph three of the complaint, but denied the motion with respect to the answer to the allegations of paragraph nine of the complaint in which the plaintiff alleged that since the date of the separation "the plaintiff has not divorced the defendant and has not remarried." The court also allowed the motion to strike from the answer the allegations with respect to the ownership of the property seized in the attachment proceedings.

The court overruled plaintiff's demurrer to the further answer and defense and the defendant's demurrer *ore tenus.*

From these rulings and the order entered in accord therewith, plaintiff and defendant appeal, assigning error.

Sedberry, Clayton & Sanders and Ralph C. Clontz, Jr., for plaintiff.

G. T. Carswell and James F. Justice for defendant.

DENNY, J. We will not disturb the ruling of the trial judge on a motion to strike unless the appellant can show that the retention or deletion of the allegation or allegations complained of would prejudice the rights of such party. *Ledford v. Transportation Co.*, 237 N.C. 317, 74 S.E. 2d 653; *Hinson v. Britt*, 232 N.C. 379, 61 S.E. 2d 185. Certainly, the plaintiff will not be prejudiced by the allegation to the effect that the defendant has obtained a divorce since the execution of the separation agreement. It was clearly within the contemplation of the parties at the time the separation agreement was executed that their marriage might thereafter be dissolved in an action for divorce. *Howland v. Stitzer*, 240 N.C. 689, 84 S.E. 2d 167. But the contract does not purport to cancel the monthly payments for the support of the wife in the event a decree of divorce is granted dissolving the marriage, but only upon the date of the remarriage of the wife. Hence, the ruling on the plaintiff's motion to strike will not be disturbed.

As to the demurrer to the defendant's further answer and defense, we think it should have been sustained. We have uniformly held since our decision in *Archbell v. Archbell*, 158 N.C. 408, 74 S.E. 327, Ann. Cas. 1913D 261, that a deed of separation executed by husband and wife, is valid in this State when it is entered into for adequate reasons and is reasonable and fair to the wife and executed in accordance with our statutes. *Hoke, J.*, later *Chief Justice*, speaking for the Court in *Archbell v. Archbell, supra*, pointed out that in *Collins v. Collins*, 62 N.C. 153, the Court had held "that articles of separation between husband and wife, whether entered into before or after separation, were against law and public policy and therefore void." But in view of the changes in our statutes, *Justice Hoke* said: ". . . we are constrained to hold that public policy with us is no longer peremptory on this question . . . This change in our public policy, which has been not inaptly termed and held synonymous with the 'manifested will of the State,' . . . has been already recognized in several of our decisions, as in *Ellett v. Ellett*, 157 N.C. 161; *Smith v. King*, 107 N.C. 273; *Sparks v. Sparks*, 94 N.C. 527."

A separation agreement between husband and wife which meets the requirements of our decisions and is executed as required by law, will

not be held void as being against public policy because it provides for the support of the wife for life or until her remarriage.

DEFENDANT'S APPEAL.

The defendant's exceptions to the order striking out the allegations heretofore discussed are without sufficient merit to be sustained, and are, therefore, overruled.

The assignment of error based on the defendant's exception to the overruling of his demurrer *ore tenus* to the plaintiff's complaint will not be sustained. An appeal does not lie from an order overruling a demurrer *ore tenus*. *Morgan v. Oil Co.*, 236 N.C. 615, 73 S.E. 2d 477, and cited cases.

On plaintiff's appeal: Modified and affirmed.

On defendant's appeal: Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

THE DAVIS COMPANY, A CORPORATION, v. BURNSVILLE HOSIERY MILLS, INC., A CORPORATION.

(Filed 12 October, 1955.)

1. Patents § 3—

In a civil action to recover royalties alleged to be due under a non-exclusive license agreement, the invalidity of the patents or the failure of licensor's title or authority to grant the licenses, are ordinarily ineffectual as defenses, and when such defenses do not come under any exception to the general rule, they are properly stricken on motion.

2. Pleadings § 31—

Allegations in the answer setting up matter ineffectual as defenses are properly stricken as irrelevant on motion aptly made. G.S. 1-153.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Clarkson, J.*, August, 1955, Regular Civil Term, Schedule B, of MECKLENBURG.

Helms & Mulliss and John D. Hicks for plaintiff, appellant.
G. D. Bailey and W. E. Anglin for defendant, appellee.

JOHNSON, J. This is a civil action to recover for royalties alleged to be due under patent license contracts. The case was heard below on

motion to strike allegations of the defendant's answer and further defense.

The gist of the complaint is that the plaintiff is engaged in the business of owning and holding patents for the production of elastic top hosiery and in licensing hosiery manufacturers to use the patents for stipulated royalties; that the defendant is a manufacturer of hosiery; that in November, 1950, the plaintiff and the defendant entered into separate license contracts, copies of which are attached to the complaint and made a part thereof, by the terms of which the defendant for stipulated royalties was granted nonexclusive licenses to manufacture elastic top hosiery under patents which the plaintiff owned entirely or in respect to which it possessed the right to grant licenses; that the defendant thereafter manufactured and sold quantities of hosiery, using the patent processes covered by the license contracts, and is indebted to the plaintiff in the sum of $695.68 for royalties due and unpaid under the terms of the contracts.

The defendant, answering, denied the material allegations of the complaint, and by further defense pleaded total failure of consideration, based on (1) invalidity of the patents, and (2) denial of the plaintiff's title to the patents or right to grant licenses relating thereto.

The plaintiff within apt time moved the court as a matter of right to strike from the answer the entire further defense. The motion was denied. The plaintiff's appeal tests the validity of this ruling.

Since the invalidity of a patent ordinarily does not release the licensee's obligation to pay royalties while the license is in force, the general rule is that, subject to certain exceptions not applicable here (69 C.J.S., Patents, Sec. 264 (e)), a licensee is estopped to assert the invalidity of the patent when sued for accrued royalties under the license agreement. *Eastern States Petroleum Co. v. Universal Oil Prod. Co.*, 22 Del. Ch. 333, 2 A. 2d 138; *Elgin Nat. Watch Co. v. Bulova Watch Co.*, 281 App. Div. 219, 118 N.Y.S. 2d 197; *Jones v. Burnham*, 67 Me. 93, 24 Am. Rep. 10; 69 C.J.S., Patents, Sections 160 and 264 (1); Walker on Patents (Deller's Edition), Sections 383 and 392; 40 Am. Jur., Patents, Section 149.

In *Eastern States Petroleum Co. v. Universal Oil Prod. Co., supra,* a licensee, when sued for royalties under a license agreement, pleaded invalidity of the patents. The licensor demurred on the ground that such defense was not available to the licensee. The demurrer was sustained. The Court said in part:

"Aside from the foregoing, there is yet another and equally convincing reason why the demurrer should be sustained; and that is that Eastern is estopped to deny the validity of the patents under which it took its license. Where a licensee takes a license to work a patent for

which letters patent have been duly issued, receiving the benefits of the agreement including immunity from molestation by the owner on the ground of infringement, it is highly inequitable that he should be permitted to escape the obligation to pay the royalties which he stipulated he would pay in consideration for the granted immunity. It was so held in the leading case of *Kinsman et al. v. Parkhurst,* 18 How. 289, 15 L. Ed. 385. The doctrine of that case has been uniformly recognized and accepted without a single dissent, so far as my investigations show, in subsequent cases in the federal and state jurisdictions in this country and in England."

In *Elgin Nat. Watch Co. v. Bulova Watch Co., supra,* the plaintiff, owner of the patent, sued the defendant licensee for royalties payable under a nonexclusive license agreement. The defendant pleaded failure of consideration in that the patents were invalid. On plaintiff's motion, the entire defense was stricken as not constituting a valid defense. There the appellate Court, in sustaining the ruling below, said in part:

"Is validity of the patent the essence of consideration under a licensing agreement, so that invalidity may be pleaded as a failure of consideration, or is the licensee estopped from challenging the patent?

"Estoppel of a licensee to deny the validity of a patent under which he manufactures, and the unavailability of such a denial as a defense to an action for accrued royalties, have long been established in the law. *Kinsman v. Parkhurst,* 18 How. 289, 59 U.S. 289, 15 L. Ed. 385; *Marston v. Swett,* 66 N.Y. 206; *Bucky v. Sebo,* 276 App. Div. 545, 95 N.Y.S. 2d 769. The reason is that the licensee has received what he bargained for, the protection of the licensing agreement and freedom from the claim and consequences of infringement."

Also, the general rule is that a licensee when sued for royalties accrued under a license agreement is estopped to escape liability by denying title of his licensor or questioning the licensor's authority to grant the license, without establishing something in the nature of an eviction. *Wyman v. Monolith Portland Cement Co.,* 3 Cal. App. 2d 540, 39 P. 2d 510; *Schnack v. Applied Arts Corporation,* 283 Mich. 434, 278 N.W. 117; *Engineering Co. v. Perryman Electric Co.,* 113 N. J. Eq. 255, 166 A. 461; 69 C.J.S., Patents, Section 264, p. 817.

This rule which estops the licensee of a patent from denying the authority from which his right proceeds derives from the same basic principle that precludes a tenant from denying his landlord's title. See *Callender v. Sherman,* 27 N.C. 711; *Lawrence v. Eller,* 169 N.C. 211, 85 S.E. 291.

The defendant's affirmative defense of failure of consideration being based upon pleas of (1) invalidity of the patents, and (2) denial of the licensor's title to the patents or authority to grant the licenses, and

these pleas being ineffectual as defenses, it necessarily follows that the further answer states no defense. It should have been stricken in its entirety as irrelevant matter. G.S. 1-153; *Thompson v. Insurance Co.*, 234 N.C. 434, 67 S.E. 2d 444. See also *Stone v. Coach Co.*, 238 N.C. 662, 78 S.E. 2d 605; *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613. The ruling of the court below in declining to strike the further defense must be held for error.

Error and remanded.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

DONALD WILLIAM KIMSEY BY NEXT FRIEND, BETTY JANE KIMSEY, v. CARL E. REAVES AND WIFE, BERTIE G. REAVES, AND TRADY T. JOHNSTON, SR.

(Filed 12 October, 1955.)

1. Parties § 10—

Ordinarily it is within the discretion of the court to allow or deny a motion to make a party who is not a necessary party to the proceeding a party plaintiff or defendant, and the order entered is not reviewable.

2. Negligence § 15: Pleadings § 10—

In the absence of statutory provision to the contrary, a defendant may not set up in plaintiff's action a cross-action against a third party in which plaintiff has no interest, and the question of primary and secondary liability between defendants is usually a matter for them to adjust between themselves.

3. Negligence § 8—

The doctrine of primary and secondary liability applies when the negligence of one party is active and that of the other is passive.

4. Automobiles § 21—

Where a passenger in a car is injured in a collision between that car and another, the question of active and passive negligence does not pertain, since if both are negligent, their negligence is necessarily concurrent.

5. Same: Negligence § 15: Parties § 10—In passenger's action, original defendants held not entitled to file cross-action against owner of other car in absence of allegation of concurrent negligence.

A passenger in a car sued the driver and owner of the other car involved in the collision. Defendants filed a cross-action against the owner of the car in which plaintiff was riding, alleging that the negligence of the driver of that car was the sole proximate cause of the collision, or that in any event the negligence of the driver of that car insulated any negligence attributable to them, and moved that such driver be made an additional

party defendant. *Held:* There being no allegation of concurrent negligence in the cross-action, and the motion for the joinder of the additional party not being under the provisions of G.S. 1-240, the court correctly allowed the motion to strike his name from the cross-action and properly refused to make him an additional party defendant, the original defendants, under their general denial, being entitled to offer evidence tending to show that the collision was caused by the sole negligence of the driver of the car in which plaintiff was riding, and that their negligence, if any, was insulated by the negligence of the driver of that car, without any plea of a cross-action.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants Reaves from *Clarkson, J.*, April Term, 1955, MECKLENBURG. Affirmed.

Civil action to recover compensation for personal injuries resulting from the collision of two automobiles, heard on motion of defendant Johnston to strike his name from the caption and to strike the cross action attempted to be alleged against him by defendants Reaves.

On 27 November 1953, the automobile of defendant Johnston was being operated in a northerly direction on U. S. 29 by his son, and the automobile belonging to defendant Carl E. Reaves was being operated in the same direction by his wife, defendant Bertie G. Reaves. U. S. 29, at the place of the accident, is a four-lane highway. The Johnston car was traveling in the outer right-hand lane, and the Reaves automobile was traveling along the inner right-hand lane. Mrs. Reaves undertook to pass the Johnston car, and the two vehicles collided. Plaintiff was a passenger on the Johnston car and received certain personal injuries.

Thereafter Johnston sued Reaves for damages resulting to his automobile. Reaves filed a cross action and the jury rendered verdict in favor of Reaves, finding that Reaves was not negligent and that the negligence of the operator of the Johnston car was the proximate cause of the collision.

In this action, instituted against defendants Reaves only, the original defendants deny any negligence and plead that (1) the negligence of the Johnston boy was the sole proximate cause of the collision, and that, in any event, (2) the negligence of the Johnston boy insulated any negligence of Mrs. Reaves. They then plead a cross action against defendant Johnston in which they assert that under the judgment entered in the former action Johnston is primarily liable, and that Reaves, if liable at all, is only secondarily liable to plaintiff. Thereupon defendants Reaves moved the court to make defendant Johnston a party defendant to this action to the end that they may recover over against him any amount which the plaintiff recovers of them. An order

making Johnston a party defendant was duly entered and summons issued. Thereafter, defendant Johnston appeared and moved to strike his name from the pleadings and to strike the cross action attempted to be alleged against him by Reaves. He also moved to strike the motion made by Reaves to have him, Johnston, made a party defendant. The motions were allowed, and judgment was entered accordingly. The defendants Reaves excepted and appealed.

Henry L. Strickland and Wm. H. Booe for appellees.
Jones & Small for defendant appellants.

BARNHILL, C. J. Ordinarily it is within the discretion of the court to allow or deny a motion to make a party who is not a necessary party to the proceeding a party plaintiff or defendant, and the order entered is not reviewable. *Aiken v. Mfg. Co.*, 141 N.C. 339; *Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859.

"The question of primary and secondary liability is for the offending parties to adjust between themselves." *Dillon v. Raleigh*, 124 N.C. 184; *Bowman v. Greensboro*, 190 N. C. 611, 130 S.E. 502. A defendant, unless the law provides to the contrary, is not permitted to clutter up the plaintiff's claim with an action by him against a third party in which the plaintiff has no interest.

The doctrine of primary and secondary liability applies when the negligence of one party is active and that of the other is passive. *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 63 S.E. 2d 118; *Davis v. Radford*, 233 N.C. 283, 63 S.E. 2d 822. Here the two automobiles collided while both were in motion, traveling upon a public highway. We cannot perceive how either motorist can successfully assert that his negligence was passive while the negligence of the other motorist was active. If both were negligent, necessarily the negligence was concurrent. But defendants Reaves studiously avoid alleging concurrent negligence and do not file their motion under the provisions of G.S. 1-240. Furthermore, defendants Reaves, under their general denial, may offer evidence tending to show (1) that the collision was caused by the sole negligence of the Johnston boy, and (2) that their negligence, if any, was insulated by the negligence of the operator of the Johnston automobile without any plea of a cross action against Johnston.

It follows that we concur in the view of the court below that the order making defendant Johnston a party to this action was improvidently issued, and that his name and the alleged cross action against him should be stricken.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

J. HERMAN BAKER, TRADING AS BAKER OIL COMPANY, v. FRUEHAUF TRAILER COMPANY, INCORPORATED.

(Filed 12 October, 1955.)

1. Pleadings § 30—

Where motion to strike under G.S. 1-153 is made prior to the time for answer or demurrer, it is made as a matter of right.

2. Pleadings § 31—

Allegations should be stricken from a pleading on motion only when they are clearly improper, irrelevant, immaterial or unduly repetitious, the ordinary test being the right of the pleader to offer in evidence the facts to which the allegations relate.

3. Appeal and Error § 40f—

A ruling of the Superior Court upon a motion to strike, even though made in apt time, will not be held for error unless it is made to appear that the ruling prejudicially affects some substantial right of appellant.

4. Pleadings § 27—

Defendant moved that plaintiff be required to make the complaint more definite on the ground that defendant was unable to determine whether plaintiff is bringing the action to rescind the contract for failure of consideration, or whether he was treating the contract as existing and suing for damages for breach of warranty. The denial of the motion cannot be held prejudicial when counsel, on appeal, state that the purpose of the complaint is to set out a cause of action for rescission, and that plaintiff had elected to pursue his remedy in accordance therewith.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Bone, J.*, at Chambers 6 July, 1955. From NASH.

The defendant Trailer Company appealed from rulings of Judge Bone on defendant's motions with respect to plaintiff's complaint.

The plaintiff alleged he was induced by the false representations and warranties of the defendant to purchase a combination transport tank trailer for use of plaintiff in transporting petroleum products in connection with the operation of his business, at the price of $6,948; that the tank trailer was found to be so defective in construction as to be worthless to the plaintiff, and that in the effort to remedy the defects at

the instance of the defendant, plaintiff was caused to incur expense in excess of $2,000.

Before the time for answering had expired, the defendant filed motions: (1) To strike certain portions of the complaint as irrelevant and prejudicial, and (2) that plaintiff be required to make the complaint more definite and certain, for that the defendant, in preparing a defense to the action was unable to determine whether plaintiff is suing to rescind the contract, or for damages for breach of contract of warranty.

Judge Bone allowed the motion to strike certain allegations deemed irrelevant, and denied defendant's motion to strike other portions of the complaint designated in defendant's motion. The judge also denied defendant's motion to require plaintiff to make the complaint more definite in the respect pointed out.

Defendant excepted and appealed.

Cooley & May for plaintiff, appellee.

Bell, Bradley, Gebhardt & DeLaney for defendant, appellant.

DEVIN, J. The defendant assigns error in the judgment below denying its motion, made in apt time, to strike designated portions of the complaint.

The right to appeal from an adverse ruling in the Superior Court on a motion to strike portions of the pleadings has extended the ground of appellate jurisdiction, and frequently causes delay in the final determination of litigation. However appropriate motions to this end are sanctioned by the statute which provides: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted." G.S. 1-153.

If the motion be made in apt time, the movant is entitled to be heard as a matter of right. But the denial of a motion to strike a pleading under this statute will not be regarded as erroneous unless the record affirmatively reveals that the matter is irrelevant or redundant and that its retention in the pleading will cause harm or injustice to the moving party. *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185. "Allegations should be stricken only when they are clearly improper, irrelevant, immaterial or unduly repetitious." *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725. It has been repeatedly held by this Court that ordinarily the test of relevancy is the right of the pleader to offer in evidence on the trial the facts to which the allegation relates (*Hildebrand v. Tel. & Tel. Co.,* 216 N.C. 235, 4 S.E. 2d 439; *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660), and that the rulings of the Superior Court upon pre-

liminary motions relating to the pleadings will not be held for error unless it be made to appear that the ruling to which exception is noted affects prejudicially some substantial right of the movant. *Sowers v. Chair Co.*, 238 N.C. 576, 78 S.E. 2d 342; *Ledford v. Transportation Co.*, 237 N.C. 317, 74 S.E. 2d 653; *Hinson v. Britt, supra. Barnette v. Woody, ante*, 424.

Keeping these general principles relating to the propriety of motions on the pleadings in mind, we have examined the portions of the complaint to which the defendant's motion was directed and conclude that there was no error in the ruling complained of with respect to the motion to strike.

The defendant also excepted to the denial of its motion under the statute that plaintiff be required to make the complaint more definite. The ground for the motion is that defendant is unable to determine whether the plaintiff is bringing this action to rescind the pleaded contract for failure of consideration, or whether he is treating the contract as existing and suing for damages for breach of warranty. *Hendrix v. Motors, Inc.*, 241 N.C. 644, 86 S.E. 2d 448.

However, it is unnecessary for us to interpret the legal meaning of the complaint in this respect, for that counsel for plaintiff stated on the argument when this appeal was heard, that the purpose of the complaint was to set out a cause of action for rescission, and that the plaintiff elected to pursue his remedy in accord therewith.

It follows that defendant's exceptions to the rulings set out in the judgment below cannot be sustained, and that the judgment must be

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

The foregoing opinion was prepared by DEVIN, Emergency Justice, while he was serving in place of WINBORNE, J., who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

HELEN RAY WORKMAN v. BILLIE SHIPLER WORKMAN.

(Filed 12 October, 1955.)

1. Pleadings § 19c—

If any portion of the complaint alleges facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be reasonably and fairly gathered from it, the pleading will survive demurrer.

2. Divorce and Alimony § 5d—

Allegations that defendant had abandoned plaintiff and failed to provide adequate support for her are sufficient without a specific allegation that the abandonment was wilful, since abandonment imports wilfulness.

3. Appeal and Error § 6c (1)—

Where there is no exception or assignment of error to an order entered in the cause, the Supreme Court need not consider such order on appeal from the overruling of demurrer.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Patton, Special Judge,* May Term, 1955, of MECKLENBURG.

This action was instituted on 29 April, 1955, pursuant to the provisions of G.S. 50-16, for alimony without divorce and for the custody of Mary Lou Workman, an infant of the marriage.

The defendant filed a demurrer to the complaint for that it fails to state a cause of action against the defendant and that it affirmatively appears on the face of the complaint that the court has no jurisdiction of the person of the child of the parties, the child being in the State of Iowa. The demurrer was overruled and the defendant appeals, assigning error.

Ralph V. Kidd and William T. Grist for plaintiff, appellee.
Charles M. Welling and Amon M. Butler for defendant, appellant.

DENNY, J. A demurrer to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, should be overruled if the complaint, when liberally construed in favor of the pleader, as it must be on demurrer, G.S. 1-151, alleges facts sufficient to constitute a cause of action. Or to put it another way, if any portion of the complaint alleges facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be reasonably and fairly gathered from it, the pleading will survive the demurrer. *Bryant v. Ice Company,* 233 N.C. 266, 63 S.E. 2d 547, and cited cases.

The plaintiff's complaint, when liberally considered in favor of the pleader, alleges that the defendant abandoned the plaintiff on 5 December, 1954, and has failed to provide adequate support for her. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923. The contention that the complaint does not allege that the abandonment was wilful is without merit. Abandonment imports wilfulness. *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909.

No exception was entered to the order signed on 29 April, 1955, directing the defendant to produce Mary Lou Workman, the infant child of

the marriage, before the court, on 16 May, 1955, in order that the question of her custody might be determined. Therefore, we are not called upon to consider that order on this appeal. Even so, see *In re Fitzgerald, post,* 732. The appellant only assigns as error the order of the court entered on 10 May, 1955, overruling his demurrer. Hence, the ruling of the court below will be upheld.

Affirmed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

EAST CAROLINA LUMBER COMPANY, INCORPORATED, v. PAMLICO COUNTY; T. D. WARREN, JR., RECEIVER; DAVID LUPTON AND WIFE, VETA LUPTON.

(Filed 12 October, 1955.)

1. Quieting Title § 1—

G.S. 41-10 is a remedial statute and must be liberally construed.

2. Quieting Title § 2—

In an action to remove cloud from title, allegations that a receiver was without legal authority to convey the lands in question are sufficient as against demurrer without allegation of specific facts showing the receiver's want of authority, and are also sufficient predicate for attacking, upon allegations of want of title, the deed from the receiver's grantee to defendant.

WINBORNE, PARKER, and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Bone, J.,* Regular Judge holding the courts of the Fifth Judicial District, at consent hearing in Chambers during May, 1955, Term of Craven Superior Court. From PAMLICO.

Civil action to remove alleged clouds from title to real estate.

The defendants demurred to the complaint for failure to state facts sufficient to constitute a cause of action. From judgment overruling the demurrers, the defendants appeal.

Willcox, Hardee, Houck & Palmer, McClelland & Burney, and Jones, Reed & Griffin for plaintiff, appellee.

B. B. Hollowell, W. B. R. Guion, R. E. Whitehurst, R. A. Nunn, Barden, Stith & McCotter, and Ward & Tucker for defendants, appellants.

JOHNSON, J. These in substance are the allegations of the complaint: (1) that the plaintiff is the owner and entitled to the immediate possession of the lands described in the complaint; (2) that the following deeds purporting to convey the lands appear of record in the Public Registry of Pamlico County; (a) deed of T. D. Warren, Jr., Receiver of East Carolina Lumber Company, to Pamlico County, dated 11 March, 1935, and (b) subsequent deed of Pamlico County to the defendant David Lupton; (3) that the deed made by the defendant T. D. Warren, Receiver, is void and of no legal force and effect, for that the grantor named therein was not vested with any legal authority to convey the lands; and (4) that the subsequent deed made by the defendant Pamlico County is void and of no legal force and effect, for that the County was not vested with title to the lands; (5) that each deed casts a cloud on plaintiff's title to the lands, entitling it to have "same removed in the manner prescribed by law."

The plaintiff does not challenge the form of the deed made by Warren, Receiver, to Pamlico County. Instead, the plaintiff alleges that the Receiver was without legal authority to convey the lands described in the deed. Therefore the defendants take the position that the plaintiff has elected to rest its case upon the allegation that the Receiver was without legal authority to convey. On this hypothesis the defendants contend that the plaintiff's failure to allege specific facts showing the Receiver's want of authority to convey renders the complaint demurrable. The contention is untenable. The action was instituted under the Jacob Battle Act, Chapter 6, Public Laws of 1893, now codified as G.S. 41-10. Prior to the passage of this Act, the procedure governing suits to quiet title had become so fixed by the settled rules of equity as to limit to narrow bounds the scope of relief in such suits. *Rumbo v. Mfg. Co.*, 129 N.C. 9, 39 S.E. 581. The statute was intended to afford an easy, expeditious mode of determining any and all conflicting claims to land. *Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369; McIntosh, North Carolina Practice and Procedure, Sections 986 and 987. The statute is highly remedial in its nature and has received a liberal construction. *Christman v. Hilliard*, 167 N.C. 4, 82 S.E. 949; *Ramsey v. Ramsey*, 224 N.C. 110, 29 S.E. 2d 340; *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16; *Barbee v. Edwards*, 238 N.C. 215, 77 S.E. 2d 646.

In the case at hand the complaint meets minimum requirements under the statute. The allegation that the Receiver's deed is void for want of legal authority to convey states ultimate facts sufficient to support specific evidentiary facts, if and when offered, showing the Receiver's lack of legal authority to make the deed. See *Hawkins v. Moss*, 222 N.C. 95, 21 S.E. 2d 873; *Daniel v. Gardner*, 240 N.C. 249, 81 S.E. 2d 660. The conclusion here reached is not at variance with the rules

explained and applied in *Wells v. Clayton, supra,* cited and relied on by the appellants.

What we have said respecting the deed of Warren, Receiver, suffices to show that the complaint states ultimate facts sufficient to overthrow the demurrer in respect to the plaintiff's attack on the subsequent deed made by Pamlico County to the defendant David Lupton.

This appeal does not present the question, discussed in the briefs and debated on the argument, whether the judgment under which the Receiver's deed purports to have been made is subject to collateral attack in this action. See *Bailey v. Hopkins,* 152 N.C. 748, 67 S.E. 569; *Christman v. Hilliard, supra; Stocks v. Stocks,* 179 N.C. 285, 102 S.E. 306; *Collins v. Highway Comm.,* 237 N.C. 277, 74 S.E. 2d 709.

The judgment overruling the demurrers is

Affirmed.

WINBORNE, PARKER, and HIGGINS, JJ., took no part in the consideration or decision of this case.

EAST CAROLINA LUMBER COMPANY, INC., v. G. A. WHITFORD, JR., ADMINISTRATOR C.T.A. OF THE ESTATE OF G. A. WHITFORD, DECEASED; SARAH LUCRETIA WHITFORD; G. A. WHITFORD, JR., AND WIFE, LULA IPOCK WHITFORD; VERA WHITFORD TOLER AND HUSBAND, ISIAH W. TOLER; CRAVEN COUNTY, A BODY POLITIC AND CORPORATE; B. W. JONES, TRUSTEE, AND T. D. WARREN, JR., RECEIVER.

(Filed 12 October, 1955.)

APPEAL by defendants from *Bone, J.,* at May Term, 1955, of CRAVEN.

Civil action to remove alleged clouds from the title to real estate.

The defendants demurred to the complaint for failure to state facts sufficient to constitute a cause of action. From judgment overruling the demurrers, the defendants appeal.

B. B. Hollowell, R. E. Whitehurst, W. B. R. Guion, R. A. Nunn, Barden, Stith & McCotter, and Ward & Tucker for Defendants, Appellants.

Willcox, Hardee, Houck & Palmer, McClelland & Burney, and Jones, Reed & Griffin for Plaintiff, Appellee.

PER CURIAM. The judgment overruling the demurrers will be upheld in this case on authority of what is said in the opinion filed simultane-

ously herewith in *Lumber Co. v. Pamlico County, ante,* 728, which is precisely decisive of the question raised by the instant appeal. Decision here will control the consolidated companion cases referred to in the stipulation appearing in the record.

Affirmed.

WINBORNE, PARKER, and HIGGINS, JJ., took no part in the consideration or decision of this case.

MRS. MARGARET T. BURNS, ADMINISTRATRIX OF THE ESTATE OF BEVERLY J. BURNS, DECEASED, v. A. H. GARDNER AND WIFE, LEILA S. GARDNER.

(Filed 12 October, 1955.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants from *Patton, Special Judge,* June Term, 1955, of MECKLENBURG.

This is an action to recover for the wrongful death of Beverly J. Burns, a girl ten years of age, as a result of falling into and drowning in an artificial lake on defendants' premises.

The plaintiff alleges that the lake had been stocked with fish and had ducks thereon and a rowboat; that the boat was neither locked nor securely tied to prevent its use by children of tender years. The plaintiff further alleges that the lake had become a common resort where children of tender years from the nearby residential area visited, fished, chased ducks and otherwise sought sport and pleasure in and around said lake, and that the defendants had actual knowledge that it was being so used.

The defendants interposed a demurrer to the complaint on the ground that it does not state a cause of action. The demurrer was overruled.

From this ruling, the defendants appeal, assigning error.

Ray S. Farris and James B. Ledford for plaintiff.

Charles W. Bundy for defendants.

PER CURIAM. When this appeal was heard in this Court, two of its members, *Winborne* and *Higgins,* JJ., were not sitting. However, *Devin, Emergency Justice,* was sitting in lieu of *Winborne, J.* The six members of the Court being evenly divided in the opinion as to whether the ruling

of the court below should be sustained, the judgment of the Superior Court is affirmed and stands as the decision in this action without being a precedent. *Insurance Co. v. Stinson*, 214 N.C. 97, 197 S.E. 751.

Affirmed.

IN RE LINWOOD GRADY FITZGERALD.

(Filed 12 October, 1955.)

Appeal and Error § 2—

An appeal from an order requiring the resident father to have the child in court in order that the question of custody might be considered and determined in a *habeas corpus* proceeding between the parents of the child, separated, but not divorced, is premature and will be dismissed, since the order is interlocutory and affects no substantial right. G.S. 1-271.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by respondent from *Patton, J.*, June Term 1955, of MECKLENBURG.

This was a proceeding to determine the custody of Linwood Grady Fitzgerald, aged 7. The proceeding was initiated 18 May, 1955, by the application of Ann Hudson Fitzgerald, the mother, for writ of *habeas corpus*. This was issued and duly served on Luther Clarence Fitzgerald, the father. The parents of the child are separated but not divorced, and both are residents of Mecklenburg County.

The petition set forth that the child was now in the custody of his father who refuses to permit the mother to have custody of the child; that the father is not a fit and proper person to have the custody of the child and that the welfare of the child would be promoted by placing the custody in the mother.

Respondent Luther Clarence Fitzgerald replied admitting that he and the petitioner were residents of Mecklenburg County, but alleged that the child since 20 April, 1955, has been in the care and custody of the child's paternal grandparents in Fulton County, Georgia.

The matter was heard by Judge Patton 13 June, 1955, on the petition and answer. No other evidence was offered.

The court found that the father was domiciled in Mecklenburg County and the domicile of the child was that of his father. The court entered an order that the respondent have the child before the court, in order that the question of custody might be considered and determined.

Respondent Luther Clarence Fitzgerald excepted and appealed.

Maurice A. Weinstein and William J. Waggoner for Petitioner, Appellee.

Fred H. Hasty for Respondent, Appellant.

PER CURIAM. It is apparent that the appeal is premature. The question of the custody of the child has not been considered or determined. The order is interlocutory and no substantial right of the appellant has been affected. G.S. 1-271. *DeBruhl v. Highway Com.*, 241 N.C. 616, 86 S.E. 2d 200.

Appeal dismissed.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

The foregoing opinion was prepared by DEVIN, Emergency Justice, while he was serving in place of WINBORNE, J., who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

CLYDE M. SCOTT v. JOE C. SCOTT.

(Filed 12 October, 1955.)

APPEAL by plaintiff from *Patton, Special Judge*, 16 May, 1955, Extra Civil Term of MECKLENBURG.

Civil action under G.S. 50-16 for alimony without divorce.

The issues of fact, submitted to and answered by the jury, were as follows:

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

"2. Did the defendant wrongfully separate himself from the plaintiff and fail to provide her with necessary subsistence according to his means and condition in life? Answer: No."

Judgment for defendant was entered on the verdict. Plaintiff excepted and appealed, assigning errors.

B. Kermit Caldwell for plaintiff, appellant.

J. M. Scarborough for defendant, appellee.

PER CURIAM. The jury, on conflicting evidence, resolved the contested (second) issue in defendant's favor; and there was ample evi-

dence to support this verdict. After careful consideration of plaintiff's assignments of error, we find no error of law deemed of sufficient prejudicial effect to warrant a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

BRIGHT E. HONEYCUTT v. CITIZENS NATIONAL BANK IN GASTONIA, EXECUTOR AND TRUSTEE OF THE ESTATE OF C. E. HONEYCUTT, AND FODA HONEYCUTT MILLER; ZORA HONEYCUTT WORRELL; JOE W. HONEYCUTT; MAY HONEYCUTT FLOWE; BLAKE HONEYCUTT KEENAN; NELLIE M. HONEYCUTT; CARRIE BROOKS HONEYCUTT; EULA HONEYCUTT COLEY; BARTLEY L. HONEYCUTT, AND J. SAMUEL HONEYCUTT.

(Filed 19 October, 1955.)

1. Husband and Wife § 14—

Where the husband furnishes the entire consideration for a conveyance of land to himself and wife, the law presumes that the conveyance to her of an interest in the land was a gift, and the title vests in them as tenants by entirety.

2. Husband and Wife § 12c—

A conveyance by the wife to the husband of an interest in realty which does not contain certificate by the examining officer, incorporating a statement of his findings that the conveyance is not unreasonable or injurious to her, is void. G.S. 52-12.

3. Same: Husband and Wife § 16—

Where lands held by entirety are conveyed by husband and wife to a trustee, who reconveys to the husband, solely for the purpose of accomplishing an indirect conveyance of the wife's interest to the husband, G.S. 52-12 applies, and where the certificate required by the statute is not incorporated in the deed by the husband and wife to the trustee, such deed is void and the trustee's deed to the husband is ineffectual to convey title.

4. Husband and Wife § 12c—

G.S. 52-12 is not repealed by Chapter 73, sec. 21, Session Laws of 1945 (G.S. 47-116).

5. Husband and Wife § 15d: Wills § 32½—

Where husband and wife's conveyance to a trustee of land held by them by entirety and the trustee's conveyance back to the husband are ineffectual because of want of certificate required by G.S. 52-12 in the deed executed by them, the estate by entireties is not destroyed, and upon the death

of the husband, the wife becomes the sole owner as surviving tenant, with no right, title or interest of any kind passing to the husband's executor for the benefit of the creditors or devisees of the husband. Proceeds of sale of the land made by the executor subsequent to the death of the husband have the same status as the lands.

6. Husband and Wife § 16: Executors and Administrators § 8—

Where husband and wife's conveyance to a trustee of land held by them by entirety and the trustee's conveyance back to the husband are ineffectual because of want of certificate required by G.S. 52-12 in the deed executed by them, the estate by entireties is not destroyed, and upon the subsequent conveyance by the husband and wife of a part of the lands to third persons, the wife, in the absence of relinquishment of her rights by gift or contract, is entitled to one-half the proceeds of sale, and upon the death of her husband, may assert such right against the estate of her husband.

7. Wills § 32½—

The right to dispose of property by will is statutory, and testator may dispose of property owned by him at the time of his death, which otherwise would descend to his heirs or be distributed to his next of kin. G.S. 31-40.

8. Wills § 44—

The doctrine of equitable election applies when the testator attempts to devise specific property not owned by him to a person other than the true owner and provides other benefits for the owner of such specific property, but the doctrine is in derogation of the property right of the true owner and does not apply unless the intention of testator to put the beneficiary to an election appears plainly in the terms of the will. Therefore, the doctrine does not apply if testator considered the specific property so devised to be his own.

9. Same—

Even though testator makes his will under the mistaken belief that he was sole owner of lands held by himself and wife by entirety, the devise to his wife of their residence and bequests to her of personalty, with further bequest and devise of "all the residue of my property" to a trustee for distribution to others, *held* not to put the wife to her election, since the will contains no provision that manifests an intention that an election be required, the bequest and devise to others being only of property owned by testator.

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

APPEAL by defendants from *McKeithen, Special Judge,* May Term, 1955, of GASTON.

Civil action to determine ownership of certain real and personal property, claimed by plaintiff, the widow, and by the defendants, executor-trustee and devisees, of the late C. E. Honeycutt.

The judgment of the court below is predicated upon Findings of Fact set forth therein, to which no exception was taken, to wit:

"1. That trial by jury was waived by all of the parties, and it was stipulated by all of the parties that the matter was properly before the Court, and that the Court properly had jurisdiction of the controversy.

"2. That Bright E. Honeycutt, the plaintiff, is the surviving widow of C. E. Honeycutt, who died on or about the 3rd day of December 1951, leaving a Will, which has been duly probated in the office of the Clerk of the Superior Court in Gaston County, North Carolina; that the Citizens National Bank of Gastonia, North Carolina, is the duly qualified Executor of said Will having offered the same for probate and having qualified as Executor on the 6th day of December 1951; that the portions of said Will relevant to this controversy are as follows:

" 'THIRD: I give, devise and bequeath unto my beloved wife, Bright Elizabeth Helms Honeycutt, my right, title, interest and estate which I may have in and to our residence property located at 1133 East Franklin Avenue, Gastonia, N. C. My said wife shall also receive all funds payable under any and all policies of insurance on my life. I give and bequeath unto my beloved wife, Bright Elizabeth Helms Honeycutt, all of my personal effects, including automobiles, jewelry, provisions, equipment and household effects . . .

" 'FOURTH: All of the residue of my property of every nature and kind wheresoever situate, I give and devise and bequeath to the Citizens National Bank of Gastonia, N. C., as Trustee, to be held in trust for the following purposes and to be disposed of in the following manner:

" '1. To pay to my beloved wife, Bright Elizabeth Honeycutt, the sum of Fifty Thousand and No/100 ($50,000.00) Dollars;

" '2. As soon as practical after my death, said Trustee is to convert all of the residue of my property into cash or bonds, and after the payment of the devise to my wife, and after payment of any charges, duties, taxes, costs of administration and other expenses incident to the winding up of my estate, to divide the residue equally between my brothers and sisters, share and share alike: . . .'

"3. That for some years prior to the death of C. E. Honeycutt and until the 29th day of January 1950, C. E. Honeycutt and his wife, Bright E. Honeycutt, were the owners as tenants by the entirety, of certain tracts of land described more particularly in the complaint, said lands having been conveyed to C. E. Honeycutt and his wife, Bright E. Honeycutt, by various parties over a period of years; that the funds used for the purchase of said property were furnished by the said C. E. Honeycutt; that on or about the 31st day of January 1950, C. E. Honeycutt and his wife, Bright E. Honeycutt, the latter being the plaintiff in this action, executed a deed dated January 26, 1950, purporting to convey to Robert N. Rosebro of Gaston County, North Carolina, the twelve tracts of land described in paragraph 4 of the com-

plaint; that Robert N. Rosebro was at that time acting as Trust Officer of the Citizens National Bank; that said deed was executed in order to permit the said Robert N. Rosebro to transfer the title to said lands to the said C. E. Honeycutt in fee simple and was solely for the purpose of accomplishing an indirect conveyance of the plaintiff's property to her husband, and that thereafter, the said Robert N. Rosebro and wife, on the first day of February 1950, executed and delivered a deed dated '.... day of January 1950' to C. E. Honeycutt, said deed conveying the identical property conveyed to the said Robert N. Rosebro by deed dated January 26, 1950.

"4. That the deed from C. E. Honeycutt and wife, Bright E. Honeycutt, dated January 26, 1950, does not have attached to it a certificate of a proper probate officer reciting that at the time of its execution the same is not unreasonable or injurious to the rights of the said Bright E. Honeycutt as required by General Statutes of North Carolina, 52-12; that said deed bears only the acknowledgment of Margaret Palmer, Notary Public, certifying 'That C. E. Honeycutt and Bright E. Honeycutt, his wife, personally appeared before me this day and acknowledged the due execution of the annexed deed of conveyance.'

"5. That following the execution of the deed from Robert N. Rosebro and wife to C. E. Honeycutt, the said C. E. Honeycutt, on or about July 17, 1951, sold and conveyed a tract or tracts described in paragraph 4 of the complaint as Tracts A, B and C (which are the identical tracts described in the aforesaid deeds as Tracts 1, 3 and 4) to Gastonia Brush Company for a total purchase price of $35,000 of which sum $10,000 was paid in cash during the lifetime of C. E. Honeycutt, and the balance was evidenced by a promissory note in the face amount of $25,000, which note was secured by a deed of trust dated July 17th, 1951, said note and deed of trust being made to 'C. E. Honeycutt and wife, Bright E. Honeycutt.'

"6. That on or about October 17, 1951, a part of the tract described in the complaint as Tract E (which is described in the aforesaid deeds to and from Rosebro as Tract 5) was sold by C. E. Honeycutt to O. A. Vaughn for the purchase price of $10,500, which was paid in cash to the said C. E. Honeycutt.

"7. That on or about February 2, 1951 the remaining portion of the tract designated as Tract E in paragraph 4 of the complaint (which is Tract 5 in the aforesaid deeds), together with an additional sixty-three acres described in paragraph 4 of the complaint as Tracts I, J-1 and J-2 (which are parts of Tracts Nos. 7 and 10 in the aforesaid deed) were sold by C. E. Honeycutt to John Edwards for the purchase price of $11,230.00, which was paid in cash.

"8. That a portion of the tract designated as J-1 in paragraph 4 of the complaint (which is a portion of Tract No. 10 described in the aforesaid deeds from and to Rosebro) was sold on April 10, 1951, to M. B. Query, Jr., for the sale price of $1,537.50, of which $500.00 was paid in cash to C. E. Honeycutt, and the remaining balance evidenced and secured by a promissory note and deed of trust in the sum of $1,037.50, which note and deed of trust were payable to 'C. E. Honeycutt and wife, Bright E. Honeycutt.'

"9. That in the case of each of the sales referred to above, Bright E. Honeycutt, the plaintiff, joined in the execution of the deeds conveying said lands.

"10. That in each of the above cases, the cash sums paid, to-wit: By O. A. Vaughn $10,500.00, by M. B. Query, Jr. $500.00, by John Edwards $11,230.00, were all paid to the said C. E. Honeycutt and deposited by him and held by him in his personal bank account, and at his death, came into the hands of the defendant, Citizens National Bank, as Executor under the Will of C. E. Honeycutt; that no agreement or contract was made at any time between the said C. E. Honeycutt and his wife, Bright E. Honeycutt, prior to his death with reference to the distribution, division or disposal of said funds which totaled $32,230.00, and no portion of said sum was paid over to the said Bright E. Honeycutt by either C. E. Honeycutt during his lifetime or the said bank as his Executor after his death.

"11. That after the death of the said C. E. Honeycutt, the said bank, as Executor of his estate, collected the sum of $25,000 from the said Gastonia Brush Company, together with accrued interest on said sum, and now retains the said sum with interest; that the said Bank now retains the note executed by M. B. Query, Jr. in the sum of $1,037.50, which said note remains unpaid both as to principal and interest.

"12. That at the time of his death, C. E. Honeycutt owned other real estate in fee simple, to-wit: a multiple apartment building in Mecklenburg County, several tracts of farm land in Gaston County, three tracts of improved real estate in the City of Gastonia, and cattle and farming equipment, said real estate being valued at approximately $112,000, and said cattle and farming equipment being valued at approximately $30,000; that said property was owned by him at the time of his death in addition to cash money on deposit which had been realized from the sale of lands described above.

"13. That after the death of the said C. E. Honeycutt, the Citizens National Bank, purporting to act under directions contained in the Will of C. E. Honeycutt, sold additional lands described in the aforesaid deeds from Honeycutt to Rosebro and from Rosebro to Honeycutt as follows: (a) the tract described as Tract D in paragraph 4 of the

complaint (which is Tract 2 in the deeds) to Colonial Neon Southern for the sum of $10,250.00; (b) the tract described as Tract F in paragraph 4 of the complaint (which is Tract 6 in the deeds) to John G. Kienke for the sum of $5,269.00; (c) the tracts described as H-1 and H-2 in paragraph 4 of the complaint (which were parts of Tract 9 described in the deeds) to B. S. Roy and Sons for the purchase price of $8,953.60; that the sale of said lands made by the Bank totaled the sum of $24,472.60, which said sum the Bank now holds.

"14. That on or about the 21st day of September 1948, C. E. Honeycutt purchased a lot located in Fairmont Park in the City of Gastonia, North Carolina, and said lot was conveyed to C. E. Honeycutt and wife, Bright E. Honeycutt, as tenants by the entireties; that subsequent to the purchase of the said lot, the said C. E. Honeycutt constructed thereon a home, said house and lot costing approximately $29,950.00, which said sum was paid by C. E. Honeycutt prior to February 1, 1951; that at the time of the purchase of the lot, and during the construction of the said home, and thereafter, no discussion or agreement was had or made between the said C. E. Honeycutt and his wife, Bright E. Honeycutt, and no discussion or agreement was had or made between the said C. E. Honeycutt and wife, Bright E. Honeycutt, as to the distribution of funds collected by the said C. E. Honeycutt from the sale of tracts of land to Gastonia Brush Company, O. A. Vaughn, M. B. Query, Jr. and John Edwards, and no part of the funds collected as the sales price of said lands was used in the payment of the construction cost of said home or the purchase of said lot.

"15. That the plaintiff, Bright E. Honeycutt, was not familiar with the terms of the Will of the said C. E. Honeycutt prior to his death, and said Will was not in anywise discussed with her prior or subsequent to its execution; that the said Bright E. Honeycutt did in no way know of the provisions of the said Will until the question arose as to whether or not she was entitled to the proceeds of the notes given by M. B. Query, Jr., and Gastonia Brush Company; that she, at that time, discussed the question with her attorney and for the first time was advised that she was entitled to the property claimed in her Proof of Claim, which is attached to the complaint; that she accepted, prior to knowing of her claim, the sum of $50,000 as provided in paragraph 4, sub-paragraph 1, of the Will attached to the complaint, but at the time of her acceptance was completely unaware of her rights, had not had legal counsel, and was being advised solely by the defendant, Citizens National Bank, through its Trust Officer.

"16. That the said Bright E. Honeycutt filed the claim attached to the complaint as EXHIBIT E, claiming, (a) that she was entitled to one-half of the cash funds collected by C. E. Honeycutt during his lifetime

and held in his bank account until his death, said sum totaling $32,230.00, of which the plaintiff claimed one-half, or $16,115.00; (b) that she was entitled to one-half of the notes given to secure the balance of the purchase price of certain lands by M. B. Query, Jr. and Gastonia Brush Company, which notes were payable jointly to C. E. Honeycutt and Bright E. Honeycutt in the face amount of $26,037.50, of which sum the plaintiff claims one-half, or $13,018.75, plus accrued interest; (c) that she is entitled to the total of the purchase price of the lands sold by the said Bank as Executor in the amount of $24,472.60.

"17. That following the discovery of the defect of title conveyed by the Bank to B. S. Roy & Sons and to John G. Kienke and Colonial Neon Southern, it was agreed between Bright E. Honeycutt and Citizens National Bank, as Executor, that Bright E. Honeycutt would execute a Quitclaim Deed to the said Bank covering the lands so conveyed by the Bank, provided that she would be entitled to the proceeds from said sale if she was entitled to the said lands, said agreement being set forth more fully as EXHIBIT D, attached to the complaint.

"18. That the Citizens National Bank now holds, as Executor, a sum of money in excess of $53,606.35, which said sum is sufficient to satisfy all debts and charges of administration as well as the claim filed by the plaintiff; that the said Bank had denied the claim of the plaintiff for the reason that the Bank, as Executor, and Trustee, filed with the proper taxing authorities the estate and inheritance tax returns of said estate, and said taxing authorities denied the right of said estate to the marital deduction in the sum of one-half of the amounts claimed."

The Conclusions of Law set forth in the judgment are as follows:

"1. That the deed referred to and attached to the complaint dated January 26, 1950, from C. E. Honeycutt and wife, Bright E. Honeycutt, to Robert N. Rosebro is void, and that said deed was wholly ineffective to pass any title to the said Robert N. Rosebro since it was made solely for the purpose of effecting a conveyance of title to C. E. Honeycutt individually.

"2. That at all times the plaintiff, Bright E. Honeycutt, has been the owner of an estate by the entireties in the lands described in the said deeds attached to the complaint.

"3. That the cash moneys derived from the sale of lands described in said deed during the life of C. E. Honeycutt were never distributed by the said C. E. Honeycutt, and that no agreement between C. E. Honeycutt and his wife was ever made for the distribution of the said moneys, and that the plaintiff is entitled to one-half of the sums realized from the sale of said land held by the entireties.

"4. That the notes representing the balance of the purchase money for land sold during the life of the said C. E. Honeycutt are payable

jointly to C. E. Honeycutt and his wife and were collected by the Citizens National Bank as Executor and Trustee after the death of the said C. E. Honeycutt, and the plaintiff is entitled to one-half of the proceeds of said notes and one-half of the accrued interest.

"5. That at the death of C. E. Honeycutt, Bright E. Honeycutt was the owner, as surviving tenant, of all the lands described in the deeds attached to the complaint which remained in the Estate of C. E. Honeycutt and by virtue of her agreement with the defendant Bank is entitled to the proceeds realized by the said Bank as Trustee from the sale of said lands.

"6. That the language of said Will does not put the plaintiff to an election since it does not appear clearly and unmistakably that the testator intended to dispose of property not his own; that the plaintiff was unaware of any rights and has not engaged in any conduct which should estop her from claiming her rights as surviving tenant by the entireties in the lands described in the deeds attached to the complaint."

Thereupon, it was "ORDERED, ADJUDGED AND DECREED, that the plaintiff have and recover of the defendants the sum of $53,606.35, together with interest thereon from and after the 31st day of August 1953."

Defendants excepted and appealed, assigning as error each of the Conclusions of Law and the judgment.

Mullen, Holland & Cooke for plaintiff, appellee.

Geo. B. Mason and L. B. Hollowell for defendants, appellants.

BOBBITT, J. The ultimate questions for decision are these: 1. Did the plaintiff own all or any part of the property in controversy as of the date of her husband's death? 2. If so, is she precluded from asserting her claims against defendants, based on such ownership, by her acceptance of benefits under her husband's will?

A deed to husband and wife, nothing else appearing, vests the title in them as tenants by entirety. *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45, and cases cited. The fact that the husband paid the entire purchase price, standing alone, does not affect the character of the estate vested in husband and wife. Where a husband purchases realty and causes the conveyance to be made to his wife, the law presumes that it is a gift and no resulting trust arises; and to rebut the presumption of gift and establish a resulting trust the evidence must be clear, strong and convincing. *Shue v. Shue,* 241 N.C. 65, 84 S.E. 2d 302, and cases cited. This well established rule applies with equal force when the husband purchases realty and causes the conveyance to be made to himself and his wife, as tenants by entirety, rather than to the wife as sole owner. In *Morton v. Lumber Co.,* 154 N.C. 278, 70 S.E. 467, the

husband paid the purchase price and caused the deed to be made to himself and his wife; and it was held that the title vested in them as tenants by entirety. In *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518, the husband paid the purchase price and caused the deed to be made to the trustee of a passive trust, for the benefit of himself and his wife; and it was held that, by virtue of our Statute of Uses, G.S. 41-7, the title vested in them as tenants by entirety.

Here there is no evidence to rebut the presumption of gift. Indeed, the Finding of Fact (#3) is that on and prior to 29 January, 1950, "C. E. Honeycutt and his wife, Bright E. Honeycutt, were the owners, as tenants by the entirety," of the lands here involved.

In passing, we note that a different rule applies when the wife pays the purchase price in money, as in *Deese v. Deese,* 176 N.C. 527, 97 S.E. 475, or in land, incident to an exchange of partition deeds, as in *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474. But we are not concerned here with the common law and statutory bases for these decisions.

True, C. E. Honeycutt and wife, Bright E. Honeycutt, purported to convey the lands here involved to Rosebro; and Rosebro and wife purported to convey the identical lands to C. E. Honeycutt. The explicit Finding of Fact (#3) is that this transaction was "solely for the purpose of accomplishing an indirect conveyance of the plaintiff's property to her husband." Further, the explicit Finding of Fact (#4) is that there was not attached to such purported deed from the Honeycutts to Rosebro "a certificate of a proper probate officer reciting that at the time of its execution the same is not unreasonable or injurious to the rights of the said Bright E. Honeycutt as required by General Statutes of North Carolina, 52-12." The certificate is solely to the effect that the Honeycutts appeared before the Notary Public and acknowledged their execution of the purported deed.

In the absence of a certificate by the *examining* officer incorporating a statement of his findings that the conveyance was not unreasonable or injurious to the wife, such purported conveyance was void. Such a judicial or *quasi*-judicial determination and certificate is indispensable to the validity of a conveyance by a wife to her husband. G.S. 52-12; *Best v. Utley,* 189 N.C. 356, 127 S.E. 337. Since the purported deed to Rosebro was void, it follows that the purported deed from the Rosebros to C. E. Honeycutt is wholly ineffectual as a conveyance of title.

As stated by *Barnhill, J.,* now *Chief Justice:* "A married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of G.S. 52-12. Any manner of conveyance—testamentary devises excepted—otherwise than as therein provided is void." *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624, and cases cited.

The contention that G.S. 52-12 was repealed by Ch. 73, s. 21, 1945 Session Laws, now codified as G.S. 47-116, is without merit. In fact, Section 19 of said 1945 Act re-enacts G.S. 52-12, leaving intact and unimpaired the provisions presently applicable. Subsequently, G.S. 52-12 was amended in respects not material here by Ch. 111, 1947 Session Laws, and again by Ch. 1006, 1951 Session Laws. Suffice it to say, G.S. 52-12 and G.S. 47-116 relate to different subjects. There is no conflict.

As to lands owned by C. E. Honeycutt and wife, Bright E. Honeycutt, as tenants by entirety, when the husband died, the wife, as surviving tenant, became the sole owner. No right, title or interest of any kind passed to the executor for the benefit of the creditors or devisees of the husband. *Underwood v. Ward,* 239 N.C. 513, 80 S.E. 2d 267; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566. The proceeds of sales made by the executor, subsequent to the death of C. E. Honeycutt, as set forth in the Findings of Fact (#13 and #17) are deemed to have the same status as such lands.

As to lands owned by C. E. Honeycutt and wife, Bright E. Honeycutt, previously sold and conveyed by them, nothing else appearing, the husband and the wife had equal right, as tenants in common, to the proceeds derived from such sales. *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468.

The cash paid as purchase price ($32,230.00) was collected by C. E. Honeycutt, deposited in his personal bank account, and upon his death passed into the hands of the executor. If it be conceded that, upon dissolution of the estate by entirety by their joint conveyance, the wife, by gift or by contract, might have relinquished her right to one-half the purchase price so collected (see *Deese v. Deese,* 176 N.C. 527, 97 S.E. 475), the explicit Finding of Fact (#10) is "that no agreement or contract was made at any time between the said C. E. Honeycutt and his wife, Bright E. Honeycutt, prior to his death with reference to the distribution, division or disposal of said funds which totaled $32,230.00, and no portion of said sum was paid over to the said Bright E. Honeycutt by either C. E. Honeycutt during his lifetime or the said bank as his Executor after his death." Furthermore, the explicit Finding of Fact (#14) negatives any suggestion that the purchase by C. E. Honeycutt on 21 September 1948, of the Fairmont Park Property, which property was conveyed to C. E. Honeycutt and wife, Bright E. Honeycutt, as tenants by entirety, affects the determination of this controversy. (It is noted that Finding of Fact #10 purports to bring forward paragraph 7 of the Stipulations, but through obvious inadvertence fails to include the $10,000.00 cash payment by the Gastonia Brush Company.)

The balance purchase price notes, for $25,000.00 and $1,037.50, secured by deeds of trust on the respective properties, were made payable to "C. E. Honeycutt and wife, Bright E. Honeycutt." Subsequent to the death of C. E. Honeycutt, the executor collected the $25,000.00 note. The $1,037.50 note remains unpaid, but the present judgment does not cover this item.

Our conclusion is that, when C. E. Honeycutt died, plaintiff, in her own right, as against the estate of C. E. Honeycutt, owned in fee the unsold portion of the lands here involved and a one-half interest in the money and notes received from the lands previously sold and conveyed by their joint deeds.

Appellants seek to invoke the doctrine of equitable election. They contend that by her acceptance of benefits under her husband's will, plaintiff is estopped from claiming against his estate that which otherwise belongs to her. The court below held that the doctrine of equitable election has no application to the facts of this case. We agree.

The right to dispose of property by will is statutory. *Pullen v. Comrs.*, 66 N.C. 361; *Alexander v. Johnston,* 171 N.C. 468, 88 S.E. 785. A testator may dispose of property owned by him at the time of his death, which otherwise would descend to his heirs or be distributed to his next of kin. G.S. 31-40.

The doctrine of equitable election is in derogation of the property right of the true owner. Hence, the intention to put a beneficiary to an election must appear plainly from the terms of the will. *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29; *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14; *Rich v. Morisey,* 149 N.C. 37, 62 S.E. 762. Ordinarily, where the testator attempts to devise *specific property,* not owned by him, to a person other than the true owner, and provides other benefits for the owner of such specific property, such beneficiary is put to his election. *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183. Even so, if it appears that the testator erroneously considered the specific property so devised to be his own, no election is required. *Byrd v. Patterson, supra; Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584; *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162. An election is required only when *the will* confronts a beneficiary with a choice between two benefits which are *inconsistent with each other.*

Here the testator devises to his wife, "*my* right, title and interest and estate which I may have in and to our residence property located at 1133 East Franklin Avenue, Gastonia, N. C." (This property is not the subject of controversy.) He bequeathed to his wife the proceeds of his insurance policies and "all of *my* personal effects," etc. Thereupon, he bequeathed and devised "all of the residue of *my* property of every

nature and kind and wheresoever situate" to defendant bank as trustee, to be disposed of as directed. (Italics added.)

The testator, in express terms, disposes only of property owned by him. *Lamb v. Lamb, supra.* The succinct statement of *Barnhill, J.,* now *Chief Justice,* in *Byrd v. Patterson, supra,* is applicable here: "Her (the widow's) property was not devised to another so as to compel her to decide whether she would stand on her rights or abide by the terms of the will."

The case of *Elmore v. Byrd, supra,* is directly in point. There the wife purported to convey her separate property to her husband, but the deed was void for failure to meet the requirements of Rev. 2107, now G.S. 52-12. Upon the husband's death, he devised "the lands of which he was seized," to his widow, for life, with remainder to others; and bequeathed his personal property to her upon like terms. It was held that the realty described in the void deed was hers, in her own right, and that the doctrine of equitable election did not apply.

As in the *Elmore case,* it appears probable that the testator made his will under the mistaken belief that the realty described in the void deed was owned by him. Too, it appears probable that the wife thought the said realty was owned by her husband by virtue of the void deed. The testator might have made a different will had he been aware of the true status of the property. On the other hand, had the widow been confronted with the necessity of making an election she might have dissented from the will. These are matters in the realm of speculation. The determinative fact is that the will itself, which is the only basis on which the doctrine of equitable election may be invoked, contains no provision that manifests an intent that an election was required.

For reasons stated, the assignments of error are overruled and the judgment is

Affirmed.

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

ADOLPHUS BARTE GREENWOOD v. INTER-OCEAN INSURANCE COMPANY.

(Filed 19 October, 1955.)

1. Insurance § 34a—

In construing disability clauses in insurance policies, each policy must be construed in relation to its particular provisions and each claim must be considered in relation to the particular profession or occupation in which the insured was engaged when injured.

2. Same—

The policy in suit provided benefits for total disability for a twelve month period, and extended coverage benefits for total disability thereafter if insured had been totally disabled for the entire twelve month period. Insured's evidence tended to show total disability for more than twelve months, but insured had submitted proofs of claim and had accepted partial disability benefits for part of the twelve month period. Insured refused partial disability benefits for the last thirteen days of the twelve month period. *Held:* Nonsuit was properly denied, the evidence being for the jury on the question of insured's right to recover total disability benefits for the last thirteen days of the twelve month period, and total disability benefits under the extended coverage, the proofs of claim and acceptance of partial disability benefits for part of the twelve month period not being conclusive as to the absence of total disability for that period as a predicate for the recovery under the extended coverage.

3. Same—

Where a policy provides disability benefits for loss resulting solely from bodily injuries effected directly and independently of all other causes through accidental means, insured is not entitled to recover for disability from a heart condition, which was independent of injuries received in the accident, if the heart condition was a sole or a concurring or cooperating cause of the disability, or one without which such disability would not have resulted.

4. Insurance § 34e—Where policy contains separate definitions of total disability for separate periods, failure of court to charge that both issues need not be answered alike was prejudicial.

The policy in suit provided total disability benefits for disability preventing insured from performing any and every duty pertaining to insured's business or occupation, not to exceed twelve consecutive months after the accident, and also for extended total disability benefits beyond the twelve months period if insured was prevented from engaging in any occupation or employment for wage or profit. *Held:* The definition of total disability for the twelve months period differs materially from the definition in the extended total disability coverage, and refers to a different period of time, and therefore where the issue of disability under each coverage is submitted without reference to the time period, and the jury requests instructions as to whether the two issues had to be answered alike, the court should give instructions that it was not required to answer both issues the same, and the failure of the court to do so must be held for prejudicial error.

APPEAL by defendant from *Nettles, J.*, June Term, 1955, of BUNCOMBE.

Action commenced 29 August, 1953, to recover under policy whereby defendant insured plaintiff against "loss resulting solely from bodily injuries effected directly and independently of all other causes through accidental means." The accident indemnity for "LOSS OF TIME—TOTAL" is at the rate of $200.00 per month.

Admittedly, the policy was in force on 26 January, 1952, when plaintiff received the injuries on which his claim is based.

Policy provisions for "Accident Indemnities," relevant here, are set forth in Section 2 in these words, viz.:

"LOSS OF TIME—TOTAL"

"PART A. If 'such injuries' shall within twenty days from date of the accident continuously and totally disable and prevent the Insured from performing any and every duty pertaining to the Insured's business or occupation, and if regularly attended by a legally qualified physician or surgeon, other than the Insured, the Company will pay for the continuous period of loss of time caused thereby, and not to exceed twelve consecutive months, accident indemnity at the rate specified above.

"If 'such injuries' shall wholly and continuously disable the Insured beyond twelve months and prevent the Insured from engaging in any occupation or employment for wage or profit, and if regularly attended by a legally qualified physician or surgeon, other than the Insured, the Company will pay for the continuous period of loss of time caused thereby and not to exceed sixty consecutive months, accident indemnity at the rate specified above."

"LOSS OF TIME—PARTIAL"

"PART B. Or, if 'such injuries' shall within twenty days from date of the accident or immediately following total disability, disable and prevent the Insured from performing one or more important duty or duties pertaining to the Insured's business or occupation, the Company will pay for the continuous period of loss of time caused thereby not exceeding six consecutive months, two-fifths of the said monthly accident indemnity, provided the Insured is regularly attended by a legally qualified physician or surgeon, other than the Insured, during the full period of such disability.

"The combined payments under parts A and B of this Section shall not be made for more than sixty consecutive months."

Plaintiff was a physician and surgeon in Asheville, specializing in urology. He was assisted in his office by Mrs. Crowder, a medical technician, who also served as nurse and as secretary. Under plaintiff's direction, Mrs. Crowder treated the women patients. She had worked for plaintiff for 24 years, continuously for several years before plaintiff was injured. When injured, plaintiff lacked less than two months of being 64 years of age.

Plaintiff's injury occurred 26 January, 1952. When visiting in Chapel Hill, he fell, when getting out of an automobile. The injury was to his left leg, in and about the knee.

Taken to Asheville, he was treated in a hospital there from 28 January, 1952, until 15 February, 1952, when he went to Hot Springs, Arkansas, for treatments there. Shortly after his return from Hot Springs, he went to his office, on a part-time schedule, from 3 March, 1952, to 8 April, 1952, on which date the disability and pain from his left knee caused him to quit his office entirely. On 23 April, 1952, an operation on his injured knee was performed in Charlotte, N. C., by Dr. Jacobs. Plaintiff remained in the hospital in Charlotte, under treatment for the knee injury, until June 1st. Then he returned to his home in Asheville, but did not go to his office until 18 August, 1952. From that date until early January, 1953, except for ten days, September 5-September 15, discussed below, plaintiff was at his office, on a part-time schedule. He gave up his practice on or about 1 January, 1953; but Mrs. Crowder, who had kept plaintiff's office open continuously until then, stayed on to dispose of his equipment, case histories, etc.

On the basis of proofs of claim filed by plaintiff, defendant paid and plaintiff received and accepted accident benefits as follows: At the rate of $200.00 per month (total loss) from 26 January, 1952, to 3 March, 1952, and from 10 April, 1952, to 18 August, 1952; and at the rate of $80.00 per month (partial loss) from 3 March, 1952, to 10 April, 1952, and from 18 August, 1952, to 6 January, 1953. Defendant tendered to plaintiff an additional payment of $80.00 for the period, 6 January, 1953, to 5 February, 1953, which plaintiff refused.

Plaintiff offered evidence tending to show:

When in his office, during the periods for which he claimed and received partial loss benefits, plaintiff was seriously handicapped in the performance of his professional duties. Unable to operate, he turned down all surgical cases. Before his injury, he examined patients completely. While he attempted to make a few examinations, he could get around only with the assistance of a crutch or cane and with the assistance of Mrs. Crowder. He could not stoop, bend forward, etc., postures necessary in making such examinations, on account of the disability from his knee. His work was limited to consultations and supervisory instructions to his nurse in the treatment of women patients, most of whom were former patients. A few new patients were seen, but any case involving complicated or strenuous treatment was referred to other urologists. Mrs. Crowder was unable to make the physical examinations of patients, not being licensed to do so.

The evidence disclosed these facts relative to plaintiff's income from his profession during the year 1952. January, when he was injured, $690.07; February, $271.00; March, $761.00; April, $416.00; May, $576.00; June, $286.00; July, $217.00; August, $418.00; September, $458.00; October, $634.00; November, $627.00; December, $529.00. These items total $5,883.07. Included in the indicated collections are items for work previously done and for services performed by Mrs. Crowder. As indicated, plaintiff's office was kept open during all of 1952. In plaintiff's absence, Mrs. Crowder was in charge. Plaintiff's total expenses for 1952 amounted to $6,472.42, which includes some items of personal expense as well as the items of professional and office expense.

On 5 September, 1952, on account of an acute illness, plaintiff entered a hospital. His testimony tends to show that Dr. Hensley, his physician for this illness, intimated to him in late December, 1952, and advised him explicitly in January, 1953, that he had a cardiovascular condition and should take a complete rest. Then plaintiff quit his practice and closed his office.

The evidence consists wholly of that offered by plaintiff.

Other facts pertinent to decision will be stated in the opinion.

Plaintiff's action was to recover $1,400.00, plus interest, to wit, total loss indemnity from 6 January, 1953, to 3 August, 1953, seven thirty-day periods.

The case was submitted to the jury. The issues and answers thereto were as follows:

"1. Has the plaintiff as the direct and independent result of his injury of January 26, 1952, been prevented from performing any and every duty pertaining to his business or occupation? Answer: Yes.

"2. Has the plaintiff as the direct and independent result of his injury of January 26, 1952, been wholly and continuously prevented from engaging in any occupation or employment for wage or profit? Answer: Yes.

"3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $1400.00."

Upon the verdict, judgment was awarded plaintiff for $1,400.00, with interest from the respective due dates of the monthly payments, and costs. Defendant appealed, assigning errors.

Harkins, Van Winkle, Walton & Buck for plaintiff, appellee.

Williams & Williams for defendant, appellant.

BOBBITT, J. "Accident Indemnities," Section 2, PART A, quoted above, deals with "LOSS OF TIME—TOTAL." Under the *first* paragraph

of said PART A, accident indemnity is payable thereunder at the rate of $200.00 per month, for a period not exceeding twelve months, if plaintiff, "resulting solely from bodily injuries effected directly and independently of all other causes through accidental means," is continuously and totally disabled and prevented from performing any and every duty pertaining to *his* business or occupation. Plaintiff alleged that the policy contained this provision. He alleged further that he had been so disabled from 26 January, 1952, on account of his knee injury.

Under the *second* paragraph of said PART A, if the facts are such as to entitle the insured to the total loss indemnity for the first twelve months under the provisions set out in said *first* paragraph, then the accident indemnity at the rate of $200.00 per month will be continued for an additional maximum period of 48 months if "such injuries" shall wholly and continuously disable the insured and prevent him from engaging in any occupation or employment *for wage* or *profit*. This provision will be referred to herein as the "extended total loss coverage." Plaintiff did not allege that the policy contained this provision. Nor did he allege that he was wholly and continuously disabled and prevented from engaging in *any* occupation or employment *for wage* or *profit*. At the close of plaintiff's evidence, by leave of court and over defendant's objection, plaintiff amended his complaint so as to allege this policy provision. In this Court, he moves to amend further by alleging that he was wholly and continuously disabled and prevented from engaging in *any* occupation or employment for *wage* or *profit*. Even so, the court below submitted the second issue, apparently upon the assumption that such allegation had been made.

The disability defined in the *first* paragraph of PART A, sufficient to require payment of the total loss indemnity for the first twelve months from the date of accident, differs materially from that defined in the *second* paragraph of PART A, which sets forth the conditions under which the "extended total loss coverage" is payable.

Counsel do not cite, nor have we discovered, a decision of this Court dealing with a disability provision substantially in accord with that set forth in the *first* paragraph of PART A. This provision relates to the insured's ability personally to perform the duties of his profession. Evidence of income when engaged on a part-time schedule at his office is relevant only as it may bear upon whether plaintiff was in fact totally disabled from performing personally "any and every duty" pertaining to his profession.

General discussions of what constitutes "total disability" may be found in 29 Am. Jur., Insurance, sec. 1161 *et seq.;* 45 C.J.S., Insurance, sec. 898; Richards on Insurance, 5th Ed., secs. 237 and 238; Appleman,

Insurance Law and Practice, sec. 671 *et seq.* The cases are legion. Annotations: 37 A.L.R. 151; 41 A.L.R. 1376; 51 A.L.R. 1048; 79 A.L.R. 857; 98 A.L.R. 788.

Suffice it to say: each policy must be construed in relation to its particular provisions and each claim must be considered in relation to the particular profession or occupation in which the insured was engaged when injured.

The policy under consideration, by its terms, indicates plainly the distinction between "LOSS OF TIME—PARTIAL" and "LOSS OF TIME—TOTAL." In the former, the disability must be such as to prevent the insured from performing *one or more important* duty or duties of his occupation. In the latter, the disability must be such as to prevent the insured from performing *any and every* duty of his occupation. Construed together, the indemnity for "LOSS OF TIME—TOTAL" is payable when the insured is disabled to such extent that he cannot perform *any important* duty of his profession.

The evidence, considered in the light most favorable to plaintiff, tends to show beyond question that plaintiff's disability on account of his knee injury prevented him from performing one or more important duty or duties of his occupation. Moreover, we think such evidence sufficient for submission to the jury on the issue as to whether he was disabled during the first twelve months from the date of the accident to such extent that he could not perform *any important* duty of his profession. The inference may be drawn that the plaintiff, when he went to his office during this period, simply indulged the false hope that he would recover sufficiently from his knee injury to resume his practice as a physician and surgeon; but that, after making an honest trial, he found that he was totally incapable of performing personally any important duty of his profession.

The fact that, during such times, he submitted proofs of claim, accompanied by the certificate of a doctor, to the effect that his then disability was partial, and accepted the partial loss benefits based on such proofs of claim, is not conclusive as to plaintiff's actual and true status. All relevant evidence, including such proofs of claim, was for consideration by the jury.

It must be borne in mind that plaintiff has received either total loss or partial loss benefits for the entire period from 26 January, 1952, to 6 January, 1953. He makes no further claim for that period. His claim now is for total loss benefits commencing 6 January, 1953. The evidence was sufficient for submission to the jury, certainly in relation to the remainder of the period of twelve months from his accident on 26 January, 1952. Hence, defendant's motion for judgment of nonsuit was properly overruled.

Since there must be a new trial, for reasons stated below, we need not consider the sufficiency of plaintiff's evidence, even if predicated on sufficient allegation, for submission on the issue as to whether he comes within the "extended total loss coverage." The evidence relevant to this issue may be different upon the second trial.

In relation to such "extended total loss coverage," attention is called to the fact that this Court has considered frequently disability provisions substantially in accord with those set forth in the *second* paragraph of PART A. A number of such cases are cited by *Winborne, J.*, in *Ingram v. Assurance Society,* 230 N.C. 10, 51 S.E. 2d 903, and by *Denny, J.*, in *Drummonds v. Assurance Society,* 241 N.C. 379, 85 S.E. 2d 338. The general rule applicable is stated by *Brogden, J.*, as follows: "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery." *Bulluck v. Insurance Co.,* 200 N.C. 642, 158 S.E. 185. Thus, recovery has been denied to an insured who, though suffering from a permanent and serious disability, continues to work at a gainful occupation. *Ford v. Insurance Co.,* 222 N.C. 154, 22 S.E. 2d 235. Under the *second* paragraph of PART A, the test is whether the insured is wholly and continuously disabled to such extent that he cannot engage in *any* occupation or employment for *wage* or *profit.*

There is evidence that plaintiff quit his office in January, 1953, withdrawing completely from any further attempt to practice his profession, on account of his knee injury. On the other hand, there is evidence that plaintiff so withdrew from his practice on account of his heart condition. There is no evidence that the heart condition resulted in any degree from the knee injury. (It is noted that the policy here under consideration contained provisions for "Sickness Indemnities," not involved in this action, including a special provision whereby insured waived benefits for disability resulting from "any deseases (*sic*) of the heart and/or complications arising therefrom."

To recover on account of disability, whether that defined in the *first* or in the *second* paragraphs of PART A, the knee injury alone must have been such as to cause such disability. If such disability was caused solely by plaintiff's heart condition, or if plaintiff's heart condition was a concurring and cooperating cause, without which such disability would not have resulted, plaintiff cannot recover. *Penn v. Insurance Co.,* 158 N.C. 29, 73 S.E. 99; *S. c.,* 160 N.C. 399, 76 S.E. 262.

In the trial below the first issue was germane only as to the period of twelve months beginning 26 January, 1952. The second issue, assuming a sufficient allegation to warrant its submission at all, was germane only as to the period of "extended total loss coverage," which began, if at all, upon the expiration of the first twelve months. However, the first and second issues as submitted related to the identical period, to wit, from 26 January, 1952.

After deliberating for a time, the jury returned for further instructions, when, as shown by the record, the following occurred:

"JUROR: We can't agree on whether the issues all have to be answered 'yes' or all 'no'?

"COURT: Gentlemen, I can't tell you that.

"JUROR: What I mean, do you have to answer them all one way?

"COURT: Just have a seat.

"Members of the jury, the plaintiff, with reference to the first and second issues, argues and contends that as a result, and as a direct and independent result of his injury on January 26, that he has been prevented from performing any and every duty pertaining to his business or occupation as a physician or medical doctor; and that as to the second issue that he has also, by reason of the direct and independent result of his injury alleged to have occurred on January 26, 1952, been wholly and continuously prevented from engaging in any occupation or employment for wage or profit, and the burden of those two issues is upon the plaintiff to satisfy you from the evidence, and by its greater weight, and if you are so satisfied from the evidence, and by its greater weight, that by reason of his injury that he was prevented from performing any and every duty pertaining to his business, and that he was wholly and continuously prevented from engaging in any other occupation for a wage or profit, and you so find from the evidence and by its greater weight, the burden being upon the plaintiff to so establish, then the Court charges you it would be your duty to answer both issues YES. If you are not so satisfied, it would be your duty to answer the issues No.

"As I have said, the burden is upon the plaintiff to satisfy you from the evidence and testimony in the case, and by its greater weight, that he was prevented from performing any and every duty pertaining to his business or occupation by reason of the direct and independent result of the injuries alleged to have been sustained on January 26, 1952, and, likewise, that he was prevented by the injuries from engaging as a direct and independent result of the injury from engaging in any other occupation or employment for wage or profit.

"Now, is there anything else that I can give you any additional instructions about, gentlemen?

"JUROR: What we are undecided on is whether you can answer the first one one way and the next one another way?

"COURT: Well—(interrupted).

"JUROR: We understood that you said to answer them all 'yes' or all 'no.'

"COURT: No, sir, I didn't say that, gentlemen. The only thing I can tell you is: that if you find from the evidence, and by its greater weight, that as a direct and independent result of the alleged injuries that the plaintiff was prevented from performing any and every duty pertaining to his business as a doctor, and that as the direct and independent result of his injury on January 26, 1952, that he was continuously and wholly prevented from engaging in any other occupation for wage or profit,—if you find those facts from the evidence and by its greater weight, the burden being on the plaintiff to so satisfy you, you would answer the first and second issue YES, otherwise you would answer it No."

We apprehend that these instructions did not satisfactorily answer the juror's pertinent inquiry, namely, whether the jury was required to answer both the first and second issues the same way, either "yes" or "no." The difficulty may be attributed, at least in part, to the fact that these issues, as pointed out above, should have related to different and defined periods. But, in relation to the issues submitted, had the jury seen fit to answer the first issue "no," it should not have considered the second issue at all; and had the jury seen fit to answer the first issue "yes," then the second issue was for its consideration to be answered either "yes" or "no" according to its findings. The jury was not required to answer both issues the same way, either "yes" or "no," and should have been instructed as indicated.

We note again that to recover during the initial twelve months plaintiff was required to establish only that he was disabled, "from performing any and every duty pertaining to the Insured's business or occupation," as provided in the *first* paragraph of PART A, while recovery for the immediately following period of "extended total loss coverage" required that the plaintiff then be disabled to such extent that he could not engage "in any occupation or employment for wage or profit."

In our opinion, the confusion inherent in the issues submitted, together with the instructions given in response to the juror's inquiry, resulted in a failure to submit correctly to the jury for their determination the issues upon which plaintiff's right to recover depends. Defendant, by proper exceptive assignments of error, challenged the submission of each issue as well as the quoted instructions.

Plaintiff's motion in this Court for leave to amend his complaint is denied, without prejudice to plaintiff's right hereafter in the court below to make the same motion or other motion in respect of amend-

ment of his pleadings. If defendant desires to amend its answer, it may move for leave to do so hereafter in the court below.

For the reasons stated, a new trial is awarded. Questions posed by other assignments of error may not arise when the cause is tried again.

New trial.

SOL BADAME v. EDGAR B. LAMPKE AND SINGER SEWING MACHINE COMPANY, A CORPORATION.

(Filed 19 October, 1955.)

1. Libel and Slander § 2—

Words actionable *per se* are those which are of an injurious character as a fact of common acceptance, of which fact the courts will take judicial notice, and the law will raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage, entitling the victim of the defamation to recover damages, nominal at least, without specific allegation or proof of damage.

2. Libel and Slander § 3—

Where the injurious character of the words does not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing its injurious effect, such utterance is actionable only *per quod*, and in such cases the injurious character of the words and some special damage must be pleaded and proved.

3. Libel and Slander § 2—

False words uttered of a person in his business relation imputing to such person conduct derogatory to his character and standing as a business man and tending to prejudice him in his business, are actionable *per se*.

4. Same—

Plaintiff alleged that defendant, a business competitor, spoke words over the telephone to a customer which imputed to plaintiff the reputation of engaging in "shady deals." *Held:* The words are actionable *per se*, and demurrer on the ground that the complaint alleged no special damage should have been overruled.

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

APPEAL by plaintiff from *Patton, Special Judge*, at 21 March, 1955, Civil Term of MECKLENBURG.

Civil action for slander, heard below on demurrer to the complaint.

The complaint alleges that the plaintiff and the defendants are engaged in the sale and distribution of sewing machines in and around the City of Charlotte. They are business competitors. The plaintiff sells Royal and Edison machines, the defendants the Singer machine.

The defendant Lampke is district manager for Singer. The plaintiff sold Mr. and Mrs. K. O. Coble an Edison machine. The Cobles owned an old Singer which was traded in on the new Edison. There was a small balance due on the Singer. This balance was assumed and promptly paid by the plaintiff. A short while later, Lampke had a phone conversation with Mr. Coble in which Lampke is alleged to have said:

"You should not have traded your sewing machine with Mr. Badame. Mr. Badame will not give you a good machine. The balance on your old machine has not been paid off. Do you know Captain McCall of the Charlotte Police Department? Call him and he can tell you all about the shady deals Mr. Badame has pulled."

It is further alleged that the words so spoken were false; that they were spoken maliciously with intent to injure the plaintiff in his business, and that by reason thereof his business reputation has been impaired and he has lost the esteem of customers and prospective customers, resulting in great loss of business, to his actual damage in the sum of $25,000.

The defendants demurred to the complaint for failure to state facts sufficient to constitute a cause of action, in that (1) the words complained of are not slanderous *per se,* and (2) no special damage is alleged. The demurrer was sustained, and from judgment in accordance with this ruling, the plaintiff appeals.

Bell, Bradley, Gebhardt & DeLaney for plaintiff, appellant.

Helms & Mulliss and John D. Hicks for defendants, appellees.

JOHNSON, J. Decision here turns on whether the words alleged to have been spoken of the plaintiff are actionable *per se.*

Defamatory words may be actionable *per se,* that is, in themselves, or they may be actionable *per quod,* that is, only upon allegation and proof of special damage. However, both classes of words are actionable for the single reason that they cause pecuniary damage to those concerning whom they are maliciously spoken. The difference between the two classes of words is in the mode of proving the resultant damage. As to words actionable *per se,* the law treats their injurious character as a fact of common acceptance, and consequently the courts take judicial notice of it. Where such words are spoken, the law raises a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage, entitling the victim of the defamation to recover damages, nominal at least, without specific proof of injury or damage. *Deese v. Collins,* 191 N.C. 749, 133 S.E. 92; *Oates v. Trust Co.,* 205 N.C. 14, 169 S.E. 869; *Broadway v. Cope,* 208 N.C. 85, 179 S.E. 452; *Kindley*

v. Privette, 241 N.C. 140, 84 S.E. 2d 660; 33 Am. Jur., Libel and Slander, Sections 5, 266, and 282. On the other hand, if the injurious character of the spoken statement appears, not on its face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing its injurious effect, such utterance is said to be actionable only *per quod,* and in such cases the injurious character of the words must be pleaded and proved, and in order to recover there must be allegation and proof of some special damage. *Deese v. Collins, supra.*

It is well settled that false words imputing to a merchant or business man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se. Broadway v. Cope, supra.* However, the better reasoned decisions seem to hold that in order to be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se,* they must be uttered of him in his business relation. *James v. Haymes,* 160 Va. 253, 168 S.E. 333; *Herman v. Post,* 98 Conn. 792, 120 A. 606; *Canton Surgical, etc., Chair Co. v. McLain,* 82 Wis. 93, 51 N.W. 1098; 53 C.J.S., Libel and Slander, Sec. 43; 33 Am. Jur., Libel and Slander, Sec. 64. See also Annotations: 52 A.L.R. 1199 and 86 A.L.R. 442. Defamation of this class ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct in business. *Broadway v. Cope, supra;* 33 Am. Jur., Libel and Slander, Sections 68 and 70.

It would seem that the words alleged to have been spoken by the defendant Lampke necessarily imputed to the plaintiff, his business rival, the character of a disreputable business man who had the reputation of engaging in "shady deals." Webster, New International Dictionary, 1951 Edition, defines "shady" as used in this sense as "equivocal as regards merit or morality; unreliable; disreputable." We conclude that the words complained of when interpreted in their natural meaning charge the plaintiff with a dishonorable course of business conduct, and are actionable *per se.*

The cases cited and relied on by the defendants are distinguishable.

The question whether the complaint alleges special damage is not presented by this appeal. See Annotation: 81 A.L.R. 848.

The demurrer interposed below should have been overruled. It is so ordered.

Reversed.

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

ARTHUR M. JENKINS AND CHARLES J. HENDERSON v. DUCKWORTH & SHELTON, INC.

(Filed 19 October, 1955.)

1. Quasi-Contracts § 1—

There can be no implied contract where there is an enforceable express contract between the parties as to the same subject matter.

2. Pleadings § 2—

Plaintiffs may state a cause of action in two different ways, leaving it to the court or jury to say to which relief they are entitled.

3. Contracts § 21—Plaintiffs may state cause of action on express contract in two different ways in complaint.

Plaintiffs alleged their employment by defendant to represent them in a legal matter, the successful performance of the employment, the rendition of an account for services in a certain amount, and prayed recovery for such amount, less credits for payments made on account. By amendment, plaintiffs alleged the same employment in the same legal matter, the successful performance of the employment, and sought to recover the reasonable worth of their services in the same amount stated in the first cause of action, less the same credits for payment. *Held:* Both causes of action are based upon express contract, and defendant's motion that plaintiffs be compelled to elect between the two causes of action was properly refused.

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

APPEAL by defendant from *Pless, J.*, August Conflict Civil Term 1955 of MECKLENBURG.

Motion to compel the plaintiffs to elect between the first and second cause of action declared on in their complaint, as amended.

The complaint alleged defendant's employment of plaintiffs, lawyers, to represent it in connection with a jeopardy assessment levied on its property by the United States, the successful performance of the employment, the rendition of an account for services in the amount of $11,000.00, less $2,650.00 already paid on the services, $600.00 paid on the account rendered, and refusal to pay the remainder of the account rendered.

The defendant answered admitting the employment of plaintiffs, the successful performance of the employment, the payment to plaintiffs of $3,250.00, but averred no payment was made on the account rendered, and plaintiffs' services were not worth $11,000.00.

Then the plaintiffs, by leave of court, filed an amendment to their complaint setting forth as a second cause of action their same employment by defendant to represent it in the same matter declared on in their first cause of action, the successful outcome of their representation, and the reasonable worth of their services to be $11,000.00, upon which $3,250.00 had been paid.

Defendant's answer to the second cause of action makes substantially the same admissions as its answer to the complaint did, but alleges there was no agreement as to the amount of the fee, though it expected to pay a reasonable fee, that $11,000.00 is not a reasonable fee, and that plaintiffs be compelled to elect between their two causes of action.

The motion was denied, and the defendant appealed, assigning error.

Covington & Lobdell for Plaintiffs, Appellees.
David H. Armstrong and J. F. Flowers for Defendant, Appellant.

PARKER, J. Both causes of action in the complaint are based upon the same express contract of employment. The answer admits an express contract of employment, the successful performance of the employment, and the expectation of paying a reasonable fee, the amount of which had not been agreed upon.

There is no question of an implied contract. There can be no implied contract where there is an enforceable express contract between the parties as to the same subject matter. *McLean v. Keith,* 236 N.C. 59, 72 S.E. 2d 44; *Lawrence v. Hester,* 93 N.C. 79; 17 C.J.S., Contracts, Sec. 5. Cases relied upon by defendant are concerned with allegations of an express contract and an implied contract, and are not applicable.

"The general rule, which is subject to some qualification under statutes, is that the statement of the same cause of action in different ways or forms, each in a separate count, so as to meet different possible phases of the evidence as it may be developed at the trial, or different possible legal views, is permissible." 71 C.J.S., Pleadings, p. 215. See: 41 Am. Jur., Pleadings, p. 318.

"The plaintiff can unite two causes of action relating to the same transaction and have alternative relief." *Herring v. Lumber Co.,* 159 N.C. 382, 74 S.E. 1011.

The law in this jurisdiction does not compel the plaintiffs here to elect at their peril, between their two causes of action stated in different ways. They may assert both, leaving it to the jury or court to say which they are entitled to.

The ruling of the court below is

Affirmed.

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

STATE v. ALONZO CLONCH.

(Filed 19 October, 1955.)

1. Bastards § 7—

Where it is judicially determined that defendant is the father of the illegitimate child in question, but that he was not guilty of the charge of abandonment and nonsupport then preferred against him, *held* in a subsequent prosecution for the defendant's subsequent willful failure to support the child, the issue of paternity is *res judicata*, and the court correctly refuses to permit defendant to introduce evidence on the issue of paternity in the second prosecution.

2. Criminal Law § 52b—

While in proper instances the court may charge the jury that if the jury finds the facts to be as all the evidence tends to show beyond a reasonable doubt, to return a verdict of guilty, an instruction that if the jury believes the evidence of defendant, to return a verdict of guilty, is too unequivocal and entitles defendant to a new trial.

APPEAL by defendant from *Rudisill, J.*, at March Term 1955, of CALDWELL.

Criminal prosecution upon a warrant issued out of Recorder's Court of Caldwell County on 5 November, 1954, on affidavit of the prosecutrix Gladys Bentley, charging defendant with willful nonsupport of his illegitimate child Floyd Everett Bentley, five years of age. G.S. 49-2.

The case on appeal shows that the case was duly tried before Judge of the Recorder's Court on 10 December, 1954; that defendant was found guilty; that he appealed to Superior Court; that on trial in Superior Court on 2 March, 1955, both the State and the defendant offered in evidence from minute docket No. 7, page 295, of the Recorder's Court of Caldwell County record to the effect that on 30 September, 1952, defendant was adjudged to be the father of the child, Floyd Edward Bentley, age three years, begotten upon the body of Gladys Bentley, but that he was not guilty of the charge as to abandonment and nonsupport then preferred against him; and the State offered evidence tending to show that thereafter defendant had failed to support and maintain said child, after demand; and defendant testifying as witness for himself gave testimony tending to show that he had not supported the child.

And in the course of the trial in Superior Court, defendant sought to offer evidence bearing upon the issue of paternity. To the refusal thereof he excepted.

At the close of the evidence the Court instructed the jury that "if you believe the evidence of the defendant, you will return a verdict of guilty." Defendant excepted.

The jury returned a verdict of guilty, and from judgment rendered thereon defendant appeals to Supreme Court and assigns error.

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

Hal B. Adams for defendant appellant.

PER CURIAM. Appellant presents for decision two assignments:

First, the one based upon exception to the refusal of the court to admit evidence relating to the issue of paternity. The exception is without merit. The judgment of the Recorder's Court in this respect is *res judicata*. See *S. v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857; also G.S. 49-7; *S. v. Clement,* 230 N.C. 614, 54 S.E. 2d 919.

And, second, the one based upon exception to the charge:

This exception is well taken. It would seem that the language used is too unequivocal. Ordinarily it is permissible for the court to charge that if the jury finds the facts to be as the evidence tends to show beyond a reasonable doubt to return a verdict of guilty; otherwise not guilty.

For error thus committed, there must be a

New trial.

STATE v. NORMAN LEE MINTZ

and

STATE v. WILLIAM FLOYD BALLINGTON.

(Filed 19 October, 1955.)

Crime Against Nature § 2: Criminal Law §§ 11, 62a—

An attempt to commit the offense defined by G.S. 14-177 is an infamous act within the meaning of G.S. 14-3, and therefore sentence to the State's prison is within the limitations permitted by law.

APPEAL by defendants from *Moore (Clifton L.), J.,* August Term 1955, NEW HANOVER.

Two criminal prosecutions under bill of indictment which charges that the defendants did feloniously commit the crime against nature.

The two causes were consolidated for trial, and the court submitted the evidence to the jury on the issue only of attempt to commit the crime against nature. There was a verdict of guilty as to each defendant.

From judgments pronounced on the verdicts the defendants appealed.

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

Aaron Goldberg and Rountree & Rountree for appellant Mintz.

W. Jack F. Canady for appellant Ballington.

PER CURIAM. G.S. 14-177 defines the crime against nature as an "abominable and detestable" crime, and we held in *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1, that an attempt to commit the crime thus defined is an infamous act within the meaning of G.S. 14-3. We still adhere to that decision. Hence the sentence imposed in the court below was within the limitations permitted by law.

The other exceptive assignments of error present no substantial question which requires discussion. They fail to point out prejudicial error. Therefore, in the trial below we find

No error.

STEDMAN B. SHEPARD, JR., v. LA GRANGE OIL & FUEL COMPANY.

(Filed 19 October, 1955.)

1. Appeal and Error § 27—

Where the several grounds of exception and assignment of error in appellant's brief mailed or delivered to appellee's counsel fail to refer to the pertinent pages of the transcript, appellee's motion to dismiss for failure to comply with the mandatory rule of court will be allowed. Rule 28, Rules of Practice in the Supreme Court.

2. Appeal and Error § 23—

The assignments of error should indicate the page of the trancript upon which the exception referred to is to be found. Rule 19 (3) and Rule 21 of the Rules of Practice in the Supreme Court.

APPEAL by plaintiff from *Sink, Emergency Judge,* May-June Term 1955 of NEW HANOVER.

Civil action to recover damages for personal injuries sustained in a motor vehicle collision.

The jury found by its verdict that the plaintiff was not injured by the negligence of the defendant, as alleged in the complaint. Whereupon judgment was entered that the plaintiff take nothing, from which judgment the plaintiff appealed, assigning error.

Elbert A. Brown, W. K. Rhodes, Jr., and I. C. Wright for Plaintiff, Appellant.

James & James for Defendant, Appellee.

PER CURIAM. The motion of the appellee to dismiss the appeal for the reason that in the copy of appellant's brief mailed or delivered to appellee's counsel within the time prescribed by Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562, the several grounds of exception and assignment of error had no reference to the pages of the transcript is allowed. This rule of court is mandatory, and will be enforced. *Bradshaw v. Stansberry,* 164 N.C. 356, 79 S.E. 302; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *S. v. Evans,* 237 N.C. 761, 75 S.E. 2d 919.

In the instant case there are twenty-two assignments of error, all of the same tenor, of which the following may be taken as typical: "Fifteenth assignment: His Honor erred in charging the jury as follows: 'The same rule applies to the driver of the car in which the plaintiff was riding.' Which error is the basis of the 20th Exception?" Where can the 20th Exception be found? This Court said in *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175: "We have frequently long records to read and re-read, and unless the statute is followed, and *seriatim* exceptions to the charge are made and numbered, with assignments of error numbered, and giving record page, it is tedious and burdensome to 'fish out' of the charge the numerous assignments of error." It would seem that the assignments of error do not comply with Rule 19 (3) and Rule 21 of Practice in this Court. *Taylor v. Hayes,* 172 N.C. 663, 90 S.E. 801; *Baker v. Clayton,* 202 N.C. 741, 164 S.E. 233. See also: *Lee v. Baird,* 146 N.C. 361, 59 S.E. 876.

Notwithstanding the condition of the record, we have examined the record and plaintiff's assignments of error—the course pursued in *Taylor v. Hayes, supra*—and have discovered no valid reason for disturbing the judgment of the Superior Court. The plaintiff has not successfully carried the burden of showing prejudicial error amounting to the denial of some substantial right. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657.

Appeal dismissed.

ELBERT WATSON, EMPLOYEE, v. HARRIS CLAY COMPANY, EMPLOYER (SELF-INSURER).

(Filed 19 October, 1955.)

Master and Servant § 55d—

When there is any competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary.

HOLT *v.* GREGORY.

APPEAL by plaintiff from *Sink, Emergency Judge,* April Term, 1955, of AVERY.

Proceeding before the Industrial Commission for compensation due to disablement from silicosis.

The hearing Commissioner found as a fact that the plaintiff failed to show an injurious exposure to the hazards of silicosis while employed by the defendant, and there is competent evidence to support such finding.

The plaintiff appealed to the Full Commission and after a review of the evidence, findings of fact and conclusions of law of the hearing Commissioner theretofore made, it adopted such findings of fact and conclusions of law and ordered an affirmance of the result reached by him. The plaintiff then appealed to the Superior Court where the order of the Commission was in all respects affirmed.

Plaintiff appeals to this Court, assigning error.

Warren H. Pritchard for plaintiff appellant

Stillwell & Stillwell, McBee & McBee, and Fouts & Watson for defendant appellee.

PER CURIAM. When there is any competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612; *Rewis v. Insurance Co.,* 226 N.C. 325, 38 S.E. 2d 97. Therefore, in light of the Commission's findings of fact, the judgment of the court below must be

Affirmed.

L. BANKS HOLT v. HERBERT L. GREGORY, A MINOR, APPEARING BY AND THROUGH HIS GUARDIAN AD LITEM F. E. WALLACE, JR.; HILDA IOLA GREGORY; TWIN STATES INSURANCE CORPORATION, AND MOTORS INSURANCE CORPORATION.

(Filed 19 October, 1955.)

APPEAL by defendant Herbert L. Gregory from *Parker, J.,* February Term, 1955, of LENOIR.

Civil action growing out of automobile collision that occurred about 11:30 p.m. on 2 May, 1954, at intersection of Washington and Nelson Streets in Kinston.

Plaintiff was driving his 1952 Dodge east along Washington Street; and defendant Herbert L. Gregory, then twenty years of age, was driv-

ing a 1954 Chevrolet owned by his sister, Hilda Iola Gregory, south along Nelson Street.

Plaintiff's action was against the defendants Gregory for damages on account of personal injuries and damage to his Dodge car, allegedly caused by the negligence of the driver of the Gregory car. Plaintiff alleged that defendant Hilda Iola Gregory was liable on principles of agency. Defendants denied negligence, alleged contributory negligence; and defendant Hilda Iola Gregory alleged a cross action against plaintiff for damages to her Chevrolet car.

Twin States Insurance Company and Motors Insurance Corporation were made parties because of payments made by them to the owners of the Dodge and Chevrolet cars, respectively, under collision insurance policies.

At the close of plaintiff's evidence, the motion of defendant Hilda Iola Gregory for judgment of involuntary nonsuit was allowed. No evidence was offered, and no issues were submitted, bearing upon the alleged cross action of defendant Hilda Iola Gregory.

The jury found that plaintiff was injured and his automobile damaged by the negligence of defendant Herbert L. Gregory, that plaintiff was not contributorily negligent, and awarded damages.

Judgment for plaintiff was entered against defendant Herbert L. Gregory in accordance with the verdict. Defendant Herbert L. Gregory excepted and appealed, assigning as error (1) the court's denial of his motions for judgment of involuntary nonsuit, and (2) alleged errors of commission and of omission in the charge.

Owens & Langley for plaintiff, appellee.
Whitaker & Jeffress for defendant Herbert L. Gregory, appellant.

PER CURIAM. Upon a careful review of the evidence, we concur in Judge Parker's denial of appellant's motions for judgment of involuntary nonsuit. Moreover, consideration of the charge fails to disclose any error of law deemed of sufficient prejudicial effect to warrant a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

APPENDIX.

AMENDMENTS TO RULES OF PRACTICE IN THE SUPREME COURT.

Rule 4 (a).

From and after the first day of the Spring Term of 1956, this Court will not entertain an appeal:

(1) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order overruling the demurrer.

(2) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order.

The foregoing rule was adopted in conference 19 October 1955.

WM. H. BOBBITT,
For the Court.

Upon motion duly made and seconded, it was unanimously resolved that the Rules of Practice in the Supreme Court, as published in 221 N.C. 544, *et seq.*, as amended as published in 233 N.C. 749, be further amended in the following particulars, effective 1 July, 1955:

Rule 5 (221 N.C. 546—as amended 233 N.C. 749) shall be, and it is further amended as follows:

In the third paragraph, line four, strike out the words, "First, Second, Third, Eighteenth, Nineteenth, Twentieth and Twenty-first" and insert in lieu thereof the words "First, Second, Third, Fourth, Fifth, Sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth," so that the paragraph shall read as follows:

"Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil case from the First, Second, Third, Fourth, Fifth, Sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth districts which is tried between first day of January and the first Monday in February, or between first day of August and Fourth Monday in August, is not

required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

Rule 6 (221 N.C. 547—as amended 233 N.C. 749) shall be and it is further amended as follows:

In line five, strike out the word "Eleventh" and insert in lieu thereof the word "Sixteenth," so that the paragraph shall read as follows:

Appeals in criminal cases, docketed twenty-one days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Sixteenth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

Rule 7 (221 N.C. 548—as amended 233 N.C. 749) shall be and it is amended as follows: Strike out all of the rule in respect to call of appeals, from the beginning to end of sentence reading "From the Tenth and Eleventh Districts, the sixteenth week of the term," and rewrite same so as to read as follows:

"Appeals from the several districts as delineated in Senate Bill No. 107, 1955 Session, entitled "An Act to Increase the Number of Judicial Districts in the State of North Carolina in Order to Provide a Sufficient Number of Resident Judges to Administer Justice Without Undue Delay," ratified March 3, 1955, as amended by House Bill No. 595, ratified April 27, 1955, will be called for hearing in the following order:

"From the First, Second, Twenty-Ninth and Thirtieth Districts, the first week of the term.

"From the Third and Twenty-Eighth Districts, the second week of the term.

"From the Fourth, Fifth, Sixth and Twenty-Seventh Districts, the fourth week of the term.

"From the Seventh and Twenty-Sixth Districts, the fifth week of the term.

"From the Eighth, Twenty-Fourth and Twenty-Fifth Districts, the seventh week of the term.

"From the Ninth, Twenty-First, Twenty-Second and Twenty-Third Districts, the eighth week of the term.

"From the Tenth and Twentieth Districts, the tenth week of the term.

"From the Eleventh and Nineteenth Districts, the eleventh week of the term.

"From the Twelfth, Thirteenth and Eighteenth Districts, the thirteenth week of the term.

"From the Fourteenth and Seventeenth Districts, the fourteenth week of the term.

"From the Fifteenth and Sixteenth Districts, the sixteenth week of the term."

Rule 8 (221 N.C. 549) shall be, and it is amended as follows: In line four, strike out the words "Eleventh" and insert in lieu thereof the words "Fifteenth and Sixteenth."

Rule 10 (221 N.C. 549-550) shall be, and it is amended as follows: In line eight, strike out the word "Ninth" and insert in lieu thereof the words "Fourteenth and Seventeenth."

CARLISLE W. HIGGINS,
For the Court.

May 10, 1955.

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ANALYTICAL INDEX.

ACCORD AND SATISFACTION.

§ 1. Nature and Validity of Agreements.

An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself entitled to; and a satisfaction is the execution or performance of such agreement. *Allgood v. Trust Co.*, 506.

ACTIONS.

§ 8c. Actions Predicated on Wrongful Act or Illegal Agreement.

Plaintiff and the individual defendant entered into a written agreement for the division of land sold at judicial sale, predicated upon suppression of bidding at the sale. This agreement was held void as contrary to public policy. Thereafter plaintiff instituted this action to recover on a subsequent parol agreement in regard to the lands, and the evidence plainly and clearly disclosed that the parol agreement was entered into solely for the purpose of simplifying performance of the void written agreement and grew immediately out of and was directly connected with the void contract. *Held:* Nonsuit was correctly entered in the second action for specific performance of the oral agreement or for damages for its breach, since a court of justice will not lend its aid to enforce an illegal contract, but will remit the parties to their own folly under the maxim, *ex colo malo non oritur actio. Lamm v. Crumpler*, 438.

ADVERSE POSSESSION.

§ 17. Presumptions and Burden of Proof.

There is a rebuttable presumption of fact that possession is in him who has the true title. *Memory v. Wells*, 277.

Where plaintiff shows a common source of title and title to the disputed area in himself from that source, and the defendants assert title to the disputed area by adverse possession, the burden on the issue of adverse possession is upon defendants. *Ibid.*

§ 18. Competency and Relevancy of Evidence.

A witness may testify as to the acts of ownership exercised over the property, but is not entitled to testify to the conclusion that she or her predecessors in title had been in the adverse, open and notorious possession of the land, this being the question for the determination of the jury under correct instructions. *Memory v. Wells*, 277.

Map prepared by surveyor appointed by court is competent in evidence. *Ibid.*

Testimony as to statements made by predecessors in title as to their acts of dominion and ownership over the *locus in quo* are incompetent as self-serving and hearsay. *Ibid.*

§ 19. Sufficiency of Evidence and Nonsuit.

Defendant is not entitled to nonsuit of plaintiff's action for possession upon defendant's evidence of adverse possession where evidence of whether defendant had been in possession for statutory time is conflicting. *Memory v. Wells*, 277.

AGRICULTURE.

§ 5a. Enforcement of Liens—Right to Possession.

Plaintiff landlord instituted this suit to recover for the wrongful seizure of his tobacco and conversion thereof by the holder of agricultural liens executed by plaintiff's wife and their tenant. Defendant contended that plaintiff was estopped to deny that the tobacco belonged to his wife and that defendant had the right to seize the tobacco before the maturity of the liens executed by the wife and the tenant under the provisions of G.S. 44-63. *Held:* The jury's finding that defendant wrongfully seized and converted the tobacco to his own use under instructions as to estoppel does not necessarily determine that defendant had no lien on the tobacco, since even though plaintiff were estopped to deny his wife's title, defendant would not have the right to seize the tobacco prior to the maturity of the liens except under the provisions of G.S. 44-63, and therefore the failure of the court to charge the provisions of the statute is prejudicial error which is not rendered immaterial by the jury's answer to the issue. *McNeill v. McDougald*, 255.

§ 9. Marketing Associations and Cooperatives—Control and Regulations.

The business of operating warehouses for the public marketing of tobacco is one affected with a public interest and is subject to reasonable public regulation. *Warehouse v. Board of Trade*, 123.

The authority granted tobacco boards of trade by G.S. 106-465, as amended, to make reasonable rules and regulations for the economic and efficient handling of the sale of leaf tobacco at auction on warehouse floors, includes the authority to make reasonable rules and regulations in respect to the allotment of sales time to each warehouse. *Ibid.; Day v. Board of Trade*, 136.

Regulations allotting selling time in regard to owner of single warehouse in relation to owners of groups of warehouses *held* reasonable and valid. *Warehouse v. Board of Trade*, 123.

Regulations allotting selling time in regard to new warehouses *held* reasonable and valid. *Day v. Board of Trade*, 136.

A tobacco board of trade is not required to adopt any particular plan for the allotment of selling time to its respective warehouse members, it being required only that the standard be reasonable and equitable. *Day v. Board of Trade*, 136.

§ 11. Marketing Associations and Cooperatives—Marketing Contracts and Agreements.

Where the owner of a warehouse for the sale of leaf tobacco at public auction applies for membership in the board of trade, pays the required membership fees and is accepted as a member, *held*, the articles of association for the purposes expressed in the charter and by-laws of the board of trade constitute a contract between the board of trade and the warehouse member, and such member is deemed to have consented to all reasonable rules and regulations pertaining to the business which have been properly determined and promulgated. *Warehouse v. Board of Trade*, 123; *Day v. Board of Trade*, 136.

Where a member of a tobacco board of trade is present and participates in a meeting at which its by-laws are amended and does not make any protest as to the regularity or validity of the meeting or the notice thereof, he waives any defect of notice. *Day v. Board of Trade*, 136.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

Even though an appeal may be decided upon procedural grounds, where the questions involved are of public importance, the Supreme Court may decide the appeal upon its merits. *Hudson v. R. R.*, 650.

Where an appeal is subject to dismissal for failure to comply with the rules of court, but the case involves matters of public interest, the Supreme Court of its own motion may elect to treat the appeal on its merits. *Day v. Board of Trade*, 136.

Where appellant is not party aggrieved, Supreme Court will dismiss the appeal *ex mero motu* for want of jurisdiction. *Langley v. Gore*, 302.

The Supreme Court will not consider a question which has not been adjudicated in the court below. *Merrell v. Jenkins*, 636.

§ 2. Judgments Appealable.

Where trial court sets aside verdict for defendant as contrary to weight of evidence, there is neither verdict nor judgment from which appeal may be based, and defendant may not present contention that nonsuit should have been granted. *White v. Keller*, 97.

The overruling of a demurrer *ore tenus* is not appealable. *Hamilton v. Hamilton*, 715.

An appeal from an order requiring the resident father to have the child in court in order that the question of custody might be considered and determined in a *habeas corpus* proceeding between the parents of the child, separated, but not divorced, is premature and will be dismissed, since the order is interlocutory and affects no substantial right. *In re Fitzgerald*, 732.

§ 3. Parties Who May Appeal—Party Aggrieved.

Only the party aggrieved by the judgment may appeal therefrom to the Supreme Court. *Langley v. Gore*, 302.

Order was issued that funds in the custody of the court be turned over to plaintiffs. Defendants appealed therefrom on the ground that plaintiffs are not entitled to the funds, but defendants did not claim the funds personally, and failed to show in the record that they have any interest in or claim to the funds. *Held:* Defendants are not the parties aggrieved by the judgment, and their appeal therefrom is dismissed by the Supreme Court *ex mero motu* for want of jurisdiction. *Ibid.*

Where neither the grantor nor the grantee appeals from a conclusion of law holding void, as being in violation of the 14th Amendment to the Federal Constitution, a conveyance of land by a municipality upon special limitation that the land be used for a park for white persons only, Negroes attacking the limitation are not the parties aggrieved by such conclusion of law, and their assignment of error thereto will be overruled. *Recreation Com. v. Barringer*, 311.

§ 5. Moot Questions and Advisory Opinions.

This proceeding challenging the order of the State Board of Education relative to assignment of school children to a school district is dismissed as moot, the children having gone to the district of their choice during the preceding school year, and the State Board of Education having been shorn of its power to assign children by statute enacted pending the appeal, G.S. 115-352; ch. 1372, Session Laws of 1955. *In re Assignment of School Children*, 500.

APPEAL AND ERROR—*Continued.*

Supreme Court will not decide question that has become moot merely to determine who is chargeable with costs. *Ibid.*

§ 6c (1). Necessity for and Form and Sufficiency of Objections and Exceptions in General.

Exceptions which appear nowhere in the record except under the assignments of error are ineffectual, since an assignment of error must be supported by exception duly noted. *Barnette v. Woody*, 424.

Exceptions not set out in the case on appeal and numbered as required by Rule of Practice in the Supreme Court No. 21, need not be considered on appeal. *Ibid.*

G.S. 1-206, as amended, does not eliminate the necessity for setting out and numbering the exceptions relied upon in the statement of case on appeal. *Ibid.*

In the absence of any exceptions, or where they have not been preserved as required by the Rules of Court, the appeal itself will be taken as an exception to the judgment, and presents the question of whether the court below committed error in sustaining plaintiff's motion as of nonsuit. *Ibid.*

The Supreme Court will not consider a question which has not been adjudicated in the court below and not presented by assignment of error. *Merrell v. Jenkins*, 636.

Where there is no exception or assignment of error to an order entered in the cause, the Supreme Court need not consider such order on appeal from the overruling of demurrer. *Workman v. Workman*, 726.

§ 6c (2). Exception to Judgment or to Signing of Judgment.

A sole exception to the signing of the judgments presents the one question whether the facts found are sufficient to support the judgment. *James v. Pretlow*, 102; *Heath v. Mfg. Co.*, 215; *Muilenburg v. Blevins*, 271; *Scarboro v. Ins. Co.*, 444; *Merrell v. Jenkins*, 636.

The want of assignment of error in the record does not warrant dismissal by the Supreme Court *ex mero motu*, since an exception to the judgment and an appeal therefrom present the questions of whether the facts found support the judgment and whether any fatal error of law appears on the face of the record. *Dellinger v. Bollinger*, 696.

The appeal itself is an exception to the judgment and to any other matters appearing upon the face of the record. *Cannon v. Wilmington*, 711; *Barnette v. Woody*, 424.

§ 6c (3). Exceptions to Findings of Fact.

Exceptions to the findings of fact which neither point out which of the findings made, or refused, are objected to, and fail to designate what the objection is, are insufficient to bring up for review either the findings of fact or the evidence upon which they are based. *Heath v. Mfg. Co.*, 215.

A general exception to the judgment and an assignment of error that the court erred in signing and entering the findings of fact and the judgment, present for review the single question of whether the facts found support the judgment, and do not bring up for review the findings of fact or the evidence on which they are based. *Merrell v. Jenkins*, 636.

Where there is only a broadside exception to the findings of fact, exceptions relating to rulings upon the evidence are not presented. *Ibid.*

APPEAL AND ERROR—*Continued.*

Where defendant does not except to findings that plaintiff was awarded and acquired a statutory easement for a cartway, defendants' exception to allowing plaintiff to amend to allege that defendants were estopped to deny the validity of the cartway, is rendered moot. *Ibid.*

§ 6c (5). Exceptions and Assignments of Error to Charge.

An exception to an excerpt from the charge ordinarily does not challenge the omission of the court to charge further on the same or another aspect of the case. *Peek v. Trust Co.*, 1; *Rigsbee v. Perkins*, 502.

An assignment of error to a long excerpt from the charge which fails to point up any objectionable instruction with definiteness and certainty is defective as a broadside assignment of error. *S. v. Norris*, 47; *Rigsbee v. Perkins*, 502.

Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail. *S. v. Atkins*, 294.

Exceptions to the charge denoted only by the word "Exception" in parenthesis at the end or in the middle of a paragraph of the charge, and an assignment of error that the court erred in improperly stating the nature of the charges against defendant, fail to point out the alleged errors in the charge with the definiteness and certainty required by Rule 19 (3). *S. v. Bostic*, 639.

§ 6c (6). Requirement That Matter Be Brought to Trial Court's Attention to Support Exception to Charge.

The misstatement of a factual contention of a party must be brought to the court's attention in apt time. *Peek v. Trust Co.*, 1.

While ordinarily the misstatement of a contention must be brought to the trial court's attention in apt time, this is not necessary when the statement of the contention presents an erroneous view of the law or an incorrect application of it. *Caudle v. R. R.*, 466.

§ 8. Theory of Trial.

The record and appellant's exceptions will be considered in the light of the theory of trial in the lower court. *Peek v. Trust Co.*, 1; *McNeill v. McDougald*, 255.

Where the question of whether the maker of an instrument placed the seal thereon and adopted same is not controverted in the trial court, controversy in the trial court being solely as to the execution of the instrument, the appeal will follow the theory of trial in the lower court, and appellant will not be heard to contest the validity of the seal on appeal. *McGowan v. Beach*, 73.

Where, in an action on a contract of sale and purchase, defendants defend solely on the theory that the agreement was an option and that plaintiff had forfeited her rights thereunder by failing to make payments on the purchase price on the dates stipulated, and admit that the land belonged to one defendant although title was registered in the name of another, and that the first defendant had authority to sell, *held*, the parties are bound by the theory of trial, and may not contend on appeal that the defendant having the registered title had not signed the agreement or authorized her signature thereto. *Douglass v. Brooks*, 178.

Where it is alleged in the complaint and admitted in the answer that the board of trustees of the graded schools of a municipality was vested with title to the property in suit, and the case is tried under the admitted theory that

both parties claim title from such board of trustees, appellant may not contend on appeal that the deed to such board of trustees failed to convey title, since the theory of trial in the lower court must prevail in considering an appeal and in interpreting the record and determining the validity of the exceptions. *Board of Education v. Waynesville*, 558.

§ 11. Appeal Bonds and Costs.

Where both parties appeal and the judgment is affirmed, the costs in the Supreme Court will be taxed one half against each party. *Jones v. Callahan*, 566.

§ 19. Necessary Parts of Record Proper.

The pleadings are part of the record proper. *Cannon v. Wilmington*, 711.

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. *Griffin v. Barnes*, 306.

§ 20. Form and Requisites of Transcript.

Where the case on appeal, settled by agreement of counsel, contains the evidence in question and answer form, rather than in narrative form as required by Rule 19 (4), Rules of Practice in the Supreme Court, the judgment will be affirmed and the appeal dismissed. *Whiteside v. Purina Co.*, 591.

§ 22. Conclusiveness and Effect of Record.

The Supreme Court can judicially know only what properly appears on the record. *Griffin v. Barnes*, 306.

§ 23. Form and Requisites of Assignments of Error.

An assignment of error must present a single question of law, and while more than one exception may be grouped under a single assignment of error, this may be done only when all the exceptions relate to but a single question of law. *S. v. Atkins*, 294.

Exceptions presenting but a single question of law are properly grouped under one assignment of error. *Hardison v. Gregory*, 324.

Where the grouping of the assignments of error refers to the exceptions, but the exceptions do not appear on the page indicated, so that it would require a voyage of discovery through the record to ascertain upon what the appellant is relying to show error, such exceptions will not be considered. *Barnette v. Woody*, 424.

The assignments of error should indicate the page of the transcript upon which the exception referred to is to be found. Rule 19 (3) and Rule 21 of the Rules of Practice in the Supreme Court. *Shepard v. Oil & Fuel Co.*, 762.

The function of the assignments of error 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, and an assignment of error not supported by exception comes to naught and will be disregarded. *Rigsbee v. Perkins*, 502.

Where no assignments of error appear in the record on appeal, the appeal must be dismissed for failure to comply with the mandatory requirement of Rule of Practice in the Supreme Court No. 19 (3). *Milling Co. v. Laws*, 505.

An assignment of error that the judge had no jurisdiction to hear the motion and sign the judgment, without exception in the record, requires dismissal of

APPEAL AND ERROR—*Continued.*

the appeal, since the rule that an assignment of error not supported by an exception will be disregarded, is mandatory and will be enforced *ex mero motu*. *Smith v. Smith*, 646.

§ 27. Form, Requisites and Service of Briefs.

Where the several grounds of exception and assignment of error in appellant's brief mailed or delivered to appellee's counsel fail to refer to the pertinent pages of the transcript, appellee's motion to dismiss for failure to comply with the mandatory rule of court will be allowed. Rule 28, Rules of Practice in the Supreme Court. *Shepard v. Oil & Fuel Co.*, 762.

§ 29. Abandonment of Exceptions by Failure to Discuss in the Brief.

Assignments of error which are not supported by reason, argument, or citation of authority in the brief, will be deemed abandoned. *Peek v. Trust Co.*, 1; *Ammons v. Layton*, 122; *Warehouse v. Board of Trade*, 123; *Rhodes v. Raxter*, 206; *Hardison v. Gregory*, 324; *Ford v. Blythe Bros. Co.*, 347; *Hatcher v. Clayton*, 450.

§ 28. Burden of Showing Error.

The burden is on appellant not only to show error, but also that the alleged error is material and prejudicial. *Henry v. Home Finance Group*, 300.

Where the Supreme Court is evenly divided in opinion, the judgment of the lower court will be affirmed without becoming a precedent. *S. v. Brown*, 602; *Refrigerator Co. v. Davenport*, 603; *Basnight v. Basnight*, 645; *Burns v. Gardner*, 731.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of testimony cannot be held prejudicial when appellant fails to show what the testimony would have been had the witness been permitted to answer. *Peek v. Trust Co.*, 1; *Rhodes v. Raxter*, 206; *Hatcher v. Clayton*, 450.

Where the driver and the owner of a vehicle make common defense in an action to recover for alleged negligent operation of the vehicle, and the driver, while under examination in his own behalf, testifies in detail as to the absence of conversation or arrangement between him and the owner with reference to his use of the truck on the occasion in question, the exclusion of his testimony on his examination by the owner as to the absence of such conversation or arrangement, cannot be prejudicial. *Hatcher v. Clayton*, 450.

§ 39f. Harmless and Prejudicial Error in Instructions.

A misstatement of the applicable law must be held for prejudicial error even though the misstatement is made in stating the contentions of the parties. *Caudle v. R. R.*, 466.

§ 40b. Review of Discretionary or Legal Rulings.

Action of the trial court in setting aside the verdict for specified error of law is reviewable. *McNeill v. McDougald*, 255.

In the absence of a showing to the contrary, it will be presumed that the denial by the trial court of defendants' motion that plaintiff be required to make the allegations of the complaint more definite and certain, was denied in the court's discretion, and such discretionary denial of the motion is not review-

able on appeal in the absence of abuse of discretion. *Lutz Industries v. Dixie Home Stores*, 332.

§ 40d. Review of Findings of Fact or Judgments on Findings.

When there are no exceptions to the findings of fact, it will be presumed that they are supported by evidence, and they are binding on appeal. *James v. Pretlow*, 102.

Even though the findings of fact be conclusive on appeal, the Supreme Court is not bound by the conclusions or inferences the trial court draws from the findings. *Heath v. Mfg. Co.*, 215.

Where all the facts necessary to bring the claim within the jurisdiction of the Industrial Commission are admitted except as to the number of employees regularly employed by defendant, and the uncontradicted evidence discloses that defendant regularly employed more than five employees, it will be assumed, in the absence of a request for findings of fact, that the court, in allowing defendant's motion for judgment as of nonsuit on the ground of exclusive jurisdiction of the Industrial Commission, found this jurisdictional fact. *Powers v. Memorial Hospital*, 290.

Where insufficient findings of fact appear of record to support the judgment, the judgment must be reversed and the cause remanded for further proceedings. *Atkinson v. Bennett*, 456.

Where it appears that the case was tried under a misapprehension of the pertinent principles of law, the court's findings supporting the judgment are not conclusive, but the cause will be remanded for further hearing. *Merrell v. Jenkins*, 636.

§ 40f. Review of Orders on Motions to Strike.

The order of the court in striking or refusing to strike certain allegations of the pleadings will not be disturbed on appeal in the absence of a showing of prejudice. *Ammons v. Layton*, 122; *Henry v. Home Finance Group*, 300; *Lutz Industries v. Dixie Home Stores*, 332; *Wilson v. Pearson*, 601; *Bolin v. Bolin*, 642; *Hamilton v. Hamilton*, 715; *Baker v. Trailer Co.*, 724.

On appeal from order allowing motion to strike, the Supreme Court will not attempt to chart the course of the trial in advance of the hearing. *Dunn v. Dunn*, 234.

The action of the trial court in striking out a portion of a pleading may not be held prejudicial on appeal when appellant fails to show what the stricken portion contained. *Pinnix v. Toomey*, 357.

Where motion to strike is not made in apt time, it is addressed to discretion of court, and the court's ruling thereon will not be disturbed in the absence of abuse of discretion. *Tucker v. Transou*, 498.

§ 40i. Review of Judgments on Motions to Nonsuit.

In passing upon the correctness of judgment as of nonsuit, the Supreme Court may consider evidence excluded by the lower court only when such evidence is competent and erroneously excluded, with preservation of exception to its exclusion. *Barnette v. Woody*, 424.

§ 40l. Review of Constitutional Questions.

The courts will not determine the constitutionality of a statute unless the question is properly presented and it is found necessary to do so in order to

protect rights guaranteed by the Constitution. *Lutz Industries v. Dixie Home Stores*, 332; *Pinnix v. Toomey*, 357.

The Supreme Court will not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the court below. *S. v. Jones*, 563.

The Supreme Court will not pass upon constitutional questions, even when properly presented, if there appears some other ground upon which the case may be decided. *Ibid.*

The Supreme Court will not undertake to determine whether an Act of Congress is invalid because violative of the Constitution of the United States except on a ground definitely drawn into focus by plaintiffs' pleadings. *Hudson v. R. R.*, 650.

APPEARANCE.

§ 2b. General Appearance.

Defendant's appearance and demurrer *ore tenus* to the partition constitutes a general appearance which waives any defect in or nonexistence of a summons. *Dellinger v. Bollinger*, 696.

ARREST.

§ 1b. Right of Officers to Arrest Without Warrant.

A highway patrolman has legal authority to stop the operator of a motor vehicle for the purpose of determining whether he is operating the car in violation of any of the penal provisions of Art. 3, G.S. 20, and may arrest any driver on sight whom he sees violating any of such provisions, such as driving without lights. *S. v. Eason*, 59.

§ 3. Resisting Arrest.

An indictment charging defendant with resisting, delaying and obstructing a public officer in the performance of his official duties must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out in a general way, at least, the manner in which defendant is charged with having resisted, delayed or obstructed such public officer. *S. v. Eason*, 59; *S. v. Harvey*, 111.

ASSAULT.

§ 8d. Assault With Deadly Weapon.

Automobile *held* deadly weapon under evidence in this case. *S. v. Eason*, 59.

§ 10. Warrant and Indictment.

An indictment charging that defendant unlawfully and willfully did assault a named person with a deadly weapon, "to-wit: a certain automobile and some hard substance to the great damage" of the said person, is sufficient to charge assault with a deadly weapon. *S. v. Eason*, 59.

A warrant charging defendant with assaulting a named officer while in the performance of his official duties is sufficient to repel a motion in arrest of judgment. *S. v. Harvey*, 111.

§ 11. Presumptions and Burden of Proof.

Where an intentional killing with a deadly weapon is admitted or established in a homicide prosecution, the law presumes malice, constituting the offense

ASSAULT—*Continued.*

murder in the second degree, with the burden upon defendant to satisfy the jury of self-defense when relied upon by him; but in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, no presumption arises from the use of a deadly weapon, and the burden rests upon the State throughout the trial to prove defendant guilty beyond a reasonable doubt. *S. v. Warren*, 581.

§ 13. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant attempted to strike one officer with a Coca-Cola bottle and kicked him four or five times on his legs, and that she swung a Coca-Cola bottle at another officer, and bit him on the hand, *is held* sufficient to overrule nonsuit in prosecutions of defendant for assaulting the officers, notwithstanding defendant's evidence to the contrary. *S. v. Harvey*, 111.

§ 14b. Instructions in Prosecutions for Assault.

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, an instruction that the law of self-defense in case of homicide applies equally in case of assault with intent to kill, together with an instruction that a person cannot *excuse* taking the life of an adversary upon the grounds of self-defense unless the killing is or reasonably appears to be necessary to protect himself from death or great bodily harm, must be held for prejudicial error as placing the burden upon defendant to prove self-defense. *S. v. Warren*, 581.

ATTORNEY AND CLIENT.

§ 10. Right to, and Amount of Compensation.

Where an attorney is employed to represent a client in specific matters at a specified fee, and before the matters are concluded, the attorney is discharged by the client without just cause, and the attorney remains ready, able and willing to comply with the contract, the attorney may recover of the client the full contract fee, and not merely the reasonable value of his services to the date of his discharge. *Higgins v. Beaty*, 479.

AUTOMOBILES.

§ 4. Sale and Transfer of Title.

It is not required that the transfer and delivery of certificate of registration of title to a motor vehicle be made at the same time as the sale and transfer of title to the vehicle. *Peek v. Trust Co.*, 1.

Printed form of warranty on certificate of title relates to liens against assignor and not in his favor, and therefore cannot estop assignor from asserting lien in his favor. *Ibid.*

§ 8. Turning and Turning Signals.

Evidence *held* to show negligence on part of motorist turning left on six-lane street at intersection and colliding with vehicle traveling straight in opposite direction. *Emerson v. Munford*, 241.

§ 9. Stopping and Parking.

Where a truck has been stopped on the highway for an appreciable length of time, the fact that the driver of the vehicle failed to give signal of his inten-

AUTOMOBILES—*Continued.*

tion to stop cannot be a proximate cause of a rear-end collision. ***Potter v. Frosty Morn Meats***, 67.

Parking car near highway so that its rear projected into highway two feet *held* not concurring cause of accident when defendant, driving jeep pulling hay baler eight feet wide, struck the car and then bridge abutment, so that jeep "jackknifed" into path of plaintiff's car. *White v. Keller*, 97.

§ 12. Backing.

Motorist undertaking to back automobile on street must not only look before backing, but must maintain lookout in direction of travel. *Gentile v. Wilson*, 704.

§ 14. Following and Passing Vehicles Traveling in Same Direction.

In this action by guest in car against both drivers involved in "rear-end" collision court was required to charge on concurrent negligence of drivers. *Tillman v. Bellamy*, 201.

Evidence of negligence in hitting rear of car traveling in same direction *held* for jury. *Davis v. Lawrence*, 496.

§ 17. Right of Way at Intersections. (Turning at intersections see *supra*, § 8.)

Where a dirt road makes a "dead-end" intersection with a paved highway, but both highways are public roads, and neither has been designated as a through highway, both roads are of equal dignity, and a vehicle traveling along the dirt highway and first in the intersection in making a left turn into the paved highway, has the right of way over a vehicle approaching the intersection along the paved highway from the left. *Brady v. Beverage Co.*, 32.

The "right of way" at an intersection means the right of a driver to continue in his direction of travel in a lawful manner in preference to another vehicle approaching the intersection from a different direction. *Ibid.*

A driver having the right of way is not required to stop, and may act upon the assumption, in the absence of notice to the contrary, that another motorist approaching the intersection will recognize his right of way and grant him free passage over the intersection. *Ibid.*

A motorist faced with a municipal traffic control signal showing red is required to stop before entering the intersection. *Hyder v. Battery Co.*, 353.

Where a motorist stops in obedience to the red signal of a traffic control system, he is warranted, upon the signal turning green, in entering the intersection, and, in the absence of anything sufficient to give him notice to the contrary, is not under duty to anticipate that a motorist approaching along the intersecting street facing the red light will fail to stop, but nevertheless he is under duty to anticipate and expect the presence of others and to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection, and may not go blindly forward in sole reliance on the traffic control signals. *Ibid.*

§ 33. Pedestrians.

Evidence *held* for jury on issue of negligence in striking pedestrian standing off the hard-surface. *Hatcher v. Clayton*, 450.

Plaintiff backed car on street and hit pedestrian. Verdict for defendant upheld, there being no error in charge. *Gentile v. Wilson*, 704.

AUTOMOBILES—*Continued.*

§ 34. Children.

A legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway, and he must anticipate that a child of tender years is likely to run into the street in front of an approaching automobile. *Pavone v. Merion*, 594.

§ 39. Evidence—Physical Facts at Scene.

It was admitted that plaintiff, a pedestrian, was struck by a vehicle operated by one of the defendants and owned by the other. The controversy was as to whether plaintiff, at the time of the impact, was standing on the hard surface or was standing some 7 or 8 feet on the shoulder of the road, as testified to by plaintiff. *Held:* Testimony of a witness that some 4 hours after the accident he inspected the scene and saw footprints of a man and tire tracks of a vehicle some 6 to 8 feet off the hard surface in the wet earth, is competent for the purpose of corroborating plaintiff's testimony as to where he was standing when struck, the testimony, not being offered for the purpose of identifying the footprints as plaintiff's, or the tire tracks as those of defendant's vehicle. *Hatcher v. Clayton*, 450.

§ 41d. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Hitting Car Traveling in Same Direction.

Evidence tending to show that the automobile, operated by one defendant and owned by the other, smashed into the rear of a car driven 15 to 20 miles per hour on a straight and level two-way street in a 35 mile speed zone, that no other cars were in sight, together with the admission of defendant driver at the scene to the effect that he was at fault, *is held* sufficient to be submitted to the jury on the issue of negligence. *Davis v. Lawrence*, 496.

§ 41e. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Stopping Without Signal or Parking.

Where a truck has been stopped on the highway for an appreciable length of time, the fact that the driver of the vehicle failed to give signal of his intention to stop cannot be a proximate cause of a rear-end collision. *Potter v. Frosty Morn Meats*, 67.

Fact that codefendant left parked car so near highway that its rear projected into highway about two feet *held* not concurring cause of accident when defendant, driving jeep pulling hay baler eight feet wide, struck car or bridge abutment, and "jackknifed" into path of plaintiff's car. *White v. Keller*, 97.

§ 41g. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Exceeding Reasonable Speed at Intersection or in Failing to Yield Right of Way.

Evidence *held* to show that truck driver had right of way and was not guilty of negligence causing collision at intersection. *Brady v. Beverage Co.*, 32.

Plaintiff's evidence *held* to show negligence on part of defendant causing collision at intersection, and not to disclose contributory negligence as a matter of law. *Emerson v. Munford*, 241.

Evidence of negligence on the part of the individual defendant, proximately causing collision at an intersection *held* sufficient to overrule his motion to nonsuit. *Powers v. Memorial Hospital*, 290.

AUTOMOBILES—*Continued.*

§ 41l. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Striking Pedestrian.

Evidence of negligence in striking pedestrian standing 7 or 8 feet from hard surface *held* sufficient to be submitted to the jury. *Hatcher v. Clayton*, 450.

§ 41m. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Striking Children.

In this action to recover for injuries to a three-year-old child struck on the highway by defendant's automobile, the evidence *is held* to require the submission of the issue of negligence to the jury. *Pavone v. Merion*, 594.

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersections.

Evidence *held* not to show contributory negligence as matter of law on part of plaintiff in moving blindly into intersection immediately upon being faced with green traffic control light. *Hyder v. Battery Co.*, 553.

§ 42h. Nonsuit for Contributory Negligence in Turning.

Plaintiff's evidence *held* to show negligence on part of defendant causing collision at intersection, and not to disclose contributory negligence as a matter of law. *Emerson v. Munford*, 241.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence.

In determining whether there is sufficient evidence of contributory negligence to be submitted to the jury, the evidence must be considered in the light most favorable for defendant. *Hyder v. Battery Co.*, 553.

Evidence that plaintiff moved into intersection blindly immediately upon seeing green light of traffic control system facing him, *held* to require submission of issue of his contributory negligence. *Ibid.*

§ 46. Actions—Instructions.

A charge on the issue of contributory negligence which merely gives the respective contentions of the parties that each was first in the intersection, and that each was not guilty of negligence, without defining contributory negligence and without explaining the law applicable to the facts in evidence, must be held for reversible error. *Dixon v. Wiley*, 117.

Instruction *held* for error in failing to charge upon liability for concurring negligence. *Tillman v. Bellamy*, 201.

It is not necessary for the court to charge on the question of maximum speed fixed by statute for business districts when the evidence is insufficient to bring the locale of the collision within the definition of business districts. *Ibid.*

The charge of the court in this case as to the duty of the defendant, in backing her car, not only to look before attempting the movement, but to keep a reasonably careful lookout in the direction of travel, *held* without prejudicial error. *Gentile v. Wilson*, 704.

Charge using word "the" instead of "a" proximate cause *held* not prejudicial where there is no evidence of concurring negligence. *Ibid.*

§ 48. Actions by Passengers—Parties.

Where a passenger in a car is injured in a collision between that car and another, the question of active and passive negligence does not pertain, since

if both are negligent, their negligence is necessarily concurrent. *Kimsey v. Reaves*, 721.

In passenger's action, original defendants *held* not entitled to file cross-action against owner of other car in absence of allegation of concurrent negligence. *Ibid.*

§ 54f. Sufficiency of Evidence on Issue of Respondeat Superior.

Admission by one defendant that he owned the vehicle driven by another and involved in the accident is sufficient to require submission of the issue of agency to the jury. G.S. 20-71.1. *Hatcher v. Clayton*, 450.

Where plaintiff alleges agency and introduces proof that at the time of the accident the automobile was registered in the name of the father of the driver, plaintiff makes out a *prima facie* case of agency by virtue of G.S. 20-71.1, sufficient to overrule the father's motion to nonsuit, and to support, but not require, a verdict against him upon the issue of agency. *Elliott v. Killian*, 471.

The admission that the car driven by one defendant was registered in the name of the other defendant requires the submission of the issue of agency to the jury, G.S. 20-71.1, and even though defendants offer evidence contradicting the allegations as to agency, such evidence may warrant a peremptory instruction based thereon, but not a judgment of nonsuit. *Davis v. Lawrence*, 496.

§ 55. Family Car Doctrine.

The "family purpose car doctrine," which is based upon the principle of *respondeat superior*, is well settled law in North Carolina. *Elliott v. Killian*, 471.

Evidence tending to show that the automobile in question was registered in the name of the father, that the father signed a note for the balance of the purchase price and permitted the son to drive the car whenever he wanted to, that a policy of liability insurance on the car was issued in the father's name as owner, that the father drove the car upon occasion and that his wife and daughter rode therein with the son driving, *is held* sufficient to be submitted to the jury on the issue of agency of the father under the family purpose doctrine, notwithstanding the father's evidence tending to show that the son bought the car with his own money and that the title and insurance were taken out in the father's name solely because of the son's minority. *Ibid.*

§ 56. Manslaughter and Assault—Culpable Negligence.

A person whose culpable negligence proximately causes death of another is guilty of manslaughter, or, under some circumstances, of murder. *S. v. Phelps*, 540.

Culpable negligence in the law of crimes is such recklessness or carelessness, proximately resulting in injury or death of another, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and is more than mere actionable negligence in the law of torts. *Ibid.*

An intentional, willful or wanton violation of a statute or ordinance designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. *Ibid.*

The violation of a safety statute regulating the use of highways which proximately causes injury or death to another is culpable negligence if such violation is intentional, willful or wanton; the violation of such statute, even though unintentional, constitutes culpable negligence if such violation is accompanied

AUTOMOBILES—*Continued.*

by recklessness amounting to a thoughtless disregard of consequences of a dangerous nature when tested by the rule of reasonable prevision, or a heedless indifference to the safety and rights of others. *S. v. Norris*, 47.

The operator of an automobile who either with actual intent, or culpable negligence from which such intent may be implied, injures another, is guilty of assault with a deadly weapon regardless of whether the vehicle strikes the injured person or the vehicle in which such person is riding, and when death ensues, is guilty of manslaughter at least. *S. v. Eason*, 59.

The evidence considered in the light most favorable to the State tended to show that defendant willfully and intentionally used the automobile which he was driving as a means for causing an officer lawfully on the running board or side of the car to be thrown therefrom while the car was in motion, so that death or great bodily injury to the officer was likely under the circumstances. *Held:* The automobile was a deadly weapon under the facts and the evidence supports a conviction of assault with a deadly weapon. *Ibid.*

§ 57. Manslaughter and Assault—Proximate Cause, Intervening and Contributory Negligence.

The evidence tended to show that the driver along the servient highway stopped before entering the intersection with the dominant highway, permitted two cars with lights to pass, started across the highway when it was apparently safe, and had cleared the highway except for about three feet of the rear of her car when she was struck by a car traveling along the dominant highway at excessive speed and without lights. *Held:* The evidence fails to show any negligence on the part of the driver along the servient highway constituting a proximate cause of the collision. *S. v. Norris*, 47.

In a prosecution for manslaughter mere proof of culpable negligence does not establish proximate cause, and the State must show that the culpable negligence relied on was a proximate cause of death in order to convict the tortfeasor of manslaughter. *S. v. Phelps*, 540.

Culpable negligence of defendant need not be the immediate cause of the death in order to hold defendant guilty of manslaughter, but defendant may be accountable if the direct cause of death is the natural result of his criminal act. *Ibid.*

Contributory negligence is no defense in a prosecution for manslaughter predicated upon culpable negligence, but contributory negligence is relevant and material solely upon the question of whether the culpable negligence was the proximate cause of the death. *Ibid.*

§ 59. Homicide and Assault—Sufficiency of Evidence.

Evidence *held* sufficient to sustain conviction of defendant of manslaughter based upon culpable negligence in operation of automobile. *S. v. Norris*, 47; *S. v. Phelps*, 540.

Evidence *held* sufficient to support conviction of defendant of assault with deadly weapon. *S. v. Eason*, 59.

§ 62. Speeding—Elements of the Offense.

It is unlawful to drive at any time on a State highway at a speed greater than is reasonable and prudent under the conditions then existing or in any event at a higher rate of speed than 55 miles per hour. *S. v. Norris*, 47.

AUTOMOBILES—*Continued.*

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions Under G.S. 20-138.

Testimony of officers that defendant was intoxicated at the time he drove a truck upon a public highway, and that a partially filled bottle of whiskey was found in the seat of the truck, is sufficient to support a conviction of driving while under the influence of intoxicating liquor, and defendant's motion for nonsuit, to set aside the verdict, and to arrest the judgment, were properly denied. *S. v. Ipock*, 119.

§ 81. Criminal Liability—Lights.

It is unlawful to drive a motor vehicle in the nighttime without lights. *S. v. Norris*, 47.

An indictment for driving upon a public highway of the State without lights during the period from a half hour after sunset to a half hour before sunrise, is sufficient if it follows the language of the statute. *S. v. Eason*, 59.

BAILMENT.

§ 10. Rights Against Third Person for Conversion.

Bailor and bailee each have such interest in property as to entitle them to maintain action jointly or severally against third persons wrongfully converting bailed property. *Peed v. Burleson's, Inc.*, 628.

BASTARDS.

§ 7. Issues, Verdict and Judgment in Prosecutions for Willful Failure to Support.

Where it is judicially determined that defendant is the father of the illegitimate child in question, but that he was not guilty of the charge of abandonment and nonsupport then preferred against him, *held* in a subsequent prosecution for the defendant's subsequent willful failure to support the child, the issue of paternity is *res judicata*, and the court correctly refuses to permit defendant to introduce evidence on the issue of paternity in the second prosecution. *S. v. Clonch*, 760.

§ 11. Rights and Liabilities of Father.

The putative father of an illegitimate child, irrespective of statute, has such interest in the child as to authorize him to maintain a suit for its custody, and also has the statutory right to maintain such proceeding, G.S. 49-1 and G.S. 49-2 being construed *in pari materia* with G.S. 50-13. *Dellinger v. Bollinger*, 696.

BILL OF DISCOVERY.

§ 1a. Nature and Scope of Remedy in General.

Sec. 2, Chapter 760, Session Laws of 1951, provides that G.S. 1-569, 1-570, 1-571, shall apply to the completion or use of any examination of an adverse party commenced or taken prior to the effective date of the 1951 Act. *Culbertson v. Rogers*, 622.

G.S., 1-569, *et seq.*, provide two separate remedies for the examination of an adverse party: (1) before filing a pleading, to obtain information necessary to draft the pleading, and (2) after the pleadings have been filed, to procure evidence to be used at the trial. *Ibid.*

BILL OF DISCOVERY—*Continued.*

§ 1b. To Obtain Information to Draft Complaint.

Where an affidavit for the examination of defendant is in substantial compliance with the requirements of the statute, and the court finds the facts to be as set out in the affidavit, plaintiff is entitled to an order for examination of the defendant as a matter of right, and notice to defendant prior to the entry of such order is not required. *Jones v. Fowler*, 162.

A petition for leave to inspect and make copies of certain papers in defendant's possession prior to filing complaint must contain actual averments showing that the papers described in the order are material and necessary to establish plaintiff's cause of action, and an order of inspection upon a petition failing to aver such facts, will be reversed. *Thomas v. College Trustees*, 504.

An examination to obtain information necessary to file pleadings may be had only by leave of court, obtained upon applicant's making it to appear under oath that such order is necessary, that the evidence sought to be elicited is material and not otherwise available, and that application is made in good faith. *Culbertson v. Rogers*, 622.

§ 6. Right to Introduce Examination at Trial.

The relevancy and competency of evidence is determined by the issues arising on the pleadings in the case in which the evidence is offered, and therefore evidence obtained upon examination of a defendant, prior to the filing of the complaint, to obtain information necessary to enable plaintiff to draft the complaint, is not admissible in evidence at the trial. The provision of G.S. 1-571, that the examination may be read by either party on the trial, refers only to an examination to procure evidence for use at the trial. *Culbertson v. Rogers*, 622.

BILLS AND NOTES.

§ 3. Consideration.

Where acknowledgment of indebtedness is under seal, the law imports consideration, and will imply promise to pay from unqualified acknowledgment of indebtedness as subsisting obligation. *McGowan v. Beach*, 73.

BOUNDARIES.

§ 5a. Competency of Evidence Aliunde.

While the description in a deed, in order to meet the requirements of the statute of frauds, must be either certain in itself or capable of being reduced to a certainty by resort to something extrinsic to which the deed refers, a deed will be upheld if this can be done consistently with the principles and rules of law applicable, and a description will be held sufficient if it furnishes a means of identifying the land intended to be conveyed. *Haith v. Roper*, 489.

It was stipulated that grantor, on the date of the deed in question, owned but two lots within the municipality, which lots had been conveyed to him separately at different times. The description in his deed to the second lot located the lot in the municipality and county, and referred to corners of the other lot owned by him and to corners of an adjacent lot. *Held:* The reference to grantor's own corners are not rendered ineffective on the ground that the lots were adjacent, and that therefore grantor owned but one lot, and the description being rendered certain by reference to the corners of the adjacent tract and to the corners of grantor's first lot referred to in the deed, the description is sufficient. *Ibid.*

BOUNDARIES—*Continued.*

The contention that a description in a deed is void for uncertainty because it contains five calls which do not close the lines when surveyed as called for in the deed, is untenable when it is apparent that one of the calls is a continuation on the same degree as another call, and that therefore the two calls comprise but one line, and the corners called for in the deed may be located by extrinsic evidence, to which the description refers. *Ibid.*

§ 5e. Court Surveys and Maps.

A map made by a civil engineer appointed by the court and acting under court order for both parties is competent in evidence not only for the purpose of illustrating the testimony, but also as evidence of the contentions of the parties, and the court surveyor may testify with reference to the beginning points of his survey, and how he located them, and the course and distance of the lines shown on the map. *Memory v. Wells*, 277.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 4. Breaking or Entering Otherwise Than Burglariously.

The essential elements of the offense described in the first part of G.S. 14-54 are: (1) an unlawful breaking or entering (2) of the dwelling house of another (3) with the intent to commit a felony or other infamous crime therein. *S. v. Cook*, 700.

§ 11. Sufficiency of Evidence and Nonsuit.

In this prosecution for unlawful and felonious breaking and entering, the evidence *is held* sufficient to take the case to the jury as to each defendant, and their motions to nonsuit were properly overruled. *S. v. Banks*, 304.

Evidence tending to show that defendant unlawfully broke or entered by trespass the sleeping quarters of one or more nurses, that a nurse awoke, and saw him, entirely nude, standing in the room, inquired what he wanted, that defendant informed her he was looking for a named girl, and, upon being told that she was gone for the week end, and that he had better leave, defendant tip-toed out of the room, without taking anything with him, *is held* insufficient to sustain conviction under G.S. 14-54 for absence of any evidence of defendant's intent to commit a felony. *S. v. Cook*, 700.

Where defendant unlawfully enters a dwelling house in the nighttime and flees upon being discovered, without making any explanation of his presence or of his intent, the jury may infer an intent to steal although no theft is actually committed, but this inference does not pertain when defendant explains his presence or intent, and leaves upon demand without any attempt at larceny. *Ibid.*

BURIAL ASSOCIATION.

§ 4c. Rules and By-Laws—Membership.

The word "year" means twelve calendar months, G.S. 12-3 (3), and will be given this meaning in the interpretation of the by-laws of a burial association. *Green v. P. O. S. of A.*, 78.

A person is "over" fifty years of age when he has passed his fiftieth birthday, and therefore under the provisions of a burial association that a member cannot be reinstated except as a new member, and that the qualifications for membership should be that the applicant be not less than sixteen years of age nor over

BURIAL ASSOCIATION—*Continued.*

fifty years of age, the reinstatement of a member after he had passed his fiftieth birthday upon the erroneous statement of the date of his birth, is not binding on the association in the absence of waiver. *Ibid.*

The by-laws of a burial association prescribing the maximum age at which a person might join or reinstate his membership is not waived by the reinstatement of membership upon a misstatement of age in the application. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 9. Pleadings.

When justified by the facts, a party may sue for rescission of instrument and for damages resulting from the fraud which induced its execution. *Zager v. Setzer*, 493.

§ 12. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that plaintiff, the owner of personal property comprising a motion picture theatre, represented that the previous operator of the theatre had a weekly gross income therefrom in a certain sum, that defendant purchased the property after determining that his operating costs would be in a smaller amount, that defendant, after renovating the theatre, realized a gross income in a much smaller sum, and that the former operator's gross weekly income was only about half that represented by plaintiff, *is held*, when considered with other testimony of an amplifying and corroborative nature, sufficient to show *prima facie* the existence of all the elements of actionable fraud, and nonsuit on defendant's counterclaim for rescission and damages was erroneously entered. *Zager v. Setzer*, 493.

Allegations of *scienter* and proof of constructive *scienter* in that misrepresentation was recklessly made, does not justify nonsuit for variance. *Ibid.*

CEMETERIES.

§ 2. Management, Regulations and Sale of Lots.

The owners of lots or burial rights in a cemetery have the right to demand that the rules and regulations of the cemetery be uniform and reasonable, and an owner of a lot or burial interest may maintain an action in behalf of himself and others having a like interest to enjoin the enforcement of unlawful and unreasonable regulations promulgated by the cemetery. *Mills v. Cemetery Park*, 20.

In an action to enjoin the enforcement of unreasonable regulations promulgated by a cemetery corporation, plaintiff must allege plainly and precisely the rules and regulations he contends are unlawful and unreasonable, and allegations that the rules and regulations adopted by the corporate cemetery set out in the complaint and still others not set out, are unlawful and unreasonable, are insufficient to state a cause of action for injunction, but constitute a defective statement of a good cause of action. *Ibid.*

Where a corporate cemetery sells lots under contract that the money paid should be used for protection and ornamentation, such funds cannot be diverted to other purposes. *Ibid.*

But allegations *held* insufficient to support action for fraud for representations that money paid would be used in part for protection and ornamentation. *Ibid.*

CEMETERIES—*Continued.*

§ 4. Removal of Bodies.

After interment a body is in the custody of the law, and the courts will take cognizance of the profound sentiments and instincts of humanity that the dead rest in uninterrupted repose and will not order a body to be removed except for compelling reasons. *Mills v. Cemetery Park*, 20.

Plaintiff alleged that the defendant cemetery had permitted the individual defendant to bury her deceased husband in a granite tomb above the ground in a section of the cemetery reserved solely for underground sepulchers, and sought by injunction to compel the defendants to remove the body from the tomb. *Held:* The complaint fails to allege any compelling reasons upon which equity could grant the relief sought, and defendants' demurrers to this cause of action should have been sustained. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 2. Form and Contents of Instrument.

A chattel mortgage on a tractor unit, which describes the vehicle by make, trade-name, and year, is sufficient when all the evidence tends to show that the mortgagor owned only the one tractor, and such evidence supports a peremptory instruction that the vehicle was covered by the instrument. *Peek v. Trust Co.*, 1.

§ 10d. Liens and Priorities Under Registered Instruments.

Owner transferring title subject to his purchase money mortgage *held* entitled to prior lien as against purchaser's subsequent mortgagee, and was not estopped from asserting priority. *Peek v. Trust Co.*, 1.

§ 15. Release of Lien.

Upon failure of the consideration for which a release or satisfaction of a mortgage is executed, such release or satisfaction ordinarily may be set aside and the lien restored to its original priority as against the mortgagor, a volunteer or one chargeable with knowledge of the rights and equities of the mortgagee, but such priority may not be re-established as against a *bona fide* purchaser or encumbrancer who has acquired an interest in or lien upon the property in reliance upon the entry of satisfaction. *Peek v. Trust Co.*, 1.

COMMON LAW.

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State, G.S. 4-1. *Warehouse v. Board of Trade*, 123.

COMPROMISE AND SETTLEMENT.

§ 1. Nature and Validity of Agreement.

Whether the acceptance of an amount less than that which plaintiff asserts is due her, operates as a compromise and settlement, depends upon the intent of the parties as expressed in their acts and statements at the time of the acceptance of the lesser amount, and nonsuit is improperly granted on the theory of accord and satisfaction unless such intent is the only reasonable inference deducible from the evidence and stipulations of the parties. *Allgood v. Trust Co.*, 506.

COMPROMISE AND SETTLEMENT—*Continued.*

Receipt for one-half proceeds of insurance from pension fund policy, without statement that sum was received in full satisfaction, *held* not to establish settlement as matter of law. *Ibid.*

CONSPIRACY.

§ 1. Civil Conspiracy.

A civil action for conspiracy will not lie for an unlawful agreement alone, but only for damages suffered by plaintiff from some overt act in furtherance of such agreement. *Reid v. Holden*, 408.

When a judgment exonerates the conspirators who perform the overt act, it must of necessity exonerate an absentee conspirator who committed no overt act resulting in damage. But where the complaint alleges that all the defendants committed the wrongful acts pursuant to the unlawful conspiracy, and it is not made to appear on the plea of *res judicata* that one of defendants, who was not a party to the prior action, was an absentee conspirator, the dismissal of the action as to him is error. *Ibid.*

Evidence *held* insufficient to establish a conspiracy on the part of defendants to procure plaintiff's commitment to the State Hospital for alleged ulterior motives. *Barnette v. Woody*, 424.

CONSTITUTIONAL LAW.

§ 8a. Legislative Powers in General.

Desirability of legislation is Legislative function. *Hudson v. R. R.*, 650.

§ 8c. General Assembly—Delegation of Power.

While the General Assembly may not delegate the power to make law, it may delegate to an administrative commission or board authority to promulgate subordinate rules and regulations for the complete operation and enforcement of a law within its express general purpose, and to determine the existence of facts upon which the statute declares the law shall apply, so long as the General Assembly lays down the policy and prescribes the standards. *Warehouse v. Board of Trade*, 123.

While the General Assembly may not delegate power to make law, it may, by reference, enact into law a standard of conduct, such as the North Carolina Building Code, and objection that the Code was subject to subsequent modification by the Building Code Council, is not germane when the sections of the Code relied on had not been changed after the passage of the statute. *Pinnix v. Toomey*, 357.

§ 13. Police Power—Safety, Health and Welfare.

For the purpose of protecting life, health and property, the General Assembly has the power to enact by reference a specified building code promulgated and published by the Building Code Council. *Lutz Industries v. Dixie Home Stores*, 332.

§ 15½. Personal Civil Rights.

Right to work is guarantee to every person, but employment of one person by another is not guaranteed. *Hudson v. R. R.*, 650.

§ 16. Racial Discrimination.

Deed conveying land for park upon special limitation that it be used solely by persons of white race *held* constitutional. *Recreation Com. v. Barringer*, 311.

CONSTITUTIONAL LAW—*Continued.*

§ 17. Monopolies, Exclusive Emoluments and Restraint of Trade.

G.S. 106-465 does not authorize tobacco boards of trade to promulgate rules and regulations in restraint of trade or to control prices, but a rule requiring any member desiring to operate a new warehouse or a warehouse which had not been operated during the preceding season to give timely notice of such intention, and allotting to such new operator selling time in proportion to its size in relation to the other warehouses, with further provision that if such new warehouse is larger in size than the average of all warehouses operating on that market, such new warehouse should not be allotted selling time for that portion of its size in excess of the average size of all of the warehouses operating on the market, *is held* reasonable, fair and equitable, and not a regulation in restraint of trade. *Day v. Board of Trade*, 136.

§ 18. Equal Application and Enforcement of Laws.

Classification of railway employees into operating and nonoperating employees in regard to collective bargaining is not unreasonable discrimination. *Hudson v. R. R.*, 650.

§ 20. Due Process of Law.

To declare possibility of reverter invalid because it was conditioned upon use of land for park by persons of white race only would result in taking of property without due process. *Recreation Com. v. Barringer*, 311.

The Fourteenth Amendment to the U. S. Constitution is a limitation of the powers of the State and furnishes a guaranty against any encroachment by the State on the fundamental rights belonging to every citizen. *Sale v. Highway Com.*, 612.

A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, is not susceptible of impairment by legislation, and, in the absence of constitutional or statutory remedy in a particular factual situation, may be enforced by an action at common law, as an exception to the principle that the sovereign cannot be sued without its consent. *Ibid.*

§ 28. Full Faith and Credit to Foreign Judgments.

The decree of another state awarding the custody of a minor child is not conclusive on our courts when such child is within the boundaries of this State, since an action relating to the custody of a child is in the nature of an *in rem* proceeding and the child is the *res* over which the court must have jurisdiction before it may enter a valid and enforceable order. *Hoskins v. Currin*, 432.

§ 30. Regulation of Commerce.

Legislation enacted by Congress regulating interstate commerce supersedes state statutes in that field. *Hudson v. R. R.*, 650.

§ 32. Necessity for Indictment.

On appeal from conviction in a county court on a warrant charging possession of whiskey for the purpose of sale, the warrant was amended to charge also possession of nontax-paid liquor, and defendant was convicted on this count alone. The judgment is arrested on authority of *S. v. Hall*, 240 N.C. 109. *S. v. Mills*, 604.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

The evidence in this case *is held* sufficient to support the court's finding, on the hearing of the order to show cause, that defendants had notice and knowledge of the contents of a restraining order theretofore issued in the action restraining mass picketing, acts of violence and intimidation of persons entering the plant during a strike, and that each defendant had willfully violated the restraining order by certain specified acts, and judgment holding defendants in contempt is upheld. *Mfg. Co. v. Bonano*, 587, 590.

Where the judgment in contempt fully states the facts found and the conclusions of law based thereon, adjudging defendants in contempt for a willful disobedience of an order lawfully issued by the Superior Court having jurisdiction, G.S. 5-1 (4), exception on the ground that the court did not specifically denominate his conclusions of law as such cannot be sustained. *Mfg. Co. v. Bonano*, 587.

CONTRACTS.

§ 5. Consideration.

Where an acknowledgment of debt is under seal, the law imports consideration and a promise to pay. *McGowan v. Beach*, 73.

§ 7. Contracts Against Public Policy.

New agreement may not be enforced when it is executed solely to facilitate performance of agreement void as against public policy. *Lamm v. Crumpler*, 438.

Antenuptial agreements are not against public policy. *Turner v. Turner*, 533.

While contracts exempting persons from liability for negligence are not favored by the law and are to be strictly construed against those relying thereon, such contracts are valid and enforceable unless contrary to some rule of law or public policy. *Hall v. Refining Co.*, 707.

The general rule that the freedom to contract includes the right to provide contractual exemption from liability for negligence in the performance of a legal duty arising out of the contract, is subject to the limitations that a party may not exempt himself from liability for negligence in the performance of a duty owed to the public or involving the public interest, or where the public interest requires the performance of a private duty, or where the parties do not have equality of bargaining power so that the one must accept the exemption from liability by the other in order to obtain something of importance to him, which for all practical purposes is not obtainable elsewhere. *Ibid.*

Where complaint incorporates contract exempting defendant from liability, and does not allege facts showing the agreement void as against public policy, demurrer is properly sustained. *Ibid.*

§ 8. Construction in General.

Separate contracts executed in the same transaction for a common purpose, even though the parties are not the same provided the several contracts are known to all of them, may be construed together to ascertain the intent of the parties. This rule may not be applied so as to avoid an essential part of one of the contracts, and does not import that the provisions of one contract may be incorporated bodily in another. *Trust Co. v. Processing Co.*, 370.

The interpretation given to a contract by the parties themselves before controversy is a material aid in ascertaining the intention of the parties. *Ibid.*

CONTRACTS—*Continued.*

§ 9½. Contracts for Benefit of Third Party.

Contracts *held* for benefit of third person, construing the agreements together to effectuate intent of parties. *Trust Co. v. Processing Co.*, 370.

Where a contract is made for the direct benefit of a third person, who has accepted and acted upon it, such contract may not be materially modified or changed by the other parties without such third party's consent. *Ibid.*

§ 13. Modification, Rescission or Abandonment by Agreement.

Whether a new contract between the same parties discharges or supersedes a prior agreement between them depends upon their intention as ascertained from the instrument, the relation of the parties and the surrounding circumstances. *Turner v. Turner*, 533.

A new contract does not discharge a prior contract between the parties unless it deals with the subject matter of the former contract so comprehensively as to be complete within itself and raise the legal inference of substitution, and a new contract which is consistent with or supplementary to the prior agreement does not rescind the prior contract. *Ibid.*

The parties may rescind or modify an agreement between themselves by a new contract unless the rights of third persons have intervened. *Ibid.*

§ 16½. Performance or Breach—Destruction of Subject Matter of Contract.

Ordinarily, when the act to be performed is necessarily dependent upon the continued existence of specific property, the destruction thereof before the performance of the act, without fault of the promisor, will excuse nonperformance, but where the promisor has the care and custody of the property, the promisor in order to excuse nonperformance, has the burden of showing that the destruction of the property was not his fault. *Sale v. Highway Com.*, 612.

§ 19. Actions on Contract—Parties.

A third party may sue to enforce a valid contract made for his benefit even though he is a stranger to the contract and to the consideration, and it is not necessary that he be the sole beneficiary, provided the contract was entered into for his direct benefit and the benefit to him is not merely incidental to the agreement. *Trust Co. v. Processing Co.*, 370.

§ 21. Pleadings in Actions Ex Contractu.

Where the complaint alleges that a contract was executed for the benefit of a third party, his executors and assigns, that the contract had been accepted and acted upon by the third party beneficiary, that the other parties had attempted to cancel the agreement contrary to its terms and without the consent of the third party beneficiary, and seeks an accounting for the sums due under the agreement, the complaint *is held* sufficient to state a cause of action in favor of the third party beneficiary, and demurrer to the complaint is properly overruled. *Trust Co. v. Processing Co.*, 370.

Plaintiff alleged a contract under which it was entitled to 5 per cent of the commissions received by defendant under a contract with a third party. *Held:* Demurrer on the ground of want of allegation that the third party had paid defendant any sum is bad when the complaint alleges that the failure of defendant to receive payments due under the contract resulted from defendant's wrongful attempt to cancel same. *Ibid.*

CONTRACTS—*Continued.*

A party may state in the alternative a cause of action to recover sums due under a contract with a cause of action for damages for breach of the contract if the contract had been canceled in violation of its terms. *Ibid.*

Plaintiffs may state cause of action on express contract in two different ways in complaint. *Jenkins v. Duckworth & Shelton*, 758.

§ 25. Damages for Breach.

The measure of damages for breach of contract is the amount which will compensate the injured party for the loss which fulfillment of the promise could have prevented or the breach of it entailed, so that the parties may be placed as near as may be in the same monetary condition they would have occupied had the contract not been breached. *Norwood v. Carter*, 152.

§ 26. Interference With Contractual Rights by Third Persons.

Allegations to the effect that plaintiff, owning a part of an island, granted permission to the owner of the other part of the island to use a strip of plaintiff's land for the purpose of depositing material dredged from the adjoining bay, which would greatly increase the value of plaintiff's land, and that defendant, a stranger to the agreement, prevented the deposit of the dredged material on plaintiff's land by threatening, without right, to restrain such operation, *is held* insufficient to show that plaintiff had an enforceable contract, and demurrer was properly sustained. *Morgan v. Speight*, 603.

CORPORATIONS.

§ 25. Liability for Torts Committed by Officers and Agents.

Evidence in this case *held* sufficient to be submitted to the jury under the principle of *respondeat superior* on the issue of the liability of the employer for an assault committed by the employee. *Davis v. Finance Co.*, 233.

COSTS.

§ 3a. Civil Actions Generally—Successful Party.

Where an appeal is dismissed as moot, the Supreme Court will not pass upon the merits of the controversy merely to determine who will pay the costs, and the judgment of the lower court being presumed correct, unless reversed on the merits, no part of the costs can be adjudged against appellees. *In re Assignment of School Children*, 500.

§ 4b. Assessment of Costs in Actions by or Against Fiduciaries.

Where the controversy involves the rights of two persons in the distribution of an estate, and the final adjudication upholds the contentions of neither in their entirety, direction that the costs be paid as a part of the costs of administration is not prejudicial, since the cost so taxed ultimately will fall equally on each. *Jones v. Callahan*, 566.

COURTS.

§ 2. Jurisdiction in General.

Jurisdiction over the person of the defendant is a prerequisite to the rendition of a personal judgment against him. *Babb v. Cordell Industries*, 286.

COURTS—*Continued.*

§ 3a. Original Jurisdiction of Superior Courts—Jurisdictional Amount.

The inclusion of one account for goods sold and delivered in this State with a large number of other accounts for sales outside the State cannot change the *loci contractus* of the out of state accounts, and when the value of the intrastate account is within the exclusive jurisdiction of a justice of the peace, it cannot be made the basis of an action in the Superior Court. *Babb v. Cordell Industries*, 286.

§ 4c. Jurisdiction of Superior Court on Appeal from Clerk.

Where an action within the proper jurisdiction of the Superior Court is begun by a special proceeding before the clerk and is appealed to the Superior Court, the appeal carries the entire proceeding into the Superior Court, and the Superior Court has jurisdiction to hear and determine the whole matter. *Sale v. Highway Com.*, 612.

§ 12. Conflict of Laws Between This State and Federal Laws.

The Union Shop Amendment to the Railway Labor Act, 45 USCA sec. 152, Eleventh, does not invalidate Chapter 328, Session Laws of 1947, except to the extent that Congress, in enacting labor legislation, related to interstate commerce, has pre-empted the field. *Hudson v. R. R.*, 650.

The Union Shop Amendment to the Railway Labor Act, 45 USCA sec. 152, Eleventh, expressly authorizes a carrier and labor union, duly designated and authorized to represent employees in accordance with the Act, to enter into a union shop agreement and exempts such union shop agreements from nullification by other statutes or laws, and the Federal statute is valid and supersedes Chapter 328, Session Laws of 1947, to the extent of conflict, and therefore a union shop agreement, complying in all respects with provisions of the Union Shop Amendment to the Railway Labor Act, is not rendered void by the State statute. *Ibid.*

§ 16. Conflict of Laws Between This and Other States.

Our courts have no jurisdiction of an action *ex contractu* when both parties are nonresidents and the cause of action does not arise in this State. *Babb v. Cordell Industries*, 286.

CRIME AGAINST NATURE.

§ 2. Prosecutions.

An attempt to commit the offense defined by G.S. 14-177 is an infamous act within the meaning of G.S. 14-3, and therefore sentence to the State's prison is within the limitations permitted by law. *S. v. Mintz*, 761.

CRIMINAL LAW.

§ 5a. Mental Responsibility for Crime.

The test of mental responsibility for crime is whether defendant had sufficient intelligence to distinguish right from wrong, and therefore the exclusion of testimony of a psychiatrist that defendant was a man of low mentality is not error. *S. v. Scales*, 400.

§ 6a. Defense of Entrapment.

Where the criminal intent and design originates in the mind of a person other than defendant, and defendant is incited and induced to commit the crime

in order that he might be prosecuted for it, such entrapment is a valid defense. *S. v. Burnette*, 164.

Where a defendant commits all the essential elements of an offense pursuant to an intent and design originating in his own mind, and the act is an offense regardless of consent, the fact that an officer or another waits passively and affords defendant an opportunity to commit the criminal act, or facilitates its commission, in order to secure evidence against defendant, does not amount to an entrapment constituting a defense. *Ibid.*

Even in those offenses in which want of consent is an essential element, a person who knows that a crime is contemplated against his person or property, may wait passively and permit matters to go on, or create conditions under which the crime against himself may be committed, for the purpose of apprehending the criminal, without having assented to the act, and the defense of entrapment is not available to the person committing the crime when the intent and design to commit the act originates in his own mind. *Ibid.*

§ 8b. Aiders and Abettors.

An instruction that mere presence is enough to make one an aider and abettor where both or all of the defendants are friends, *is held* to constitute prejudicial error. *S. v. Banks*, 304.

§ 11. Crimes and Misdemeanors.

Crime against nature is infamous and attempt to commit the offense is a felony. *S. v. Mintz*, 761.

§ 13. Venue.

A motion for change of venue or for a special venire on the ground of prejudice created against defendant by publicity in the county, is addressed to the sound discretion of the trial court. *S. v. Scales*, 400.

§ 31c. Qualification of Experts.

Where objections are entered to the testimony of a physician in respect to X-ray pictures which he saw made of head injuries received in the accident, but no reason for the objections are assigned at the time, appellant may not contend on appeal that the evidence was incompetent because the State failed to qualify the expert as a brain surgeon, certainly when it appears that the defendant brought out the testimony in more detail on cross-examination and also the fact that the witness had performed successfully a large number of brain operations. *S. v. Norris*, 47.

§ 38d. Photographs and X-ray Pictures.

A physician may use such X-rays as an aid in enabling him to determine the nature and extent of the injuries, and may testify thereto even though the X-ray pictures are not introduced in evidence. *S. v. Norris*, 47.

Where a patrolman identifies photographs as representing the true condition of the cars immediately after the accident, such photographs are competent for the purpose of enabling the witnesses to illustrate and explain their testimony. *Ibid.*

§ 41i. Right of Defendant Not to Testify.

Defendant sought to introduce evidence as to his physical condition the day before and on the day of trial for the purpose of accounting for his failure to

testify in his own defense. *Held:* Defendant's physical condition at the time of trial was irrelevant to the issue of whether the defendant was intoxicated at the time of driving the truck some six months prior thereto, and the evidence was properly excluded and the court properly interrupted counsel in arguing the matter to the jury. *S. v. Ipock*, 119.

§ 42f. Exculpatory Evidence Offered by the State.

The fact that the State offers in evidence an exculpatory statement of defendant does not prevent the State from showing that the facts were otherwise. *S. v. Phelps*, 540.

§ 43. Evidence Obtained Without Search Warrant.

Where an undercover officer knocks on defendant's door, enters upon invitation, and buys whiskey from defendant, his testimony as to what he saw is competent, since, in the absence of fraud or deceit on the part of the officer, his actions do not amount to an illegal entry so as to render his testimony incompetent under G.S. 15-27. *S. v. Smith*, 297.

§ 44. Time of Trial and Continuance.

A motion for a continuance is addressed to the discretion of the trial judge, and refusal of the motion upon certificate of a physician, stating that the physician had advised home care for defendant, but which does not state the defendant was unable to stand trial or that a trial would endanger his health, does not show abuse of discretion. *S. v. Ipock*, 119.

§ 48c. Reception of Evidence—Evidence Competent for Restricted Purpose.

A general objection to the admission of testimony which is competent for the purpose of corroboration, cannot be sustained. *S. v. Eason*, 59.

§ 48f. Reception of Evidence—Unresponsive Answer and Motions to Strike.

A patrolman, who had followed defendant's car for some distance shortly before the accident, in response to a question as to what defendant said at the hospital some hour after the accident, stated that he told defendant he was "afraid" something was going to happen and that he had planned to stop him, to which defendant replied that he wished the patrolman had stopped him. *Held:* The officer's statement was incompetent and should have been stricken on motion aptly made. *S. v. Norris*, 47.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

Court will consider only evidence favorable to the State and will disregard defendant's evidence in conflict therewith. *S. v. Norris*, 47,

§ 52a (4). Nonsuit for Exculpatory Evidence.

Where the exculpatory statement of defendant offered by the State is contradicted by the State's evidence as to the physical facts at the scene and is further contradicted by, or repugnant to, other statements of defendant offered in evidence, nonsuit is properly denied upon the conflicting evidence. *S. v. Phelps*, 540.

CRIMINAL LAW—*Continued.*

§ 52a (8). Motion to Nonsuit and Renewal of Motion.

Where, after refusal of motion to nonsuit at the close of the State's evidence, defendant introduces evidence and moves for nonsuit at the close of all the evidence, he waives his exception to the refusal of his motion at the close of State's evidence, but his later exception challenges the sufficiency of the entire evidence to go to the jury, considering all the evidence in the light most favorable to the State, and the exception must be overruled if the entire evidence is sufficient to go to the jury. *S. v. Norris*, 47.

§ 52b. Directed Verdict.

A motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. *S. v. Wiley*, 114.

While in proper instances the court may charge the jury that if the jury finds the facts to be as all the evidence tends to show beyond a reasonable doubt, to return a verdict of guilty, an instruction that if the jury believes the evidence of defendant, to return a verdict of guilty, is too unequivocal and entitles defendant to a new trial. *S. v. Clonch*, 760.

§ 53b. Charge on Presumptions and Burden of Proof.

The court's charge on reasonable doubt *held* without error. *S. v. Ipock*, 119.

§ 53f. Expression of Opinion on Evidence in Charge.

An instruction by the court to the effect that the court had not undertaken to recite all the evidence but only the substance of the evidence on both sides necessary to enable the court to explain and apply the law, but that it was the duty of the jury to remember and consider all of the evidence on both sides, and if its recollection differed from the court's statement, to be guided by its own recollection, *is held* not to contain an expression of opinion on the evidence by the court, but to be in strict compliance with G.S. 1-180. *S. v. Tyson*, 574.

§ 53g. Instructions on Less Degree of Crime.

Evidence *held* to require submission of question of defendant's guilt of lesser degrees of crime charged. *S. v. Davis*, 476.

§ 53k. Instructions—Statement of Contentions.

A statement of a valid contention supported by competent evidence cannot be held for error. *S. v. Burnette*, 164.

§ 53o. Instructions on Defense of Entrapment.

Instructions on defense of entrapment *held* without error. *S. v. Burnette*, 164.

§ 56. Arrest of Judgment.

Where motion in arrest of judgment is allowed for a fatal defect in the indictment, defendant is not entitled to his discharge, but is subject to further prosecution if the solicitor so elects. *S. v. Eason*, 59.

A judgment may be arrested only for some error or defect appearing upon the face of the record. *Ibid.*

Warrant for resisting arrest *held* insufficient, and motion in arrest should have been allowed. *S. v. Harvey*, 111; *S. v. Eason*, 59.

Warrant *held* sufficient to charge assault on officer, and motion in arrest was properly overruled. *S. v. Harvey*, 111.

CRIMINAL LAW—*Continued.*

Warrant charging willful failure to support wife and children *held* fatally defective, and motion in arrest is allowed. *S. v. Outlaw*, 220.

Judgment will be arrested when defendant, on appeal from county court, is convicted on charge not in warrant upon trial in county court. *S. v. Mills*, 604.

§ 57a. Motions for New Trial for Misconduct of or Affecting Jury.

Defendant moved for a new trial on the ground that during the trial he discussed the case with one of the jurors before recognizing him as a juror. The court found that defendant had not shown that he was in any wise prejudiced by the occurrence, and denied defendant's motion for a new trial. *Held:* The ruling of the court is not reviewable. *S. v. Scott*, 595.

§ 61a. Formalities and Requisites of Judgment.

In a prosecution for less than a capital felony, the failure of the judge to sign the judgment or the minute docket does not affect the validity of the judgment. *S. v. Atkins*, 294.

§ 62a. Severity of Sentence.

Crime against nature is an infamous offense, and attempt to commit the offense is punishable by imprisonment in the State's prison. *S. v. Mintz*, 761.

§ 62f. Suspended Judgments and Executions.

The court may not suspend execution of its judgment upon prescribed conditions without the consent of the defendant, express or implied. *S. v. Eason*, 59; *S. v. Harvey*, 111.

Where defendant's counsel gives notice of appeal immediately upon the pronouncement of a suspended sentence, modification of the sentence is necessary and appropriate because of the refusal of the defendant to consent thereto, and such modification will not be held for error when there is no suggestion that defendant was being penalized for announcing his intention to appeal. *S. v. Bostic*, 639.

§ 77d. Charge Not in Record Deemed Without Error.

Where the charge of the court is not in the record it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by G.S. 1-180. *S. v. Phelps*, 540.

§ 78e. Exceptions and Assignments of Error to Charge.

An exception to a long excerpt from the charge which fails to point up any objectionable instruction with definiteness and certainty is ineffective as a broadside exception. *S. v. Norris*, 47.

Where there is an assignment of error based on several distinct portions of the charge, and one of the parts excepted to is correct, the assignment must fail. *S. v. Atkins*, 294.

Exception to the charge denoted only by the word "Exception" in parenthesis at the end or in the middle of a paragraph of the charge, and an assignment of error that the court erred in improperly stating the nature of the charges against defendant, fail to point out the alleged errors in the charge with the definiteness and certainty required by Rule 19 (3). *S. v. Bostic*, 639.

§ 78h. Form and Requisites of Assignments of Error.

Assignments of error which are not based on exceptions duly taken will not be considered. *S. v. Wiley*, 114.

Assignment of error must present but a single question of law for review. *S. v. Atkins*, 294.

§ 79. Briefs.

Assignments of error not supported by any reason, argument, or authority cited in the brief are deemed abandoned. *S. v. Eason*, 59; *S. v. Atkins*, 294.

§ 81c (1). Harmless and Prejudicial Error in General.

In order to be entitled to a new trial, defendant must not only show error, but also that his rights were prejudiced thereby. *S. v. Scott*, 595.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

Where the court, in admitting in evidence properly identified photographs, instructs the jury that they are offered as corroborative evidence and not as substantive evidence, and adds that they are offered for the purpose of illustrating the testimony of the witnesses. *Held:* The use of the word "corroborative" is technically incorrect, but the explanation following made plain to the jury the proper function of the photographs, and the technical error is not prejudicial. *S. v. Norris*, 47.

Where, construing the charge as a whole, it is apparent that considering the part of the charge immediately before and immediately after the portion excepted to, the jury could not have been misled thereby, error in such portion is not sufficiently prejudicial to warrant a new trial. *S. v. Burnette*, 164.

In a prosecution for possession of tax-paid whiskey for the purpose of sale, and selling tax-paid whiskey, an inadvertence in the charge referring to the whiskey as nontax-paid whiskey, immediately corrected by the court, is not prejudicial, since the offenses are not dependent upon whether the whiskey was tax-paid or untax-paid. *S. v. Bostic*, 639.

§ 81c (3). Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where the court erroneously fails to strike an unresponsive statement of witness upon motion aptly made, but in the light of the entire evidence in the case, the error is not of such prejudicial import as to have affected the result, a new trial will not be awarded. *S. v. Norris*, 47.

Objection to the admission of testimony cannot be sustained when defendant thereafter testifies to the same import. *S. v. Eason*, 59.

The exclusion of evidence cannot be held prejudicial when the same witness immediately thereafter testifies to substantially the same facts, and further, the evidence is merely cumulative of other testimony. *S. v. Tyson*, 574.

Where only part of the answer of a witness, elicited on defendant's cross-examination, is objectionable as hearsay, the refusal of a motion to strike will not be held for prejudicial error when the same witness thereafter testifies to the same facts without objection, and in view of all the testimony, the hearsay statement is too insignificant to have affected the result. *Ibid.*

§ 81c (4). Harmless and Prejudicial Error—Error Relating to One Count Only.

Where one judgment is pronounced upon conviction of each of two indictments, consolidated for trial, and the judgment is arrested as to one of the indictments, the cause will be remanded for proper judgment relating to the verdict in the other case. *S. v. Eason*, 59.

CRIMINAL LAW—*Continued.*

§ 81c (5). Error Cured by Verdict.

Error in failing to submit to the jury the question of defendants' guilt of lesser degree of the crime charged is not cured by a verdict of guilty as charged. *S. v. Davis*, 476.

§ 81f. Review of Exceptions to Refusal to Nonsuit.

Where defendant introduces evidence, he waives his objection to refusal to nonsuit at close of State's evidence, and his motion to nonsuit at close of all evidence presents sufficiency of entire evidence to go to jury. *S. v. Norris*, 47.

In passing upon motion to nonsuit, the Supreme Court does not weigh the evidence or attempt to reconcile contradictions therein, but will consider only the evidence favorable to the State and disregard defendant's evidence in conflict therewith. *Ibid.*

§ 83. Determination and Disposition of Appeal—Remand.

Upon judgment being arrested on one count, the cause is remanded for proper judgment on the other. *S. v. Eason*, 59.

DAMAGES.

§ 7. Punitive Damages.

Though no specific form of allegation is required as the basis for the award of punitive damages, the complaint must allege facts showing circumstances justifying the award, such as actual malice, or oppression, or gross and willful wrong, or wanton and reckless disregard of plaintiff's rights. *Lutz Industries v. Dixie Home Stores*, 332.

This action was instituted to recover damages suffered in a fire allegedly caused by improper installation of electrical equipment in violation of the standard prescribed by law. *Held:* The action was not to recover for any willful or malicious conduct on the part of defendants, and therefore the allegations are insufficient to support an award of punitive damages. *Ibid.*

The allegations of the complaint in this action being insufficient to support an award of punitive damages, allegations as to the pecuniary worth of defendants are irrelevant and should have been stricken upon motion aptly made. *Ibid.*

In an action where punitive damages may be awarded, evidence of the financial condition of defendant and its reputed wealth is competent, but when only compensatory damages are recoverable, evidence thereof is incompetent, and allegations in regard thereto are properly stricken on motion. *Ibid.*

§ 15. Liens Upon and Distribution of Recovery.

The parent and not the unemancipated child is indebted for medical treatment to the child, although the child may be liable therefor if emancipated or as for necessities if the parent is financially unable to pay therefor, and therefore the provisions of G.S. 44-50 creating a lien upon recovery for negligent injury where the beneficiary is indebted for medical expenses incurred as a result of the injury does not authorize the minor in its suit by its next friend to recover for medical expenses. *Ellington v. Bradford*, 159.

DEATH.

§ 8. Measure of Damages for Wrongful Death.

The measure of damages for the loss of human life is the present value of the net pecuniary worth of the deceased based upon his life expectancy. *Caudle v. R. R.*, 466.

In an action for wrongful death, the net pecuniary worth of the deceased is to be ascertained by deducting from the probable gross income to be derived from his own exertions the probable cost of his own reasonably necessary personal living expenses over the period of his life expectancy. *Ibid.*

In an action for wrongful death, the jury, in ascertaining the probable gross income of the deceased, may take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was engaged and the means he had for making money. *Ibid.*

In an action for wrongful death, the jury, in ascertaining the probable cost of deceased's necessary living expenses during the period of his life expectancy, may take into consideration the deceased's age and manner of living. *Ibid.*

In an action for wrongful death, the jury, in ascertaining deceased's life expectancy, may take into consideration the mortuary tables as evidence along with other evidence as to his health, constitution and habits. *Ibid.*

The present value of the net pecuniary worth of a deceased is such sum which presently paid will compensate for the loss of such net pecuniary worth when paid from time to time during the deceased's life expectancy. *Ibid.*

In this action for wrongful death, the court instructed the jury that only the present pecuniary worth of the deceased might be awarded as damages without further instruction in regard to the present value of deceased's net pecuniary worth. *Held:* The charge, when taken in connection with the court's final instructions relating to the conflicting contentions of the parties as to the net pecuniary worth of deceased, must be held for prejudicial error as tending to augment the recovery in a substantial sum in leaving the impression that the undiminished net pecuniary worth of deceased might be awarded as damages. *Ibid.*

DECLARATORY JUDGMENT ACT.

§ 2b. Subject of Action—Legal Controversy.

The Declaratory Judgment Act does not authorize the submission of a theoretical problem or a mere abstraction. *NASCAR v. Blevins*, 282.

This proceeding under the Declaratory Judgment Act was instituted to ascertain whether insurance issued in connection with auto racing sanctioned by the parent company precluded recovery for wrongful death against the promoters or managers of such sanctioned races. It was admitted that the insured was fatally injured in a collision in a sanctioned racemeet, and it appeared that the administratrix of insured had instituted action for wrongful death against the promoters and managers of that racemeet. *Held:* The question of negligence is a question incidental to the action by the administratrix, and in the absence of an admission in the action under the Declaratory Judgment Act that insured's death resulted from negligence, the facts are insufficient to present a controversy cognizable under the Declaratory Judgment Act, and the cause is remanded by the Supreme Court *ex mero motu*. *Ibid.*

A controversy between the parties as to whether the deeds in question created a fee upon special limitation and as to whether title would revert in grantors

DECLARATORY JUDGMENT ACT—*Continued.*

upon the threatened happening of the contingency, may be maintained under the Declaratory Judgment Act. *Recreation Com. v. Barringer*, 311.

DEEDS.

§ 5. Seals.

A deed ineffectual because not under seal may nevertheless be enforceable as a contract to convey. *Dunn v. Dunn*, 234.

§ 13a. Estates and Interests Created—Fee Upon Special Limitation.

A fee upon special limitation, which is a fee since it may last forever, but is not a fee absolute since it may terminate upon the happening of the contingencies specified, is recognized in North Carolina, and may be created by deed, will or other instrument in writing, which in expressed terms provides that upon the happening of named contingencies, title should revert to grantor or his successors. Upon the happening of such contingencies, the title reverts by operation of law. *Recreation Com. v. Barringer*, 311.

Deed conveying land for park upon special limitation that it be used by persons of white race only *held* valid and constitutional. *Ibid.*

The possibility of reverter in the grantor of lands conveyed upon special limitation is not void for remoteness and does not violate the rule against perpetuities. *Ibid.*

Where the grantor conveys land for a park upon special limitations set out, but provision for reverter in the event the park is not maintained for use of the white race only is not included in the limitations inserted in the deed, the use of the park by persons of the Negro race would not effectuate the reverter, which would become operative only upon violation of the limitations expressly incorporated therein. *Ibid.*

§ 16b. Restrictive Covenants.

The findings of fact in this case to the effect that the neighborhood in which plaintiffs' property is situated had undergone such a radical, substantial and fundamental change in character from residential to business purposes as to render the property no longer suitable or valuable for residential purposes, that the property had been zoned by the municipality for business, and that a residential restriction of the same character imposed on a lot in the same neighborhood had theretofore been declared unenforceable, *are held* to support the judgment declaring the residential restrictions null and void. *Muilenburg v. Blevins*, 271.

Ordinarily, in an action to declare residential restrictions unenforceable and void because of change in conditions, it should be made to appear whether or not the subdivision in which the property is situated was originally developed and sold under a uniform scheme or plan of development in order to determine whether or not the covenants are enforceable *inter se* by the owners of lots in the subdivision, and all persons who may have a right to enforce the covenants *inter se* or otherwise, should be made parties. *Ibid.*

§ 16c. Covenants to Support Grantor.

The evidence in this case *is held* sufficient to be submitted to the jury on the issue of grantee's breach of covenant to support grantor for her lifetime, constituting the consideration of the grantor's conveyance to him. *Norwood v. Carter*, 152.

DEEDS—*Continued.*

The measure of damages for breach of covenant to support grantor for her lifetime, constituting the consideration of the grantor's conveyance, is the reasonable value of the services agreed to be rendered, with the burden on plaintiff to introduce evidence of facts, circumstances, and data as to the reasonable value of such services, and where the damages are predicated solely upon plaintiff's allegation that it would cost defendant as much as $100 a month to pay for such services, a new trial must be awarded, since no substantial recovery may be based on mere guesswork or inference. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 2. Distinction Between Descent and Purchase Under Will.

Where a will disposes of certain designated property and then directs that all the other property, both real and personal, owned by testator should descend and be considered as though testator had died intestate, *held*, testator died testate as to his entire estate, the descent and distribution of the residue of the estate in accordance with the rules of intestacy being by direction of the will. *Jones v. Callahan*, 566.

§ 13. Advancements.

While a parent cannot change into an advancement that which was intended as a gift at the time of delivery, a parent may change into a gift that which was at the time of delivery intended as an advancement, and where more than a year after an alleged advancement, the parent executes a deed conveying all of her property in equal division between two of the children, without providing for advancements previously made, the asserted advancement to one of them should not be taken into account in the division of the property conveyed by the deed. *Atkinson v. Bennett*, 456.

A gift to a child cannot be considered in applying the doctrine of advancements. *Ibid.*

A child must account for advancements in order to share by inheritance or by distribution in the real estate and personal property owned by the parent at death, and therefore it must be ascertained that the parent left property before the question of advancements can arise. *Ibid.*

Where testator purchases war bonds payable upon his death to his daughter, but dies in possession of the bonds, the bonds may not be considered an advancement in the settlement of the estate in accordance with the statute of distribution under directions of the will, since an advancement must be a gift *in presenti*. *Jones v. Callahan*, 566.

DIVORCE AND ALIMONY.

§ 5. Pleadings.

Allegations that defendant had abandoned plaintiff and failed to provide adequate support for her are sufficient without a specific allegation that the abandonment was wilful, since abandonment imports wilfulness. *Workman v. Workman*, 726.

§ 12. Alimony and Counsel Fees Pendente Lite.

A plea of adultery, even if found by the court to be true, does not preclude the court from allowing the wife reasonable counsel fees for the prosecution or defense of a divorce action. *Bolin v. Bolin*, 642.

DIVORCE AND ALIMONY—*Continued.*

§ 13. Alimony Upon Divorce from Bed and Board.

In rendering a decree of divorce *a mensa et thoro*, the court has power to decree that the husband should pay permanent alimony for the subsistence of the wife and their infant children. *Rayfield v. Rayfield*, 691.

The amount of alimony and counsel fees decreed upon a divorce *a mensa et thoro*, is a matter of judicial discretion. *Ibid.*

§ 15. Alimony and Subsistence Upon Absolute Divorce.

While permanent alimony may not be awarded in this State upon a decree of divorce *a vinculo*, by express provision of G.S. 58-11, a decree of absolute divorce on the ground of two years separation does not impair or destroy the wife's right to receive alimony under a judgment or decree rendered before the commencement of the proceeding for absolute divorce. *Rayfield v. Rayfield*, 691.

Subsequent divorce does not relieve husband of liability for payments under deed of separation unless the agreement so provides. *Hamilton v. Hamilton*, 715.

§ 16. Enforcing Payment of Alimony.

Judgment of contempt for willful refusal of defendant to make payments to his wife in compliance with a former order of the court is erroneous when it directs that defendant be committed to jail for an indefinite period rather than for thirty days as prescribed by statute, G.S. 5-4. *Basnight v. Basnight*, 645.

§ 16½. Modification of Decrees for Subsistence.

Court may increase amount of subsistence for changed conditions. Motion in the cause is proper procedure. *Rayfield v. Rayfield*, 691.

§ 19. Custody of Children of Marriage—Findings and Decree.

Upon the court's findings, supported by evidence, that the mother is not a proper and suitable person to have the custody of the minor child, that its father is a proper and suitable person, but because of his frequent changes of residence incident to military service, it is not to the best interest of the minor that its custody be awarded the father, but further that the brother and sister-in-law of the child's father are proper and suitable persons to have its custody, and that the best interest of the child would be served by awarding its custody to them, the decree awarding the child's custody to its uncle and aunt will be affirmed. *Hoskins v. Currin*, 432.

§ 21. Validity and Attack of Foreign Decrees.

The evidence tended to show that the husband, serving in the Armed Forces, maintained his legal residence in North Carolina, that he obtained his minor son from his estranged wife in another state, brought him to North Carolina and placed him in the home of his brother and sister-in-law, that thereafter in a divorce action instituted by the wife in such other state, custody was awarded the husband, and that the foreign decree was later modified to award the custody of the child to his mother, notwithstanding the child was and had remained in this State. *Held:* Upon appropriate findings from the evidence, the court of this State had authority to hear and determine the question of the custody of the child, the foreign decree not being binding on our courts in this respect. *Hoskins v. Currin*, 432.

DOWER.

§ 2. Lands to Which Dower Attaches.

Testator owned two tracts of land. He devised one of them to his wife, and provided that the other tract and his personalty should descend and be distributed in accordance with the applicable rules of descent and distribution as in case of *intestacy*. *Held:* The widow is entitled to dower as to the second tract. *Jones v. Callahan*, 566.

§ 3. Conveyance of Dower.

Where the wife joins in her husband's deeds in fee simple, duly executed and acknowledged, she conveys her inchoate right of dower, and upon his death she may not contend that her right of dower in the lands conveyed should be taken into consideration in determining her share of the estate. *Jones v. Callahan*, 566.

§ 5. Waiver or Forfeiture of Dower.

Antenuptial agreement relinquishing dower *held* not rescinded by subsequent deed of separation and precluded claim of dower. *Turner v. Turner*, 532.

EJECTMENT.

§ 16. Competency and Relevancy of Evidence.

In an action for the possession of realty, plaintiff may introduce in evidence a deed referred to in defendants' answer for the limited purpose of attacking it. *Memory v. Wells*, 277.

§ 17. Sufficiency of Evidence and Nonsuit.

Plaintiff's evidence establishing a common source of title and better title from that source makes out a *prima facie* case. *Memory v. Wells*, 277.

ELECTION OF REMEDIES.

§ 2. Between Rescission and Damages for Fraud.

When justified by the facts, a party may maintain an action for rescission of an instrument and also for damages resulting from the fraud which induced its execution. *Zagler v. Setzer*, 493.

§ 5. Election of Remedies in Actions Ex Contractu.

A party may state in the alternative a cause of action to recover sums due under a contract with a cause of action for damages for breach of the contract if the contract had been canceled in violation of its terms. *Trust Co. v. Processing Co.*, 370.

ELECTIONS.

§ 18b. Contested Elections—Necessity of Allegation of Illegality of Ballots.

In *quo warranto* proceedings, an allegation that certain ballots were illegal and void states no more than a conclusion, and the trial court should permit the allegation of sufficient facts to disclose that the ballots challenged were void for the reason that the voters casting them were nonresidents of the municipality in which the election was held. *Wilson v. Pearson*, 601.

ELECTRICITY.

§ 7. Condition and Position of Wires.

A person maintaining an overhead wire across a public road at a height that will not clear vehicles which do not exceed the maximum legal height of 12 feet, 6 inches (G.S. 20-116 (c)), is liable under the general law of negligence for injury to a motor vehicle or its occupants resulting from the maintenance of such wire. *Dennis v. Albemarle*, 263.

§ 10. Contributory Negligence of Person Injured.

Evidence *held* not to show contributory negligence as matter of law on part of plaintiff in failing to see overhead wire. *Dennis v. Albemarle*, 263.

§ 12. Fires.

Provisions of the 1936 Building Code which require that electrical systems be installed in conformity with the National Electric Code and the National Board of Fire Underwriters, contain regulations having the force of law, and therefore in an action to recover for destruction of property in a fire allegedly caused by negligence of defendants in failing to properly install electrical fixtures and wiring and in failing to have the electrical system inspected before turning on the electricity, evidence of violations of germane provisions of the National Electric Code, adopted as the standard by the Board of Fire Underwriters, would be competent, and therefore denial of motions to strike allegations of the complaint referring to such violations is not error. *Lutz Industries v. Dixie Home Stores*, 332.

EMINENT DOMAIN.

§ 2. Necessity of Compensation.

When private property is taken for public use just compensation must be paid. *Eller v. Board of Education*, 584; *Sale v. Highway Com.*, 612.

Constitutional provision is self-executing. *Sale v. Highway Com.*, 612.

§ 3. Acts Constituting "Taking."

In order to constitute a "taking" of private property for a public purpose within the principle of eminent domain, it is not necessary that there be an actual seizure, but it is sufficient if the creation and maintenance of a government project constitutes a nuisance substantially impairing the value of private property. *Eller v. Board of Education*, 584.

§ 14. Petition and Service.

In summary proceeding for condemnation, provision of statute for service by publication on nonresident landowners does not preclude service by publication on resident landowners upon a proper showing. *Brown v. Doby*, 462.

§ 17. Exceptions to Report and Appeal.

Acceptance by respondents of voluntary payment by petitioner of award fixed by commissioners settles question of compensation and waives and surrenders any right of petitioner to take exception to commissioners' report. *Highway Com. v. Pardington*, 482.

§ 22. Purchase of Right of Way.

Where consideration of right of way easement is a stated sum plus agreement to move buildings of landowner, and buildings are destroyed by fire while in custody of Commission, landowner may recover for damage as a part of compensation for the easement. *Sale v. Highway Com.*, 612.

EMINENT DOMAIN—*Continued.*

§ 22½. Actions to Recover Compensation.

G.S. 40-11, *et seq.*, are applicable only to instances where the condemnor acquires title and right to possession of specific land, and where the value of private property has been impaired as a result of the maintenance of a nuisance on adjoining public property, the private owners may maintain an action for compensation for such taking, and the contention that their sole remedy is by petition before the clerk is untenable. *Eller v. Board of Education*, 584.

Common law action will lie against State Highway Commission to recover consideration for highway easement. *Sale v. Highway Com.*, 612.

The rule that the owner of property, in the exercise of his constitutional right, may maintain an action against the State Highway and Public Works Commission to obtain just compensation for lands taken, does not apply to an action against it to remove a cloud on plaintiff's title based upon a mere alleged invalid claim of a right of way. *Cannon v. Wilmington*, 711.

But action to quiet title will lie against municipality. *Ibid.*

Highway Commission may be compelled by *mandamus* to define right of way claimed by it. *Ibid.*

EQUITY.

§ 2b. Party Must Come Into Equity With Clean Hands.

In this action to enforce an express, parol trust, defendants allege that the agreement was made for the purpose of defeating the Federal tax lien on the land. *Held:* The Federal Government had one year from date of sale within which to redeem, since the tax lien was subsequent to the lien of the deed of trust under which defendant purchased, 28 USCA Sec. 2410, and defendants' defense that plaintiffs did not come into a court of equity with clean hands, was determined in favor of plaintiffs under a correct charge of the court. *Roberson v. Pruden*, 632.

ESTATES.

§ 16. Joint Estates and Survivorship.

U. S. War Bonds, Series E, registered in testator's name, payable on death to his daughter, purchased prior to testator's second marriage, and in his possession at the time of death, belong to the daughter not under the will, but under the terms of the bonds, and are not to be considered in the settlement of testator's estate in the absence of any provision in the will in regard thereto. *Jones v. Callahan*, 566.

ESTOPPEL.

§ 6. Equitable Estoppel.

The printed form warranty of title contained in the assignment of title of a motor vehicle relates to liens against the assignor and not those in his favor, and therefore, nothing else appearing, the assignor is not estopped thereby from asserting a lien in his favor as against the mortgagee of the assignee. *Peek v. Trust Co.*, 1.

The conduct of the party claiming an estoppel must be considered no less than the conduct of the party sought to be estopped. *Ibid.*

A party asserting an equitable estoppel must show conduct on the part of the party sought to be estopped which amounts to (1) a false representation or concealment of material facts or which is reasonably calculated to mislead;

ESTOPPEL—*Continued.*

(2) intention or expectation that such conduct should be acted upon or which is calculated to induce a reasonably prudent person to believe such conduct was to be relied upon; (3) knowledge, actual or constructive, of the real facts. The party claiming the estoppel must further show on his part: (1) lack of knowledge and the means of knowledge as to the truth of facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon to his prejudice. *Ibid.*

In the absence of actual fraud, a party asserting an estoppel must not have been misled through his own want of reasonable care and circumspection. *Ibid.*

§ 11b. Actions—Burden of Proof and Evidence.

A defendant pleading estoppel by way of affirmative defense has the burden of proof upon the issue. *Peek v. Trust Co.*, 1.

Where the junior mortgagee contends that the senior mortgagee used the money borrowed from the junior mortgagee and secured by its instrument to make good a check given by the senior mortgagee to discharge a prior lien on the property, testimony of the senior mortgagee that he had other funds with which to make good the check is competent upon the issue of estoppel. *Ibid.*

§ 11c. Actions—Nonsuit and Directed Verdict.

A bank holding a junior mortgage asserted that the senior mortgagee was estopped from asserting the priority of his lien by reason of the fact that the senior mortgagee accompanied the mortgagor to the bank and represented that there were no liens upon the property. The evidence was conflicting as to whether the senior mortgagee, in endorsing the transfer of title with warranty against liens, read the instrument or if he read it, assumed that it referred to liens against him and not in his favor. *Held:* The court correctly refused to give a peremptory instruction on the issue of estoppel in favor of the junior mortgagee. *Peek v. Trust Co.*, 1.

EVIDENCE.

§ 2. Judicial Notice of Governmental, Legislative and Judicial Acts.

The courts will take judicial notice of the Building Code published by the Building Code Council, since such publication is an important public document having the force of law through enactment by reference. G.S. 143-136 to G.S. 143-143, inclusive. *Lutz Industries v. Dixie Home Stores*, 332.

The courts will take judicial notice of the counties comprising a judicial district at the time of the rendition of judgment, and that the resident judge was assigned by statute to hold the courts of the district during a particular term. *Dellinger v. Bollinger*, 696.

§ 26. Similar Facts and Transactions.

Evidence of other conditions or events may be used, within limits, to prove a habit or custom under like conditions, or to show the standard of care under which it is claimed a party ought to have conformed, but did not, but in order for such evidence to be competent, there must be a substantial similarity in the other conditions or events. *R. R. v. Motor Lines*, 676.

§ 30a. Photographs.

Where a patrolman identifies photographs as representing the true condition of the cars immediately after the accident, such photographs are competent

EVIDENCE—*Continued.*

for the purpose of enabling the witnesses to illustrate and explain their testimony. *S. v. Norris*, 47.

§ 32. Transactions or Communications With Decedent.

In an action by the widow against the executor of her husband upon an acknowledgment of indebtedness to her executed by him, the widow is incompetent to testify that she had loaned her husband the sum or that she saw him sign the instrument. *McGowan v. Beach*, 73.

G.S. 8-51 applies to tort actions. *Hardison v. Gregory*, 324.

The disqualification of a party to the action to testify against the personal representative of a deceased person as to a transaction or communication with the deceased does not prohibit such interested party from testifying as to the acts and conduct of the deceased where the interested party is merely an observer and is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. *Ibid.*

In this action for alienation of affections and criminal conversation against the administrators of the alleged tort-feasor, plaintiff's testimony that when he returned to his home at night he found the deceased standing in the living room of the unlighted house, and that on two other occasions he saw his wife and the deceased alone at farm cabins, *is held* competent as testimony of independent facts. The Supreme Court is evenly divided in opinion, one Justice not sitting, as to the competency of plaintiff's testimony in regard to an assault by plaintiff on the deceased. *Ibid.*

§ 40. Parol or Extrinsic Evidence Affecting Writings.

The rule that parol evidence is not admissible to vary or contradict a written instrument applies when the enforcement of the writing is the basis of the cause of action or the substantial issue between the parties, and not when the writing is collateral to the issue involved in the action. *Peck v. Trust Co.*, 1.

Stipulations contained in correspondence prior to execution of the agreement are superseded by the written agreement executed by the parties, but such prior correspondence may be competent to identify the subject matter of the contract and throw light upon certain of its provisions when it does not vary the terms of the written agreement, and correspondence subsequent to the agreement may be relevant as bearing upon the rights of the parties to declare an abandonment of the agreement but not to establish or vary the terms of the contract. *Douglass v. Brooks*, 178.

Parol evidence *held* competent to show that the actual consideration for a deed to two lots was an agreement of the grantee to construct a house on each lot and to pay to grantors, so long as either of them lived, the rental from one of the houses. *Willis v. Willis*, 597.

§ 46d. Opinion Evidence as to Value.

A municipal engineer may testify as to the value of the sewer system appropriated by the city, when his testimony is based upon his personal knowledge and observation and a map prepared by him which fairly represents the sewer lines in controversy. *Mfg. Co. v. Charlotte*, 189.

§ 46f. Medical Experts.

Physician may use X-ray pictures as aid in determining extent of injuries and may testify as to the extent of the injuries even though the X-ray pictures are not introduced in evidence. *S. v. Norris*, 47.

EVIDENCE—*Continued.*

In this action to recover for burns received by a 3-year-old child, evidence was admitted that prior to the injury the child was not nervous and that she slept and ate well, but that after the injury she was excitable, afraid of noises, and neither ate nor slept well. *Held:* Medical expert testimony to the effect that the injury could cause traumatic neuroses or personality shock to the child was properly admitted. *Ford v. Blythe Bros. Co.*, 347.

The fact that expert witnesses testify that an injury might or might not result in traumatic neuroses, goes to the weight of their testimony rather than to its admissibility. *Ibid.*

§ 48. Subjects in Exclusive Province of Experts.

Whether an operation should be undertaken in a given case relates to a field of expert knowledge and is subject only to expert testimony. *Hunt v. Bradshaw*, 517.

Proof of what is in accord with approved surgical procedure, and what constitutes the standard of care of a surgeon in performing an operation, relate to expert knowledge and may be established only by the testimony of qualified experts. *Ibid.*

§ 51. Competency and Qualification of Experts.

Where no objection is entered to testimony of physician as to head injuries, appellant may not contend on appeal that appellee failed to qualify the expert as a brain surgeon. *S. v. Norris*, 47.

EXECUTORS AND ADMINISTRATORS.

§ 8. Title and Right to Possession of Assets.

Where husband and wife's conveyance to a trustee of land held by them by entirety and the trustee's conveyance back to the husband are ineffectual because of want of certificate required by G.S. 52-12 in the deed executed by them, the estate by entireties is not destroyed, and upon the subsequent conveyance by the husband and wife of a part of the lands to third persons, the wife, in the absence of relinquishment of her rights by gift or contract, is entitled to one-half the proceeds of sale, and upon the death of her husband, may assert such right against the estate of her husband. *Honeycutt v. Bank*, 734.

§ 12b. Sale of Assets Under Provision of Will.

The will in suit provided that the executor should "come down & take an inventory of my chattel property & real estate," bequeathed the home tract to testator's wife for life, and further provided that after her death it should be "sold & divided (as all of my other property) equally between all of my children." *Held:* It was the intent of testator that all of his property, with the exception of the home tract, should be sold forthwith and the proceeds equally divided between his children. *Gomer v. Askew*, 547.

Where land is devised to be sold and the proceeds divided among heirs or designated beneficiaries, nothing else appearing, the executor has no implied power to make the sale, but where realty and personalty are to be sold for division, nothing else appearing, the power of the executor to sell the realty involved in making division of the realty and personalty, is implied. These are rules of construction, to aid in the ascertainment of testator's intention, and must yield if the provisions of the will manifest a contrary intent. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

The will devised certain lands to testator's widow for life with further provision that at her death the propuerty, as well as all his other property, real and personal, be sold, and the proceeds equally divided between his children. The widow dissented from the will. *Held:* The dissent of the widow accelerated the vesting of the right of immediate enjoyment in the remainder, and the executor had authority to sell all the personalty and realty, subject to the widow's dower, for division of the proceeds among testator's children. *Ibid.*

§ 15c. Claims Against the Estate—Notes and Indebtedness of Decedent.

Where a widow files claim against the estate of her husband upon a written acknowledgment of indebtedness executed by him under seal, her right to recover depends upon the legal effect of the writing coupled with the fact that she had it in her possession and introduced it in evidence, and therefore issues as to whether he signed and delivered the instrument and whether it was supported by valuable consideration are sufficient, and the court correctly refuses to submit a further issue as to whether she had loaned the money to her husband. *McGowan v. Beach*, 73.

The fact that the acknowledgment of indebtedness is under seal imports consideration, and the law will imply a promise to pay from the unqualified acknowledgment. *Ibid.*

§ 15g. Widow's Year's Support.

The right of a widow to a year's support for herself and children is solely statutory, G.S. 30-15, and the statute does not apply unless the husband dies intestate or the widow dissents from his will. *Jones v. Callahan*, 566.

FALSE IMPRISONMENT.

§ 3. Limitations.

The one year statute of limitations applies to an action for false imprisonment. G.S. 1-54. *Barnette v. Woody*, 424.

FRAUD.

§ 1. Elements and Essentials in General.

The essential elements of fraud are a misrepresentation of a material fact, false within the knowledge of the party making it, made with intent to deceive, which misrepresentation does in fact deceive the other party to his damage. *Parker v. Hensel*, 211.

To constitute fraud, there must be a false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with the intent to deceive. *Lester v. McLean*, 390.

§ 3. Part or Subsisting Fact.

Representation as to the replacement costs of buildings sold *held* to relate to matter of opinion rather than of fact, and therefore could not support action for fraud. *Lester v. McLean*, 390.

A representation which is nothing more than a statement of opinion cannot constitute fraud. *Ibid.*

§ 4. Knowledge and Intent to Deceive.

The fact that the evidence discloses that plaintiff had no knowledge of the falsity of his representation is not fatal when the evidence further discloses

FRAUD—*Continued.*

that the representation was material and was intended by plaintiff to be accepted and relied on by defendant, and that the representation was recklessly made, or positively averred when plaintiff was consciously ignorant whether it was true or false. *Zager v. Setzer*, 493.

§ 5. Deception and Reliance Upon Misrepresentation.

Where party does not see plans and specifications approved by FHA, representation that buildings were constructed in accordance with plans cannot have misled, especially when completed buildings were repeatedly inspected and FHA approved completed buildings for loan. *Lester v. McLean*, 390.

§ 9. Pleadings in Actions for Fraud.

Allegations that defendant cemetery had delivered deeds for burial lots stamped as having been recorded when in fact the deeds had not been recorded, and that such action was willfully and fraudulently intended to keep the owners from having their deeds recorded, *held* insufficient to state a cause of action for fraud. *Mills v. Cemetery Park*, 20.

Allegations that the corporate cemetery had sold burial lots upon representation that certain funds should be used for protection and ornamentation and that the cemetery had breached these agreements and had no present intention of performing them, in the absence of allegation that when the cemetery made the representations, it knew them to be false, and made them with the intention that they should be acted upon, *is held* to be a defective statement of good cause of action for fraud. *Ibid.*

Party may maintain action for rescission of instrument for fraud and also for damages resulting from the fraud which induced its execution. *Zager v. Setzer*, 493.

§ 10. Burden of Proof.

Where defendant sets out fraud as an affirmative defense, the burden of the issue is on defendant. *Lester v. McLean*, 390.

§ 11. Competency and Relevancy of Evidence.

On a counterclaim for fraud inducing the purchase of property by defendant, the contract of sale entered into by the parties is admissible as evidence as to what the parties actually agreed, even though the action is in tort. *Lester v. McLean*, 390.

§ 12. Sufficiency of Evidence and Nonsuit on Issue of Fraud.

Conscious misrepresentation as to gross receipts from operation of theatre *held* sufficient to support action for fraud. *Zager v. Setzer*, 493.

Allegation of *scienter* and proof of constructive *scienter* in that representation was recklessly made in conscious ignorance of its truth or falsity, does not justify nonsuit for variance. *Ibid.*

FRAUDS, STATUTE OF.

§ 3. Pleading the Statute of Frauds.

The defense of the Statute of Frauds cannot be raised by demurrer. *McKinley v. Hinnant*, 245.

FRAUDS, STATUTE OF—*Continued.*

§ 4. Estoppel and Waiver of Defense.

In proper cases, an estoppel based upon grounds of fraud may override the Statute of Frauds. *McKinley v. Hinnant*, 245.

§ 9. Contracts Affecting Realty—Application in General.

Plaintiffs conveyed to defendant two lots under an agreement that defendant should construct a house on each lot and pay to plaintiffs the rental value from one of the houses. *Held:* The statute of frauds does not apply to the executed contract. *Willis v. Willis*, 597.

GUARANTY.

§ 2. Construction and Operation of Agreements in General.

A guaranty of payment is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the obligation of the guarantor, as distinguished from that of a surety, is separate and independent of the obligation of the principal debtor, giving the creditor a cause of action against the guarantor immediately upon failure of the principal debtor to pay the account at maturity. *Milling Co. v. Wallace*, 686.

§ 4. Rights and Remedies of Creditor.

The male defendants were sued on their trade acceptances. Their respective wives were sued on a continuing guaranty of payment executed by the wives. *Held:* While the guarantors are not in any sense parties to the trade acceptances, the cause of action on the guaranty arose out of the same transactions or transactions connected with the same subject of action, rests upon the same proof, and all defendants may be joined in one action for a complete determination of the questions involved. *Milling Co. v. Wallace*, 686.

HEALTH.

§ 5. Prosecutions for Violating Health Ordinances.

An indictment charging that defendant did unlawfully and willfully "build or install" a septic tank and cover same without first having the inspection and approval of the county board of health, and did unlawfully "build or install" a septic tank without first obtaining a permit from the health officer, in violation of ordinance, *is held* not subject to quashal on the ground of duplicity. *S. v. Jones*, 563.

HIGHWAYS.

§ 11. Cartways—Procedure to Establish.

While an aggrieved party is not required to wait until a cartway is laid off and the damages assessed in a proceeding under G.S. 136-68, before appealing from the order of the clerk adjudging that petitioner is entitled to the relief, the location of the cartway and the assessment of damages, if any, even though the clerk's order be affirmed, remain matters for the jury of view, subject to the right of review. *Tucker v. Transou*, 498.

Section 7, Chapter 145, Public Laws of 1931 (G.S. 136-51), discloses no legislative intent to deprive commissioners of Buncombe County of jurisdiction to lay out cartways. *Merrell v. Jenkins*, 636.

HIGHWAYS—*Continued.*

§ 12. Cartways—Use and Rights Therein.

A cartway established under Section 18, Chapter 328, Public Laws of 1923, does not preclude the owners of the servient estate from erecting gates across the cartway if the gates are constructed and operated so as not unreasonably to interfere with the right of passage. *Merrell v. Jenkins*, 636.

HOMICIDE.

§ 14. Indictment.

Under an indictment for murder in the form prescribed by G.S. 15-144, the State is entitled to introduce evidence that the defendant committed the homicide in the perpetration, or attempted perpetration, of a felony, and thus make out defendant's guilt of murder in the first degree. *S. v. Scales*, 400.

Where under an indictment drawn under form prescribed by G.S. 15-144, the theory of trial is in accordance with pre-trial statements of defendant, tending to show that he killed deceased in an attempt to perpetrate rape, the defendant is in no way prejudiced by the denial of his motion for a bill of particulars. *Ibid.*

§ 16. Presumptions and Burden of Proof.

In assault prosecution, use of deadly weapon raises no presumption, and therefore instruction in assault prosecution that same rules of self-defense apply as in homicide cases, is error. *S. v. Warren*, 581.

§ 17. Relevancy and Competency of Evidence.

Where there is testimony that defendant fired several shots in the direction of the door of a room, evidence that a bullet hole was found in the door and that a bullet was found lying on the sill below the hole, is competent for the purpose of corroboration. *S. v. Tyson*, 574.

§ 27f. Instructions on Self-Defense.

Where the evidence discloses that the fatal encounter was provoked by an insult or assault made upon the woman escorted by the deceased, and there is ample evidence tending to show that defendant used excessive force and continued to shoot after deceased had attempted to turn and run out the door, there is sufficient evidence to justify the jury in finding that defendant was not without fault, and therefore it is proper for the court to charge the jury that a defendant cannot justify a slaying on the ground of self-defense unless he is without fault. *S. v. Tyson*, 574.

§ 27h. Instructions on Less Degrees of Crime.

Under evidence in this case the court correctly refused to submit question of guilt of less degrees of crime. *S. v. Scales*, 400.

HUNTING AND FISHING.

§ 4. Maintenance of Blinds and Ponds.

Maintenance of pond with bait and lame wild geese may constitute nuisance *per accidens*. *Andrews v. Andrews*, 382.

HUSBAND AND WIFE.

§ 1. Antenuptial Contracts in General.

Antenuptial agreements are not against public policy. *Turner v. Turner*, 533.

Where both parties are competent to contract, and each owns realty and has knowledge of the realty owned by the other, an antenuptial contract in which each releases to the other any estate in the realty of the other predicated upon marriage, which contract is acknowledged before the clerk, who incorporates in the certificate a finding that the agreement is not injurious to the *feme*, is valid, the mutuality of the stipulations being a sufficient consideration. *Ibid.*

§ 2. Construction and Operation of Antenuptial Contracts.

The principles of construction applicable to contracts generally are applicable to antenuptial agreements. *Turner v. Turner*, 533.

Dower rights may be released by a valid antenuptial contract which so provides in plain and unequivocal language. *Ibid.*

When the terms of an antenuptial contract are plain and explicit, the court will determine their legal effect. *Ibid.*

§ 3. Rescission, Modification and Attack of Antenuptial Contracts.

Antenuptial contracts may be modified or rescinded during coverture with the full and free consent of the parties thereto, provided the rights of third parties have not intervened. *Turner v. Turner*, 533.

In absence of contractual or statutory provisions to the contrary, an antenuptial agreement is not affected by a later separation and subsequent reconciliation of the parties. *Ibid.*

§ 12b. Contracts Between Husband and Wife.

The wife's guaranty of payment of the husband's trade acceptance is not a contract between husband and wife within the purview of G.S. 52-12, and the rule that a wife may execute a primary obligation as surety for her husband's debt without complying with the provisions of G.S. 52-12, applies with equal force to the execution by her of a collateral obligation as guarantor of his debt. *Milling Co. v. Wallace*, 686.

§ 12c. Conveyances Between Husband and Wife.

A conveyance by the wife to the husband of an interest in realty which does not contain certificate by the examining officer, incorporating a statement of his findings that the conveyance is not unreasonable or injurious to her, is void. G.S. 52-12. *Honeycutt v. Bank*, 734.

Where lands held by entirety are conveyed by husband and wife to a trustee, who reconveys to the husband, solely for the purpose of accomplishing an indirect conveyance of the wife's interest to the husband, G.S. 52-12 applies, and where the certificate required by the statute is not incorporated in the deed by the husband and wife to the trustee, such deed is void and the trustee's deed to the husband is ineffectual to convey title. *Ibid.*

G.S. 52-12 is not repealed by Chapter 73, sec. 21, Session Laws of 1945 (G.S. 47-116). *Ibid.*

§ 12d (2). Deeds of Separation—Construction and Operation.

Where the terms of an antenuptial agreement and a deed of separation are plain and explicit, the court will determine their legal effect. *Turner v. Turner*, 533.

HUSBAND AND WIFE—*Continued.*

Deed of separation *held* not to rescind prior antenuptial agreement, and the antenuptial agreement, by its terms precluded the wife from claiming dower upon the death of the husband. *Ibid.*

Subsequent divorce does not relieve husband of payments under deed of separation unless the agreement so provides. *Hamilton v. Hamilton*, 715.

§ 12d (4). Separation Agreements—Revocation and Rescission.

A deed of separation is annulled by the subsequent resumption of conjugal cohabitation by the parties. *Turner v. Turner*, 533.

§ 14. Creation of Estates by Entirety.

Where the husband furnishes the entire consideration for a conveyance of land to himself and wife, the law presumes that the conveyance to her of an interest in the land was a gift, and the title vests in them as tenants by entirety. *Honeycutt v. Bank*, 734.

§ 15c. Estates by Entireties—Rights of Parties Upon Termination of Estate.

A fire insurance policy was issued in the name of the husband alone on property held by entirety, but in the sole possession of the husband. Upon the destruction of the property by fire, insurer paid the amount of the policy into court. *Held:* The husband had an insurable interest in the property, constituting an inseparable part of the single-entity title held in unity by him and his wife, and thus covering the entire estate as owned by both. Therefore, upon the estate by entirety being later severed by absolute divorce, each is entitled to one-half the proceeds of the insurance moneys. *Carter v. Ins. Co.*, 578.

§ 15d. Estates by Entirety—Survivorship.

Where husband and wife's conveyance to a trustee of land held by them by entirety and the trustee's conveyance back to the husband are ineffectual because of want of certificate required by G.S. 52-12 in the deed executed by them, the estate by entireties is not destroyed, and upon the death of the husband, the wife becomes the sole owner as surviving tenant, with no right, title or interest of any kind passing to the husband's executor for the benefit of the creditors or devisees of the husband. Proceeds of sale of the land made by the executor subsequent to the death of the husband have the same status as the lands. *Honeycutt v. Bank*, 734.

§ 16. Conveyance of Estates by Entirety.

Where husband and wife convey estate by entirety to trustee, who reconveys to husband, and deed of husband and wife does not have wife's certificate as required by G.S. 52-12, the deed is void and the estate by entirety is not destroyed. *Honeycutt v. Bank*, 734. Upon subsequent sale by the husband, the wife is entitled to one-half the proceeds. *Ibid.*

§ 17. Abandonment—Nature and Elements of the Offense.

This husband's willful separation of himself from his wife is not a criminal offense so long as he provides her with adequate support, but becomes a criminal offense only if after abandonment he intentionally and without just cause or excuse ceases to provide adequate support for her according to his means and condition in life. *S. v. Lucas*, 84.

HUSBAND AND WIFE—*Continued.*

Under certain circumstances the willful abandonment of the wife by the husband may be a significant factor in determining whether his failure to provide adequate support was willful, as when he leaves and goes to a new community where there is no prospect of equally satisfactory employment. *Ibid.*

§ 20. Abandonment—Indictment.

Under G.S. 14-322, as amended, defendant's abandonment and willful failure to support his wife and his abandonment and willful failure to support the children of the marriage, are separate and distinct offenses, and each offense should be fully charged in separate bills of indictment or in separate counts in a bill of indictment. *S. v. Lucas*, 84.

A warrant charging that defendant willfully failed to provide adequate support for his wife and children, but failing to charge that he willfully abandoned either the wife or the children, is insufficient under G.S. 14-322, and motion in arrest of judgment is allowed. *S. v. Outlaw*, 220.

A warrant charging that defendant willfully neglected and refused to provide adequate support for his wife and children, without alleging that defendant committed the offense "while living with his wife," is insufficient under G.S. 14-325, and motion in arrest of judgment is allowed. *Ibid.*

§ 22. Abandonment—Sufficiency of Evidence and Nonsuit.

Evidence in this prosecution of the defendant for willful abandonment of his wife without providing her adequate support *is held* sufficient to overrule defendant's motion to nonsuit. *S. v. Lucas*, 84.

§ 23. Abandonment—Instructions.

Where, in a prosecution for abandonment and willful failure to support, the evidence tends to show that the husband was employed and had earnings, and had in some measure made provision for the support of the wife, the adequacy of such support and the willfulness of the defendant's failure to do more, are the crucial questions to be submitted to the jury, and an instruction to the effect that defendant's earning capacity made no difference is erroneous, and an instruction that the failure to provide support would be excusable only if the husband had no income or earning capacity whatsoever, is inexact. *S. v. Lucas*, 84.

§ 26. Alienation—Nature and Essentials of Right of Action.

Alienation of affections and criminal conversation are distinct torts; physical debauchment is not an element of alienation of affections. *Hardison v. Gregory*, 324.

§ 33. Criminal Conversation—Elements and Essentials of Right of Action.

Alienation of affections and criminal conversation are distinct torts; physical debauchment is generally not a necessary element of a right of action for alienation of affections. *Hardison v. Gregory*, 324.

§ 36. Criminal Conversation—Sufficiency of Evidence.

In an action for criminal conversation it is not necessary to show the adultery of the wife by direct proof, but it may be shown by circumstantial evidence from which the guilt of the parties can be reasonably inferred, and circumstantial evidence in this case *held* sufficient to be submitted to the jury. *Hardison v. Gregory*, 324.

IMPERSONATING AN OFFICER.

§ 1. Nature and Elements of Offense.

The elements of the offense defined by G.S. 14-277 are a false representation by a person that he is a duly authorized peace officer, and some overt act committed by him upon such representation in usurpation of the authority delegated to duly authorized peace officers. *S. v. Church*, 230.

§ 2. Prosecution and Punishment.

The State's evidence tended to show that defendant made no oral representation that he was a peace officer, but exhibited a sheriff's association courtesy card to the prosecuting witness, and stopped his car in such a position as to prevent the prosecuting witness, for a few minutes, from proceeding as he had intended. *Held:* The evidence is insufficient to be submitted to the jury in a prosecution for violation of G.S. 14-277, there being no evidence that the witness was misled or that the defendant used words or took any action which would indicate he intended or attempted to arrest the witness. *S. v. Church*, 230.

INDICTMENT AND WARRANT.

§ 9. Charge of Crime.

Ordinarily an indictment for a statutory offense is sufficient if it is framed upon the statute and charges the offense in the language of the act, and unless the exact time and place of the alleged occurrence are essential elements of the offense itself, defendant must move for a bill of particulars if he desires more definite information in respect thereto. *S. v. Eason*, 59.

If the words of a statute do not charge the essential elements of the offense in a plain, intelligent and explicit manner, an indictment charging the offense in the language of the statute is defective, it being necessary in such instances that the words of a statute be supplemented by allegations which explicitly and accurately set forth each element of the offense. *Ibid.*

Ordinarily an indictment should not charge the offense in the alternative, but this rule does not apply when the charges are synonymous and one term is used only to explain or illustrate the other, or the statute commands the performance of a positive duty and the use of the disjunctive does not result in uncertainty. *S. v. Jones*, 563.

§ 10. Identification of Accused.

Where defendant's name appears in the warrant and the warrant expressly refers to the affidavit upon which it is based, the fact that defendant's name does not appear in the affidavit is not fatal. *S. v. Outlaw*, 220.

§ 11. Definiteness and Sufficiency in General.

An indictment is sufficient if it expresses the charge against the defendant in a plain, intelligible, and explicit manner and contains sufficient matter to enable the court to proceed to judgment. *S. v. Jones*, 563.

§ 18. Motions for Bill of Particulars.

A motion for a bill of particulars is addressed to the discretion of the trial court. *S. v. Scales*, 400.

INFANTS.

§ 9c. Suit by Infant for Negligent Injury.

Infant may sue to recover for permanent injury and for impairment of earning capacity after attaining majority, but may not sue tort-feasor for hospital and medical expenses in absence of waiver by defendant. *Ellington v Bradford*, 159.

INJUNCTIONS.

§ 3. Grounds of Relief—Irreparable Injury.

Injunctive relief will be granted only when irreparable injury is both real and immediate. *Hudson v. R. R.*, 650.

§ 4g. Enjoining Commission of Criminal Offenses.

The practice of law without a license is a criminal offense, with adequate legal remedy by indictment against a person or corporation practicing law without license, and therefore, injunction will not lie to restrain the unauthorized practice of law. *Mills v. Cemetery Park*, 20.

While ordinarily the validity of a municipal ordinance creating a criminal offense may not be tested by injunction, injunctive relief may lie when it is manifest that otherwise property rights or the rights of persons would suffer irreparable injury. *Davis v. Charlotte*, 670.

§ 8. Continuance of Temporary Restraining Orders.

Where there is sufficient evidence to support the trial court's findings that there was probable cause that plaintiff would be able to establish title to the *locus in quo* and that the continuance of the cutting of timber by defendants during the litigation would produce injury, judgment continuing the restraining order to the hearing will be affirmed. *Brown v. Williams*, 648.

INSURANCE.

§ 13a. Construction of Insurance Contracts in General.

When the terms of an insurance policy are not ambiguous, they must be given their usual, ordinary and commonly accepted meaning and enforced accordingly, like any other contract, since it is the duty of the courts to construe policies of insurance as written, and not to rewrite them. *Scarboro v. Ins. Co.*, 444.

§ 24d. Fire Insurance—Persons Entitled to Proceeds.

A fire insurance policy was issued in the name of the husband alone on property held by entirety, but in the sole possession of the husband. Upon the destruction of the property by fire, insurer paid the amount of the policy into court. *Held:* The husband had an insurable interest in the property, constituting an inseparable part of the single-entity title held in unity by him and his wife, and thus covering the entire estate as owned by both. Therefore, upon the estate by entirety being later severed by absolute divorce, each is entitled to one-half the proceeds of the insurance moneys. *Carter v. Ins. Co.*, 578.

§ 26. Life Insurance—Insurable Interest.

Pension fund has no insurable interest in life of employee-member. *Allgood v. Trust Co.*, 506.

INSURANCE—*Continued.*

§ 28. Life Insurance—Aviation Exclusion Clause.

A single-seated glider is an "aircraft" within an Aviation Exclusion Rider in a life insurance policy. *Scarboro v. Ins. Co.*, 444.

Insured was fatally injured when a single-seated glider he was operating fell to the earth. *Held:* The pilot of a glider is under duty to exercise ordinary care to avoid injury to persons in the air and upon the ground, particularly in returning to earth, and therefore insured was a "pilot" having "any duties whatsoever aboard such aircraft while in flight" within the purview of an Aviation Exclusion Rider in the policy of insurance on his life. *Ibid.*

A provision in a policy of life insurance excluding risk if insured "is a pilot, officer or other member of the crew" of an aircraft, is not ambiguous and does not require that insured be a pilot who is a member of a crew in order for the exclusion clause to obtain, since the terms are disjunctively set forth and the occurrence of any one of the conditions excludes liability. *Ibid.*

§ 34. Disability Insurance.

In construing disability clauses in insurance policies, each policy must be construed in relation to its particular provisions and each claim must be considered in relation to the particular profession or occupation in which the insured was engaged when injured. *Greenwood v. Ins. Co.*, 745.

Evidence *held* sufficient for jury on right to recover under extended term disability provisions of policy. *Ibid.*

Where a policy provides disability benefits for loss resulting solely from bodily injuries effected directly and independently of all other causes through accidental means, insured is not entitled to recover for disability from a heart condition, which was independent of injuries received in the accident, if the heart condition was a sole or a concurring or cooperating cause of the disability, or one without which such disability would not have resulted. *Ibid.*

Where policy contains separate definitions of total disability for separate periods, failure of court to charge that both issues need not be answered alike was prejudicial. *Ibid.*

§ 48. Auto Liability Insurance—Rights of Persons Injured Against Insurer.

A liability or indemnity policy voluntarily taken out by the owner of an automobile constitutes a contract solely between the owner and insurer for the protection of the owner in the absence of provision in the policy to the contrary, and therefore in an action by the injured third party to recover for loss sustained by reason of the negligence of the owner, the insurer is not a proper party defendant, and its joinder is properly denied. *Taylor v. Green*, 156.

§ 51. Auto Insurance—Payment and Subrogation.

Where insurer pays the entire damages to the automobile of insured, it must sue in its own name to enforce its right of subrogation against the tort-feasor, G.S. 1-57, but when insurer pays only a part of the loss and is thus subrogated only *pro tanto* to the rights of the insured against the tort-feasor, insurer is not a necessary party to the action against the tort-feasor, but is a proper party and may be joined as an additional party in the discretion of the court upon motion of the tort-feasor. *Taylor v. Green*, 156.

INTOXICATING LIQUOR.

§ 2. Regulation and Control.

Since the State regulations for the sale of beer make no distinction between on the premises sale of beer by a licensee inside his building and outside his building, a municipal ordinance prohibiting an on the premises licensee from selling beer outside his building, but on his premises, by "car hops," waitresses or other employees, is invalid as being in conflict with the State law. *Davis v. Charlotte*, 670.

§ 5b. Possession of Materials for Manufacture of Intoxicating Liquor.

In a prosecution for possession of materials and equipment for the purpose of manufacturing nontax-paid whiskey, the State must prove possession of such materials and equipment, either actual or constructive, and the mere fact that defendants were apprehended near the equipment raises no presumption that they were the owners or in possession. *S. v. Wiley*, 114.

Evidence *held* insufficient to sustain conviction of possession of equipment for manufacture of whiskey. *Ibid.*

JUDGES.

§ 2a. Jurisdiction and Powers of Resident Judges.

The judge holding the courts of a district as then constituted has jurisdiction of chambers matters. The statute increasing the number of judicial districts did not go into effect until from and after 1 July 1955. *Smith v. Smith*, 646; *Dellinger v. Bollinger*, 696.

JUDGMENTS.

§ 10. Judgments by Default.

A judgment by default final upon a complaint supporting a judgment by default and inquiry only, is not void, but is voidable at the election of defendants, and is valid until vacated in the manner provided by law. *Gardner v. Price*, 592.

§ 19. Time and Place of Rendition.

Where the cause comes before the court at chambers upon notice to defendant to appear prior to the filing of answer, the court, upon overruling defendant's demurrer and motion to dismiss, may not proceed to render final judgment on the merits without giving defendant an opportunity to answer, G.S. 1-399, G.S. 1-125, and such final judgment is a defect appearing on the face of the record requiring the vacation of the order. *Dellinger v. Bollinger*, 696.

§ 25. Attack of Judgments—Procedure.

Where the court has jurisdiction over the person and the subject matter, the judgment is not void and is not subject to collateral attack, but is binding on the parties even if irregular or erroneous until set aside upon motion in the cause or reversed on appeal. *Worthington v. Wooten*, 88.

§ 26. Attack of Judgments—Time Within Which Attack May Be Made.

Where judgment by default final, rather than a judgment by default and inquiry, is entered, and a motion to set aside the judgment is heard and denied without exception and appeal, a later motion in the cause to set aside the judg-

JUDGMENTS—*Continued.*

ment, made some twelve years thereafter, is barred by the lapse of time, the default judgment being irregular but not void. *Gardner v. Price*, 592.

§ 32. Estoppel by Judgment.

Judgment by default final after due service of summons and complaint on the defendant was entered in an action to collect past-due drainage assessments and to enforce the lien therefor. Defendant thereafter filed motion to set aside the default judgment on the grounds of excusable neglect and also on the ground that the proceedings were void. The clerk's judgment denying the motion was affirmed by the Superior Court on appeal. *Held:* The judgment of the Superior Court on appeal is conclusive and binding as to all matters therein decided and also as to all matters which could properly have been determined therein, and bars a subsequent action by the defendant therein to restrain the enforcement of the lien and to vacate the proceedings as invalid and a cloud on title. *Worthington v. Wooten*, 88.

Generally, the plea of *res judicata* may be sustained only when there is an identity of parties, of subject matter, and of issues. *Reid v. Holden*, 408.

Plaintiff-relator is the real party in interest in an action brought in the name of the State on official bonds, G.S. 109-34-G.S. 109-35, and he will be so considered in determining the identity of the parties under a plea of *res judicata*. *Ibid.*

Where a prior action relates solely to a cause of action for personal injuries from an assault, the judgment therein is not *res judicata* as to a subsequent action for tortious injury and damage to personal property, even though based on the same transaction, and even though both causes might properly have been joined in the prior action, since plaintiff is not required to so join them in order to prevent a judgment in the one from barring an action in the other. *Ibid.*

§ 35. Estoppel by Judgment—Plea of Bar, Hearings and Determination.

Where all the facts sufficient to constitute estoppel by judgment are set out in the answer, it is a sufficient pleading of the estoppel. *Worthington v. Wooten*, 88.

Res judicata is an affirmative defense which may not be raised by demurrer unless the facts supporting the plea appear on the face of the complaint or are alleged or admitted in plaintiff's reply. Otherwise the plea must be raised by answer, in which event it must be determined according to the practice of the court, and ordinarily is not available on motion to dismiss. *Reid v. Holden*, 408.

Upon a plea of *res judicata* the prior judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge, and the issues submitted to and answered by the jury. *Ibid.*

Ordinarily it is error for the court on pre-trial hearing to dismiss the cause on the plea of *res judicata*. *Ibid.*

Dismissal of an action for an assault on the plea of *res judicata* is error when it does not appear from the pleadings, admissions or evidence that the same assault was the basis of the prior action. *Ibid.*

JURY.

§ 9. Special Venires.

A motion for change of venue or for a special venire on the ground of prejudice created against defendant by publicity in the county, is addressed to the sound discretion of the trial court. *S. v. Scales*, 400.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

Words actionable *per se* are those which are of an injurious character as a fact of common acceptance of which fact the courts will take judicial notice, and the law will raise a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage, entitling the victim of the defamation to recover damages, nominal at least, without specific allegation or proof of damage. *Badame v. Lampke*, 755.

False words uttered of a person in his business relation imputing to such person conduct derogatory to his character and standing as a business man and tending to prejudice him in his business, are actionable *per se*. *Ibid.*

Plaintiff alleged that defendant, a business competitor, spoke words over the telephone to a customer which imputed to plaintiff the reputation of engaging in "shady deals." *Held:* The words are actionable *per se*, and demurrer on the ground that the complaint alleged no special damage should have been overruled. *Ibid.*

§ 4. Construction of Words—Words Actionable Per Quod.

An article in a newspaper criticizing the amount paid by the city for a certain lot as "a wasteful and non-arbitrated use of public money," characterizing the lot as "shabby" and the deal as one that "smells," and, upon information, that a majority of the city council voted for the purchase with the verbal backing of the mayor, *is held* to charge bad judgment in a critical and sarcastic manner, but not to charge conversion, embezzlement or misconduct in office on the part of the council or the mayor. *Yancey v. Gillespie*, 227.

A published article must be read and considered in its setting in determining whether it is libelous. *Ibid.*

Where the injurious character of the words does not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing its injurious effect, such utterance is actionable only *per quod*, and in such cases the injurious character of the words and some special damage must be pleaded and proved. *Badame v. Lampke*, 755.

§ 7a. Privilege in General.

Whether a publication is privileged is a question of law to be determined by the court. *Yancey v. Gillespie*, 227.

§ 7b. Qualified Privilege.

A newspaper enjoys a qualified privilege in commenting upon public affairs and the manner in which public officials carry on the public business, and such comments and criticisms are not libelous, however severe or sarcastic, unless they are written maliciously. *Yancey v. Gillespie*, 227.

In cases of qualified privilege, the falsity of the charge is not sufficient to establish malice, for there is a presumption that the publication was made *bona fide*. *Ibid.*

A complaint alleging in effect that a newspaper published an article criticizing the purchase of a lot by a municipality in a sarcastic vein not amounting to a charge of conversion, embezzlement, or misconduct in office on the part of the officials, fails to state a cause of action for libel, since such publication comes within the qualified privilege of the newspaper as a matter of law, and is not actionable in the absence of actual malice. *Ibid.*

LIBEL AND SLANDER—*Continued.*

§ 15. Pleadings.

In an action for slander, allegations to the effect that as a result of the alleged slander a person to whom plaintiff had sold merchandise became afraid that some of it had been stolen, and burned it, fails to allege special damage to defendant, and is irrelevant, and the refusal of the court to strike such allegations is prejudicial. *Henry v. Home Finance Group*, 300.

LIMITATION OF ACTIONS.

§ 15. Pleading Statutes of Limitation.

A plea of the statute of limitations, although perfect in form, is demurrable where the plea is irrelevant and constitutes no defense. *Dunn v. Dunn*, 234.

The defense of the statute of limitations must be pleaded affirmatively by answer and cannot be considered upon demurrer. G.S. 1-15. Ordinarily such plea will not be considered on a motion to dismiss. *Reid v. Holden*, 408.

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Right of Action.

In an action for malicious prosecution the plaintiff must prove malice, want of probable cause, and termination of the prosecution or proceeding in plaintiff's favor. *Barnette v. Woody*, 424.

The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued. *Ibid.*

§ 10. Sufficiency of Evidence.

Evidence in this case *held* insufficient to show malice on the part of defendants in suing out a writ for plaintiff's commitment to the State Hospital. *Barnette v. Woody*, 424.

§ 14. Limitations.

An action for malicious prosecution or an action for abuse of process is not barred until the expiration of three years after the accrual of the cause of action. *Barnette v. Woody*, 424.

MANDAMUS.

§ 2a. Legal Duty.

The statutory procedure for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made by the State Highway and Public Works Commission, and therefore if the Commission claims a right of way over plaintiff's land, plaintiff may require that it define with particularity the location and extent of the claim, and if the Commission refuses, plaintiff can invoke the remedy of *mandamus*. *Cannon v. Wilmington*, 711.

MASTER AND SERVANT.

§ 1e. Collective Bargaining.

State law precluding union shop *held* superseded by Railway Labor Act in regard to union shop for railroad employees. *Hudson v. R. R.*, 650.

MASTER AND SERVANT—*Continued.*

A proposed union shop agreement may not be challenged on the ground that it discriminates against plaintiff employees when such ground of attack is not supported by allegation. *Ibid.*

A collective bargaining agent, duly designated and authorized to represent employees in accordance with the Railway Labor Act, is not required to ascertain by referendum the wishes of the employees of the craft or class it represents before making demands for a union shop agreement with the railroad employer. 29 USCA sec. 151 *et seq.* *Ibid.*

§ 22. Liability of Employer for Assault Committed by Employee.

Evidence in this case *held* sufficient to be submitted to the jury under the principle of *respondeat superior* on the issue of the liability of the employer for an assault committed by the employee. *Davis v. Finance Co.*, 233.

§ 38. Employers and Employees Subject to Compensation Act—Residence.

The Industrial Commission has jurisdiction only if the contract of employment is made in this State, the employer's place of business is here and the injured employee is a resident. *Aylor v. Barnes*, 223.

§ 40c. Whether Accident Arises "Out of Employment."

Where there is sufficient circumstantial evidence in the record to sustain the finding of the Industrial Commission to the effect that claimant was injured in an explosion of a number of dynamite caps resulting when he idly or out of curiosity attempted to set off a single dynamite cap during his lunch hour, and that therefore the injuries did not arise out of his employment, the Superior Court is without power to reverse. *Moore v. Stone Co.*, 647.

§ 40e. Compensation Act—Causal Connection Between Accident and Disability.

Findings of the Industrial Commission that claimant's disability was due to pre-existing physical infirmities, and that there is no causal connection between plaintiff's disability and her employment, *held* supported by competent evidence, and the judgment denying compensation is affirmed. *Manuel v. Cone Mills Corp.*, 309.

§ 45. Compensation Act—Functions and Jurisdiction of Industrial Commission.

Where it appears that compensation had been paid in good faith to the mother of the deceased employee upon judicial determination that she was the next of kin entitled to all benefits, the Industrial Commission is without jurisdiction upon its later adjudication that the employee left a widow entitled to the compensation, to enter judgment that the widow recover against the mother the amount of compensation paid to the mother. *Green v. Briley*, 196.

§ 47. Exclusiveness of Remedy Under Compensation Act.

This action was instituted by a student nurse for injuries received in an automobile collision. Plaintiff in her reply admitted that the relationship between plaintiff and the hospital was that of employee and employer, that plaintiff was furnished transportation to and from the nurses' home as a part of the contract of employment, and that her injury arose out of and in the course of her employment by the hospital. The uncontradicted evidence at the trial tended to show that the hospital regularly employed more than five employees.

MASTER AND SERVANT—*Continued.*

Held: Nonsuit as to the defendant hospital on the ground that the claim against it was within the exclusive jurisdiction of the Industrial Commission, was proper. *Powers v. Hospital*, 290.

Whether an employer has the required number of employees to bring their employment within the coverage of the Workman's Compensation Act is a jurisdictional fact to be found by the court. *Ibid.*

§ 50. Compensation Act—Burden of Proof.

Claimant has the burden of proving that his or her claim is compensable under the Workmen's Compensation Act. *Aylor v. Barnes*, 223; *Moore v. Stone Co.*, 647.

§ 53d. Compensation Act—Persons Entitled to Award, Payment and Discharge.

When compensation is paid in good faith to person adjudicated entitled thereto, liability of carrier is discharged. *Green v. Briley*, 196.

But where compensation is paid to mother of employee in good faith, and it later appears that employee left a widow, the Industrial Commission has no jurisdiction to order the mother to pay the widow the compensation received. *Ibid.*

§ 55d. Compensation Act—Appeal and Review in Superior Court.

Jurisdictional findings of the Industrial Commission are not conclusive on appeal, and when the award of the Industrial Commission is attacked on the ground that the deceased employee was not a resident of this State, the Superior Court has the power and duty to find the jurisdictional facts without regard to the findings of the Industrial Commission, and the action of the Superior Court in merely overruling the exceptions to the findings of fact and conclusions of law of the Commission, is insufficient, necessitating that the cause be remanded. *Aylor v. Barnes*, 223.

When there is any competent evidence to support a finding of fact by the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Watson v. Clay Co.*, 763.

MAYHEM.

§ 2. Prosecution.

In a prosecution under G.S. 14-30, an instruction that general malice is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief, *is held* without error. *S. v. Atkins*, 294.

In this prosecution of defendant for maliciously maiming her step-daughter by putting out her eye by the use of defendant's thumb, the evidence *is held* sufficient to make out a case for the jury, and defendant's motions to nonsuit were properly overruled. *Ibid.*

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

An action for money had and received may be maintained as a general rule whenever the defendant has money in his hands which belongs to plaintiff, and

MONEY RECEIVED—*Continued.*

which in equity and good conscience he ought to pay to plaintiff. *Allgood v. Trust Co.*, 506.

An action for money had and received is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another, and neither wrongdoing nor fraud is an element of the cause of action. *Ibid.*

Evidence and pretrial stipulations disclosing that an insured employee, after voluntarily leaving the employment, died while a pension fund policy on his life was still in full force and effect, that insurer had paid the full amount of the policy, but that the trustee of the pension fund had retained one-half the proceeds, make out a *prima facie* case for money had and received in favor of the beneficiary named in the policy as against the trustee of the pension fund for the part of the proceeds retained. *Ibid.*

MORTGAGES.

§ 2c. Equitable Mortgages.

Whether a deed and option to repurchase constitute a mortgage is to be determined in accordance with the intention of the parties which must be established by evidence *dehors* the instruments on the basis of whether, from a consideration of the entire transaction, the deed was given to secure a debt existing at the inception of the transaction, in which instance equity will declare it a mortgage notwithstanding its form. *McKinley v. Hinnant*, 245.

In determining whether a deed and option to repurchase constitute a mortgage, the fact that the value of the property is much greater than the consideration for the deed is a factor tending to show that the instrument was intended to operate as a mortgage. *Ibid.*

Doubt as to whether a deed and option to repurchase were executed solely as security for a debt will be resolved by equity in favor of declaring the transaction a mortgage. *Ibid.*

The equitable principle upon which a deed and option to repurchase will be declared a mortgage applies to the sale of a note secured by a deed of trust with option to repurchase the note upon the repayment of the amount borrowed, plus an increment. *Ibid.*

Allegations *held* sufficient to state cause of action to have sale of mortgage note with option to repurchase declared an equitable mortgage, in which event transaction would not be defeated, as an option would, by failure to repurchase within time stipulated. *Ibid.*

§ 2f. Contracts to Execute Mortgage.

Plaintiff alleged that in the sale of certain property to husband and wife the purchasers executed a deed of trust on other property as security, and agreed to execute a deed of trust on the property conveyed after they had obtained a first mortgage loan thereon. *Held:* A demurrer by the wife on the ground that no cause of action was stated against her is properly overruled, there being no plea of the Statute of Frauds nor demurrer by the husband on the ground that the complaint fails to state a cause of action against him. *McKinley v. Hinnant*, 245.

§ 29. Action to Set Aside Cancellation.

In an action to set aside the cancellation of a deed of trust the trustee is at least a proper party and should be made a party defendant. *McKinley v. Hinnant*, 245.

MORTGAGES—*Continued.*

§ 30g. Enjoining Foreclosure on Equitable Grounds.

Foreclosure may not be enjoined on the ground that the Federal Government had filed a tax lien against the lands, and that therefore the land would not sell at its true value because of the right of the Government to redeem the land under the provision of Title 28, USCA, sec. 2410, at any time within one year from the date of sale. *Roberson v. Boone*, 598.

§ 36. Deficiency and Personal Liability.

Defendants executed purchase money notes, secured by deed of trust, for certain lands, machinery and equipment, the parties agreeing on the value of the land at the time of the execution of the notes. The machinery and equipment were damaged or destroyed by fire. *Held:* In an action on the notes, judgment for deficiency, calculated upon the value of the land as agreed upon by the parties at the time of the purchase and sale, is premature, since there can be no deficiency until sale, and only then may the court determine whether the machinery and equipment were affixed to the land and became realty, the application of G.S. 45-21.38, and the amount of the deficiency judgment, if any, to which plaintiff is entitled. *Fleishel v. Jessup*, 605.

§ 40. Agreements to Purchase at Sale for Benefit of Mortgagor.

Agreement between *cestui* and stranger to the instrument that stranger would bid in property at sale for benefit of *cestui* is enforceable parol trust. *Roberson v. Pruden*, 632.

MUNICIPAL CORPORATIONS.

§ 5. Powers and Functions in General; Legislative Control.

A municipal corporation is a creature of the General Assembly and may exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those given. *Daves v. Charlotte*, 670.

§ 8f. Ports Authority.

The statutes relating to the N. C. Ports Authority should be liberally construed to enable the Authority to accomplish the purposes of its creation, and a statute will not be given a construction that would tend to hamper the Authority in this respect unless plainly required by the express terms thereof. *Ports Authority v. Trust Co.*, 416.

The State Ports Authority may issue valid bonds to raise funds for the construction of a particular new facility and secure the payment of such bonds solely from the revenues to be derived from such new facility. The issuance of such bonds is not precluded by Section 13, Chapter 820, Session Laws of 1949, requiring that net operating earnings of the Authority, after reserving operating capital and improvements, be paid to the State Treasurer for the State Ports Bond Sinking Fund, since the pledged revenues from the new facility do not involve revenues from any facility constructed by use of the proceeds of the State Ports Bonds, but to the contrary the general revenues of the Authority will be augmented by wharfage and dock charges of ships using such new facility. *Ibid.*

The N. C. Ports Authority was created and empowered to act in order to accomplish the public purpose of developing and promoting the natural resources of the State and to expand the agricultural, industrial and commercial interests of the people of the State. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

The validity of bonds issued for the purpose of constructing a grain handling facility at a State port is not affected by the fact that the bonds are to be paid solely from revenues from rental of the facility to a private corporation, since the new facility is to be used by lessee in the public interest for the purpose of providing additional facilities auxiliary and subordinate to the principal operations of the Port and the fact that the lessee is a private corporation is incidental. *Ibid.*

§ 14h. Injuries to Person—From Electric Power System.

Evidence that defendant municipality maintained a wire of its electric power system over a highway at a height less than 12 feet, 6 inches, and that plaintiff, standing at the rear of a truck loaded with hay with his head above the main load, was struck in the mouth by the wire as the truck passed under the wire, and was thereby thrown from the truck to his injury, *is held* sufficient to be submitted to the jury on the issue of the negligence of the municipality in the maintenance of the wire. *Dennis v. Albemarle*, 263.

§ 15a. Appropriation by City of Private Water and Sewer Systems.

Plaintiff *held* entitled to recover upon *quantum meruit* for sewer system constructed in reliance on unenforceable contract. *Mfg. Co. v. Charlotte*, 189.

Where a municipality appropriates sewer systems constructed by a private corporation at its own expense, the city may not contend that the corporation gave the sewer systems to the city by connecting its sewer line to the city's system without a valid contract, when the facts stipulated show that the city itself made the connection at the city's expense pursuant to authority of the city council. *Ibid.*

§ 36. Nature and Extent of Municipal Police Power in General.

Municipal ordinances must harmonize with the general laws of the State, and when there is a conflict between a general State statute and a municipal ordinance, the ordinance must yield to the State law. *Davis v. Charlotte*, 670.

§ 37. Zoning Ordinances.

Power of a municipality to enact and enforce zoning regulations rests exclusively on statutory authority. *S. v. Owen*, 525.

The State-wide statutes authorizing municipalities to enact zoning regulations delegate no power to zone beyond municipal corporate limits. G.S. 160-172 through G.S. 160-181.1. *Ibid.*

Section 116, Chapter 232, Public Laws of 1927, when read in context, discloses the legislative intent to enlarge the territorial jurisdiction of the municipal court of the city in question to one mile outside its corporate limits, and the statute does not confer by implication power upon the city to extend its zoning regulations beyond its corporate limits. *Ibid.*

Where a city is given no statutory authority to zone outside the corporate limits, a statute (Chapter 677, Session Laws of 1947) which provides that when the city is given authority in the territory outside its corporate limits, the exercise of such authority shall be subject to the approval of the board of commissioners of the county, does not give the city authority to zone property outside its corporate limits. *Ibid.*

Where at the time of the enactment of a zoning ordinance purporting to extend the city's zoning regulations one mile beyond its corporate limits, the municipality has no statutory authority to zone outside its limits, a later statute

(Chapter 777, Session Laws of 1953), which confers authority on the municipality to extend its zoning regulations three miles beyond its corporate limits, but which contains no provision purporting to validate any existing ordinance, does not validate the prior zoning regulations, and in the absence of ordinance passed subsequent to the statute, the violation of zoning regulations in territory outside the corporate limits may not be made the subject of prosecution. *Ibid.*

§ 38. Regulations Relating to Public Morals.

Since the State regulations for the sale of beer make no distinction between on the premises sale of beer by a licensee inside his building and outside his building, a municipal ordinance prohibiting an on the premises licensee from selling beer outside his building, but on his premises, by "car hops," waitresses or other employees, is invalid as being in conflict with the State law. *Davis v. Charlotte*, 670.

§ 46. Actions Against Municipalities.

G.S. 1-53 does not apply to actions against a municipality based on tort. *Dennis v. Albemarle*, 263.

Evidence tending to show that claimant delivered his claim for damages against the municipality and addressed to the mayor and board of commissioners, to the city clerk, and that the original notice was in the municipality's custody and voluntarily produced by it in open court at the trial, discloses a substantial compliance with the charter provisions of the city requiring that such claim should be presented to the board of commissioners. *Ibid.*

A municipal corporation may be sued to quiet title on the ground that it claims an alleged invalid right of way across plaintiff's land, G.S. 160-2, G.S. 41-10. *Cannon v. Wilmington*, 711.

NEGLIGENCE.

§ 1. Negligence in General.

The violation of a statute which imposes upon a person a specific duty for the protection of others constitutes negligence *per se*, and is actionable when a proximate cause of injury. *Lutz Industries, Inc., v. Dixie Home Stores*, 332.

Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty imposed by law, by mandate of statute, or by the common-law rule that every person is under an obligation so to act, or so to use that which he controls, as not to injure another. *Pinnix v. Toomey*, 358.

The common-law duty to use due care may be a specific duty owing by defendant to the plaintiff, or a general one owing by defendant to the public, of which the plaintiff is a part. *Ibid.*

Negligent performance of contract may constitute tort as well as breach of contract. *Ibid.*

§ 4b. Attractive Nuisances.

A condition need not be an attractive nuisance *per se* in order for the owner of the land upon which the condition is maintained to be liable for the injury of a child on the premises, but if the owner knows or by the exercise of ordinary care should know that the premises are frequented by children of tender years, it becomes his duty to exercise ordinary care to provide such children

reasonably adequate protection from injuries which can be reasonably foreseen. *Ford v. Blythe Bros. Co.*, 347.

Clearing, grading and excavating operations upon land are *held* not to constitute an attractive nuisance *per se*. *Ibid.*

A 3-year-old child was burned when she walked into a bed of ashes containing live coals beneath the surface. Defendant, who was doing the clearing and grading work on the land, knew that the premises were frequented by children of tender years, and was chargeable with knowledge of the condition of the fire. *Held:* The fact that the child was not injured by grading machinery and equipment which attracted her to the premises does not preclude recovery, since defendant could have foreseen that some injury might result to children of tender years from the way and manner in which it burned brush and other debris on the land. *Ibid.*

The evidence tended to show that a 3-year-old child, in the company of an adult and other children, had gone upon land being cleared and graded by defendant, that the child's mother went where they were to get the child from the premises, talked briefly with the adult, and started back toward her apartment calling the child to come home, and that the child, in returning, walked into a bed of ashes and was burned by live coals underneath the surface. *Held:* The presence of the mother does not preclude recovery, since the evidence does not indicate that the mother had any information or knowledge that would put her on notice that a bed of live coals lay under the apparently harmless bed of ashes. *Ibid.*

Evidence *held* sufficient to overrule nonsuit to this action to recover for burns received by child when attracted to premises by grading operations. *Ibid.*

§ 6. Concurring Negligence.

When the negligence on the part of two or more persons, operating independently of each other, join and concur in proximately producing the injury complained of, each author of negligence is liable for the damages inflicted, and the person injured may bring action against any one or all of them as joint tort-feasors. *Tillman v. Bellamy*, 201.

§ 7. Intervening Negligence.

If the original negligent omission of a party becomes injurious only in consequence of the intervention of some wrongful act or omission on the part of another, the injury is to be imputed to the last cause rather than the first. *Potter v. Frosty Morn Meats*, 67.

§ 8. Primary and Secondary Liability.

The doctrine of primary and secondary liability applies when the negligence of one party is active and that of the other is passive. *Kimsey v. Reaves*, 721.

§ 11. Contributory Negligence of Persons Injured in General.

A person will not be held contributorily negligent as a matter of law for forgetfulness or inattention to a known danger when under the exigencies and circumstances of the particular situation a person of ordinary prudence would have forgotten or would have been inattentive to the danger because of the diversion of his attention by conditions suddenly arising, or when the situation is such as to require him to give undivided attention to other matters. *Dennis v. Albemarle*, 263.

NEGLIGENCE—*Continued.*

§ 15. Action for Negligence—Parties.

In the absence of statutory provision to the contrary, a defendant may not set up in plaintiff's action a cross-action against a third party in which plaintiff has no interest, and the question of primary and secondary liability between defendants is usually a matter for them to adjust between themselves. *Kimsey v. Reaves*, 721.

§ 16. Pleadings in Actions for Negligence.

In actions for negligence, plaintiff may allege contract in so far, and only in so far, as to show relationship between the parties and the contractual duty defendant is charged with negligently performing. *Pinnix v. Toomey*, 358.

In an action for negligence, it suffices to state in a plain and concise manner the ultimate facts from which the law will imply the legal duty owed by defendant to plaintiff, and the complaint should not contain collateral, irrelevant, redundant or evidentiary matters in respect to the relationship of the parties and the legal duty or duties upon which the plaintiff grounds his cause of action. *Ibid.*

§ 18. Relevancy and Competency of Evidence.

Evidence of other conditions or events may be used, within limits, to prove a habit or custom under like conditions, or to show the standard of care under which it is claimed a party ought to have conformed, but did not, but in order for such evidence to be competent, there must be a substantial similarity in the other conditions or events. *R. R. v. Motor Lines*, 676.

§ 19c. Nonsuit on Ground of Contributory Negligence.

A motion for nonsuit on the ground of contributory negligence will be allowed only when plaintiff's evidence establishes this defense and is so clear that no other reasonable inference is deducible therefrom, and when the evidence is susceptible to diverse inferences, the motion should be denied. *Emerson v. Munford*, 241; *Dennis v. Albemarle*, 263.

§ 20. Instructions in Negligence Actions.

A charge on the issue of contributory negligence which merely gives the respective contentions of the parties that each was first in the intersection, and that each was not guilty of negligence, without defining contributory negligence and without explaining the law applicable to the facts in evidence, must be held for reversible error. *Dixon v. Wiley*, 117.

The charge of the court in this case as to foreseeability as an essential element of proximate cause *is held* without error. *Gentile v. Wilson*, 704.

Where there is no evidence of concurring negligence, an instruction that the burden was on plaintiff to satisfy the jury from the evidence and by its greater weight that the negligence on the part of defendant was "the" proximate cause of the injury instead of "a" proximate cause of the injury, is not prejudicial. *Ibid.*

§ 23. Culpable Negligence.

Culpable negligence is such recklessness or carelessness, proximately 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. Norris*, 47.

NUISANCE.

§ 1. Acts and Conditions Constituting Private Nuisance.

An improper use of one's property which results in injury to the land, property or rights of another, constitutes in law a private nuisance under the maxim *sic utere tuo ut alienum non laedas*. *Andrews v. Andrews*, 382.

A private nuisance *per se* is an act, occupation or structure which is a nuisance at all times or under any circumstances or surroundings; a private nuisance *per accidens* is one which constitutes a nuisance by reason of its location or the manner in which it is constructed, maintained or operated. *Ibid.*

Negligence and nuisance are separate torts, and private nuisances *per accidens* may exist without the element of negligence, and are in fact usually intentionally created or maintained. *Ibid.*

PARENT AND CHILD.

§ 4a. Right to Custody and Control of Children.

Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children, and while this right is not absolute, it will be interfered with or denied only when the welfare of the children clearly requires it for the most substantial and compelling reasons. *James v. Pretlow*, 102.

While the preferences of the children will be given weight in accordance with their age and intelligence in determining their custody, in a contest between a parent and one not connected by blood to the children, such preferences will not ordinarily prevail over the natural right of the parent, unless essential to the children's welfare. *Ibid.*

In this special proceeding to determine the custody of children as between their mother and their stepmother, their father being dead, the court found that the mother, stepmother, and the father, a few days before the father's death, had agreed that the children should stay with their father and stepmother during the scholastic year. *Held:* The best interest and the welfare of the children demand that their custody for the school year be not disturbed, and that part of the judgment awarding their custody to their stepmother for the balance of the current school year is affirmed. *Ibid.*

Findings *held* insufficient to support judgment awarding custody of children to stepmother in preference to mother. *Ibid.*

The putative father of an illegitimate child, irrespective of statute, has such interest in the child as to authorize him to maintain a suit for its custody, and also has the statutory right to maintain such proceeding, G.S. 49-1 and G.S. 49-2 being construed *in pari materia* with G.S. 50-13. *Dellinger v. Bollinger*, 696.

§ 5. Liability of Parent for Support.

The liability of a parent for support includes hospital and medical treatment for his child, and therefore the child may not maintain an action against the tort-feasor therefor. *Ellington v. Bradford*, 159.

§ 8. Right of Parent to Recover for Injuries to Child.

The right to recover against the tort-feasor for hospital and medical expenses for an injured child rests in the parent. *Ellington v. Bradford*, 159.

PARENT AND CHILD—*Continued.*

§ 9. Abandonment—Nature and Elements of Offense.

Abandonment of child is separate offense from abandonment of wife and should be separately charged; abandonment is continuing offense. *S. v. Lucas*, 84.

Warrant charging willful failure to support *held* fatally defective in failing to charge abandonment. *S. v. Outlaw*, 220.

PARTIES.

§ 1. Parties Plaintiff in General.

The interests of parties plaintiff must be consistent, but the common law requirement of unity or identity of interests no longer obtains. G.S. 1-68. *Peed v. Burleson's, Inc.*, 628.

§ 2½. Actions by Representatives of a Class.

There is a community of interest of the owners of lots or burial rights in a cemetery, and therefore an owner of a lot or burial right may bring an action in behalf of himself and all others similarly situated to protect the community of interest. *Mills v. Cemetery Park*, 20.

§ 10. Joinder of Additional Parties.

Ordinarily it is within the discretion of the court to allow or deny a motion to make a party who is not a necessary party to the proceeding a party plaintiff or defendant, and the order entered is not reviewable. *Kimsey v. Reaves*, 721.

Where original defendants do not allege concurrent negligence in cross action against additional defendant, refusal to join additional defendant is without error. *Ibid.*

PARTNERSHIP.

§ 1a. Creation and Existence.

Complaint *held* insufficient to allege partnership between the parties for development of pocosin lands for agricultural purposes, and therefore plaintiff was not entitled to division of profits. *Lindley v. Yeatman*, 145.

PATENTS.

§ 3. Licensing Agreements.

In a civil action to recover royalties alleged to be due under a nonexclusive license agreement, the invalidity of the patents or the failure of licensor's title or authority to grant the licenses, are ordinarily ineffectual as defenses, and when such defenses do not come under any exception to the general rule, they are properly stricken on motion. *Davis Co. v. Hosiery Mills*, 718.

PAYMENT.

§ 2. Payment by Check.

In the absence of a contrary agreement, the delivery and acceptance of a check is not payment as between the parties until the check is paid. *Peek v. Trust Co.*, 1.

PENSIONS.

§ 3. Right to Benefits.

The rule of a pension system that an employee-member voluntarily leaving the employment should cease to be a member of the system and should receive no benefits from the pension fund or any contract purchased thereunder for his benefit, entitles the trustee of the fund, upon the voluntary termination of the employment by an employee, to cancel at any time before the death of the insured employee an insurance policy purchased for his benefit, but when the trustee does not do so, and the policy is in full force and effect at the death of the insured employee, the beneficiary named in the policy is entitled to the proceeds of the policy rather than the trustee of the pension fund, notwithstanding a rule of the pension system that the equity in such contracts should inure to the benefit of the pension fund, since the insured employee's death immediately wiped out the cash surrender equity of the policy. *Allgood v. Trust Co.*, 506.

Whether rule of pensions system changing benefits of policy from person named in policy to pension fund would be valid, *quaere? Ibid.*

PHYSICIANS AND SURGEONS.

§ 14. Liabilities to Patients in General.

A physician or surgeon may be held liable only for such damages as proximately result from his failure to possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, or his failure to exercise reasonable care and diligence in his application of his knowledge and skill to the patient's case, or his failure to use his best knowledge in his treatment and care of the patient. *Hunt v. Bradshaw* 517.

§ 19. Competency of Evidence in Actions for Malpractice.

The advisability of performing an operation in a given case, and whether the operation was performed in accordance with approved standard of care relate to matters in the exclusive province of experts, and may be established only by the testimony of qualified experts. *Hunt v. Bradshaw*, 517.

§ 20. Sufficiency of Evidence and Nonsuit in Actions for Malpractice.

Plaintiff had a small piece of steel imbedded in his chest about ¾ of an inch from his lung and about 4½ inches from his heart. Plaintiff introduced expert medical testimony to the effect that such foreign objects tended to migrate in the body, and that it was within the realm of good surgical practice to operate for the removal of such objects, although one expert testified in response to a hypothetical question that in the absence of pain or fever, etc., he would be inclined not to operate in such instance. *Held:* Plaintiff's own evidence fails to show that defendant surgeon was negligent in advising the operation. *Hunt v. Bradshaw*, 517.

In regard to an operation for the removal of a small foreign object from plaintiff's body, expert testimony to the effect that additional X-rays might have been desirable, but that the witness could not say that more X-rays were necessary or might have located the object more exactly, does not tend to show that good surgical practice required additional X-rays in such instance. *Ibid.*

The statement of a surgeon to his patient that the contemplated operation was very simple, while plaintiff's expert testimony is sufficient to support a finding that the operation was of a very serious nature, *is held*, under the facts

PHYSICIANS AND SURGEONS—*Continued.*

of this case, insufficient to show such want of ordinary care as to import liability. *Ibid.*

Evidence *held* insufficient to establish that untoward results of operation were result of negligence, the doctrine of *res ipsa loquitur* not being applicable. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

A plaintiff may unite in the same complaint several causes of action, legal or equitable, in contract or in tort, provided they all arise out of the same transaction or transaction connected with the same subject of action so that a connected story can be told of the whole. *Mills v. Cemetery Park*, 20.

A cause of action against a cemetery for breach of promissory representations made in the sale of burial lots, and a cause of action against the cemetery to restrain the enforcement of unlawful and unreasonable rules and regulations in the management of the property, are improperly joined in the same complaint. *Ibid.*

There is material difference between the consolidation of cases for convenience in trial and the joinder of several causes of action in the complaint, and ordinarily only those causes may be joined which affect all the parties to the action. *McKinley v. Hinnant*, 245.

G.S. 1-123 will be liberally construed to effectuate its purpose for the judicial determination of actions with reasonable promptness and a minimum of cost to the litigants. *Milling Co. v. Wallace*, 686.

Action against principal debtor on trade acceptances may be joined with action against guarantors of payment. *Ibid.*

§ 3a. Complaint—Statement of Causes.

If plaintiff seeks to recover in one action on two or more causes of action, each cause must be separately stated. *Mills v. Cemetery Park*, 20.

Repugnant allegations neutralize each other. *Lindley v. Yeatman*, 145.

Plaintiffs may state a cause of action in two different ways, leaving it to the court or jury to say to which relief they are entitled. *Jenkins v. Duckworth & Shelton*, 758.

§ 3c. Pleading Private Statutes and Ordinances.

A municipal ordinance may be pleaded by its caption or the number of the section thereof and the caption, but allegations that "The National Electric Code of 1951 . . . which has been adopted by" the municipality in question, is an insufficient pleading of the municipal ordinance, and such allegations are properly stricken on motion. *Lutz Industries, Inc., v. Dixie Home Stores*, 332; *Pinnix v. Toomey*, 357.

§ 8. Answer—Matters in Traverse or Denial.

A general denial of plaintiff's allegations entitles defendant to offer evidence in support of the denial. *Dunn v. Dunn*, 234.

§ 10. Cross-Actions.

Where the pleader demands affirmative relief upon allegations contained in his further answer, the further answer constitutes in reality cross-actions. *Johnson v. Scarborough*, 681.

PLEADINGS—*Continued.*

In the absence of statutory provision to the contrary, a defendant may not set up in plaintiff's action a cross-action against a third party in which plaintiff has no interest, and the question of primary and secondary liability between defendants is usually a matter for them to adjust between themselves. *Kimsey v. Reaves*, 721.

§ 15. Office and Effect of Demurrer.

In passing upon the sufficiency of the allegations of the complaint to state a cause of action, the allegations must be taken as true for the purpose of the demurrer. *Mills v. Cemetery Park*, 20; *Trust Co. v. Processing Co.*, 370.

A demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits only those facts which are properly pleaded, and the legal inferences and conclusions of the pleader therefrom should be disregarded. *Lindley v. Yeatman*, 145.

A demurrer does not admit the legal effect of an instrument as asserted by the pleader when the instrument itself is incorporated in the pleading and the construction alleged is repugnant to the language of the instrument. *Ibid.*

A demurrer admits the truth of the allegations of fact contained in the complaint, but does not admit conclusions or inferences of law. *McKinley v. Hinnant*, 245.

§ 17. Demurrer—Statement of Grounds, Form and Requisites.

A written demurrer must specify the grounds of objection or it is defective, and may be disregarded. *McKinley v. Hinnant*, 245; *Trust Co. v. Processing Co.*, 370.

§ 19b. Demurrer for Misjoinder of Parties and Causes.

Where there is a misjoinder of causes of action, but not a misjoinder of parties and causes, the action should not be dismissed upon demurrer, but the court will sever the causes and divide the actions. *Mills v. Cemetery Park*, 20.

Where a complaint improperly joins two separate causes of action which are defectively stated, the court, upon demurrer, should not dismiss the action, but should permit amendment and divide the actions for separate trials. *Ibid.*

Demurrer for misjoinder of causes should have been sustained, and the actions divided for separate trials. *McKinley v. Hinnant*, 245.

Where there is a misjoinder of parties and causes of action, the action must be dismissed upon demurrer. *Johnson v. Scarborough*, 681.

Demurrer is proper procedure to test whether cross-actions set up in answer are bad for misjoinder of parties and causes of action. *Ibid.*

§ 19c. Demurrer for Failure to State Cause of Action.

Where a complaint stating a single cause of action contains two repugnant statements of fact, the repugnant allegations destroy and neutralize each other, and where the remaining averments are insufficient to state a cause of action, a demurrer thereto is properly sustained. *Lindley v. Yeatman*, 145.

If the complaint in any portion, or to any extent, presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading cannot be overthrown by demurrer for failure to state a cause of action. *McKinley v. Hinnant*, 245; *Cannon v. Wilmington*, 711; *Workman v. Workman*, 726.

PLEADINGS—*Continued.*

Repugnant allegations neutralize each other, and pleading is demurrable when this results in failure to state cause of action. *Hall v. Refining Co.*, 707.

§ 20½. Form and Effect of Judgment Upon Demurrer.

Upon demurrer on the ground of misjoinder of causes, as distinguished from a demurrer for misjoinder of parties and causes, the court properly refuses to dismiss the action, but should sever the causes improperly joined for separate trials. *McKinley v. Hinnant*, 245.

§ 22. Amendment of Pleadings.

Complaint containing defective statement of good cause of action is subject to amendment; complaint containing statement of defective cause of action is not subject to amendment. *Lindley v. Yeatman*, 145.

§ 24. Variance.

Plaintiff must make out her case according to her allegations, and the court cannot take notice of any proof unless there be corresponding allegation. *Brady v. Beverage Co.*, 32.

Recovery must be based on the case made out by the allegations of the complaint, and proof without allegation is an ineffective as allegation without proof. *Andrews v. Bruton*, 93.

In determining the question of variance, a pleading will be liberally construed with a view to substantial justice, and a party may not complain of an immaterial variance which does not take him by surprise and which in no way prejudices him. *Dennis v. Albemarle*, 263.

§ 25½. Admission or Denial and Necessity for Proof.

Where an allegation in the pleading is admitted by the adverse party, such judicial admission establishes the fact admitted, removes it from the issuable matters, and relieves the party making the allegation of the necessity of proving it at the trial. *Powers v. Memorial Hospital*, 290.

§ 27. Motion to Require Plaintiff to Make Complaint More Definite.

Defendant moved that plaintiff be required to make the complaint more definite on the ground that defendant was unable to determine whether plaintiff was bringing the action to rescind the contract for failure of consideration, or whether he was treating the contract as existing and suing for damages for breach of warranty. The denial of the motion cannot be held prejudicial when counsel, on appeal, state that the purpose of the complaint is to set out a cause of action for rescission, and that plaintiff had elected to pursue his remedy in accordance therewith. *Baker v. Trailer Co.*, 724.

§ 30. Motions to Strike—Discretionary or Legal Right.

When a motion to strike is made in apt time, it is made as a matter of right. *Lutz Industries, Inc., v. Dixie Home Stores*, 332; *Baker v. Trailer Co.*, 724.

Where motion to strike is not made in apt time it is addressed to the discretion of the trial court. *Tucker v. Transou*, 498.

§ 31. Motions to Strike—Grounds.

In action by infant for negligent injury, allegations relating to recovery for medical expenses and hospitalization should have been stricken on motion, since parent and not child is entitled to recover therefor. *Ellington v. Bradford*, 159.

PLEADINGS—*Continued.*

If new matter set up in the answer does not constitute a defense, plaintiff may challenge it by motion to strike, which will be treated as a demurrer *ore tenus*, but such motion should not be granted if the allegations contain any fact or combination of facts which, if true, entitle defendant to some relief. *Dunn v. Dunn*, 234.

Where defendant is entitled to offer evidence in support of general denial of allegations of complaint, allegations in further defense alleging facts supporting denial are properly stricken as surplusage. *Ibid.*

Further defense alleging estoppel and laches, without alleging facts supporting these legal conclusions, *held* properly stricken on motion. *Ibid.*

Where the defendant pleads the three-year statute of limitations as a further defense, but fails to show that the statute of limitations pleaded is relevant as a defense, the striking of the further defense is not erroneous. *Ibid.*

Where plaintiffs attack a deed solely on the ground that it is void for want of a seal, G.S. 22-2, and for failure of consideration, a further defense based upon the assumption that plaintiffs were attempting to create a resulting trust in their favor, is properly stricken as irrelevant. *Ibid.*

Where a further defense, *inter alia*, pleads facts sufficient to disclose a valuable consideration for the execution of a deed as a basis for reformation for inadvertence and mutual mistake, motion to strike such further defense is improperly allowed. *Ibid.*

In an action to set aside a deed for want of a seal, a further defense containing allegations to the effect that the instrument was supported by valuable consideration, and seeking specific performance on the theory that it constituted an enforceable contract to convey, states a defense, and motion to strike in the nature of a demurrer *ore tenus*, should be denied. *Ibid.*

In an action for slander, allegations to the effect that as a result of the alleged slander a person to whom plaintiff had sold merchandise became afraid that some of it had been stolen, and burned it, fails to allege special damage to defendant, and is irrelevant, and the refusal of the court to strike such allegations is prejudicial. *Henry v. Home Finance Group*, 300.

The test of whether matter alleged in a pleading is irrelevant, and therefore should be stricken on motion aptly made, is whether the pleader would have the right to introduce in evidence the facts to which the allegations relate. *Lutz Industries, Inc., v. Dixie Home Stores*, 332.

Motions to strike allegations relating to violations of North Carolina Building Code *held* properly denied. *Ibid.; Pinnix v. Toomey*, 358.

Where punitive damages are not recoverable, allegations as to financial worth of defendant are properly stricken. *Lutz Industries, Inc., v. Dixie Home Stores*, 332.

In action to recover for negligent performance of contract, allegations establishing contractual duties are proper, but allegations tending to substitute contractual standard of care for common-law rule of due care, are properly stricken. *Pinnix v. Toomey*, 357.

In this action by the general contractor to recover against a subcontractor for negligence in the performance of contractual duties, allegations that defendants were under duty to perform their contract in accord with the plumbing code of the municipality in question are properly stricken where the complaint nowhere specifically alleges the plumbing code of the city, nor any negligence based on the violation of the city code. *Ibid.*

PLEADINGS—*Continued.*

Where the facts alleged are sufficient for the law to imply a duty of defendants to warn of defects in their work, a specific averment of such duty is not necessary, and plaintiff is not prejudiced by the action of the court in striking such averment. *Ibid.*

Custom or common practice relates to evidentiary facts bearing on the question of due care and may be shown under the allegations of ultimate facts showing negligence, and therefore plaintiff is not prejudiced by the trial court in striking from the complaint allegations relating to custom or common practice. *Ibid.*

Court should not strike allegations of facts necessary to support conclusion of law of pleader. *Wilson v. Pearson*, 601.

Allegations in the answer setting up matter ineffectual as defenses are properly stricken as irrelevant on motion aptly made. *Davis v. Hosiery Mills*, 718.

Allegations should be stricken from a pleading on motion only when they are clearly improper, irrelevant, immaterial or unduly repetitious, the ordinary test being the right of the pleader to offer in evidence the facts to which the allegations relate. *Baker v. Trailer Co.*, 724.

PROCESS.

§ 5a. Personal Service on Individuals.

Under the rule that ministerial duties of the office of sheriff may be performed by a substitute or deputy, it would seem that a rural police officer who works under the supervision and direction of the sheriff by provision of local act and resolution of the county commissioners, may serve a summons for and on behalf of the sheriff. *Griffin v. Barnes*, 306.

§ 6. Service by Publication.

In a summary proceeding for the condemnation of land under G.S. 115-85, the provision of the statute that nonresident landowners may be served by publication does not preclude service by publication on resident landowners upon a proper showing under the provisions of G.S. 1-98. *Brown v. Doby*, 462.

It is sufficient for an affidavit for service by publication to allege the ultimate fact that after due diligence personal service on the defendant could not be had in the State, without statement of any of the probative or evidentiary facts to support the conclusion of due diligence. In the present case it appeared of record that evidentiary facts showing due diligence were before the clerk, but in the absence thereof it will be presumed, ordinarily, from the clerk's order that sufficient probative facts were presented to and found by the clerk to sustain the order. G.S. 1-98.4 (a). *Ibid.*

§ 8c. Service on Agent of Foreign Corporation.

In order for a foreign corporation to be subject to service of process by service on its resident agent, such agent must have some degree of control over the corporate functions and be empowered to exercise some discretion with respect to the corporate business, and the extent and nature of his authority rather than his designation is controlling. *Heath v. Mfg. Co.*, 215.

Findings of fact to the effect that a foreign corporation sold equipment manufactured by it to local distributors or wholesalers, and that the resident upon whom process was served was a sales and factory representative of the corpo-

PROCESS—*Continued.*

ration, are insufficient to support the court's conclusion that such agent was a managing or local agent of the foreign corporation through whom it was doing business in this State, since a salesman or broker who takes orders and submits them to the home office of a foreign corporation for acceptance is not a local agent for service of process, and therefore the motion of the corporation to set aside the service should have been allowed. *Ibid.*

In order to bring a foreign corporation into court by service of process under G.S. 1-97, it is necessary that the corporation be doing business here or have property in this State, or that the cause of action arose here, and that service be made personally upon an officer or agent designated by the statute. *Babb v. Cordell Industries*, 286.

§ 8d. Service on Foreign Corporation by Service on Secretary of State.

In an action between nonresidents upon a transitory cause of action *ex contractu*, the fact that the nonresident defendant corporation is doing business here does not justify service of process by service on the Secretary of State under G.S. 55-38 when the cause of action does not arise in this State, and a judgment rendered upon such service violates the due process clause of the Federal Constitution, and is void. *Babb v. Cordell Industries*, 286.

§ 15. Nature and Essentials of Right of Action for Abuse of Process.

Abuse of process consists in the malicious misuse or perversion of a civil or criminal writ to accomplish some purpose not warranted or commanded by the writ, and is composed of the two elements of the existence of an ulterior purpose and an act in improperly using the process in the regular prosecution of the proceeding. *Barnette v. Woody*, 424.

The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued. *Ibid.*

§ 16. Actions for Abuse of Process.

Where plaintiff's evidence discloses that the process under which she was committed to the State Hospital was used for the purpose for which it was intended and that the result accomplished was warranted and commanded by the writ, the evidence is insufficient to make out a cause of action for abuse of process. *Barnette v. Woody*, 424.

§ 17. Limitations.

An action for malicious prosecution or an action for abuse of process is not barred until the expiration of three years after the accrual of the cause of action. G.S. 1-52. *Barnette v. Woody*, 424.

QUASI-CONTRACTS.

§ 1. Elements and Essentials.

There can be no implied contract where there is an enforceable express contract between the parties as to the same subject matter. *Jenkins v. Duckworth & Shelton*, 758.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

Action to quiet title upon alleged invalid claim to right of way will not lie against Highway Commission, but will lie against municipality. *Cannon v. Wilmington*, 611.

G.S. 41-10 is a remedial statute and must be liberally construed. *Lumber Co. v. Pamlico County*, 728.

§ 2. Actions to Quiet Title.

In an action to remove cloud from title, allegations that a receiver was without legal authority to convey the lands in question are sufficient as against demurrer without allegation of specific facts showing the receiver's want of authority, and are also sufficient predicate for attacking, upon allegations of want of title, the deed from the receiver's grantee to defendant. *Lumber Co. v. Pamlico County*, 728.

RAILROADS.

§ 4. Crossing Accidents.

In this action to recover for the death of a passenger in a car, killed in a collision between the car and defendant's train at a grade crossing as the result of the alleged negligence of the railroad company, the evidence *is held* sufficient to be submitted to the jury upon the issue of negligence. *Caudle v. R. R.*, 466.

Evidence *held* to show contributory negligence as a matter of law on part of motorist in crossing accident. *R. R. v. Motor Lines*, 676.

The duty of a motorist to look and listen before driving upon a railroad grade crossing requires him to do so at a time when the precaution will be effective. *Ibid.*

It is error for the court to charge upon a party's contention as to the negligence of a railway company in failing to maintain gates or gongs or other signaling devices at a crossing without referring to G.S. 136-20, giving the State Highway and Public Works Commission exclusive jurisdiction to decide whether a railway company should maintain gates, gongs, signals or other approved safety devices at a particular crossing. *Ibid.*

Evidence of protective devices maintained by a railroad at crossings within the bounds of a municipality, where noises or diversions exist, traffic is congested, and trains move frequently, is incompetent to show that the railway company was negligent in failing to maintain such protective devices at a crossing in a rural portion of the county on tracks upon which only one train daily passes. *Ibid.*

RAPE.

§ 24. Assault With Intent to Commit Rape—Elements and Essentials.

In order to convict defendant of an assault with intent to commit rape, the State must prove not only an assault, but that defendant committed the assault with intent to gratify his passion on the person of his victim at all events, notwithstanding any resistance on her part. *S. v. Burnette*, 164.

§ 25. Assault With Intent to Commit Rape—Prosecutions.

In this prosecution for assault with intent to commit rape, evidence *held* not to show consent for purpose of entrapment. *S. v. Burnette*, 164.

REFERENCE.

§ 14i. Appeal and Review.

Where on appeal to the Supreme Court from an order affirming the referee's report and judgment entered in accordance therewith in favor of plaintiffs in an action to recover for the wrongful cutting and removal of timber from lands claimed by plaintiffs, nonsuit is entered in plaintiffs' cause and a new trial is ordered on defendant's cross action to establish title; the findings of fact and conclusions of law of the referee are vacated. *Andrews v. Bruton*, 93.

REFORMATION OF INSTRUMENTS.

§ 1. Nature and Grounds of Remedy in General.

Equity will not reform a deed when it is not supported by a valuable or meritorious consideration, since in such event any mistake or defect is a mere failure in a bounty which the grantor was not required to make and hence cannot be required to perfect. *Dunn v. Dunn*, 234.

Complaint *held* to allege consideration for deed from other tenants in common in relinquishment of claim by grantee for expenses of nursing common ancestor in her last illness or for funeral expenses of common ancestor. *Ibid.*

ROBBERY.

§ 3. Prosecutions—Less Degrees of Crime.

An indictment for robbery with firearms will support a conviction of a lesser offense, such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. *S. v. Davis*, 476.

SALES.

§ 27. Actions and Counterclaims for Breach of Warranty.

The measure of damages for breach of warranty in the sale of personal property is the difference between the market value of the goods at the time and place of delivery, as delivered, and such value if the goods had complied with the warranty, together with such special damages as were within the contemplation of the parties. *Grossman v. Johnson*, 571.

Where, upon counterclaim for breach of warranty, the purchaser offers no evidence as to the value of the goods, as delivered, at the time and place of delivery, the purchase price must be regarded as the actual value, and in the absence of allegation of special damages, nonsuit on the counterclaim is proper, and further, the balance due on purchase price being admitted, a directed verdict against the purchaser for the balance due must be upheld. *Ibid.*

SCHOOLS.

§ 4b. Suit Against County Boards of Education.

While county board of education is immune from liability for tort except under Tort Claims Act, an action will lie against it for depreciation in value of land contiguous to a school resulting from maintenance of septic tanks on school grounds. *Eller v. Board of Education*, 584.

§ 6c. Title to School Property.

Title to school property in question *held* vested in county board of education by virtue of G.S. 115-352. *Board of Education v. Waynesville*, 558.

SEALS.

§ 3. Adoption of Seal—Evidence and Burden of Proof.

Where an acknowledgment of debt, including the word "seal" after the signature of the maker, is in the handwriting of the maker, it will be presumed that the maker intended to adopt the seal, and, in the absence of proof to the contrary by the maker or his personal representative, the seal is valid, and imports consideration. *McGowan v. Beach*, 73.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant.

Where an undercover officer knocks on defendant's door, enters upon invitation, and buys whiskey from defendant, his testimony as to what he saw is competent, since, in the absence of fraud or deceit on the part of the officer, his actions do not amount to an illegal entry so as to render his testimony incompetent under G.S. 15-27. *S. v. Smith*, 297.

SPECIFIC PERFORMANCE.

§ 1a. Contracts and Instruments Specifically Enforceable.

An instrument ineffectual as a deed because not under seal may nevertheless be specifically enforceable as a contract to convey. *Dunn v. Dunn*, 234.

§ 3. Defenses.

In this action to enforce an express, parol trust, defendants allege that the agreement was made for the purpose of defeating the Federal tax lien on the land. *Held:* The Federal Government had one year from date of sale within which to redeem, since the tax lien was subsequent to the lien of the deed of trust under which defendant purchased, 28 USCA Sec. 2410, and defendants' defense that plaintiffs did not come into a court of equity with clean hands was determined in favor of plaintiffs under a correct charge of the court. *Roberson v. Pruden*, 632.

STATE.

§ 3a. Actions Against State or Subdivisions—Nature and Scope of Remedy.

While county board of education is not liable in tort except under Tort Claims Act, action will lie against it for depreciation of value of property contiguous to school resulting from maintenance of nuisance on school property. *Eller v. Board of Education*, 584.

While State Highway Commission may not be sued except as allowed by statute, common-law action will lie against it to recover consideration for taking of lands. *Sale v. Highway Com.*, 612.

The State Highway and Public Works Commission is an unincorporated governmental agency of the State and not subject to suit except in the manner expressly authorized by statute. *Cannon v. Wilmington*, 711.

Action will not lie against Highway Commission to remove cloud on title, but will lie against municipality. *Ibid.*

STATUTES.

§ 3. Form and Contents—Enactment by Reference.

Unless prohibited by Constitutional restrictions, the General Assembly may enact by reference standards of conduct promulgated and published by a public

STATUTES—*Continued.*

body or commission when such publication is clearly identified. *Lutz Industries, Inc., v. Dixie Home Stores*, 332; *Pinnix v. Toomey*, 357.

The North Carolina Building Code of 1936 was ratified and adopted by Chapter 280, Public Laws of 1941, by clear and specific reference, and therefore the Building Code and the National Electric Code to which it refers, have the force and effect of law. *Ibid.*

§ 6. Construction in Regard to Constitutionality.

The presumption in favor of the validity of an act of the Legislature is a universal and fundamental rule. *Lutz Industries, Inc., v. Dixie Home Stores*, 332.

§ 10. Effective Date and Retroactive Statutes.

Statute giving municipalities power to zone property within three miles of corporate limits *held* not to validate prior ordinance attempting to extend zoning regulations beyond corporate limits. *S. v. Owens*, 525.

§ 13. Repeal by Implication.

A later statute will not repeal a former statute by implication unless in irreconcilable conflict therewith. *Ports Authority v. Trust Co.*, 416.

SUBROGATION.

§ 1. Nature and Grounds of the Remedy.

In order for a person who lends money used in the discharge of a lien on property to be subrogated to the rights of the lienholder, it must not only appear that the money loaned was actually used to discharge the lien, but also that the money was advanced for this purpose, either by express understanding or by implication, and when there is no evidence that the money was advanced with the intent and for the purpose of extinguishing the prior lien, the court properly refuses to submit the issue of subrogation. *Peek v. Trust Co.*, 1.

TAXATION.

§ 6. Lending Credit of State to Person, Firm or Corporation.

The issuance of bonds to obtain funds for the construction of a new facility in connection with the operations of the State Ports Authority, which bonds are payable solely from revenues derived from the lease of such new facility to a private corporation, is not in effect a lending of the credit of the State to a private corporation in violation of Article V, sec. 4, of the Constitution of North Carolina, since such bonds do not constitute a debt of the State or of the State Agency by which they are issued. *Ports Authority v. Trust Co.*, 416.

§ 30. Sales Taxes.

A resident who sells pre-cast septic tanks and component parts thereof at retail within this State for installation within this State is liable for sales tax under Article V, Schedule E, of the Revenue Act under the comprehensive definition contained in G.S. 105-167, such sales not being within the exemptions set forth in G.S. 105-169. *Robinson & Hale v. Shaw*, 486.

It is a matter of common knowledge that the imposition of our sales tax tended to encourage residents to make out-of-state purchases, and the history of the enactment of the sales and use taxes indicates a legislative intent to

TAXATION—*Continued.*

impose by the use tax the same burdens on out-of-state purchases as are imposed on purchases within the State by the sales tax. *Ibid.*

Where the retail sale of building materials in this State comes within the purview of G.S. 105-167, the seller may not contend that he is not subject to the sales tax because G.S. 105-187 imposes upon the purchaser a use tax on such materials, since the use tax does not apply in such instance, but only when the materials have not been subjected to the sales tax against the seller. *Ibid.*

TIME.

The word "year" means twelve calendar months. *Green v. P. O. S. of A.*, 78.

TORTS.

§ 6. Joinder of Joint Tort-Feasors for Contribution.

The right of one defendant sued in tort to maintain a cross action against another for the purpose of contribution in the event plaintiff should recover, is purely statutory and may be enforced only in accord with the provisions of the statute. *Potter v. Frosty Morn Meats*, 67.

In order to be entitled to have another joined as additional defendant for the purpose of contribution, the original defendant must allege facts tending to show liability of himself and such additional party as joint tort-feasors predicated upon negligence of each concurring in proximately producing the injury, and the right to contribution may not be predicated upon allegations showing that the negligence of such additional party was the sole cause of the injury, or that the accident resulted from the negligence of an outside agency or responsible third person, or which invoke the doctrine of primary and secondary liability. *Ibid.*

The cross-complaint in this action *is held* insufficient to allege facts tending to show that the negligence of the other defendants concurred in proximately causing the injury in suit, and therefore, the demurrer of such defendants to the cross-action was properly sustained. *Ibid.; White v. Keller*, 97.

A defendant sued in tort is given the right by statute to bring into the action another joint tort-feasor for the purpose of determining his contingent liability for contribution so that all matters in controversy growing out of the same subject of action may be settled in one action, even though the plaintiff may thus be delayed in securing his remedy, G.S. 1-240. *White v. Keller*, 97.

Those who are joint tort-feasors for the purpose of contribution within the purview of G.S. 1-240 are those who act together in committing the wrong, or whose acts, if independent of each other, unite in causing a single injury. *Ibid.*

The right to join additional parties for the purpose of contribution under G.S. 1-240 may not be used for the purpose of injecting into the litigation another action not germane to plaintiff's action. *Ibid.*

Where defendants do not allege concurrent negligence they are not entitled to joinder of additional defendant upon plea of primary and second liability or plea of sole negligence. *Kimsey v. Reaves*, 721.

§ 8a. Release From Liability—Fraud and Duress.

Allegations that tort-feasor obtained release from liability upon payment of stipulated sum to injured party plus payment of hospital and medical bills, and that injured party's accident and health insurance was applied without his

TORTS—*Continued.*

knowledge to hospital and medical bills *held* insufficient to set aside release for fraud. *Parker v. Hensel*, 211.

TRESPASS TO TRY TITLE.

§ 2. Defenses.

Where, in an action for damages for wrongful cutting and removal of timber from land claimed by plaintiffs, defendant denies plaintiffs' title and alleges that defendant owned the described tract and that the timber cut by him was on this tract, and prays that he be adjudged the owner of the tract described in the answer, *held*, the answer amounts to a cross action to establish defendant's title to the tract described in the answer, and when no determination is made either by the referee or the court of the issues raised by the answer, the defendant's cross action is still pending, and a new trial on the cross action will be ordered. *Andrews v. Bruton*, 93.

§ 3. Actions.

In an action to recover for trespass on lands by the cutting and removal of timber therefrom, defendant's denial of plaintiffs' title places the burden upon plaintiffs to establish both their title and defendant's trespass, and where plaintiffs' proof of ownership relates to a description of the property not alleged in the complaint, but at variance therewith, nonsuit should be entered for material variance and for lack of jurisdiction. *Andrews v. Bruton*, 93.

In an action to recover for the wrongful cutting and removal of timber from land claimed by plaintiffs, plaintiffs must locate the land by fitting the description in their deeds to the earth's surface, regardless of whether they rely upon their deeds as proof of title or color of title, G.S. 8-39, or, in the absence of title or color of title, they are required to establish the known and visible lines and boundaries of the land actually occupied by them for the statutory period. *Ibid.*

Plaintiffs alleged that defendant owned land adjoining their lands. There was a finding that beginning at the stake as claimed by defendant and running to the boundaries of the tract of land claimed by defendant, the disputed area is included in the description of the lands claimed by the defendant in his answer. *Held:* The finding does not in effect establish defendant's title to the disputed area, but only that defendant claims it does. *Ibid.*

§ 4. Rents and Damages.

When one wrongfully enters upon the land of another and cuts trees therefrom, the owner of the land has an election of remedies, but when the owner elects to sue for the value of the timber alleged to have been converted by defendant, recovery cannot be had on the basis of the difference in the value of the land before and after the alleged trespass. *Andrews v. Bruton*, 93.

TRIAL.

§ 5½. Pre-Trial.

Unless otherwise provided by stipulation, only the documents constituting the record proper are before the court at pre-trial conference, and ordinarily evidence may not be introduced thereat. *Reid v. Holden*, 408.

Ordinarily it is error for the court on pre-trial hearing to dismiss the cause on the plea of *res judicata*. *Ibid.*

TRIAL—*Continued.*

§ 6. Expression of Opinion on Evidence by Court During Progress of Trial.

The provisions of G.S. 1-180 prohibiting expressions of opinion by the trial judge as to the sufficiency of the evidence are not confined to formal instructions to the jury but include the expression of any opinion at any time during the trial which is calculated to prejudice either party. *Hyder v. Battery Co.*, 554.

The evidence in this case was sufficient to require the submission of the issue of contributory negligence to the jury. *Held:* Remarks of the trial court, in the hearing of the jury, to the effect that the court saw no sufficient evidence of contributory negligence to be submitted to the jury, and, later, that the court had some doubt about the issue, but would submit it, must be held for prejudicial error as an expression of an opinion by the court as to the sufficiency of the evidence. *Ibid.*

§ 8. Conduct of Trial—Matters Prejudicing Parties Before Jury.

Ordinarily evidence of the existence of the liability insurance is incompetent and any reference thereto in the presence of the jury is prejudicial. *Taylor v. Green*, 156.

§ 15. Motions to Strike Testimony.

Where only part of the answer of a witness is objectionable as hearsay, the objecting party should single out the objectionable part of the answer and make only that part the subject of his motion to strike. *S. v. Tyson*, 574.

§ 17. Admission of Evidence Competent for Restricted Purpose and Objections.

Where testimony is competent for purpose of corroboration, its general admission will not be held for error in the absence of a request by the adverse party that its admission be restricted. *Hatcher v. Clayton*, 450.

Exception to the admission of a document on which appeared the summons, affidavit, warrant of attachment, and return of the officers, offered for the purpose of showing that the action was instituted within one year from the accident in order to claim the benefits of G.S. 20-71.1, is not sustained, it appearing that appellant did not move that the admission of the document be limited, and it not appearing that the contents of the writ of attachment were read to the jury. *Hensley v. Harris*, 599.

§ 21½. Motion to Nonsuit and Renewal of Motion.

Introduction of evidence after refusal of nonsuit at close of State's evidence waives exception, and renewal of motion at close of all evidence presents sufficiency of entire evidence to go to jury, considering the evidence in the light most favorable to State. *S. v. Norris*, 47.

§ 22b. Nonsuit—Consideration of Defendant's Evidence.

Upon motion to nonsuit, defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff. *Brady v. Beverage Co.*, 32.

§ 23f. Nonsuit for Variance.

Where there is a material variance between allegation and proof, such defect may be taken advantage of by motion for judgment as of nonsuit. *Brady v. Beverage Co.*, 32; *Andrews v. Bruton*, 93.

Objection based on material variance between allegation and proof should be presented by exception to refusal of motion for judgment for involuntary nonsuit, and not by exception to the charge. Prejudicial error in the charge results in a new trial rather than reversal of the judgment. *Douglass v. Brooks*, 178.

On defendant's counterclaim for rescission and damages, the fact that defendant alleges *scienter* of plaintiff, whereas the evidence discloses at most *prima facie* proof only of constructive *scienter* in that the representation was recklessly made in conscious ignorance of its truth or falsity, does not justify nonsuit for variance, since upon the record it does not appear that plaintiff was misled to his prejudice. *Zagler v. Setzer*, 493.

§ 24a. Nonsuit on Affirmative Defense.

Nonsuit on affirmative defense of compromise and settlement is not proper unless the defense is established as the only reasonable inference from the evidence. *Allgood v. Trust Co.*, 506.

§ 29. Directed Verdict and Peremptory Instructions.

A verdict may not be directed in favor of the party upon whom rests the burden of proof. *Peek v. Trust Co.*, 1.

The court may give a peremptory instruction upon an issue in favor of the party upon whom rests the burden of proof only when but a single inference can reasonably be drawn from the undisputed facts in evidence. *Ibid.*

Where all the evidence bearing on an issue points in the same direction and justifies but a single inference, an instruction to answer the issue in the affirmative if the jury finds the evidence to be true, will be upheld. When the credibility of the evidence is left to the jury, it is a peremptory instruction as distinguished from a directed verdict. *Ibid.; Rhodes v. Raxter*, 206.

Defendant is not entitled to a directed verdict as a matter of law upon an issue upon which the evidence is conflicting. *Elliott v. Killian*, 471.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

Charge *held* for error in failing to charge law arising on evidence except in stating contentions. *Dixon v. Wiley*, 117.

It is incumbent upon the trial judge to charge the jury upon each substantive feature of the case arising upon the evidence even in the absence of a request for special instructions. *Tillman v. Bellamy*, 201.

It is the duty of the trial judge to declare and explain the statutory law as well as the common law on the substantial features of the case arising on the evidence, even though there be no special request for instructions, and the court's failure to do so is prejudicial error. *McNeill v. McDougald*, 255.

§ 31c. Instructions—Conformity to Pleadings and Evidence.

Instruction in this case *held* to conform sufficiently to pleadings and any variance, under the facts, was not prejudicial. *Dennis v. Albemarle*, 263.

§ 31e. Instructions—Expression of Opinion on Weight or Credibility of Evidence.

The fact that the court, in dealing with definitions and requisites necessary in establishing negligence, states that "the fact that the defendant had been guilty of negligence" . . . would not render the defendant liable unless the

negligence was the proximate cause of the injury, instead of an instruction that the fact that a defendant may have been guilty of negligence, etc., *held* not prejudicial when in other portions of the charge the court clearly instructed the jury that the burden was on plaintiff to establish negligence of defendant by the greater weight of evidence, and the *lapsus linguae* could not have misled the jury, construing the charge as a whole. *Ford v. Blythe Bros. Co.*, 347.

The mere statement by the court of the valid contentions made by the respective parties, cannot be held for error as an expression of opinion by the court as to the credibility of the witness and weight of the evidence. *Higgins v. Beaty*, 479.

Instruction that had recited only substance of evidence on both sides necessary to enable court to explain and apply law *held* not expression of opinion on evidence. *S. v. Tyson*, 574.

§ 31f. Instructions—Statement of Contentions.

The statement by the court of a valid contention of a party based on competent evidence cannot be held for error. *Peek v. Trust Co.*, 1.

§ 32. Requests for Instructions.

A party desiring instructions upon a subordinate feature of the case must aptly tender a request therefor. *Peek v. Trust Co.*, 1.

§ 36. Form and Sufficiency of Issues.

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *McGowan v. Beach*, 73.

§ 47. New Trial for Newly Discovered Evidence.

A motion for a new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his ruling thereon is not reviewable in the absence of abuse of discretion. *Frye & Sons v. Francis*, 107.

§ 49. Setting Aside Verdict as Contrary to Weight of Evidence.

The trial court has the discretionary power to set aside the verdict as being against the weight of the evidence, and such action by the trial court is not reviewable in the absence of abuse of discretion. *White v. Keller*, 97.

A motion to set aside the verdict and grant a new trial on the ground that the verdict is contrary to the greater weight of the evidence is directed to the sound discretion of the trial judge, and his ruling thereon is not reviewable on appeal in the absence of abuse of discretion. *Frye & Sons v. Francis*, 107.

Right to set aside verdict as contrary to weight of evidence extends to caveat proceedings. *In re Will of Barfield*, 308.

§ 51. Setting Aside Verdict for Error of Law.

Where the trial court sets aside the verdict for specified error of law, the order is reviewable. *McNeill v. McDougald*, 255.

TROVER AND CONVERSION.

§ 3. Actions.

The one-year statute of limitations does not apply to action for tortious injury and damage to personal property or for wrongful seizure and conversion of personalty. *Reid v. Holden*, 408.

Ordinarily, co-owners of personalty may maintain a joint action for the conversion of the property. *Peed v. Burleson's, Inc.*, 628.

TRUSTS.

§ 2a. Creation and Validity of Parol Trusts.

Allegation and proof to the effect that after his parents acquired legal title to the premises, they entered into a verbal agreement with defendant under which defendant was to have that portion of the land which would include the dwelling house, barn and other improvements which defendant assisted in placing on the land, *held* insufficient to establish a parol trust in defendant's favor, since an agreement relied upon to create a parol trust must ordinarily be made prior to, or contemporaneously with, the passing of the legal title. *Rhodes v. Raxter*, 206.

Allegations and evidence in this case to the effect that prior to the foreclosure sale by the trustee, the *cestuis* and defendant, a stranger to the instrument, agreed that the defendant should purchase the property at the sale, and hold the title in trust for the *cestuis* for five years, and convey the property to the *cestuis* at any time within the five-year period upon repayment of the amount defendant had invested, considered in the light most favorable to the *cestuis*, *is held* sufficient to be submitted to the jury in this action to establish an express, parol trust. *Roberson v. Pruden*, 632.

While a parol trust in favor of grantor cannot be engrafted upon a deed in fee simple unless otherwise indicated in the deed, a parol trust may be enforced in favor of a stranger to the deed when the grantee takes title to the property under an express agreement to hold the property for his benefit. This rule applies to an agreement between a *cestui* in a deed of trust and a stranger to the instrument who agrees to purchase at the foreclosure sale for the benefit of the *cestui*. *Ibid.*

§ 4a. Elements and Essentials of Resulting Trusts.

Resulting trust must be based on consideration advanced before or at time of passing of legal title to alleged trustee, and consideration furnished after acquisition of legal title by alleged trustee cannot create trust. *Rhodes v. Raxter*, 206.

§ 4c. Actions to Establish Resulting Trusts.

Upon the issue of a resulting trust, evidence of the furnishing of consideration after legal title had passed to the alleged trustee is properly excluded, since such evidence is irrelevant to the issue. *Rhodes v. Raxter*, 206.

VENDOR AND PURCHASER.

§ 3½. Form and Requisites of Agreement.

Where plaintiff alleges a contract of sale and purchase and attaches to the complaint correspondence between the parties together with an agreement, alleging that the writings together with verbal agreements constituted the contract, *held*, the submission of the case to the jury on the theory of the writ-

VENDOR AND PURCHASER—*Continued.*

ten agreement is not a material variance when the written agreement modifies the agreement as set forth in the prior correspondence only in vendor's favor by making the deed deliverable upon completion of payment of the purchase price rather than upon the down payment. *Douglass v. Brooks*, 178.

An instrument ineffectual as a deed because not under seal may nevertheless be enforceable as a contract to convey when it is supported by a valuable consideration. *Dunn v. Dunn*, 234.

§ 5a. Options.

An option creates a unilateral obligation upon the vendor to sell upon the stipulations agreed, but creates no obligation on the purchaser to buy, but gives him the right to exercise the option or not at his election. If he fails to exercise the option, he loses only the consideration given for it. *Douglass v. Brooks*, 178.

§ 5b. Contracts to Convey.

Where a contract respecting realty creates bilateral obligations, on the one hand the obligation to purchase and on the other hand the obligation to sell, as reciprocal considerations, the contract is one of sale and purchase and not an option. *Douglass v. Brooks*, 178.

§ 18. Payment of Purchase Price.

In the absence of special circumstances, time is of the essence of an option to purchase land, but is not of the essence of a contract of sale and purchase. *Douglass v. Brooks*, 178.

Where under the provisions of a contract of sale and purchase, the purchase price is to be paid in monthly installments, and the vendor accepts payments in arrears, the vendor may not thereafter treat the contract as abandoned for delinquency in payment until notice and demand for strict compliance with the terms of the agreement have been given the purchaser and the purchaser has failed to comply therewith within a reasonable time. *Ibid.*

The vendor's renunciation of the contract relieves the purchaser of any necessity of thereafter tendering the purchase price. *Ibid.*

VENUE.

§ 4. Change of Venue.

Motion for change of venue for prejudice against defendant in the county is addressed to sound discretion of trial court. *S. v. Scales*, 400.

WAIVER.

§ 2. Acts Constituting Waiver.

Waiver is the intentional relinquishment of a known right, and there can be no waiver unless so intended by one party and so understood by the other, unless one party has acted so as to mislead the other. *Green v. P. O. S. of A.*, 78.

WILLS.

§ 27. Caveat Proceedings—Setting Aside Verdict.

The discretionary authority of the trial court to set aside the verdict as being contrary to the greater weight of the evidence extends to a verdict rendered in a caveat proceeding. *In re Will of Barfield*, 308.

WILLS—*Continued.*

§ 31. General Rules of Construction.

In construing a will, the primary inquiry is to ascertain the testator's intent. *Jones v. Callahan*, 566.

Nothing else appearing, it must be presumed that testator intended to dispose only of the property owned by him at the time of his death. *Ibid.*

§ 32½. Property Passing by Will and Transmissible Estate.

U. S. War Bonds, Series E, pass under the terms of the bonds to the person named by virtue of Federal law, and do not pass under the will. *Jones v. Callahan*, 566.

The right to dispose of property by will is statutory, and testator may dispose of property owned by him at the time of his death, which otherwise would descend to his heirs or be distributed to his next of kin. *Honeycutt v. Bank*, 734.

Property held by entirety passes to surviving widow by operation of law. *Ibid.*

§ 33c. Vested and Contingent Interest and Defeasible Fees.

Fee upon special limitation may be created by will. *Recreation Com. v. Barringer*, 311.

Where the will devises certain lands to testator's wife with provision that after her death the lands should be sold and the proceeds divided between testator's children, the children take vested remainder interest in the land with the right to immediate enjoyment being postponed for the benefit of the life estate of the widow. *Gomer v. Askew*, 547.

§ 36. General and Specific Legacies.

A bequest of all testator's household and kitchen furniture, jewelry, clothing, and other articles of personal property used in and around his home, to his wife, does not include, nothing else appearing, an automobile owned by testator at the time of his death, but the car passes under the residuary clause. *Jones v. Callahan*, 566.

§ 40. Widow's Dissent and Effect Thereof.

The widow's dissent from the will terminates her interest in lands devised to her for life and accelerates the right of the remaindermen to immediate enjoyment, and she takes nothing under the will, but is entitled to dower based upon all the real property of which her husband died seized, and a child's part in the personalty, with allowances for a year's support for herself and children under 15 years of age. The fact that dower is allotted in the same lands which were devised to the widow for life is a mere coincidence and does not affect the principles of law applicable. *Gomer v. Askew*, 547.

If the testator is regarded as charged with knowledge of the statute law defining the widow's right to dissent, he must be regarded also as charged with knowledge that if she exercises such right, the dissent accelerates the rights of the remaindermen. *Ibid.*

§ 41. After-Born Children.

Where a will makes substantial provision for a class of beneficiaries to which the posthumous child of testator belongs, such provision precludes the applica-

tion of G.S. 31-45, and such child is not entitled to claim under the statute as a pretermitted child. *Sheppard v. Kennedy*, 529.

§ 44. Election.

The doctrine of equitable election applies when the testator attempts to devise specific property not owned by him to a person other than the true owner and provides other benefits for the owner of such specific property, but the doctrine is in derogation of the property right of the true owner and does not apply unless the intention of testator to put the beneficiary to an election appears plainly in the terms of the will. Therefore, the doctrine does not apply if testator considered the specific property so devised to be his own. *Honeycutt v. Bank*, 734.

Even though testator makes his will under the mistaken belief that he was sole owner of lands held by himself and wife by entirety, the devise to his wife of their residence and bequests to her of personalty, with further bequest and devise of "all the residue of my property" to a trustee for distribution to others, *held* not to put the wife to her election, since the will contains no provision that manifests an intention that an election be required, the bequest and devise to others being only of property owned by testator. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-15. Defense of statute of limitations cannot be presented by demurrer or motion to dismiss. *Reid v. Holden*, 408.

1-52. Action for malicious prosecution and for abuse of process not barred until three years. *Barnette v. Woody*, 424.

1-52; 1-54. One year statute does not apply to action for tortious injury to personal property or for wrongful seizure and conversion of personalty. *Reid v. Holden*, 408.

1-53. Does not apply to actions against municipality based on tort. *Dennis v. Albemarle*, 264.

1-54. One year statute applies to action for false imprisonment. *Barnette v. Woody*, 424.

1-54 (3). Cause of action for assault barred after one year. *Reid v. Holden*, 408.

1-57. Injured third party *held* not entitled to joinder of insurer in action against driver of insured car. *Taylor v. Green*, 156.

1-68. Interest of parties plaintiff must be consistent but need not be identical. *Peed v. Burleson's, Inc.*, 628.

1-70. Owner of burial lot in cemetery may bring action on behalf of himself and all other similarly situated to protect community of interest. *Mills v. Cemetery Park Corp.*, 20.

1-97. In order for service under this section, corporation must be doing business here or have property in this State, or cause of action arise here, and service be made personally on officer or agent designated by the statute. *Babb v. Cordell Industries*, 286.

1-98.4 (2). It is sufficient for affidavit to allege ultimate facts without statement of evidentiary facts supporting conclusion of due diligence. *Brown v. Doby*, 462.

1-98; 115-85. Resident landowner may be served by publication upon proper showing. *Brown v. Doby*, 462.

1-123. Plaintiff may unite in one action causes arising out of same transaction or transaction connected with same subject of action. *Mills v. Cemetery Park Corp.*, 20. Ordinarily, only those causes may be joined which affect the parties to the action. *McKinley v. Hinnant*, 246.

1-123; 1-69. Cause of action on trade acceptances may be joined with action against guarantors of payment. *Milling Co. v. Wallace*, 686.

1-128. Demurrer must specify grounds of objection. *McKinley v. Hinnant*, 246.

1-132. Where there is misjoinder of causes only, action should not be dismissed, but cause should be separated. *McKinley v. Hinnant*, 246.

1-153. Motion to strike made in apt time is made as matter of right. *Baker v. Trailer Co.*, 724; *Lutz Industries, Inc., v. Dixie Home Stores*, 332. When motion is not made in apt time, court has discretionary power to allow the motion. *Bolin v. Bolin*, 642. Competency of allegations as to contractual duties in action in tort for negligent performance of contract. *Pinnix v. Toomey*, 358. Allegations of answer ineffectual as defense are properly stricken on motion. *Davis Co. v. Hosiery Mills*, 718.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

1-168. Allegation of *scienter* and proof of constructive *scienter* is not fatal variance. *Zager v. Setzer*, 493. Party may not complain of immaterial variance. *Dennis v. Albemarle*, 264.

1-180. Charge *held* for error in failing to explain law applicable to facts in evidence. *Dixon v. Wiley*, 117. Instruction that court would not undertake to recite all evidence but only substance of evidence on both sides necessary to enable court to explain law, *held* not prohibited expression of opinion. *S. v. Tyson*, 574. Statute precludes expression of opinion not only in charge but at any time during trial. *Hyder v. Battery Co.*, 553. Statement of valid contentions cannot be erroneous as expression of opinion. *Higgins v. Beaty*, 479. Where charge is not in record it will be presumed that court's charge complied with statute. *S. v. Phelps*, 540.

1-206. Does not eliminate necessity of setting out and numbering exceptions. *Barnette v. Woody*, 424.

1-207. Motion to set aside verdict as against weight of evidence is directed to discretion of trial court. *Frye v. Francis*, 107.

1-240. Right to join party for contribution is purely statutory. *Potter v. Frosty Morn Meats, Inc.*, 67. But allegations must show that negligence of party sought to be joined was a concurring proximate cause of the injury. *Potter v. Frosty Morn Meats, Inc.*, 67; *White v. Keller*, 97. In passenger's action, original defendants *held* not entitled to file cross-action against owner of other car in absence of allegation of concurrent negligence. *Kimsey v. Reaves*, 721.

1-253. Does not authorize submission of theoretical problem or mere abstraction. *NASCAR, Inc., v. Blevins*, 282. Controversy as to whether deed created fee upon special limitation with right of reverter may be maintained under Declaratory Judgement Act. *Recreation Com. v. Barringer*, 311.

1-271. Only party aggrieved may appeal. *Langley v. Gore*, 302. Appeal from order requiring resident father to have child in court to adjudicate right to custody is premature. *In re Fitzgerald*, 732.

1-276. On appeal from clerk, Superior Court acquires jurisdiction of entire cause. *Sale v. Highway Com.*, 612.

1-399; 1-125. Upon hearing of procedural motion, court has no jurisdiction to enter judgment on merits. *Dellinger v. Bollinger*, 696.

1-568.10. Notice to defendant prior to order for examination as a matter of right is not required. *Jones v. Fowler*, 162.

1-569; 1-570; 1-571. Apply to completion and use of examination of adverse party; examination to obtain information to file complaint may not be used as evidence at the trial. *Culbertson v. Rogers*, 622.

4-1. So much of common law as has not been abrogated or repealed by statute is in full force and effect in this State. *Warehouse v. Board of Trade*, 123.

5-1 (4). Judgment for contempt *held* not erroneous for failure to denominate conclusions of law as such. *Mfg. Co. v. Bonano*, 587. Findings of court *held* sufficient to support judgment of contempt in violating order against unlawful picketing. *Mfg. Co. v. Bonano*, 587, 590.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

5-4. Court may not commit husband to jail for indefinite term for failure to make payments of alimony. *Basnight v. Basnight*, 645.

8-39. Plaintiff must fit land to description in deeds regardless of whether he is relying on record title or adverse possession under color. *Andrews v. Bruton*, 93.

8-51. Applies to tort actions; does not preclude testimony from own knowledge as to acts and conduct of deceased. *Hardison v. Gregory*, 324. Widow may not testify against executor of her husband's estate that she loaned her husband money or that she saw him sign acknowledgment of indebtedness. *McGowan v. Beach*, 73.

9-14. Refusal of motion for new trial on ground that defendant had spoken to juror is not reviewable. *S. v. Scott*, 595.

12-3 (3). Word "year" means twelve calendar months. *Green v. P. O. S. of A.*, 78.

14-30. Instruction defining general malice *held* without error. *S. v. Atkins*, 294. Evidence *held* sufficient. *Ibid.*

14-54. Intent to commit felony is essential element of offense under this section. *S. v. Cook*, 700.

14-177; 14-3. Attempt to commit offense defined by G.S. 14-177 is infamous act and constitutes felony. *S. v. Mintz*, 761.

14-322. Warrant must charge not only willful failure to support, but also willful abandonment. *S. v. Outlaw*, 220.

14-277. Evidence *held* insufficient for conviction under this section. *S. v. Church*, 230.

14-322. Abandonment of wife and abandonment of children are separate offenses and should be separately charged in indictment. *S. v. Lucas*, 84.

14-325. Warrant failing to charge that willful failure to support was while defendant was living with wife *held* defective. *S. v. Outlaw*, 220.

15-27. Officer may testify as to what he saw when his entry into defendant's home was legal. *S. v. Smith*, 297.

15-143. Defendant *held* not prejudiced for denial of motion for bill of particulars. *S. v. Scales*, 400.

15-144. Under indictment in statutory form, State is entitled to show that homicide was committed in perpetration of rape. *S. v. Scales*, 400.

15-153. Indictment is sufficient if it expresses charge in plain, intelligent manner and contains sufficient matter to enable court to proceed to judgment. *S. v. Jones*, 563. Ordinarily, indictment following language of statute is sufficient, and defendant wishing more particularity must request bill of particulars. G.S. 15-143; but if statute does not charge all essential elements of the offense, words of the statute must be supplemented in the indictment. *S. v. Eason*, 59.

15-169; 15-170. Indictment for robbery with firearms will support conviction of less degrees of crime, and court should submit question of guilt of less degrees to jury when supported by evidence. *S. v. Davis*, 476.

20-71.1. Admission of ownership of car takes issue of *respondeat superior* to jury. *Hatcher v. Clayton*, 450; *Davis v. Lawrence*, 496. Proof of registration of vehicle in defendant's name takes issue of *respondeat superior* to jury. *Elliott v. Killian*, 471. Documents *held* competent

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

to show that action was instituted within one year after accident, and admission of document in evidence *held* not error in absence of request that its admission be limited. *Hensley v. Harris*, 599.

20-129; 20-176 (b). Indictment following language of statute is sufficient. *S. v. Eason*, 59.

20-129; 20-183. Patrolman may arrest on sight motorist whom he sees violating penal auto statutes. *S. v. Eason*, 59.

20-129. It is unlawful to drive a motor vehicle at nighttime without lights. *S. v. Norris*, 47.

20-140. Reckless driving defined. *S. v. Norris*, 47.

20-141 (a), (b) (4). It is unlawful to drive motor vehicle on highway at speed greater than is reasonable and prudent under the circumstances, or in any event at higher speed than 55 miles per hour. *S. v. Norris*, 47.

20-141 (b). Court need not charge on maximum speed in business district when evidence does not bring locale of collision within definition of business district. *Tillman v. Bellamy*, 201.

20-141 (b) (4); 20-146. Evidence *held* sufficient to sustain conviction of manslaughter. *S. v. Phelps*, 540.

20-154. Evidence *held* to show negligence on part of defendant causing collision at intersection, and not to disclose contributory negligence as matter of law. *Emerson v. Munford*, 241.

20-156; 20-158. Unless signs are erected neither highway is dominant highway even though one of them is paved and the other not. *Brady v. Beverage Co.*, 32.

22-2. Statute does not apply to executed contract. *Willis v. Willis*, 597.

30-15. Does not apply unless husband dies intestate or widow dissents from will. *Jones v. Callahan*, 566.

31-40. Right to dispose of property by will is solely statutory. *Honeycutt v. Bank*, 734.

31-45 (before being rewritten by G.S. 31-5.5). Where will makes substantial provision to class to which posthumous child belongs, statute has no application. *Sheppard v. Kennedy*, 529.

40-11. Common law action will lie against county board of education to recover depreciation in value of property caused by maintenance of nuisance on school property. *Eller v. Board of Education*, 584.

41-10. Is a remedial statute and should be liberally construed. *Lumber Co. v. Pamlico County*, 728.

44-49. Does not authorize minor in his suit by his next friend to recover for medical expenses. *Ellington v. Bradford*, 159.

44-63. In this action for wrongful seizure of tobacco, right of lienholder to seize crop prior to maturity *held* substantial feature of case. *McNeill v. McDougald*, 255.

45-21.34. Foreclosure may not be enjoined on ground that there was Federal tax lien on lands. *Roberson v. Boone*, 598.

45-21.38. In action on notes secured by mortgage, applicability of statute may not be determined until there is sale. *Fleishel v. Jessup*, 605.

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49-1; 49-2; 50-13. Putative father of illegitimate child may maintain action for its custody. *Dellinger v. Bollinger*, 696.

50-14. Court may modify order for subsistence upon change in conditions. *Rayfield v. Rayfield*, 691.

50-16. Adultery of wife does not preclude court from allowing her counsel fees. *Bolin v. Bolin*, 642. Judge holding courts of district as then constituted has jurisdiction. *Smith v. Smith*, 646.

52-12. Wife's guaranty of payment of husband's trade acceptances is not contract between husband and wife within this section. *Milling Co. v. Wallace*, 686. Conveyance by husband and wife to trustee, who in turn conveys to husband, for purpose of terminating estate by entireties, is conveyance by wife to husband within meaning of statute. *Honeycutt v. Bank*, 734.

52-13. Dower may be released by antenuptial agreement. *Turner v. Turner*, 533.

55-38. Cause of action must arise in this State in order to serve corporation under this section. *Babb v. Cordell Industries*, 286.

58-11. Decree of absolute divorce on ground of separation does not impair prior order for alimony. *Rayfield v. Rayfield*, 691.

58-204.3. Pension system has no insurable interest in life of employee covered, and therefore may not change beneficiary or divert proceeds upon voluntary termination of employment by employee. *Allgood v. Trust Co.*, 506.

95-78. State law superseded by Railway Labor Act in regard to union shop for railway workers. *Hudson v. R. R.*, 650.

97-36. Industrial Commission has jurisdiction only if the contract of employment is made in this State, the employer's place of business is here and the injured employee is a resident. *Aylor v. Barnes*, 223.

97-48 (c). When compensation is paid in good faith to person adjudicated to be entitled thereto, liability of insurance carrier is discharged. *Green v. Briley*, 196.

105-167; 105-169. Sales of pre-cast septic tanks and component parts at retail within State are subject to sales tax. *Robinson v. Hale*, 486.

106-465. Tobacco Boards of Trade are given authority to make reasonable rules for allotment of sales time. *Warehouse v. Board of Trade*, 123. Members of Tobacco Board of Trade are deemed to have consented to all reasonable rules and regulations; regulations *held* not invalid as in restraint of trade. *Day v. Board of Trade*, 136.

109-34; 109-35. Relator is real party in interest, and will be so considered in determining plea of *res judicata*. *Reid v. Holden*, 408.

115-45. County board of education may be sued to recover compensation for depreciation in value of property caused by maintenance of nuisance on school property. *Eller v. Board of Education*, 584.

115-352. Title to school property *held* vested in county board of education by virtue of statute. *Board of Education v. Waynesville*, 558. Validity of order of State Board of Education assigning school children *held* moot, the Board having been shorn of power to assign children. *In re Assignment of School Children*, 500.

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136-19. Acceptance by respondents of voluntary payment by petitioner of award of commissioners settles question of compensation. *Highway Com. v. Pardington*, 482. Landowner may sue Highway Commission at common law to recover consideration for right of way easement. *Sale v. Highway Com.*, 612.

136-20. It is error to charge on duty of railroad company to maintain gates or signaling devices without referring to this statute. *R. R. v. Motor Lines*, 676.

136-51. Does not repeal power of Commissioners of Buncombe County to lay off cartways. *Merrell v. Jenkins*, 636.

136-68. While party may appeal from order of clerk adjudging petitioner is entitled to cartway, as to location and damages appeal will not lie until determined by jury of view. *Tucker v. Transou*, 498.

143-136 to 143-143. Courts will take judicial knowledge of building code. *Lutz Industries, Inc., v. Dixie Home Stores*, 332.

143-139. In action for negligence in performance of contractual duties, plaintiff may allege violations of Building Code. *Pinnix v. Toomey*, 358.

143-228. Statute will be liberally construed to effectuate purpose. *Ports Authority v. Trust Co.*, 416.

160-2; 41-10. Municipal corporation may be sued to quiet title. *Cannon v. Wilmington*, 711.

160-172 through 160-181.1. Statutes do not authorize municipalities to zone outside corporate limits. *S. v. Owen*, 525.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. 17. When private property is taken for public use, just compensation must be paid. *Eller v. Board of Education*, 584; *Sale v. Highway Com.*, 612. To declare right of reverter invalid would violate due process. *Recreation Com. v. Barringer*, 311.

I, sec. 20. Comments and criticisms of newspaper on public affairs are not libelous, however severe, unless they are written maliciously. *Yancey v. Gillespie*, 227.

V, sec. 4. Leasing of facilities by Ports Authority is not lending of credit to private corporation. *Ports Authority v. Trust Co.*, 416.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.
ART.

I, sec. 8. Acts of Congress in regard to interstate commerce supersedes State laws in conflict therewith. *Hudson v. R. R.*, 650.

IV, sec. 1. Decree of another state awarding custody of child resident in this State is not binding here. *Hoskins v. Currin*, 432.

5th Amendment. To declare right of reverter invalid would violate due process. *Recreation Com. v. Barringer*, 311.

14th Amendment. Limits powers of the states and guarantees encroachment by any state on fundamental rights of a citizen. *Sale v. Highway Com.*, 612. Deed conveying land for park on special limitation that it be used by persons of white race only *held* valid. *Recreation Com. v. Barringer*, 311.