# NORTH CAROLINA REPORTS

VOL. 243

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

FALL TERM, 1955

SPRING TERM, 1956

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1956

# CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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| 2 " | " | 3 | " |
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| 9 Iredell Law | as | 31 | N. C. |
| 10 " " | " | 32 | " |
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| 12 " " | " | 34 | " |
| 13 " " | " | 35 | " |
| 1 " Eq. | " | 36 | " |
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| 6 " " | " | 41 | " |
| 7 " " | " | 42 | " |
| 8 " " | " | 43 | " |
| Busbee Law | " | 44 | " |
| " Eq. | " | 45 | " |
| 1 Jones Law | " | 46 | " |
| 2 " " | " | 47 | " |
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| 5 " " | " | 50 | " |
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| 1 " Eq. | " | 54 | " |
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| Phillips Law | " | 61 | " |
| " Eq. | " | 62 | " |

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

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

# JUSTICES

OF THE

# SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1955—SPRING TERM, 1956.

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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:

WILLIAM B. RODMAN, JR.

---

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
CLAUDE L. LOVE,
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HARRY W. McGALLIARD,
JOHN HILL PAYLOR,
SAMUEL BEHRENDS, JR.,
ROBERT E. GILES.

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SUPREME COURT REPORTER:

JOHN M. STRONG.

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CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

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MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

LEONARD S. POWERS.

---

†On recall from 7 November, 1955, through 21 November, 1955, from 9 April, 1956, through 27 April, 1956.

# 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 H. 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 W. 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. |
| MAURICE E. BRASWELL | Ninth | Fayetteville. |
| 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. |

# SUPERIOR COURTS, SPRING TERM, 1956

## FIRST DIVISION

### First District—Judge Frizzelle

Camden—Apr. 9.
Chowan—Apr. 2; Apr. 30†.
Currituck—Jan. 23†; Mar. 5.
Dare—Jan. 16†; May 28.
Gates—Mar. 26; May 21†.
Pasquotank—Jan. 9†; Feb. 13†; Feb. 20* (2); May 7† (2); June 4* (2); June 18†.
Perquimans—Jan. 30† (2); Apr. 16.

### Second District—Judge Morris

Beaufort—Jan. 23* (2); Feb. 20† (2); Mar. 12*; May 7† (2); June 11†; June 25.
Hyde—May 21.
Martin—Jan. 9†; Mar. 19; Apr. 9† (2); May 28† (2); June 18.
Tyrrell—Feb. 6†; Apr. 23.
Washington—Jan. 16*; Feb. 13†; Apr. 2†; Apr. 30*.

### Third District—Judge Paul

Carteret—Mar. 12†; Apr. 2; Apr. 30†; June 11 (2).
Craven—Jan. 9 (2); Feb. 6† (3); Apr. 9; May 7† (2); June 4.
Pamlico—Feb. 13 (A) (2).
Pitt—Jan. 23†; Jan. 30; Feb. 27† (2); Mar. 19 (2); Apr. 16† (2); May 21; May 28†; June 25†.

### Fourth District—Judge Bundy.

Duplin—Jan. 23*; Feb. 13† (2); Mar. 12† (2); Apr. 2*; Apr. 23†.
Jones—Jan. 30† (S); Mar. 5; May 14†.
Onslow—Jan. 9 (2); Feb. 27; Mar. 26†; May 21 (2).
Sampson—Jan. 30 (2); Apr. 9† (2); Apr. 30*; May 7†; June 4† (2).

### Fifth District—Judge Stevens.

New Hanover—Jan. 16*; Jan. 23† (2); Feb. 13† (2); Feb. 27* (2); Mar. 12† (2); Apr. 9*; Apr. 16† (2); May 7† (2); May 21*; May 28† (2); June 11*; June 18† (2).
Pender—Jan. 9; Feb. 6†; Mar. 26; Apr. 30.

### Sixth District—Judge Moore.

Bertie—Feb. 13 (2); May 14 (2).
Halifax—Jan. 30 (2); Mar. 5† (2); Apr. 30; May 28† (2); June 11*.
Hertford—Feb. 27; Apr. 16 (2).
Northampton—Jan. 16† (S); Apr. 2 (2).

### Seventh District—Judge Parker

Edgecombe—Jan. 23*; Feb. 27* (2); Mar. 26† (A) (2); Apr. 23*; June 4 (2).
Nash—Jan. 30* (2); Mar. 12† (2); Apr. 9† (2); May 21* (2).
Wilson—Jan. 9† (2); Feb. 13* (2); Mar. 12† (A) (2); Mar. 26* (2); May 7* (2); June 18† (2).

### Eighth District—Judge Bone

Greene—Jan. 9†; Feb. 27; Apr. 30.
Lenoir—Jan. 16*; Feb. 13† (2); Mar. 19 (2); Apr. 16† (2); May 21† (2); June 18* (2).
Wayne—Jan. 23*; Jan. 30* (S); Feb. 6†; Mar. 5† (2); Apr. 2* (2); May 7† (2); June 4† (2).

## SECOND DIVISION

### Ninth District—Judge Seawell.

Franklin—Feb. 6*; Feb. 20† (2); Apr. 23† (2); May 14*.
Granville—Jan. 23; Apr. 9 (2).
Person—Feb. 13; Mar. 26† (2); May 28.
Vance—Jan. 16*; Jan 23* (S); Mar. 5*; Mar. 19†; June 18*; June 25†.
Warren—Jan. 9*; Jan. 30†; Mar. 12†; May 7†; June 4*.

### Tenth District—Judge Hobgood.

Wake—Jan. 9† (A) (2); Jan. 9*; Jan 16† (2); Jan. 23* (S); Jan. 30*; Feb. 6† (A) (2); Feb. 13† (2); Feb. 27* (2); Mar. 12† (2); Mar. 26† (A) (2); Mar. 26*; Apr. 2† (2); Apr. 16† (2); Apr. 30*; May 7† (2); May 21† (2); June 4† (A) (2); June 4* (2); June 18† (2); June 25* (A).

### Eleventh District—Judge Bickett.

Harnett—Jan. 9*; Jan. 16† (A) (2); Feb. 20† (2); Mar. 19*; Apr. 23† (2); May 21*; May 28†; June 11† (2).
Johnston—Jan. 16† (2); Feb. 13; Feb. 20 (A); Mar. 5† (2); Apr. 2† (2); Apr. 16*; May 7† (2); June 4; June 25*.
Lee—Jan. 30† (2); Mar. 26*; May 7† (A) (2); June 18† (A) (2).

### Twelfth District—Judge Williams

Cumberland—Jan. 9*; Jan. 23† (2); Feb. 6* (2); Feb. 20† (2); Mar. 12* (2); Apr. 2† (2); Apr. 16* (2); May 7† (2); May 21* (2); June 4† (2); June 18* (2).
Hoke—Jan. 16 (S); Mar. 5; Apr. 30.

### Thirteenth District—Judge Nimocks

Bladen—Feb. 20; Mar. 19† Apr. 23; May 21†.
Brunswick—Jan. 23; Feb. 27†; Apr. 30†; May 14.
Columbus—Jan. 9† (2); Jan. 30* (2); Mar. 5† (2); May 7*; June 18.

### Fourteenth District—Judge Mallard

Durham—Jan. 9*; Jan. 16† (2); Jan. 30*; Feb. 6† (2); Feb. 20* (2); Mar. 5† (2); Mar. 19*; Mar. 26* (2); Apr. 9† (2); Apr. 23*; Apr. 30† (2); May 14* (2); May 28† (2); June 11*; June 18* (2).

### Fifteenth District—Judge Hall

Alamance—Jan. 9† (2); Feb. 6† (2); Mar. 5* (2); Apr. 16† (2); May 7*; May 21† (2); June 11* (2).
Chatham—Jan. 30†; Feb. 20; Mar. 19†; May 14; June 18† (A).
Orange—Jan. 23†; Feb. 27*; Mar. 26†; Apr. 30*; June 25†.

### Sixteenth District—Judge Carr

Robeson—Jan. 9† (2); Jan. 23* (2); Feb. 27† (2); Mar. 12*; Mar. 26† (2); Apr. 9* (2); Apr. 23†; May 7* (2); May 21† (2); June 11*; June 18†.
Scotland—Feb. 6†; Mar. 19; Apr. 30†.

## THIRD DIVISION

### Seventeenth District—Judge Rousseau

Caswell—Mar. 5†; Mar. 26* (A).
Rockingham—Jan. 30* (2); Mar. 12*; Mar. 19†; Apr. 16† (2); May 21† (2); June 11* (2).
Stokes—Feb. 27*; Apr. 2*; Apr. 9†; June 25.
Surry—Jan. 9* (2); Feb. 13† (2); Mar. 26; Apr. 30* (2); June 4.

### Eighteenth District

### Schedule A—Judge Gwyn

Guilford Gr.—Jan. 9* (2); Jan. 23† (2); Feb. 6* (2); Feb. 27* (2); Apr. 16* (2); May 14* (2); June 11* (2).
Guilford H. P.—Feb. 20*; Mar. 12*; Mar. 19† (2); Apr. 2*; Apr. 30*; May 28*; June 4†.

### Schedule B—Judge Preyer

Guilford Gr.—Jan. 9† (2); Feb. 6† (2); Feb. 20†; Feb. 27† (2); Mar. 12† (2); Mar. 26*; Apr. 2† (2); Apr. 16† (2); Apr. 30† (2); May 28† (2); June 11† (2).
Guilford H. P.—Jan. 23*; Jan. 30†; May 14† (2).

### Nineteenth District—Judge Crissman

Cabarrus—Jan. 9 (2); Mar. 5† (2); Apr. 23 (2); June 11† (2).
Montgomery—Jan. 23*; May 21† (2).
Randolph—Jan. 30*; Feb. 6† (2); Apr. 2*; Apr. 9† (2); May 28† (A) (2); June 25*.
Rowan—Feb. 20 (2); Mar. 19† (2); May 7 (2).

### Twentieth District—Judge Armstrong

Anson—Jan. 16*; Mar. 5†; Apr. 16 (2); June 11*; June 18†.
Moore—Jan. 23†; Jan. 30*; Mar. 12†; Apr. 30*; May 21†.
Richmond—Jan. 9*; Feb. 13†; Mar. 19† (2); Apr. 9*; May 28† (2).
Stanly—Feb. 6†; Apr. 12; May 14†.
Union—Feb. 20 (2); May 7.

### Twenty-First District—Judge Phillips

Forsyth—Jan. 9 (2); Jan. 23† (3); Feb. 6 (A) (2); Feb. 13† (3); Mar. 5 (2); Mar. 19† (3); Apr. 9 (2); Apr. 23† (2); May 7† (A) (2); May 7 (2); May 21† (3); June 11 (2); June 18† (A) (2).

### Twenty-Second District—Judge Johnston.

Alexander—Mar. 12; Apr. 16.
Davidson—Jan. 30; Feb. 20† (2); Apr. 2† (2); Apr. 30; June 4† (2); June 25.
Davie—Jan. 23*; Mar. 5†; Apr. 23.
Iredell—Feb. 6 (2); Mar. 19†; May 21 (2).

### Twenty-Third District—Judge Olive

Alleghany—Jan. 30; Apr. 23.
Ashe—Apr. 2*; May 28†.
Wilkes—Jan. 16† (2); Jan. 30* (S); Feb. 20† (2); Mar. 12* (2); Apr. 30† (2); June 4 (2); June 18† (2).
Yadkin—Jan. 9; Feb. 6 (2); May 14.

## FOURTH DIVISION

### Twenty-Fourth District—Judge Moore

Avery—Apr. 30 (2).
Madison—Feb. 6†; Feb. 27; Mar. 26† (2); May 28* (2); June 25†.
Mitchell—Apr. 9 (2).
Watauga—Jan. 23*; Apr. 23*; June 11† (2).
Yancey—Jan. 30†; Mar. 5 (2).

### Twenty-Fifth District—Judge Huskins

Burke—Feb. 20; Mar. 12 (2); June 4 (2).
Caldwell—Jan. 23† (2); Feb. 27 (2); Mar. 26† (2); Apr. 23† (2); May 21 (2).
Catawba—Jan. 9† (2); Feb. 6 (2); Apr. 9 (2); June 18† (2).

### Twenty-Sixth District

### Schedule A—Judge Rudisill

Mecklenburg—Jan. 9* (2); Jan. 23† (2); Feb. 6† (3); Feb. 27† (2); Mar. 12* (2); Mar. 26† (2); Apr. 9* (2); Apr. 23† (2); May 7† (2); May 21† (2); June 4† (2); June 18* (2).

### Schedule B—Judge Campbell

Mecklenburg—Jan. 9† (2); Jan. 23† (2); Feb. 6†; Feb. 13* (2); Feb. 27† (2); Mar. 12† (2); Mar. 26† (2); Apr. 9† (2); Apr. 23† (2); May 7* (2); May 21† (2); June 4† (2); June 18† (2).

### Twenty-Seventh District—Judge Clarkson

Cleveland—Jan. 16† (S) (2); Jan. 30; Mar. 26† (2); Apr. 30 (2).
Gaston—Feb. 6† (2); Feb. 27* (2); Mar. 12† (2); Apr. 23*; May 28† (2); June 11*.
Lincoln—Jan. 16; Jan. 23†; May 14; May 21†.

### Twenty-Eighth District—Judge Froneberger

Buncombe—Jan. 9* (2); Jan. 16† (A); Jan. 23† (3); Feb. 13† (A) (2); Feb. 13*; Feb. 27† (3); Mar. 19† (A); Mar. 19*; Mar. 26† (3); Apr. 16* (2); Apr. 23† (A); Apr. 30† (3); May 21† (A) (2); May 21*; June 4† (3).

### Twenty-Ninth District—Judge Nettles

Henderson—Feb. 13 (2); Mar. 19† (2); May 7*; May 28† (2).
McDowell—Jan. 9*; Feb. 27† (2); Apr. 16*; June 11 (2).
Polk—Jan. 30; June 25.
Rutherford—Jan. 16 (2); Mar. 12; Apr. 23 (2); May 14 (2).
Transylvania—Jan. 9 (A) (2); Apr. 2 (2).

### Thirtieth District—Judge Pless

Cherokee—Apr. 2 (2); June 25†.
Clay—Apr. 30.
Graham—Mar. 19 (2); June 4 (2).
Haywood—Jan. 9† (2); Feb. 6 (2); May 7† (2).
Jackson—Feb. 20 (2); May 21 (2); June 18†.
Macon—Apr. 16 (2).
Swain—Mar. 5 (2).

*Indicates criminal term.
†Indicates civil term.
‡Indicates jail and civil term.
(S) Indicates special 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. GLENIS S. GAMM, Deputy Clerk.

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

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

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

### OFFICERS

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

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*Hudson v. R. R.*, 242 N.C. 650. Petition for *certiorari* pending.

**DISPOSITION OF APPEALS TO THE SUPREME COURT OF THE UNITED STATES.**

*Recreation Commission v. Barringer*, 242 N.C. 311. Petition for Writ of *Certiorari* denied 5 March, 1956.

*S. v. McPeak*, 243 N.C. 243. Petition for Writ of *Certiorari* denied 30 April, 1956.

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# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH

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## FALL TERM, 1955

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WACHOVIA BANK AND TRUST COMPANY v. JOHN G. MILLER AND WIFE, PEARL L. MILLER; GEORGE J. MILLER; NICK J. MILLER AND EVAGELIA J. MILLER.

(Filed 2 November, 1955.)

**1. Boundaries § 6—**

Where the boundary line called for in a deed is actually located on the premises is an issue of fact.

**2. Quieting Title § 1—**

G.S. 41-10 is a remedial statute and is to be liberally construed to advance the remedy and permit the courts to bring the parties to an issue.

**3. Adverse Possession § 19—**

In an action to establish title to land, the failure of plaintiff to show valid record title to the disputed area does not justify nonsuit when plaintiff alleges title by seven years adverse possession under color of title, and introduces supporting evidence.

**4. Adverse Possession § 9a—**

While an instrument that passes title is not color of title, where the deeds under which plaintiff claims convey title only to a part of the land described therein, but do not convey valid title to the area in dispute, such deeds are color of title as to the disputed area.

**5. Adverse Possession § 9b—**

Possession taken under color of title is commensurate with the limits of the tract to which the instrument purports to convey title provided there has been no adverse possession of the tract in part or in whole by another, and possession under such deed which is exclusive, open, continuous and

adverse for seven consecutive years will ripen into an unimpeachable title to the whole, title being out of the State. G.S. 1-38.

**6. Same—**

A deed is not color of title beyond the boundaries set forth in the instrument.

**7. Same—**

Color of title, without adverse possession thereunder, does not operate to give constructive possession.

**8. Adverse Possession § 9c—**

A party claiming under a deed as color of title must fit the description in the deed to the land it conveys by proof in accordance with appropriate law.

**9. Boundaries §§ 3b, 3e—**

As a general rule, course and distance must give way to a call for a natural boundary, and a call to the line of an adjacent tract, if well known and established, is a call to a natural boundary.

**10. Adverse Possession § 7—**

The party claiming adverse possession under color of title may tack the possession of the predecessors in his chain of title.

**11. Adverse Possession § 19—**

In this trial by the court under agreement of the parties, there was competent evidence to support the judge's findings of fact that the possession of defendants and their predecessors in title was not adverse to the ownership of the land in dispute, which was claimed by plaintiff and its predecessors in title under color of title.

**12. Adverse Possession §§ 5, 19—**

Plaintiff claimed title to the area in dispute under color of title, and introduced in evidence deeds in its chain of title which called for the line of the adjacent lot as the boundary. The line of the adjacent lot was known and established, and plaintiff introduced evidence of actual or constructive possession up to that line. *Held:* In trial by the court under agreement of the parties, the evidence supports the court's findings that the line of the adjacent lot was the boundary to which plaintiff claimed under color of title, plaintiff's deeds not being offered in evidence for the purpose of establishing record title to the disputed area or the purpose of establishing the corner by reference to the line of a junior conveyance.

**13. Trial § 55—**

In a trial by the court under agreement of the parties, the court's findings of fact are conclusive if supported by competent evidence, notwithstanding the introduction of evidence to the contrary by the adverse party.

**14. Adverse Possession § 21—**

In this trial by the court under agreement of the parties, the court found that plaintiff and its predecessors in title went into possession upon the delivery of the deeds under which plaintiff claimed under color of title,

and that plaintiff and its predecessors in title had been in continuous adverse possession of the *locus in quo* from a date more than seven years prior. *Held:* The findings are sufficient to support judgment in plaintiff's favor, notwithstanding the absence of specific finding that the deeds in plaintiff's chain of title were color of title and of adverse possession thereunder for seven years.

**15. Appeal and Error § 40d—**

A finding of fact relating to a matter not alleged in the pleading must be stricken on exception and assignment of error.

**16. Same—**

A finding of fact not supported by any evidence in the record must be stricken on exception and assignment of error.

**17. Boundaries § 9—**

In an action to establish a boundary between contiguous tracts, the burden of locating the true boundary line is on plaintiff.

**18. Ejectment § 15—**

In an action to establish title to land, plaintiff must rely upon the strength of its own title and not upon the weakness or want of title in the defendants.

DEVIN, E. J., and WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

APPEAL by defendants from *Clarkson, J.*, May Term 1955 of MECKLENBURG.

Statutory action to quiet title to realty against an adverse claim.

The parties waived in writing their right to a trial by jury, and consented to a trial of the issues of fact by the court.

These are the material findings of fact by the court:

*One.* The property in dispute is a rectangular tract of land 5.44 feet by 100 feet, and shown on the plat attached to the complaint marked Exhibit "A," as lying between the lines E-F and B-D marked in red upon the plat.

*Two.* The plaintiff, and its predecessors in title, have an unbroken record title to the land in dispute from deed of W. D. Duckworth *et al.* to James J. Sims *et al.* dated 24 March 1881, and properly recorded, up to and including deed from E. C. Griffith, and wife, to plaintiff dated 9 March 1953, and duly recorded.

*Three.* Thomas Cavalaris and John J. Lampros, plaintiff's predecessors in chain of title, were conveyed a lot of land, which included the land in dispute, by deed of the Penn Mutual Life Insurance Co., dated 21 June 1943, and properly recorded: upon the delivery to them of this deed they entered into possession of this lot, and occupied the same

adversely to all the world until a sale of this lot to the plaintiff by E. C. Griffith, its agent.

*Four.* This land was conveyed by deed to E. C. Griffith, as agent for plaintiff, by Thomas Cavalaris, and wife, and John J. Lampros, and wife; the deed bearing date of 4 March 1953 is properly recorded. Upon delivery of this deed E. C. Griffith, as agent for plaintiff, entered upon the lot, and occupied it adversely to the world as agent for plaintiff, until he conveyed it to plaintiff.

*Five.* On 9 March 1953 E. C. Griffith, and wife, conveyed this lot by deed properly recorded to plaintiff, which took possession of the lot, and has occupied it adversely to the world to the present.

*Six.* The H. G. Springs line referred to in the descriptions contained in deeds constituting plaintiff's chain of title is the line B-D shown on the plat attached to the complaint, and marked Exhibit "A," which is the eastern boundary of plaintiff's lot.

*Seven.* The western boundary of the property described in the deed from Zetta M. Ross, *et al.* to the defendants, and dated 24 March 1945, is the line B-D shown on the plat marked Exhibit "A," attached to the complaint.

*Eight.* Any occupancy of the land in dispute by the defendants Miller, and their predecessors in title, was not under visible metes and bounds, nor was it continuous or hostile, and, therefore, it was not adverse to the ownership of the land in dispute by plaintiff, and its predecessors in title.

*Nine.* Any occupancy of the land in dispute by the Ross heirs, grantors in the quitclaim deed to the defendants, which deed is dated 9 February 1955 subsequent to the institution of this action, was not under visible metes and bounds, nor was it hostile or continuous, and, therefore, it was not adverse to the ownership of the land in dispute by plaintiff's predecessors.

The court made these conclusions of law:

*One.* The plaintiff is the owner of, and entitled to possession of the lot set forth in the complaint, and more particularly described as follows:

"Beginning at a point in the easterly margin of South Church Street, which point is S. 45-18-30 W. 198 feet from the point of intersection of the easterly margin of South Church Street and the southerly margin of West Trade Street, and runs thence with the easterly margin of South Church Street S. 45-18-30 W. 100 feet to a point; thence S. 48-10-45 E. 103.24 feet to a stake; thence with the westerly line of the property of John G. Miller and others N. 45-08-40 E. 100 feet to a stake in said line; thence S. 48-10-30 E. 103.44 feet to the point of Beginning, which

includes the rectangular tract of land 5.44′ x 100′ which was in dispute in this case."

*Two.* The defendants to deliver immediate possession of the strip of land in dispute to plaintiff.

The defendants excepted, and appealed, assigning errors.

*Bell, Bradley, Gebhardt & DeLaney for Plaintiff, Appellee.*

*Maurice A. Weinstein and George J. Miller for Defendant, Appellants.*

PARKER, J. The controversy in this cause is the proper location of the boundary line between two adjacent lots. It is so stated in the briefs of the parties. Penn Mutual Life Insurance Co., by deed dated 21 June 1943, conveyed to Thomas Cavalaris and John J. Lampros a certain lot, they conveyed by deed this lot to E. C. Griffith, and he conveyed it by deed to plaintiff. In all of these deeds the rear or eastern boundary line of this lot is described as the Springs line. Plaintiff contends that the line B-D shown on the plat attached to the complaint, marked Exhibit A, is the Springs line: the defendant contends the line E-F shown on the same plat is the Springs line. The land in dispute is a rectangular tract of land 5.44 feet wide and 100 feet long. According to these deeds, the rear or eastern boundary line of plaintiff's lot is the Springs line. Where the Springs line is actually located on the premises is an issue of fact. *Lance v. Cogdill,* 236 N.C. 134, 71 S.E. 2d 918; *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169; *Davidson v. Arledge,* 88 N.C. 326.

The defendants assign as error the failure of the court to sustain their motion for judgment of nonsuit, for the reason that the plaintiff has neither alleged nor shown color of title and adverse possession for seven years under color of title. Plaintiff alleged in its complaint that it "is the owner of a valid, fee simple and record title" to this lot, and sets forth the three deeds above mentioned. Plaintiff states in its brief: "There was no attempt to show title out of the State, or to prove that the deed to Cavalaris conveyed a valid title to any part of plaintiff's land." Plaintiff's evidence shows the correctness of this statement in its brief. Plaintiff bases its claim on seven years adverse possession under color of title. G.S. 1-38. This action was brought under the provisions of G.S. 41-10 to quiet title: a remedial statute liberally construed "to advance the remedy and permit the courts to bring the parties to an issue." *Land Co. v. Lange,* 150 N.C. 26, 63 S.E. 164. Since there is only one cause of action for one specific thing, we see no reason why, if the plaintiff fails to establish its right to recover by a valid,

record title, it should be denied the privilege of resorting to seven years adverse possession under color of title.

Defendants in support of their contention that plaintiff has not shown color of title cites this language from *Justice v. Mitchell,* 238 N.C. 364, 78 S.E. 2d 122: "An instrument that passes title is not color of title." The defendants contend that the deed to plaintiff conveyed a valid, legal title to this lot, except as to the area of land in dispute. Plaintiff's evidence does not show that the deed to Cavalaris and Lampros conveyed to them a valid, legal title to this lot, and the plaintiff makes no such contention. A grantor can convey to his grantee no better title than he has. *Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479. Plaintiff offered in evidence the deeds from Penn Mutual Life Insurance Co. to Cavalaris and Lampros, from them to Griffith, and from him to it. These deeds on their face purport to convey this lot by definite lines and boundaries. The description of this lot in these deeds is substantially the same, and in all of them plaintiff's rear or eastern boundary line is described as the Springs line. Plaintiff by proof fitted the description in these deeds to the lot. These deeds are color of title for the land designated and described therein. *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Davidson v. Arledge, supra.* Even if we concede that these deeds did convey a valid, legal title to this lot, except as to the disputed area, as contended by the defendants, which we do not, still these deeds would be color of title as to the area in dispute, provided the area in dispute is embraced within the description of these deeds. *Ingram v. Colson,* 14 N.C. 520.

It is thoroughly established law that when a person having color of title to a particular tract of land, which the written instrument, that is color of title, describes by known and visible lines and boundaries, enters into and adversely holds a part of such tract under the authority ostensibly given him by such instrument asserting ownership of the whole, his ensuing possession is not limited to the portion of the tract as to which there has been an entry or actual possession, but is commensurate with the limits of the tract to which the instrument purports to give him title, provided that at the inception, and during the continuance of the possession, there has been no adverse possession of the tract in whole or in part by another: and in this State such possession, if exclusive, open, continuous and adverse for seven consecutive years, the title being out of the State, will ripen into an unimpeachable title to the whole, provided there has been and is no adverse possession of the tract in whole or in part during such seven consecutive years by another. G.S. 1-38; *Wallin v. Rice,* 232 N.C. 371, 61 S.E. 2d 82; *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56; *Vance v. Guy,* 223 N.C. 409, 27 S.E. 2d 117; *Ray v. Anders,* 164 N.C. 311, 80 S.E. 403; *Simmons v.*

*Box Co.*, 153 N.C. 257, 69 S.E. 146; *Haddock v. Leary*, 148 N.C. 378, 62 S.E. 426; 2 C.J.S., Adverse Possession, Sec. 183, where cases are cited from many jurisdictions. Beyond such boundaries set forth in the written instrument his possession cannot go under color of title. *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 458; 1 Am. Jur., Adverse Possession, p. 910. "A deed is never color of title for more than it professes to convey." *Carson v. Carson*, 122 N.C. 645, 649, 30 S.E. 4.

Color of title, without adverse possession thereunder, does not operate to give constructive possession. *Carswell v. Morganton*, 236 N.C. 375, 72 S.E. 2d 748.

A party introducing a deed in evidence, which he intends to use as color of title must fit by proof the description in the deed to the land it covers in accordance with appropriate law relating to course and distance and natural objects called for as the case may be. *Williams v. Robertson, supra; Locklear v. Oxendine*, 233 N.C. 710, 65 S.E. 2d 673.

"It is true that the general rule is that course and distance must give way to a call for a natural boundary, and that the line of an adjacent tract, if well known and established, is a natural boundary." *Lumber Co. v. Hutton*, 152 N.C. 537, 68 S.E. 2. ". . . another's line called for, if known and established, is usually treated as a monument." *Newkirk v. Porter*, 237 N.C. 115, 74 S.E. 2d 235.

The plaintiff can tack its possession of the lot with the successive possession of Cavalaris and Lampros and Griffith for the purpose of showing a continuous adverse possession for seven years because there is a privity of estate or connection of title between the several occupants. *Newkirk v. Porter, supra; Locklear v. Oxendine, supra.*

The evidence shows these facts: Plaintiff's lot is designated as Lot 2, the defendants' lot as Lot 1. Cavalaris collected rents on Lot 2 from the date of purchase on 21 June 1943, until they conveyed it to Griffith, an agent of plaintiff, on 4 March 1953. Griffith conveyed this lot to plaintiff on 9 March 1953, which has collected rent on it since. When Cavalaris and Lampros bought Lot 2, the disputed area was being used by the tenants and owners of Lot 1, and later a one-story concrete building attached to a building on Lot 1 was erected on the disputed area. Miller never told Cavalaris he owned the disputed area. Cavalaris never discussed the matter with Miller, because he didn't know where his back line was located on the premises.

In 1945 the heirs of John D. Ross conveyed Lot 1 to the defendants by deed: the disputed area is not included in the description in this deed. Charles B. Ross, a son of John D. Ross, handled Lot 1 from his father's death in 1934, until it was sold to the defendants. He never claimed to own the disputed area of land, nor authorized any one to

claim it for him. The Ross heirs in 1955, after the institution of this action, gave the defendants a quitclaim deed for the disputed area.

W. M. Malcolm, a carpenter, in 1949 or 1950 did some patch work on the concrete building on the disputed area for Mr. Miller, who said he didn't want to spend much money on it, because it was not his property, and that someone was going to let him use it.

Spero Athans, a witness for the defendant, testified that he was a tenant on Lot 1 from 1920 to 1944, paying rent to John D. Ross, and after his death to his heirs; that there was a coal bin in the disputed area which he used; that he built a fence on it to prevent pilfering from the rear of his restaurant; others used this area back of his restaurant to park cars; he told no one this area belonged to him or his landlord; no one objected to his using it.

John G. Miller, one of the defendants, testified he bought Lot 1 in 1945, and knew the disputed area was not embraced in the description of his deed; in 1950 he built the concrete building on this area; he personally moved into the building on Lot 1 in 1948 and since has used the spot where the concrete building is; that he never told Malcolm he didn't want to spend any money in this area, because it wasn't his.

There is competent evidence in the record to support the judge's findings of fact that any occupancy of the land in dispute by the defendants Miller and by the Ross heirs was not adverse to the ownership of the land in dispute by plaintiff and its predecessors in title.

The next question presented is whether there is competent evidence to support the judge's findings of fact that the Springs line is the line B-D shown on the plat attached to the complaint, and marked Exhibit A.

Lot 1 was Lot 19 of the real estate of H. G. Springs, deceased, as sold by commissioners. W. A. Blankenship, a registered engineer, surveyed the defendants' Lot 1 from a description the defendants gave him. He surveyed the entire area. Lot 1 goes beyond Lot 2 to West Trade Street, and on West Trade Street the building on Lot 1 is adjacent to other buildings. Blankenship testified the line between the defendants' property and the adjacent property is well defined by two independent walls, so he had little difficulty in establishing that line and projecting it to the rear part of Lot 2: that line is the line B-D on the plat marked plaintiff's Exhibit A: that he had known the front portion of this line for 30 years. He further testified that according to the map of the Springs property in 1904, which is recorded, the western line of Lot 1 is the line B-D shown on the plat marked Exhibit A. "We reached a very firm conclusion as to where the westerly property line of the H. G. Springs lot was."

In the deeds to Cavalaris and Lampros, from them to Griffith, and from him to plaintiff, Lot 2 is described as beginning at a certain place formed by the intersection of West Trade and South Church Streets and running back 98 feet to a stone, now or formerly P. M. Morris' line, thence South 49-52 West with the Springs line 100 feet to a stake in Lethco's line, thence with his line North 42-40 West 98 feet to a stake in the southeasterly margin of South Church Street, thence to the beginning. We have abbreviated the description, merely setting forth the metes and bounds that are pertinent. Blankenship surveyed Lot 2, and when he went back 98 feet from South Church Street parallel with West Trade Street on the northeast side and 98 feet back on the southwest side as called for in plaintiff's deed, he found that the lines of Lot 2 did not coincide with the line of Lot 1. He lacked 5.44 feet of reaching the line B-D on the plat marked Exhibit A on the northeasterly side and 5.24 feet of coming to the corner of Lot 1 on the southwesterly side. He was unable to find any monument or stone at the termination of the 98 feet measurement. The line E-F was put on the plat marked Exhibit A, because it is 98 feet from the easterly margin of South Church Street. The Harris map of the City of Charlotte showed in 1855 the width of South Church Street as 55 feet: its width today is 47.8 feet. According to the line of buildings North Church Street, where it enters West Trade Street, is about 5 feet wider than South Church Street where it enters into West Trade Street on the other side.

There is evidence to show that the Springs line was well known and established by two independent walls to buildings on adjacent lands and as such it was a natural boundary. *Lumber Co. v. Hutton, supra.* Such being the case, the call for 98 feet must give way to the call for the Springs line, and the distance will be extended to that line. *Newkirk v. Porter, supra; Jennings v. White,* 139 N.C. 23, 51 S.E. 799. The defendants' contention that in the chain of title to plaintiff's lot all conveyances from 1806 to 1881 describe Lot 2 as having a depth of 98 feet, and all conveyances since 1881 describe the depth as 98 feet and the rear line as the Springs line, that the boundaries set forth in senior grants control later grants, and therefore the depth cannot be extended beyond 98 feet to the Springs line, is untenable on the facts here. In this case plaintiff did not resort to a junior conveyance for the purpose of locating a corner or line referred to or described as being established by a previous deed or grant. Plaintiff's evidence located where the Springs line was on the premises from the defendants' deed and a map of the Springs property, which were not in its line of title. The deeds of former owners of Lot 2 were introduced by plaintiff for the purpose of explaining the reference to the Springs line contained in the Cavalaris and Lampros deed, and there was no proof to fit the description in all

these deeds to Lot 2. Further, plaintiff is relying upon seven years adverse possession under color of title, and not upon a connected chain of title.

There is competent evidence to show that Cavalaris, Lampros, Griffith and plaintiff had color of title to Lot 2 including the disputed area; that the Springs line referred to in their deeds is the line B-D shown on the plat marked Exhibit A, that the western boundary of Lot 1 as described in the deed of the Ross heirs to defendants in 1945 is the line B-D shown on the same plat, that Cavalaris and Lampros in 1943 under the authority ostensibly given them by their deed entered into and adversely held a part of Lot 2 until its sale to Griffith, and that their possession was commensurate with the limits of Lot 2 to which their deed purported to give them title, because there was no adverse possession of Lot 2 in whole or in part by another: that the same facts exist as to Griffith and plaintiff to the present: and that plaintiff tacking on its adverse possession to Griffith and Cavalaris and Lampros has shown adverse possession for seven consecutive years under color of title. The defendants offered evidence to the contrary, but the trial judge upon competent evidence found the facts as contended for by plaintiff. The parties having consented to a trial by the court without a jury, the findings of fact by the court, supported by competent evidence, are as conclusive as the verdict of a jury. *Lovett v. Stone, supra.*

The defendants' assignments of error as to the overruling of their motions for judgment of nonsuit made at the close of plaintiff's evidence, and renewed at the close of all the evidence are not sustained.

While the judge did not find that the deeds to Cavalaris and Lampros, to Griffith and plaintiff were color of title, he did find that the grantees in these deeds upon delivery of them entered into possession of Lot 2. Though he did not explicitly find adverse possession in these grantees for seven years under color of title, he did find continuous adverse possession in them from 1943 to the present. The judge has found the ultimate facts, which though meager, seem to be sufficient. The defendants do not contend in their brief that the findings of adverse possession are insufficient to support the judgment.

All of the defendants' assignments of error are overruled, except assignments of error Nos. 4 and 5.

Assignment of error No. 4 is to this finding of fact: "3. In its Complaint the plaintiff claims a valid fee simple title to the property in controversy (by virtue of an unbroken chain of deeds from 1881 to date and adverse possession under color of title in itself and those under whom it claims for eleven years before this action was commenced on December 14, 1954.)" This assignment of error is sustained as to the

part of the finding put in parenthesis, because no such allegations appear in the complaint.

Assignment of error No. 5 is to this finding of fact: "5. That the plaintiff and its predecessors in title have an unbroken record title to the property in question from deed of W. D. Duckworth, *et al.*, to James J. Sims, *et al.*, dated March 24, 1881, and recorded in the office of the Register of Deeds of Mecklenburg County on March 28, 1881, in Deed Book 27 at page 26, to and including deed from E. C. Griffith and wife to the Wachovia Bank and Trust Company, plaintiff herein, dated March 9, 1953, and recorded in the office of the Register of Deeds of Mecklenburg County on the 14th day of December, 1953, in Book 1653 at page 22." This assignment of error is sustained. Plaintiff states in its brief the deeds offered by it prior to the deed to Penn Mutual Life Insurance Co. were offered for the purpose of explaining the reference to the Springs line contained in the Cavalaris and Lampros deed. The plaintiff offered no evidence to fit the description contained in all these prior deeds to the descriptions contained therein. *Skipper v. Yow*, 238 N.C. 659, 78 S.E. 2d 600. In addition it seems from the *parts* of these prior deeds appearing in the record that there is not an unbroken record title from the Duckworth *et al.* deed to Griffith's deed to plaintiff.

The findings of fact that remain are supported by competent evidence and support the judge's conclusions of law. The burden of establishing the true location of the rear boundary line of Lot 2 was on the plaintiff. *Boone v. Collins*, 202 N.C. 12, 161 S.E. 543. The plaintiff must rely upon the strength of its own title, and not upon the weakness or want of title in the defendants. *McDonald v. McCrummen*, 235 N.C. 550, 70 S.E. 2d 703. The plaintiff successfully carried its burden to the satisfaction of the judge below. The judgment below will be modified by striking out the part of finding of fact No. 3 in parenthesis, and by striking out finding of fact No. 5 in its entirety and with this modification the judgment below is

Modified and affirmed.

DEVIN, E. J., and WINBORNE and HIGGINS, JJ., took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND THE ALEXANDER RAILROAD COMPANY ET AL. V. STATE OF NORTH CAROLINA; THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE GRANGE; THE FARMERS COOPERATIVE COUNCIL; THE FARMERS COOPERATIVE EXCHANGE; AND THE NORTH CAROLINA FARM BUREAU FEDERATION.

(Filed 2 November, 1955.)

**1. Judgments § 19—**

An order signed out of the county and out of the district without notice to the adversary parties and without their consent is void.

**2. Same: Appeal and Error § 14—**

Notice of appeal from a void order does not take the cause out of the Superior Court, and the judge has power thereafter to enter a subsequent order in the cause.

**3. Constitutional Law § 8a—**

The establishment of State policy is the prerogative of the General Assembly.

**4. Same: Utilities Commission § 1—**

The standard provided by the General Assembly for the fixing of rates for public utilities operating in this State, and whether such standard is outmoded, lie within the exclusive province of the General Assembly, the Utilities Commission not being a policy-making agency.

**5. Utilities Commission § 1—**

The General Assembly has provided the standard to be followed by the Utilities Commission in fixing charges to be made by public utilities operating in this State, and such standard is binding upon the Commission and the courts.

**6. Utilities Commission § 3—**

An order of the Utilities Commission granting a petition of railroad companies for increase in intrastate freight rates, entered without any evidence of the fair value of the respective properties of the companies used and useful in conducting their intrastate business separate and apart from their interstate business, is unsupported by evidence of the type required by G.S. 62-124, and judgment of the Superior Court reversing such order is without error.

**7. Same—**

In determining a petition for increase in intrastate freight rates, the Utilities Commission must follow the standard prescribed by statute, and whether the Interstate Commerce Commission may thereafter order an increase in intrastate rates if the Utilities Commission should deny the petition, is irrelevant.

APPEAL by petitioners from *Harris, J.*, October Term, 1953, WAKE.

Proceeding before the North Carolina Utilities Commission upon petition of the railroads operating in the State of North Carolina to make increases in the intrastate freight rates and charges in the State. On 3 January 1952, the Utilities Commission granted the petitioners a six per cent increase in their freight rate schedules for intrastate shipments. This six per cent increase is not at issue. A petition was filed by the various railroads of the country with the Interstate Commerce Commission, hereinafter referred to as I. C. C., for general increase in the freight rate charges for interstate shipments. A hearing was had at which the Utilities Commission and like agencies in other States had representatives present who "participated" in the hearing. The I. C. C., in proceedings known as *Ex Parte* 175, allowed a fifteen per cent increase, with few exceptions, on interstate shipments of freight.

On 2 June 1952, the North Carolina carriers filed their petition herein, seeking authority to increase their intrastate rates an additional nine per cent so that they would conform with the increase allowed for interstate shipments. The petition was allowed, such increase to expire 28 February 1953. Later the expiration date was extended to 28 February 1954.

The Attorney-General of the State of North Carolina and others, protesting the increases, appealed to Wake Superior Court.

The case came on for hearing on 10 October 1953 at the October Civil Term before Harris, Judge of the then Seventh Judicial District. At the conclusion of the oral argument, counsel for the appellants tendered to the court a judgment and moved that it be signed and entered as the judgment of the court. At the conclusion of the hearing, the court announced that it would take the matter under consideration, no objection being entered thereto. On the following day, 20 October 1953, counsel for the railroads, pursuant to an informal agreement with counsel for appellants, tendered to the court a judgment, this being treated and regarded by all parties as a motion for the signing and entering of such judgment.

Thereafter, on 4 February 1954, Harris, J., signed and entered the judgment so tendered to him by the appellants at the hearing on 19 October 1953, the same being signed out of term and out of the Seventh Judicial District, the judge being then a patient in Memorial Hospital at Chapel Hill, North Carolina.

On 10 February 1954, counsel for the railroads, after notice to appellants, appeared before Harris, J., who was still a patient in Memorial Hospital, and entered their motion for an order permitting the railroads to continue to charge the rates as authorized by the said order of the Utilities Commission until 28 February 1954. The motion was allowed and an order permitting the railroads to continue to collect the said

freight charges until 28 February 1954 was entered upon conditions set forth in the said order.

On 12 February 1954, the railroads gave due notice of their appeal to the Supreme Court of North Carolina from the judgment of 4 February 1954.

On 3 March 1954, Harris, J., having returned to Wake County from Chapel Hill, re-signed the identical judgment previously signed by him on 4 February 1954 while he was in the hospital. On 12 March 1954, the said railroads gave due notice of their appeal to the Supreme Court of North Carolina from the re-signing of the said judgment.

The order of the Utilities Commission dated 9 July 1953, which was reversed on appeal by the court below, was based, in part, on these findings: (1) "That the revenue needs of the railroads operating in North Carolina since the decision in the Divisions Case . . . are substantially the same as that of railroads operating in other sections of the United States;" (2) "That the disparity between intrastate rates within the State of North Carolina and the interstate rates in effect to and from points in this State, constitute an unlawful discrimination, and is inconsistent with the policy of this State in its long and successful effort in CLASS RATE INVESTIGATION, DOCKET No. 28300, for a uniform level of class rates;" and (3) "That, subject to exceptions . . . the additional increase in intrastate rates herein requested amounting to approximately 9% is fair, just and reasonable."

In addition, the order of the Utilities Commission which is the subject of this appeal is based upon the following interpretation of the opinion and order of the I. C. C. in the proceeding before it known as *Ex Parte* 175:

"In other words, under the findings of the Interstate Commerce Commission in a cooperative proceeding in which state commissions, including this Commission, participated, it is necessary that all basic freight rates and charges, interstate and intrastate, be increased 15% to produce the revenue needs of the railroads."

The court below concluded as a matter of law that the above-quoted findings were not supported by any substantial evidence and were arbitrary and capricious. It also found that the above-quoted interpretation of the opinion and order of the Interstate Commerce Commission was erroneous as that order did not undertake to fix or regulate intrastate rates.

The court below also concluded that the order appealed from was erroneous and in excess of the authority conferred upon the Utilities Commission in that there was no evidence to show, and the Commission did not find, the value for rate making purposes of the property of the petitioning railroads used and useful in the performance by them of the

service of transporting freight in intrastate commerce. Also, the court concluded that there was no evidence tending to show the rate of return earned by the petitioning railroads upon such properties from the transportation of freight in intrastate commerce, as a basis for increasing said rates.

The court below likewise concluded that the order of the Commission was erroneous and in excess of its authority in that there was no evidence to show that the rates in effect prior to the order were insufficient to permit the petitioning railroads to earn a fair return upon the value, for rate making purposes, of their properties used and useful in the transportation of freight in intrastate commerce, or that any increase was necessary in order to enable the railroads to earn in the reasonable future a fair return upon such value of their properties, or to show that the rates fixed by the order appealed from were just and reasonable.

The order of the Commission also contained a finding that the intrastate rates in North Carolina were depressed and were creating a discrimination which could not successfully be defended. A fear was expressed that "In attempting to maintain this position we will certainly run afoul of the provisions of U. S. Code, Title 49, Sec. 13 (4) which could take from this Commission its jurisdiction over intrastate freight rates in this State."

A petition of the Commission to the I. C. C. growing out of another proceeding was relied on in this proceeding. It is, in part, as follows:

"That the North Carolina Corporation Commission desires to cooperate to the fullest extent with the Interstate Commerce Commission.

It realizes from the order made in the instant case that the state and interstate rates in issue must be on a parity. The object of both commissions should be to see that this result is accomplished without manifest unfairness. With the express understanding, and upon the express condition that the North Carolina Corporation Commission will cooperate fully with the Interstate Commerce Commission by permitting the carriers to establish their intrastate class rates on the interstate level, and with the further understanding that the North Carolina Corporation Commission has no intention or desire to maintain commodity rates on any articles within the scope of the complaint on a basis lower than the rates actually governing the movement of interstate traffic of the same nature from Virginia to North Carolina, it is requested that the Commission suspend the operation of its order dated February 11, 1930, in order to permit the North Carolina Corporation Commission to bring about the establishment of rates in harmony with the findings of the Interstate Commerce Commission."

Counsel for the petitioners stipulated that no railroad "has or can supply for the record the investment which is attributable to intrastate

freight or intrastate freight and passenger service in North Carolina. It cannot attribute to the intrastate freight or the intrastate freight and passenger service combined, the proportion of operating expenses."

The court below concluded that the order of the Commission dated 9 July 1953 was arbitrary, capricious, in excess of the statutory authority of the Commission, and was unsupported by competent, material and substantial evidence.

The order of the Utilities Commission of 9 July 1953 was reversed by the lower court in each judgment signed by Harris, J. The petitioners excepted and appealed.

*Attorney-General McMullan, Assistant Attorneys-General Lake, and Paylor for the State of North Carolina and the Department of Agriculture of the State of North Carolina, appellees.*

*W. T. Joyner, H. E. Powers, A. J. Dixon, and H. J. Karasin for petitioner appellants.*

*Broughton & Broughton for North Carolina Farm Bureau Federation, North Carolina State Grange, Farmers Cooperative Council, and Farmers Cooperative Exchange, appellees.*

BARNHILL, C. J. The order entered herein by Harris, J., on 4 February 1954, at Chapel Hill, N. C., was signed out of the County of Wake and out of the District without notice to the adversary parties and without consent that the cause might be thus heard. The order is void. *Patterson v. Patterson,* 230 N.C. 481, 53 S.E. 2d 658; *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445, and cases cited; *Jeffreys v. Jeffreys,* 213 N.C. 531, 197 S.E. 8; *Collins v. Wooten,* 212 N.C. 359, 193 S.E. 385; *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650; *McNeill v. Hodges,* 99 N.C. 248; *Godwin v. Monds,* 101 N.C. 354. The notice of appeal therefrom did not serve to take the case out of the Superior Court or to deprive the proper Superior Court Judge of jurisdiction in Wake County. *Ferrell v. Hales,* 119 N.C. 199; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143. Hence the cause pending before us on this appeal is the order signed by Harris, J., in Wake County on 3 March 1954 from which the petitioners appealed.

The Utilities Commission is not a policy-making agency of the State. That prerogative rests in the General Assembly. While its long line of decisions cited in the opinion written by Hunter, Commissioner, may establish a uniform policy of the Commission, it does not and cannot be regarded as State policy.

The Commission expressed the fear that it would lose its jurisdiction over intrastate rates unless it made the intrastate schedule of freight charges conform to the schedule adopted by the I. C. C. for interstate

commerce and states in its opinion that it had assured the I. C. C. that if it was permitted to retain jurisdiction over the intrastate freight rates to be charged by railroads operating in North Carolina, then it, the Commission, would establish rates on a parity with the rates already approved by the I. C. C. for interstate shipments. In view of these facts, we are unable to perceive how the Commission could hear the evidence of the protestants and weigh and consider the same with the cold neutrality of impartial judges.

Be that as it may, this case comes within a very narrow compass. The Legislature, in adopting G.S. 62-124, has provided the standard to be followed by the Utilities Commission in fixing charges to be made by public utilities operating in this State. *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.,* 239 N.C. 333, 80 S.E. 2d 133. It may be that this standard is outmoded, and some other more feasible procedure should be provided. That is a question for the General Assembly to determine. So long as the law remains as it is now written, it is binding both upon the Commission and upon this Court. It is frankly stipulated that the petitioners had no testimony tending to show, and they were unable to prove, the fair value of their respective properties used and useful in conducting their intrastate business, separate and apart from their interstate business. This being true, the order entered by the Commission is unsupported by evidence of the type required by this statute. It follows that the court below committed no error in entering its order dated 3 March 1954.

In *Ex Parte* 175 the I. C. C. granted a fifteen per cent increase in interstate rates only. It is apparent that it anticipated that the rate-making agencies in the several States would grant a like increase for intrastate shipments of freight. The Mississippi Public Service Commission declined to fix rates on a parity with the increased interstate rates. Thereupon the railroads petitioned the I. C. C. for the requested increase. The petition was allowed. The Mississippi Commission sought to restrain the enforcement of the increase in intrastate rates, and a three Judge District Court held that there was no substantial evidence in the record to support the order of the I. C. C. and reversed. *Mississippi Public Service Commission v. United States,* 124 F. Supp. 809. On appeal the judgment entered was affirmed by *per curiam* opinion, 349 U.S. 908.

In Louisiana the same procedure was had except that the three Judge District Court affirmed the order of the I. C. C. *Louisiana Public Service Commission v. United States of America and the Interstate Commerce Commission,* 125 F. Supp. 180. This judgment was affirmed on appeal in a *per curiam* opinion, 348 U.S. 921.

After Harris, J., signed his judgment reversing the order of the Commission, the Commission vacated its order. Thereupon the railroads petitioned the I. C. C. to increase intrastate rates so as to place them on a parity with rates fixed for interstate shipments. The petition was allowed. The State of North Carolina and certain farm agencies instituted an action in the District Court to enjoin the enforcement of said order. A three Judge District Court composed of *Parker, Circuit Judge,* and *Gilliam* and *Warlick, District Judges,* denied injunctive relief and dismissed the action. 128 F. Supp. 718. This judgment was affirmed by the Supreme Court on 10 October 1955, by *per curiam* opinion.

The three above-cited cases have no bearing on the question here presented. They are simply cited to disclose developments since the judgment appealed from was entered. In comparing those cases with the case instituted before our Commission, we must bear in mind that the I. C. C., in granting the increase in intrastate rates, was acting under 49 U.S.C., sec. 13 (4) which makes discrimination the criterion; whereas our Commission is confined to the standard prescribed by the State statute.

In neither the Mississippi nor the Louisiana case was the jurisdiction of the I. C. C. to intervene and fix intrastate freight rates specifically discussed or decided. The clear implication is that the United States Supreme Court sustains that authority. If this be true—as apparently it is—it is merely one more incident in the ever-increasing centralization of authority in the Federal government. Even so, when resort is had to the Utilities Commission for an increase of intrastate rates, the Commission must follow our statute, let the final result as to jurisdiction be what it may.

In fact, the question here posed would now be moot except for the fact that during the period the Commission order was in force the railroads collected approximately one million dollars in freightage.

The judgment entered in the court below is

Affirmed.

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MARY A. EWING AND AURIE A. COOMER v. DAISY CALDWELL.

(Filed 2 November, 1955.)

**1. Partnership § 1c—**

**Under the Uniform Partnership Act, G.S. 59-31 *et seq.*, each partner is co-owner with the other partners of the specific partnership property as a tenant in partnership, and each has an interest in the partnership and the right to participate in the management. Whether the record title to realty owned by the partnership is in the name of one partner, rather than the names of all, makes no difference unless innocent third parties are affected.**

**2. Partnership § 10—**

Upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners for partnership purposes, and the interest of the deceased partner in the partnership is his share of the profits and surplus, which is personalty. G.S. 59-56.

**3. Same: Partnership § 13: Executors and Administrators § 9½—**

Upon the death of a partner, the surviving partner or partners are required to give bond, G.S. 59-74, and, together with the personal representative of the deceased partner, to make a full and complete inventory of the partnership's liabilities and assets, including real estate, G.S. 59-76, with the exclusive right in the personal representative to require a true accounting either by the surviving partner or partners or by a receiver under court supervision. G.S. 59-75, G.S. 59-76, G.S. 59-73, G.S. 59-70.

**4. Same—Only personal representative of deceased partner may sue for accounting of the partnership.**

This action was instituted by the beneficiaries under the will of a deceased partner against the surviving partner to have a deed to partnership realty executed by testatrix to the surviving partner declared in equity a mortgage, and for an accounting of the partnership property. The allegations were to the effect that the partnership continued up until the death of testatrix. *Held:* The personal representative of the deceased partner not being a party to the action, the demurrer of the surviving partner should have been sustained both for failure of the complaint to state facts sufficient to constitute a cause of action and for defect of parties plaintiff. G.S. 1-127.

APPEAL by defendant from *Sink, Emergency Judge,* April Term, 1955, of MITCHELL.

This appeal is from an order overruling defendant's demurrer to the complaint.

The allegations of the complaint may be summarized as follows:

1. Martha Armstrong died 14 November, 1954, testate; and, with the exception of a $100.00 legacy, plaintiffs, sisters of Martha Armstrong, are the only beneficiaries under her will.

2. In 1938 Martha Armstrong and Daisy Caldwell, defendant herein, formed a partnership, which purchased real estate in Mitchell County, North Carolina. Conveyance was made to them, in their individual names, by deed of 27 April, 1938. Tourist cottages were erected thereon and equipped with furnishings. Each partner owned a one-half interest in the property. Under their partnership agreement, Martha Armstrong, from 1938 to 1947, devoted all of her time to the partnership business, to wit, the operation of said tourist cottages, without the assistance of Daisy Caldwell. During this period (1938-1947) Daisy Caldwell was gainfully employed outside of Mitchell County. In 1947 Daisy Caldwell joined Martha Armstrong at Spruce Pine, North Carolina, "and

thereafter said partners jointly carried on the operation of said tourist cottages."

3. From 1938 to 1950 each of the partners had made considerable investments in said property in cash. Martha Armstrong, in addition to her investments of money, had spent twelve years of her life in the interests of said partnership. Daisy Caldwell, having a separate salary income during the years 1938-1947, was able to invest more actual money in the partnership than Martha Armstrong.

4. By deed dated 10 June, 1950, Martha Armstrong executed and delivered to Daisy Caldwell a deed for a one-half undivided interest in the partnership real estate acquired by them under said deed of 27 April, 1938, being the real estate on which the tourist cottages had been erected, which deed contained this provision: "EXCEPTING AND RESERVING HOWEVER, unto the party of the first part herein, a life estate in the hereinabove described lands and premises."

5. By (another) deed dated 10 June, 1950, Daisy Caldwell conveyed to Martha Armstrong a life estate in a one-half undivided interest in the identical real estate.

6. As of 10 June, 1950, Daisy Caldwell claimed to have invested approximately $10,417.18 more money in said partnership property than Martha Armstrong, not taking into consideration all of the services which Martha Armstrong had performed for the partnership for a period of twelve years; and prior to 10 June, 1950, Daisy Caldwell advised Martha Armstrong that she wanted some protection or security for the amount which she had invested in the partnership property in cash in excess of money invested in the property by Martha Armstrong.

7. Martha Armstrong was 73 years of age and in ill health. Daisy Caldwell was much younger. Daisy Caldwell, a person of superior business experience in whom Martha Armstrong placed confidence, exercised undue influence upon Martha Armstrong, taking advantage of her ignorance in such matters, and caused Martha Armstrong to execute what was in fact the deed of 10 June, 1950, upon the representation, relied on by Martha Armstrong, that the instrument was a mortgage given solely as security for $10,417.18.

Plaintiffs alleged that they were entitled to have the deed declared a mortgage, with right of redemption, and further to an accounting "for the purpose of determining the amount of indebtedness due Daisy Caldwell and the amount of indebtedness due the estate of Martha Armstrong, . . ."

Defendant demurred on these grounds: (1) Lack of jurisdiction to compel defendant to account to plaintiffs; (2) defect of parties plaintiff, the executor of Martha Armstrong's will not being a party; (3) misjoinder; (4) failure to state facts sufficient to constitute a cause of action.

From the order overruling demurrer, defendant excepted and appealed, assigning error.

*Fouts & Watson for plaintiffs, appellees.*

*McBee & McBee, G. D. Bailey, and W. E. Anglin for defendant, appellant.*

BOBBITT, J. It is not alleged that the deed of 10 June, 1950, from Martha Armstrong to Daisy Caldwell, is void. The allegation made is that Martha Armstrong "understood" that she was conveying her one-half interest in the realty of the partnership as security, it being "the actual intent of Martha Armstrong to secure the investment of $10,-417.18 of Daisy Caldwell."

In the absence of allegation that the partnership was dissolved and a settlement between the partners made on 10 June, 1950, the inference is permissible, if not compelling, that the partnership continued until the death of Martha Armstrong and that said real estate remained the principal asset in the continuing conduct of the partnership business.

The impression prevails that plaintiffs have alleged in effect that the transaction of 10 June, 1950, resulted in nothing more than a reduction to certainty as of 10 June, 1950, the amount of the excess of Daisy Caldwell's investment over Martha Armstrong's investment and the giving of such security therefor as would be afforded by the conveyance of Martha Armstrong's one-half interest in the realty. This impression is fortified by the allegation, quoted above, wherein plaintiffs demand an accounting. Too, plaintiffs allege that "Daisy Caldwell joined Martha Armstrong at Spruce Pine, North Carolina, and *thereafter* said partners jointly carried on the operation of said tourist cottages." (Italics added.) It is further noted that there is no allegation as to what agreement, if any, was made as to the due date of the $10,417.18 for which the instrument is alleged to constitute security.

It is noted that, unless innocent third parties are affected, it makes no difference that the legal (record) title to real estate owned by a partnership is in the name of one partner rather than in the names of all. 40 Am. Jur., Partnership sec. 103; *Justice v. Sherard,* 197 N.C. 237, 148 S.E. 241; *Young v. Cooper,* 30 Tenn. App. 55, 203 S.W. 2d 376.

The allegations require that we consider the complaint in relation to a partnership owning the realty herein involved, subsisting until the death of Martha Armstrong.

If the partnership subsisted until then, the death of Martha Armstrong caused its dissolution. G.S. 59-61 (4). In such case, the surviving partner, Daisy Caldwell, had the right and duty to wind up the partnership affairs. *In re Estate of Johnson,* 232 N.C. 60, 59 S.E. 2d

223. As surviving partner, she was required to give bond conditioned upon the faithful performance of her duties in the settlement of the partnership affairs, G.S. 59-74; and, together with *the personal representative* of Martha Armstrong, to make a full and complete inventory of the assets of the partnership, *including real estate,* together with the debts and liabilities thereof, a copy to be retained by her and a copy to be furnished to *the personal representative* of Martha Armstrong. G.S. 59-76.

As surviving partner, she was required, within the time prescribed, to file her account with the clerk, and "come to a settlement with *the executor or administrator* of the deceased partner." G.S. 59-82. (Italics added.)

Upon failure of the surviving partner to comply with the statutory requirement as to bond, the clerk, upon application of any person interested in the estate of the deceased partner, is required to appoint a collector of the partnership, G.S. 59-75; and, if the surviving partner fails to make the required inventory or refuses to allow *the personal representative* of the deceased partner's estate to do so, such *personal representative* of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets in accordance with law. G.S. 59-77. Notwithstanding the aforesaid rights of the surviving partner, any partner, his legal representative or his assignee, upon cause shown, "may obtain winding up by the court." G.S. 59-67.

"The right to an account of his interest shall accrue to any partner, or his *legal representative,* as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary." G.S. 59-73. (Italics added.)

The partnership property is to be applied to discharge its liabilities and the surplus to the payment *in cash* of the net amount owing to the respective partners. G.S. 59-68 (1). The rules for settlement of accounts between partners after dissolution are defined. G.S. 59-70.

Prior to the adoption of the Uniform Partnership Act (1941), G.S. 59-31 *et seq.,* the title to personal property owned by a partnership vested at once in the surviving partner, but this Court, in accord with *Shearer v. Shearer,* 98 Mass. 107, held that the interest of a deceased partner in real property owned by a partnership descended to his heir, subject to the right of the surviving partner to have such property applied, if necessary, to the payment of partnership debts and the settlement of accounts between the partners. *Sherrod v. Mayo,* 156 N.C. 144, 72 S.E. 216, and cases cited. See: *Mendenhall v. Benbow,* 84 N.C. 650.

But a radical change in this respect was made by the Uniform Partnership Act. Thereunder, "the property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management." G.S. 59-54. As to specific partnership property, a partner is co-owner with his partners, "holding as a tenant in partnership." G.S. 59-55 (1). Thus, a new kind of estate, "tenancy in partnership," was created. *Goldberg v. Goldberg,* 375 Pa. 78, 99 A. 2d 474, 39 A.L.R. 2d 1359.

The incidents of this tenancy are defined. G.S. 59-55 (2). These include provisions that a partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership; that when partnership property is attached for a partnership debt no partner or the representatives of a deceased partner can claim any right under the homestead or exemption laws; that a partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin; and, directly pertinent here, that "on the death of a partner his right in specific partnership property vests in the surviving partner or partners, . . ."—for partnership purposes. G.S. 59-55 (2) (c) (d) (e). "A partner's interest in the partnership is his share of the profits and surplus, *and the same is personal property.*" G.S. 59-56. (Italics added.)

Dr. William Draper Lewis, the draftsman of the Uniform Partnership Act, has pointed out clearly the reasons for adoption of the English rule, to wit, that a partner's interest in the partnership is personal property, irrespective of the physical character of the property of the partnership, rather than the rule of *Shearer v. Shearer, supra.* 24 Yale Law Journal, pp. 637-638.

The deceased partner's interest being personal property, the statute requires the surviving partner to make settlement with *the personal representative* of the deceased partner; and there is placed upon *the personal representative* of the deceased partner the duty to require that a true accounting be made either by the surviving partner or by a receiver under court supervision. This is in accord with G.S. 28-172, which provides: "Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate."

The conclusion reached is that the right to sue for an accounting of the partnership assets and affairs vested exclusively in the personal representative of the deceased partner. *La Russo v. Paladino,* 109 N.Y.S. 2d 627; *S.c.,* 116 N.Y.S. 2d 617; *S.c.,* 139 N.Y.S. 367; *Stewart v. Wall,* 87 F. 2d 598; 40 Am. Jur., Partnership sec. 306; *Appeal of Hume,*

130 Me. 338, 155 A. 730. No special facts are alleged that would or might enable the plaintiffs, as devisees of Martha Armstrong, to maintain an action against the surviving partner for an accounting.

The plaintiffs having attempted to allege a cause of action for a partnership accounting, the demurrer should have been sustained for plaintiffs' failure to allege facts sufficient to state such cause of action and, the personal representative not being a party plaintiff, for defect of parties plaintiff. G.S. 1-127.

If the realty was not partnership property, and Martha Armstrong individually owned an interest therein at the time of her death, different questions would arise. However, it is not appropriate that we consider whether plaintiffs could maintain a cause of action against defendant predicated upon allegations that the transaction of 10 June, 1950, was incident to the dissolution of the partnership and a final settlement between the partners, if such were the facts. Suffice it to say that such allegations do not appear in the complaint before us.

For reasons stated, the order overruling demurrer is

Reversed.

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MADGE G. BURRELL v. RAYMOND LUTHER BURRELL.

(Filed 2 November, 1955.)

**1. Appeal and Error § 40d: Venue § 1a—Evidence held insufficient to support finding that plaintiff was a resident of the county in which the action was instituted.**

Where the evidence is to the effect that plaintiff instituted an action in another state and filed a verified complaint therein alleging that she was a resident of such other state, that being unable to obtain service on defendant, she came to North Carolina for the purpose of instituting action, and instituted action in the county of her father's residence, together with averment to the effect that she planned to spend all of her nights at her father's home and commute to her employment in the adjoining state as soon as she had completed a course of study in such other state, *is held* insufficient to support a finding that at the time of the institution of the action plaintiff was a resident of the county wherein the action was instituted, and defendant's motion to remove to the county of his residence should have been allowed.

**2. Domicile § 2—**

Intent alone is insufficient to establish a legal residence or domicile by choice, it being required that there be both residence and *animus manendi*.

**3. Venue § 1a—**

The residence of the parties at the time of the institution of the action is controlling and is not affected by subsequent change of residence. G.S. 1-82.

BURRELL *v.* BURRELL.

APPEAL by the defendant from *Nettles, J.*, in Chambers at Asheville, North Carolina, 11 June, 1955. From MADISON.

This action was instituted in Madison County, North Carolina, on 30 April, 1955, pursuant to the provisions of G.S. 50-16, for alimony without divorce and for the custody of the three minor children born to the plaintiff and defendant while they were living together as man and wife, and for the support of said children.

The record discloses these undisputed facts: The plaintiff and defendant were lawfully married to each other on 6 April, 1940, and three children were born of the marriage, to wit: Loretta Gaye, age 14, R. L. Jr., age 11, and Marianne, age 9; that Loretta Gaye is now in the custody and control of the plaintiff and the other children are in the custody and control of the defendant. The plaintiff and the defendant lived together as man and wife in Canton, North Carolina, until 7 May, 1954, when the plaintiff went to the home of her parents in Madison County, North Carolina. That thereafter she entered a "beauty school" in Johnson City, Tennessee, and in order to support herself she obtained part-time employment in Greeneville, Tennessee, and commuted back and forth from Greeneville to Johnson City. That plaintiff kept her 14-year-old daughter in school in Greeneville, Tennessee, during the school year 1954-1955, which school did not close until the latter part of May, 1955; that she and her daughter spent most of their week-ends at the home of the parents of the plaintiff in Madison County, North Carolina, which was only 17 miles from Greeneville.

On 16 April, 1955, the plaintiff instituted an action for absolute divorce from the defendant in Greene County, Tennessee. In the complaint filed in that action she alleged that after being forced to leave the home of her husband in Canton, North Carolina, in May, 1954, she came "to Greeneville, Tennessee to stay with relatives here and to establish her home and since that time she has been working in the Bon Ton Beauty Salon and going to school in Johnson City, Tennessee to study to be a beauty operator." She verified her complaint under oath and stated therein that she was a citizen and resident of Greene County, Tennessee.

Being unable to obtain service on the defendant in Tennessee, upon advice of her counsel, she went to Haywood County, North Carolina, for the purpose of instituting this action in said county. After consulting counsel in Haywood County, it was decided to institute the action in Madison County.

The defendant, before time for answering expired, moved for a change of venue to Haywood County, North Carolina, on the ground that the plaintiff was a citizen and resident of Greeneville, Tennessee, and the defendant was a citizen and resident of Haywood County, North Carolina.

The motion was heard before the Clerk of the Superior Court of Madison County on 27 May, 1955, who found as a fact that the plaintiff was a resident of Madison County at the time of the institution of the action. An appeal was taken to the judge of the Superior Court. The matter was heard by Nettles, J., the Resident and Presiding Judge of the Nineteenth Judicial District of North Carolina, by agreement, at Chambers in Asheville, North Carolina, on 11 day of June, 1955. His Honor heard the matter upon affidavits offered in behalf of the respective parties, together with certain exhibits offered in evidence by the defendant. The trial judge found as a fact that the plaintiff in the latter part of April, 1955, and prior to the institution of this action, as a result of visits made by the defendant to Greeneville, Tennessee, where on such visits he harassed and annoyed the plaintiff, she made arrangements to spend all of her nights at her father's home in Madison County and to commute daily from that point to her employment in Greeneville, Tennessee. He further found as a fact that the plaintiff did not at any time have the intention of making her permanent home in the State of Tennessee, or at any place other than the home of her father in Madison County, North Carolina, and affirmed the ruling of the Clerk of the Superior Court of Madison County.

From such ruling the defendant appeals, assigning error.

*No counsel for appellee.*

*Ward & Bennett for defendant, appellant.*

DENNY, J. The only question for determination on this appeal is whether the finding of the court below, that plaintiff was a citizen and resident of Madison County, North Carolina, at the time she instituted this action, is supported by competent evidence.

There is nothing in the evidence adduced in the trial below to support the finding that this plaintiff, on account of the visits of the defendant to Tennessee and his conduct toward her in that State, made arrangements to spend all of her nights at her father's home in Madison County and to commute daily from that point to her employment in Greeneville, Tennessee. On the contrary, the evidence is to the effect that by reason of his visits to see her in Tennessee, she instituted an action in Tennessee for absolute divorce on 16 April, 1955, in which action she filed a duly verified complaint under oath in which she swore that she was a citizen and resident of Greene County, Tennessee. However, according to the plaintiff's affidavit filed in her behalf in the hearing below, being unable to obtain service on the defendant in Tennessee, upon advice of her counsel, she came to North Carolina for the purpose of instituting this action in Haywood County, North Carolina, the

county in which her husband resided. Neither does the evidence support the finding that she did not at any time intend to make her permanent home in the State of Tennessee, or in any place other than the home of her father in Madison County, North Carolina. The evidence is to the effect that she went to Greeneville, Tennessee, with the intent to establish a home for at least an indefinite period of time and that she did so.

In her affidavit, referred to above, she states that while she was employed in Greeneville, Tennessee, and commuted back and forth from Greeneville to Johnson City, "she maintained her home with her father in Madison County, North Carolina, and returned to her said home during the week-ends." Even so, she then proceeded to negative any contention that she had been at all times a citizen and resident of North Carolina. She says, ". . . this affiant in the latter part of April, 1955, made plans to start spending all of her nights in her father's home in Madison County, North Carolina, *as soon as she had completed her course* and to commute daily from her father's home to her employment in Greeneville, Tennessee, and *in this manner to have her residence in the State of North Carolina;* that after *making this decision to establish and maintain her residence at the home of her father in Madison County, North Carolina,* and after having taken steps to put this decision into effect, this affiant went to Haywood County, North Carolina and conferred with counsel . . . relative to bringing a legal action against the defendant in Haywood County, North Carolina; that . . . (counsel) advised this affiant to go to . . . an attorney at Marshall, and get him to bring her action in Madison County . . ." (Emphasis added.)

A careful consideration of all the evidence disclosed on this record leads us to the conclusion that it will support, at most, nothing more than an intention on the part of the plaintiff to establish her residence in Madison County, North Carolina, *after she completed her training in Tennessee,* and there is no evidence tending to show that such training had been completed at the time this action was instituted. Moreover, intent alone is not sufficient to establish a legal residence or domicile by choice. *Horne v. Horne,* 31 N.C. 99; *Reynolds v. Lloyd Cotton Mills,* 177 N.C. 412, 99 S.E. 240, 5 A.L.R. 284; *Roanoke Rapids v. Patterson,* 184 N.C. 135, 113 S.E. 603. There must be both residence and *animus manendi. Bryant v. Bryant,* 228 N.C. 287, 45 S.E. 2d 572.

Furthermore, there is no evidence which tends to show that when the plaintiff instituted this action on 30 April, 1955, she had taken any of the steps outlined in her affidavit by which she proposed or intended to establish her residence in North Carolina. At the time of the hearing below, she may have moved to her father's home and consummated her

intent to establish her residence in Madison County, but the statute, G.S. 1-82, requires that such an action as this must be tried in the county in which the plaintiff or the defendant resided at its commencement.

The motion for change of venue should have been allowed.

The ruling of the court below is

Reversed.

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STATE v. EDWARD C. STONESTREET.

(Filed 2 November, 1955.)

**1. Arrest § 3: Criminal Law §§ 56, 81a—**

An indictment charging that defendant did unlawfully and willfully resist a public officer while discharging and attempting to discharge a duty of his office is fatally defective in failing to charge the official duty the designated officer was discharging or attempting to discharge, and the Supreme Court will arrest the judgment thereon *ex mero motu*.

**2. Intoxicating Liquor § 9g—**

Where an indictment charges separately the unlawful possession and unlawful transportation of intoxicating liquor, a separate judgment may be pronounced on each count.

**3. Criminal Law § 17b—**

A plea of guilty has significance only to the extent that it is responsive to the charge made in the indictment.

**4. Same: Criminal Law §§ 56, 60b—**

The indictment charged defendant with unlawfully and willfully receiving intoxicating liquor. Defendant plead guilty to unlawful possession. The plea must be given significance by reference to the charge, and since "receiving" of intoxicating liquor is not an offense under our statute, the judgment must be arrested.

**5. Criminal Law § 62c—**

Where the court enters separate judgments, each complete within itself, imposing sentences to the same place of confinement, the sentences run concurrently as a matter of law.

**6. Criminal Law § 81c (4)—**

Where two or more counts or indictments are consolidated for the purpose of a single judgment, error relating to one count or indictment requires remand for proper judgment on the valid counts or indictments, but where separate judgments are entered on each count or indictment, each judgment complete within itself, a valid judgment pronounced on a plea of guilty on one valid count or indictment will be upheld, notwithstanding that judgment must be arrested on the other counts or indictments.

**7. Criminal Law § 62f—**

Where the court before entering judgment on several counts states that it intends to give active sentences on several of the counts, but that if defendant consented to a suspended sentence on another count, the court would make the active sentences less than it would otherwise impose, *held* not prejudicial, there being no comment or suggestion that the suspended sentence would restrict the defendant's right to appeal from the judgments imposing active sentences.

APPEAL by defendant from *Rousseau, J.*, March Term, 1955, of WILKES.

Criminal prosecutions upon two bills of indictment.

One indictment charged that defendant on 5 December, 1954, at and in Wilkes County, (1) "did unlawfully and willfully operate an automobile upon the public highways of Wilkes County while then and there being under the influence of intoxicating liquors, or narcotic drugs," etc., and (2) "did unlawfully and willfully receive and transport certain intoxicating liquors," etc.

The other indictment charged that defendant on 5 December, 1954, at and in Wilkes County, (1) "(did) unlawfully, willfully resist, delay and obstruct one F. C. Bell a public officer, to wit, State Highway Patrolman while discharging and attempting to discharge a duty of his said office by beating and kicking him," and (2) "did unlawfully and willfully make an assault upon one, F. C. Bell, State Highway Patrolman, by striking, and kicking the said officer, and did then and there unlawfully beat, wound and seriously injure the said F. C. Bell, State Highway Patrolman," etc.

When the cases were called for trial, defendant pleaded guilty to unlawful *possession* and to unlawful transportation of intoxicating liquor as *charged* in the second count of the bill of indictment first referred to above; and he pleaded not guilty to all other charges. The cases were consolidated for the purpose of trial. Upon trial, the court did not submit to the jury the assault charge, set forth as the second count in the bill of indictment last referred to above.

The verdict of the jury was: (1) as to operating an automobile while under the influence of intoxicating liquor as charged, "Not Guilty"; and, (2) as to resisting an officer, "Guilty of resisting an officer as charged."

After verdict, as shown by the record, this occurred: "COURT stated to counsel and to the defendant before imposing any judgment on any count that the Court intended to give the defendant Stonestreet an active sentence on the charge of resisting an officer and on one of the other counts, but if counsel and defendant would consent to a suspended sentence on one count on terms the Court deemed proper that the Court

would make the active sentences less than the sentences he would otherwise impose." The Court explained: "I am talking about suspending a sentence. That is a proper judgment if he will consent to it." To this comment, counsel for defendant replied: "I would rather your Honor would just sentence him, and we will take such steps as we can."

Thereupon, the court pronounced judgment, on defendant's plea of guilty of unlawful transportation of intoxicating liquor, that the defendant "be confined in the common jail of Wilkes County for a period of 12 months, and assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission"; and the court pronounced judgment, imposing a like sentence of 12 months, on defendant's plea of guilty of unlawful *possession* of intoxicating liquor. On the verdict of guilty of resisting an officer as charged, the court pronounced judgment that the defendant "be confined in the common jail of Wilkes County for a period of 18 months, and assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission." Later, the court modified this judgment by reducing the term thereof from 18 months to 12 months. No provision was made that the sentences should run otherwise than concurrently.

Defendant excepted and appealed, assigning errors.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Trivette, Holshouser & Mitchell for defendant, appellant.*

BOBBITT, J. First, we consider the conviction for resisting arrest as charged. While not argued in appellant's brief, we are constrained to hold that the motion in arrest of judgment should have been allowed. If the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment. *S. v. Thorne*, 238 N.C. 392, 78 S.E. 2d 140; *S. v. Watkins*, 101 N.C. 702, 8 S.E. 346. The indictment is fatally defective in that it does not allege all the facts necessary to constitute an offense under G.S. 14-223. Specifically, it fails to charge the official duty the designated officer was discharging or attempting to discharge. *S. v. Harvey*, 242 N.C. 111, 86 S.E. 2d 793, and cases cited. As to the essentials of an indictment charging bribery, G.S. 14-218, see *S. v. Greer*, 238 N.C. 325, 77 S.E. 2d 917.

When an indictment charges separately the unlawful possession and unlawful transportation of intoxicating liquor, a separate judgment may be pronounced on each count. *S. v. Chavis*, 232 N.C. 83, 59 S.E. 2d 348. Here the defendant pleaded guilty to unlawful possession and to unlawful transportation of intoxicating liquor. Even so, the plea

had significance only to the extent it was responsive to the charge laid in the indictment. The indictment does not charge unlawful possession of intoxicating liquor. Our statutes make no reference to "receiving" of intoxicating liquor. Possibly this word was borrowed from another jurisdiction. Hence, this Court, *ex mero motu*, arrests the judgment predicated on defendant's plea of guilty of unlawful possession of intoxicating liquor.

The indictment did properly charge unlawful transportation of intoxicating liquor. Defendant's plea of guilty was responsive thereto. The judgment pronounced thereon is valid and must be upheld.

Separate judgments, each imposing a sentence of twelve months to the same place of confinement, were pronounced. Each judgment is complete within itself. As a matter of law, the sentences run concurrently. *In re Parker*, 225 N.C. 369, 35 S.E. 2d 169. Compare: *In re Smith*, 235 N.C. 169, 69 S.E. 2d 174; *In re Bentley* and *State v. Bentley*, 240 N.C. 112, 81 S.E. 2d 206.

Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count. "Presumably this (the single judgment) was based upon consideration of guilt on both charges." *Devin, J.*, later *C. J.*, in *S. v. Camel*, 230 N.C. 426, 53 S.E. 2d 313; also, see *S. v. Braxton*, 230 N.C. 312, 52 S.E. 2d 895. But the rule is otherwise when, as here, separate judgments, each complete within itself, are pronounced on separate indictments or counts. In such case, a valid judgment pronounced on a plea of guilty to a valid count in a bill of indictment will be upheld. *S. v. Thorne, supra; S. v. Calcutt*, 219 N.C. 545, 15 S.E. 2d 9.

Defendant urges that this Court set aside all judgments pronounced because of the comment made by the trial judge to him and to his counsel before any judgment was pronounced on any count. In effect, the contention is that the comment was such as to disqualify the trial judge from pronouncing any judgment. Upon the record before us, we cannot so hold.

The validity of a suspended sentence rests upon the consent of the defendant, express or implied. *S. v. Cole*, 241 N.C. 576, 86 S.E. 2d 203, and cases cited. The court's suggestion that he was disposed to make the active sentences he had in mind to pronounce less if defendant would agree that the sentence on one count be suspended on certain undefined terms apparently did not interest the defendant. Hence, there was no discussion whatever as to what the court had in mind,

either in respect to the length of the active sentences or in respect to the length of the sentence to be suspended or the conditions of suspension thereof. Nor was there any comment or suggestion that the suspended sentence would restrict the defendant's right of appeal from judgment imposing active sentences. In this connection, while he excepted to the judgments pronounced, defendant did not except to the comment of the court. Be that as it may, prejudicial error in this regard has not been shown.

For the reasons stated, the judgment predicated on the defendant's plea of guilty of the unlawful transportation of intoxicating liquor is affirmed; the judgment predicated on defendant's plea of guilty of unlawful possession of intoxicating liquor is arrested; and the judgment predicated upon defendant's conviction when tried upon defective bill of indictment attempting to charge resisting an officer under G.S. 14-223 is arrested.

Judgment affirmed as to unlawful transportation of intoxicating liquor.

Judgment arrested as to unlawful possession of intoxicating liquor.

Judgment arrested as to resisting arrest.

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DR. FRED M. DULA, T/A DULA HOSPITAL, v. FRANK PARSONS.

(Filed 2 November, 1955.)

**1. Judgments § 22—**

A duly docketed judgment is a lien on the real property of the judgment debtor situated in the county and owned by the judgment debtor at the time the judgment is docketed and any land acquired by him at any time within ten years from date of the rendition of the judgment. G.S. 1-234.

**2. Registration § 4—**

No notice, however full and formal, as to the existence of a prior deed can take the place of registration, and a statement in registered deeds of trust that a certain tract was excluded therefrom because such tract had been sold by prior deed to another, is insufficient notice of such prior deed as against creditors and purchasers for value when such prior deed is not recorded.

**3. Judgments § 23½: Homestead § 5—**

The grantee in a deed executed by the judgment debtor prior to the rendition of the judgment is not entitled to assert homestead in the lands as against the judgment creditor when the deed is not registered until after the docketing of the judgment, and the property is subject to sale under execution to satisfy the judgment.

DULA *v.* PARSONS.

APPEAL by defendant from *Rudisill, J.*, at May Term 1955, of CALDWELL.

Civil action reduced to judgment on which execution issued,—heard upon motion of plaintiff to set aside a purported homestead allotted to grantee of judgment debtor.

These facts appear from the record and by stipulation of parties:

1. On 28 October, 1954, a judgment in favor of Dr. Fred M. Dula, t/a Dula Hospital, as plaintiff, and against Frank Parsons, as defendant, for the sum of $966.35, with interest and costs, was duly entered, recorded and docketed in Judgment Book 29 at page 3 in office of Clerk of Superior Court of Caldwell County.

2. Subsequent to the docketing of said judgment plaintiff caused an execution to be issued. It was returned by the sheriff endorsed to the effect that defendant had no property subject to execution. But on 23 February 1955 plaintiff again caused execution to be issued, and called to attention of sheriff property owned by defendant, and subject to execution. Thereupon the sheriff advertised the property for sale under the execution,—the sale to be held 20 April, 1955, at the courthouse in Lenoir, N. C.

3. Also subsequent to the docketing of said judgment, to wit, 1 November, 1954, Glenn D. Parsons, son of defendant, caused to be filed for registration and registered in the office of Register of Deeds for Caldwell County, N. C., in Deed Book 303 at page 341, an instrument bearing date 10 October, 1949, from Frank Parsons and wife, acknowledged and probated 19 October, 1954, purporting to convey to Glenn D. Parsons 13½ acres of land.

4. On 16 April, 1955, without written notice to plaintiff, Glenn Parsons requested the sheriff of Caldwell County to lay off to him a homestead in the above described tract of land, and same was purportedly laid off to include the full 13½ acres above described, and same was filed for registration in office of Register of Deeds for Caldwell County.

5. On 20 April, 1955, the sheriff, when he cried the sale of the property at the courthouse door in Lenoir at 12 o'clock noon, and before offering the land for sale, announced the laying off the homestead covering the entire 13½ acres, and only one bid was submitted, and that conditioned upon the purported homestead allotment being a nullity.

6. Defendant Frank Parsons has removed from the State of North Carolina.

7. Plaintiff, so contending, filed in this cause a motion praying among other things (a) that the purported allotment of homestead be declared a nullity, and of no effect, and canceled of record, (b) that the sheriff of Caldwell County be directed to re-advertise said property for sale under the execution issued, and to sell same free and clear

of the purported homestead allotment, and (c) for such other and further relief to which plaintiff might be entitled by virtue of facts set forth and adduced at the hearing upon the motion.

8. The cause came on for hearing upon the motion, without the intervention of a jury, when and where Glenn Parsons was represented by his attorneys, and orally testified in respect to the conveyance to him by his father Frank Parsons of the 13½ acres of land here involved. His testimony tended to show that his father delivered to him two deeds for this land,—that the first, dated 18 March, 1947, was not registered, but was later lost; and that the second, hereinafter referred to, was made by reason of the first being lost. He also offered from the deed records of Caldwell County:

(1) Records of two deeds of trust executed by F. A. Parsons and wife to a trustee for the Mutual Building & Loan Association of Lenoir, N. C., conveying certain specifically described 80 acres of land, "excepting from the foregoing . . . also that 13½ acres more or less tract conveyed by the parties of the first part to Glenn Parsons by deed dated March 18, 1947, forthwith intended to be recorded in the office of the Register of Deeds for Caldwell County, N. C." (a) The first of these two deeds of trust bears date 20 March, 1947, and appears to have been duly signed, sealed, acknowledged and probated, and filed for registration 21 March, 1947, and registered and thereafter stamped satisfied on 11 October, 1948; (b) the second of these two deeds of trust bears date 6 October, 1948, and appears to have been duly signed, sealed, acknowledged and probated, and filed for registration 11 October, 1948, and registered and thereafter stamped satisfied on 22 March, 1952.

(2) The Record of a warranty deed from F. A. Parsons and wife to R. R. Triplett and L. H. Wall, dated 15 October, 1954, purporting to have been duly signed, sealed, acknowledged and probated, and filed for registration 15 October, 1954, and purporting to convey two specifically described tracts of land "excepting from the above tracts a small tract of land sold to Glen Parsons by deed dated March 18, 1947, containing about 13 and one-half acres, more or less."

And (3) a warranty deed between F. A. Parsons and wife, E. P. Parsons, grantors, and Glenn D. Parsons and wife, grantees, purporting to be dated 10 October, 1949, signed and sealed, and acknowledged and probated 19 October, 1954, and filed for registration 1 November, 1954, and registered 3 November, 1954, in Book 303 at page 341 by specific description. (Note: The wife of Glenn D. Parsons was offered in corroboration of him, and it was admitted that she would corroborate his testimony.)

The court, after hearing evidence so offered by Glenn D. Parsons, finding facts, substantially as hereinabove set forth, being of the opinion (1) that the lien of the docketed judgment of plaintiff is prior to any rights obtained under the deed from Frank Parsons and wife, E. P. Parsons, to Glenn D. Parsons and wife, Joy Parsons, which was registered subsequent to the docketing of the judgment, and (2) that said property is subject to sale under execution to satisfy the judgment, entered judgment in which it is "ordered, adjudged and decreed that the said homestead allotment be, and the same is hereby set aside and declared of no effect, that the instrument purporting to be a record of said allotment be canceled of record by the Register of Deeds of Caldwell County, that the Sheriff of Caldwell County re-advertise said property for sale as by law provided and sell same free and clear of any homestead allotment, and that Glenn D. Parsons pay the costs incident to the motion."

To the signing of the judgment Glenn D. Parsons objects and excepts, and appeals to Supreme Court and assigns error.

*Claude F. Seila for plaintiff, appellee.*

*Fate J. Beal and Marshall E. Cline for respondent, appellant.*

WINBORNE, J. The brief of appellant indicates that he challenges the judgment from which this appeal is taken on the ground that the exceptions appearing in the two deeds of trust, and in the deed from defendant, judgment debtor, as set forth in statement of facts hereinabove, gave to plaintiff sufficient recorded notice of the fact that defendant no longer owned any interest whatever in the 13½ acres of land here in controversy. The contention is not well taken.

A docketed judgment, directing the payment of money, is a lien on the real property situated in the county in which the judgment is docketed and owned by the judgment debtor at the time the judgment is docketed, or on such land as is acquired by him at any time within ten years from the date of the rendition of the judgment. G.S. 1-234, formerly C.S. 614. *Durham v. Pollard,* 219 N.C. 750, 14 S.E. 2d 818.

Furthermore, the Connor Act, Laws 1885, Chap. 147, now G.S. 47-18, formerly C.S. 3309, provides that "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies . . ." *Durham v. Pollard, supra.* Indeed "no notice however full and formal as to the existence of a prior deed can take the place of registration." See opinion

by *Adams, J.*, in *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713, and cases cited. This Court has uniformly so held.

All that the exceptions purport to do is to call attention to the existence of a prior deed, notice of which as just stated would not take the place of registration. They are not in the form of a deed and do not purport to convey any right or interest in the land excepted.

The cases cited by appellant as supporting authority for position taken by him are distinguishable in factual situations and are inapplicable here.

The judgment below will be, and it is hereby

Affirmed.

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L. H. WALL v. WILL ENGLAND.

(Filed 2 November, 1955.)

**1. Pleadings § 31½: Courts § 5: Judgments § 33f—**

An order striking certain allegations from an answer was entered at term by the presiding judge, with leave to defendant to file answer or other pleading. No exception was taken to the order. Thereafter defendant filed an amended further answer. At a subsequent term, upon the hearing of plaintiff's motion to strike, the court found that the amended further answer contained the identical matter stricken under the prior order. *Held:* Order striking the amended further answer is affirmed, since defendant was concluded by the prior order as the law of the case, there being no right of appeal from one Superior Court judge to another.

**2. Pleadings § 22—**

An order striking certain matter from a pleading with permission to the pleader to file further pleading if so advised, does not authorize the pleader to file a subsequent amendment reiterating *verbatim* or in substance the matter ordered stricken.

APPEAL by defendant from *McSwain, Special J.*, at May Term 1955, of CALDWELL.

Civil action to recover damages, both actual and punitive, for alleged libel and slander, heard upon motion of plaintiff to strike certain averments from further answer of defendant.

The record on this appeal discloses the following: Plaintiff alleges in his complaint in pertinent part, summarily stated:

(1) That defendant, as owner and publisher of a sheet designated and called "The Hypodermic," on a certain date, published therein, and uttered of and concerning the plaintiff certain false, libelous and slanderous matters specifically set forth, with respect to a demurrer,

filed by plaintiff, as an attorney, to a complaint filed by defendant as it relates to returns in primary election in which defendant was a candidate.

(2) That in response to demand by plaintiff that defendant retract, and apologize for, the publication and utterances, defendant published a statement in his "publication" that he would apologize, but then reiterated and re-emphasized his former publication in language specifically quoted, which constituted no apology or retraction.

(3) That defendant made, publicized and declared these statements "of and concerning this plaintiff, knowing full well, or should have known, that the same were false, libelous and slanderous; that he made the said statements maliciously, carelessly, recklessly and without any investigation as to the truth of said statements."

(4) That on account of the libelous and slanderous remarks published of and concerning plaintiff he, the plaintiff, was damaged in character and reputation in the sum of $10,000; and that on account of the malicious, careless, reckless and wanton manner in which the libelous statements were made and circulated by defendant, and his failure to retract said statements, as by statute provided in such cases, plaintiff is entitled to have and recover of defendant punitive damages in the amount of $5,000.

Defendant filed an answer to the complaint, in which he admits the publication, and that plaintiff made a request that he, the defendant, publish an apology and retraction of the publication and utterance, and that he published a retraction and apology as to the statements contained in the former article in words as quoted,—averring the truth of portions of the published article for which no apology is made. Defendant denies, as untrue, all other allegations of the complaint *seriatim*.

However, further answering the complaint defendant averred at length matter pertaining to a controversy he had with the Board of Elections of Caldwell County in respect to results of a certain primary election in which he, the defendant, was a candidate, as to which he filed a complaint for a writ of *mandamus* in Superior Court of Caldwell County, "requesting that the defendants therein, the Board of Elections of Caldwell County, *et al.*, be compelled to certify that this defendant had the second highest number of votes in said primary election, and requesting that they be compelled to call a run-off election between F. L. German and this defendant," and that it was to this complaint that L. H. Wall, plaintiff in present action, representing the defendants there, filed demurrer referred to in the publications of which present plaintiff complains.

The plaintiff, through his attorneys, moved to strike certain portions of the further answer to the complaint as so filed, for the reason that

the same are irrelevant and immaterial, and do not constitute a defense to an action for libel and slander. This motion came on for hearing and was heard before Judge Rudisill, presiding at February Term 1955 of Caldwell Superior Court, and the judge being of opinion and, finding "as a matter of fact, that those portions of the answer and further answer and defense specified in the motion to strike are irrelevant, improper and prejudicial to the plaintiff and that they should be stricken from the answer" entered an order on 9 March, 1955, in which it is adjudged and decreed "that all those portions of the answer and further answer of the defendant as set forth in the motion to strike be and the same are stricken from the answer," and, further, "that the defendant have thirty days from the 9th day of March, 1955 in which to file answer or other pleading if he is so advised." The record fails to show that defendant excepted to or appealed from this order.

However, the record shows that thereafter defendant filed an amended further answer. Thereupon on 28 April, 1955, the plaintiff, L. H. Wall, moved the court for an order striking out the amended further answer upon the grounds that the matters and things therein alleged are incompetent, irrelevant, immaterial and sham, and have already been adjudged so to be, and, therefore, the question is *res judicata,* and plaintiff moved for judgment on the pleadings for that the amended further answer is frivolous and made for the purpose of delay.

The cause came on for hearing and was heard before Judge McSwain, presiding at the 2 May, 1955, term of Caldwell County Superior Court, when and where the judge entered the following order: "This cause coming on to be heard and being heard before the undersigned upon motion of the plaintiff to strike out the entire amended further answer filed by the defendant and it appearing to the court and the court finding as facts that the matters and things set forth in said amended further answer are incompetent, irrelevant, immaterial, sham and frivolous;

"And it further appearing to the court that the identical matters and things set forth in the amended further answer filed in this action on April 8, 1955 had theretofore been adjudicated on March 9, 1955 before the Honorable J. C. Rudisill, Judge presiding at the February-March 1955 Term of Caldwell Superior Court to be incompetent, irrelevant and immaterial and the court concluding as a matter of law that the competency, relevancy, and materiality of the matters and things set forth in said amended further answer are *res judicata.*

"It is therefore ordered that the entire amended further answer filed by the defendant on April 8, 1955 be, and the same is hereby stricken out."

Defendant excepted to this judgment, and appeals to Supreme Court and assigns error.

*Claude F. Seila, W. H. Strickland, and Hunter Martin for plaintiff, appellee.*

*Kenneth D. Thomas for defendant, appellant.*

WINBORNE, J. This appeal turns in the main on a procedural question. It is observed that the judgment of Judge Rudisill, striking out the averments of defendant's further answer on the ground that same is irrelevant, improper and prejudicial to plaintiff, was entered in term time, at a term of Superior Court, over which he was the presiding judge, with jurisdiction and power to hear and pass upon the motion to strike. G.S. 1-153. This Court held in *Commrs. v. Piercy,* 72 N.C. 181, that the Superior Court has power to strike out an answer whenever it appears to the satisfaction of the Court that it is irrelevant or frivolous under the statute as it then existed. C.C.P. 120. If the ruling of the Judge of Superior Court were erroneous, the remedy of defendant was to except thereto and appeal to Supreme Court. And upon failure of defendant to except and appeal the judgment becomes, not so much as *res judicata,* as the law of the case.

Hence the judgment of Judge Rudisill was not before Judge McSwain for review. He, Judge McSwain, could not question its correctness but was bound by its terms. Indeed no appeal lies from one Superior Court judge to another. *S. v. Oil Co.,* 205 N.C. 123, 170 S.E. 134, citing *S. v. Lea,* 203 N.C. 316, 166 S.E. 292; *Revis v. Ramsey,* 202 N.C. 815, 164 S.E. 358, and numerous other cases. "The power of one judge of the Superior Court is equal to and coordinate with that of another. A judge holding succeeding term of a Superior Court has no power to review a judgment rendered at a former term upon the ground that such judgment is erroneous." *Caldwell v. Caldwell,* 189 N.C. 805, 128 S.E. 329.

And the judgment of Judge Rudisill striking the averments of defendant's further answer is not before this Court for review.

Moreover, when the motion to strike the further answer repleaded by defendant came before Judge McSwain for hearing, the question before him related to the identity of matters pleaded. He has found them so to be. And while Judge Rudisill gave defendant permission "to file answer or other pleading if he is so advised" it may not be seriously contended that this meant that defendant could reiterate *verbatim* or in substance the matters just ordered stricken. At least there is nothing in the record to so indicate.

Hence the judgment from which this appeal is taken will be

Affirmed.

JOHNNIE NORMAN BULLOCK v. M. F. CROUCH, TRADING AND DOING BUSINESS AS CROUCH BROTHERS.

(Filed 2 November, 1955.)

**1. Constitutional Law § 28: Judgments § 34—**

In order for a judgment of another state to be *res judicata* or binding upon a resident of this State under the Full Faith and Credit Clause of the Federal Constitution, Article IV, Section 1, the resident must have been a party to the action in such other state or in privity with the defendant therein.

**2. Same—**

A judgment obtained in another state against the driver of a motor vehicle upon adjudication that the accident in suit was caused by the negligence of such driver, is not *res judicata* or binding upon the employer of the driver sought to be held liable under the doctrine of *respondeat superior* in an action instituted in this State, since the employer's liability is derivative and does not arise out of mutuality.

**3. Master and Servant § 21: Automobiles § 54a—**

A person who is injured by the negligence of an employee may sue the employee alone or the employer alone, or may bring a single action against both, and where action is brought against the employee alone, no recovery can be had in a subsequent action against the employer if the employee satisfies the judgment against him or obtains a verdict in his favor, nor may the amount of the recovery against the employer exceed the amount of the recovery against the employee.

APPEAL by plaintiff from *Hobgood, J.*, in Chambers at Roxboro, 26 August, 1955. From PERSON.

The plaintiff, a citizen and resident of Person County, North Carolina, instituted an action against Alfred M. Cherry in the Circuit Court of Pittsylvania County, Virginia, to recover for personal injuries sustained by him on 16 May, 1953, when an International truck, owned by the defendant and operated by Cherry, as an employee of the defendant, collided with the automobile owned and operated by the plaintiff.

The plaintiff obtained judgment against Cherry in the Virginia action for $3,200, with interest from 25 May, 1954, and costs, from which judgment Cherry did not appeal. The Virginia judgment has been duly transferred of record to Person County and is unpaid.

The plaintiff instituted this action against M. F. Crouch, a citizen and resident of Iredell County, North Carolina, trading and doing business as Crouch Brothers, alleging ownership by Crouch of the truck Cherry was driving and that Cherry was the agent and employee of Crouch and acting within the course of his employment at the time of the collision in which the plaintiff sustained his damages and injuries.

Upon the establishment of these allegations, the plaintiff seeks to enforce payment of the judgment obtained in the Virginia court against Cherry as determinative of the injuries and damages sustained by the plaintiff. The plaintiff alleges that by reason of the principles of estoppel and *res judicata,* he is entitled to judgment against the defendant for the amount of damages as determined by the Virginia court, and that the defendant has no right to defend this action on its merits.

The defendant interposed a demurrer on the ground that the complaint does not state a cause of action against him in that the complaint shows on its face that he was not a party to the action in the Circuit Court of Pittsylvania County, Virginia, and that the judgment rendered therein was against Alfred M. Cherry only. The demurrer was sustained and the plaintiff appeals, assigning error.

*Burns & Long for appellee, and*
*Edwin B. Meade of Danville, Virginia, of counsel for appellee.*
*D. Emerson Scarborough for appellant.*

DENNY, J. The appellant insists that by virtue of the provisions contained in Article IV, Section 1, of the Constitution of the United States, we must give full faith and credit to the judgment entered in the Circuit Court of Pittsylvania County, Virginia, in the action of *Bullock v. Cherry.* Conceding this to be so, it does not follow that such judgment is binding on the defendant in this action.

To bind Crouch by the Virginia judgment it must appear that he was a party to such action or in privity with the defendant therein. *Bigelow v. Old Dominion Copper Mining & Smelting Co.,* 225 U.S. 111, 56 L. Ed. 1009, 32 S. Ct. 641, Ann. Cas. 1913E 875; *Green v. Bogue,* 158 U.S. 478, 39 L. Ed. 1061; *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99; *Thomas v. Reavis,* 196 N.C. 254, 145 S.E. 226; *Hines v. Moye,* 125 N.C. 8, 34 S.E. 103; *Simpson v. Cureton,* 97 N.C. 112, 2 S.E. 668; *Bennett v. Holmes,* 18 N.C. 486; *Briley v. Cherry,* 13 N.C. 2, 18 Am. Dec. 561; 30 Am. Jur., Judgments, section 220, page 951.

Since it is admitted that the defendant in this action was not a party to the action in which the judgment sought to be enforced was entered, neither the doctrine of *res judicata* nor estoppel applies unless there was a privity of relationship between this defendant and Cherry.

In the case of *Bigelow v. Old Dominion Copper Mining & Smelting Co., supra,* the Supreme Court of the United States said: "No judgment can be regarded as *res judicata* as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as a matter of right, appear and defend, even though he may have had knowledge of the suit. Otherwise, he might be bound

by a judgment as to which he had never had the opportunity to be heard which is opposed to the first principles of justice."

It is likewise said in 50 C.J.S., Judgments, section 802, page 347, ". . . where the master is not a party to the action against the servant, either actually or through privity of relationship to his servant, a judgment against the servant is not *res judicata* as against the master," citing *Sherwood v. Huber & Huber Motor Exp. Co.*, 286 Ky. 775, 151 S.W. 2d 1007, 135 A.L.R. 263.

In the last cited case, a judgment had been obtained against the servant, or employee, as in the instant case, and in the suit against the master, or employer, the question was raised as to whether or not the defendants were bound under the doctrine of *res judicata* by the judgment rendered in the action against their servant. The Court said: "To hold that the judgment in such latter case should be given *res judicata* effect so as to bind one only *derivatively* liable in a later action against him would destroy the principal ground upon which the doctrine of *res judicata* is founded, which is, that one so estopped must have been an actual party to the litigation wherein the estopping judgment was rendered, or he must have sustained a privy relationship to one of the actual parties thereto." The Court held that the defendants, not having been parties to the first action of plaintiff against their servant, either actually or through privy relationship to their servant, that the judgment rendered against the latter was not *res judicata* as against them. It was pointed out, however, that if the judgment in the action against the servant had terminated in favor of the servant, since the defendants' liability was only derivative, no action could have been sustained against the defendants.

The decisions generally are to the effect that in an action *ex delicto*, where the doctrine of *respondeat superior* is, or may be, invoked, the injured party may sue the servant alone or the master alone, or may bring a single action against both. And when the action is brought against the servant alone, and a judgment is obtained against him, and such judgment is not satisfied, the injured party may bring an action against the master. In such case, however, the recovery against the master may not exceed the amount of the recovery against the servant. *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164, and cited cases. However, if the servant satisfies the judgment against him, or obtains a verdict in his favor, no action will lie against the master. *Whitehurst v. Elks*, 212 N.C. 97, 192 S.E. 850. See also 50 C.J.S., Judgments, section 757, page 279, where the authorities are assembled.

The ruling of the court below in sustaining the demurrer will be upheld.

Affirmed.

OLIVER G. RAND AND WADE A. GARDNER, COMMISSIONERS, v. WILSON COUNTY; J. T. BOYETTE, TAX COLLECTOR OF WILSON COUNTY; AND K. J. HERRING, AUDITOR AND TREASURER OF WILSON COUNTY.

(Filed 2 November, 1955.)

**1. Pleadings § 23—**

Where it is admitted on appeal that the judgment in question was a consent judgment, motion on appeal for permission to amend the complaint to allege that the judgment was a consent judgment may be allowed.

**2. Taxation § 26½—**

The listing of land in the name of the estate of the deceased owner is a void listing. G.S. 105-301 (3).

**3. Same—**

Where land has been improperly listed for taxation, the tax listing authorities have authority to list the property properly for taxation for the five years next preceding the date the taxes due are tendered. G.S. 105-331 (3).

**4. Judgments § 3½—**

A consent judgment is to be construed in the same way as if the parties had entered into the contract by a writing duly signed and delivered.

**5. Parties § 1—**

Where a consent judgment directs named persons to sell and convey land, to collect the proceeds, to pay the taxes lawfully due, and to distribute the balance as directed, the persons named are trustees of an express trust within the purview of G.S. 1-63, notwithstanding that the judgment denominates them as commissioners.

**6. Judgments § 3½: Taxation § 38c—**

A consent judgment directed trustees named therein to pay taxes lawfully due. The land in question had not been properly listed for more than five years. *Held:* The trustees could not tender the taxes lawfully due for the five years next preceding the tender, but were compelled to pay the amount demanded by the county and then sue to recover so much of the amount as was not lawfully due, G.S. 105-267, and the contention that the judgment authorized them to pay only the taxes due is untenable.

**7. Taxation § 38c: Parties § 1—**

Trustees of an express trust who have been required to pay taxes on the property not lawfully due are authorized to maintain an action for the recovery of the taxes not lawfully due without the joinder of the beneficial owners of the property. G.S. 1-63.

**8. Same: Pleadings § 19b—**

A suit to recover taxes paid under protest is not subject to demurrer for misjoinder of causes of action, notwithstanding that the suit is to recover the accumulation of taxes over a number of years.

APPEAL by plaintiffs from *Nimocks, J.*, May Term, 1955, WILSON. Reversed.

Civil action to recover taxes on real property, paid by plaintiffs under protest.

Sometime prior to October 1953, Herbert Farmer and others instituted an action against H. H. Hutchinson and others to try title to the real property described in the complaint. On 17 October 1953, a consent judgment was entered in which the plaintiffs were appointed commissioners (1) to sell the land in controversy, (2) to pay out of the proceeds of sale all taxes lawfully assessed against the property, and (3) to distribute the remaining proceeds as provided in the judgment.

On 13 February 1954, the plaintiffs, having made sale of the land, paid to the defendant County all arrearages of taxes claimed by the County to be due and payable which included taxes for the years 1931 through 1949. The payment was made under protest, and within ninety days thereafter the plaintiffs instituted this action, 20 July 1954, to recover the taxes paid for the years 1931 through 1949 in the sum of $2,238.78.

The defendants appeared and demurred to the complaint on four grounds, to wit: (1) plaintiffs are not the real parties in interest; (2) the plaintiffs have no legal capacity to sue; (3) there is a misjoinder of causes; and, (4) the plaintiffs have joined in one action a number of causes of action but have failed to set forth such causes of action separately. The demurrer was sustained, and plaintiffs excepted and appealed.

*Lucas, Rand & Rose and Gardner, Connor & Lee, Cyrus F. Lee for plaintiff appellants.*

*Luke Lamb for Wilson County, defendant appellee.*

BARNHILL, C. J. The complaint does not allege specifically that the judgment entered in the action to try title to the lands described in the complaint was in effect a judgment by consent. Reference is made thereto as such in the briefs filed in this Court, and it was admitted during the oral argument that said judgment was in fact a consent judgment. Therefore, the motion entered by the plaintiffs in this Court for permission to amend the complaint to allege that said judgment was a consent judgment is allowed.

It is alleged in the complaint that the property described therein was listed for the years 1931 through 1949 in the name of "M. S. Hutchinson Estate." This was a void listing. Hence we must discuss the question here presented as if the property had not been listed for taxation

for the period in question. *Morrison v. McLauchlin,* 88 N.C. 251; *Wake County v. Faison,* 204 N.C. 55, 167 S.E. 391; G.S. 105-301 (3).

The tax listing authorities of Wilson County were authorized to list properly the property for taxation for the five years next preceding the date the tender of taxes due was made, G.S. 105-331 (3), *Lawrence v. Comrs. of Hertford,* 210 N.C. 352, 186 S.E. 504, so that when the plaintiffs tendered to the County or offered to pay the taxes "lawfully due" on the property, there were then legally due and collectible taxes for the preceding five years. The question here presented is this: Did the plaintiffs have the right to pay the taxes demanded by the County and then maintain an action for the recovery of all taxes paid in excess of the amount "lawfully due?"

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of the court. It is to be construed in the same way as if the parties had entered into the contract by writing duly signed and delivered. *Bunn v. Braswell,* 139 N.C. 135; *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27; *Houghton v. Harris,* and cases cited, *post,* p. 92.

While the contract of the parties in the solemn form of a judgment refers to plaintiffs as commissioners, they were and are in fact trustees of an express trust within the meaning of G.S. 1-63. By the judgment they were directed, and it was their duty, (1) to sell and convey the land, (2) to collect the proceeds, (3) to pay the taxes lawfully due, and (4) to distribute the balance, after the payment of taxes, as directed in the judgment.

It is argued that plaintiffs were authorized to pay only taxes lawfully due. But under our statute they had no alternative other than to proceed as they did. They could not tender the taxes lawfully due for the five years next preceding the tender. They were compelled to pay the amount demanded by the County and then to sue for the recovery of so much of the amount paid as was not lawfully due. G.S. 105-267.

Aside from the express provisions of the judgment, upon the sale of the property it became their duty to pay the taxes assessed or assessable against the property sold. *Holt v. May,* 235 N.C. 46, 68 S.E. 2d 775; G.S. 105-408.

We conclude, therefore, that the plaintiffs, being trustees of an express trust, are authorized by G.S. 1-63 to maintain this action without the joinder of the beneficial owners of the property.

The demurrer cannot be sustained for the misjoinder of causes of action. The subject matter of the suit is the amount paid in excess of taxes for five years next preceding the payment. It is this excess pay-

ment that plaintiffs seek to recover. That it represents the accumulation of taxes over a number of years is immaterial.

The other grounds for demurrer set forth in the demurrer filed are without substance.

The judgment entered in the court below is

Reversed.

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OLIVER G. RAND AND WADE A. GARDNER, COMMISSIONERS, v. CITY OF WILSON; BLANCHE WOOLARD, CITY TAX COLLECTOR; AND F. TALMADGE GREEN, CITY MANAGER AND CITY TREASURER.

(Filed 2 November, 1955.)

APPEAL by plaintiffs from *Nimocks, J.*, May Term, 1955, WILSON. Reversed.

*Lucas, Rand & Rose and Gardner, Connor & Lee, Cyrus F. Lee for plaintiff appellants.*

*Carr & Gibbons for defendant appellees.*

PER CURIAM. This and the case of *Rand v. Wilson County, ante,* p. 43, are companion cases, the only difference being that this action is to recover taxes paid under protest to the City of Wilson rather than the County of Wilson. The judgment entered in the court below is reversed on authority of *Rand v. Wilson County, supra.*

Reversed.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 2 November, 1955.)

**1. Utilities Commission § 2—**

The common capital stock of a corporation is a security within the meaning of that term as used in G.S. 62-82, 83, and the Utilities Commission has authority not only to veto a proposed issue and sale of capital stock by a public utility to its stockholders at a designated price per share, but also to stipulate the minimum price at which the stock may be sold.

**2. Utilities Commission § 3—**

Findings of fact by the Utilities Commission that a proposed issue and sale by a public utility of its common stock to its stockholders at the pro-

posed price would not provide the utility with the funds necessary to meet the ever-increasing demands made upon it for public service, that the sale at $125 per share would barely provide the necessary capital, and that the stock of the utility was selling on the open market at a price in excess of $144 per share, are sufficient to support its order requiring the utility to sell the stock at a price not less than $125 per share.

WINBORNE and JOHNSON, JJ., took no part in the consideration or decision of this case.

APPEAL by Utilities Commission from *Nimocks, J.*, May Term, 1955, EDGECOMBE. Modified and affirmed.

The petitioner, Carolina Telephone and Telegraph Company, proceeding under G.S. 62-82, *et seq.*, filed a petition before the Utilities Commission seeking authority to issue and sell 33,320 shares of its common capital stock to its stockholders at par of $100 per share. The Utilities Commission approved the plan of financing set forth in the petition but vetoed the sale of said stock at par and ordered that it be sold at a price not less than $115 per share. The cause reached this Court on appeal, and we remanded for the Utilities Commission to find the facts upon which it based its order, particularly in respect to the facts required by G.S. 62-82, the existence of which authorizes the Commission to act. The material facts are fully stated in the opinion on the former appeal. *Utilities Commission v. Telephone Co.*, 239 N.C. 675, 80 S.E. 2d 643.

After the cause was remanded, the petitioner amended its petition so as to request authority to issue 66,640 shares of its common capital stock at par. The Commission made a full finding of facts in substantial, though not exact, accord with the statute. Upon the facts found, it authorized the petitioner to "sell 66,640 shares of its authorized but unissued common capital stock in accordance with its petition in this case, with the exception that same should be offered and sold at not less than $125 per share instead of $100 par." The petitioner appealed to the Superior Court. On the hearing of the appeal, the court below remanded the cause "with direction that it eliminate from its Order that part of its Order which requires the stock offered pro rata to stockholders or their assigns under pre-emptive rights be offered at a price of not less than $125.00 per share."

The Utilities Commission excepted and appealed to this Court.

*Attorney-General Rodman and Assistant Attorney-General Paylor for North Carolina Utilities Commission, appellant.*

*Chauncey H. Leggett, Ward & Tucker, and Joyner & Howison for appellee.*

BARNHILL, C. J. The common capital stock of a corporation is a security within the meaning of that term as used in G.S. 62-82, 83. *People v. Whelpton,* 222 P. 2d 935; *In Re McGraw's Estate,* 10 A. 2d 377, and cases cited; *Equitable Trust Co. v. Marshall,* 17 A. 2d 13; *Mary Pickford Co. v. Bayly Bros.,* 68 P. 2d 239. See also G.S. 78-2, G.S. 14-401.7, G.S. 105-67. This fact was conceded by the petitioner on the oral argument in this Court.

The right of the Commission to act upon the petition of the petitioner and the scope of its authority in so doing rest on the language used in G.S. 62-82, 83. The pertinent parts of these statutes are as follows:

"No utility shall issue any securities . . . unless and until, and then only to the extent that, upon application by the utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof . . . the Commission by order authorizes such issue . . ." G.S. 62-82.

"The Commission, by its order, may grant or deny the application provided for in the preceding section as made, or may grant it in part or deny it in part or *may grant it with such modification and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises . . .*" G.S. 62-83. (Italics supplied.)

In view of the language thus used by the Legislature in conferring power on the Utilities Commission to supervise and control the issue and sale of securities by a public utility, we unhesitatingly hold that the Commission had the authority not only to veto the sale of the proposed stock at par but also to impose the condition that such stock should be sold at a price not less than $125 per share.

The facts found by the Commission are amply sufficient to support its order. They disclose (1) that at the time the order was entered capital stock of the petitioner was selling on the open market at $144 per share; (2) that a sale of the stock at par would not provide the petitioner with the funds necessary to meet the ever-increasing demands made upon it for public service; and (3) that the sale at $125 per share will barely provide the capital outlay funds now needed by the petitioner. While the findings were not in these exact words, this is a correct summation of the facts found.

It follows that the court below erred in remanding the cause to the Utilities Commission with direction to strike from its order the requirement that said stock be sold at not less than $125 per share. The order entered by the Commission should have been affirmed. Therefore, this cause is remanded to the court below to the end that judgment may be entered in accord with this opinion.

Modified and affirmed.

WINBORNE and JOHNSON, JJ., took no part in the consideration or decision of this case.

STATE v. LILLIE MAE FRIZZELLE.

(Filed 2 November, 1955.)

**1. Homicide § 11—**

The right of a person to stand his ground and fight in his self-defense, regardless of the character of the assault made upon him, when such person is on his own premises, applies not only when he is in his home or place of business, but also when he is within the curtilage of his home, and where there is evidence that defendant was standing on the edge of her yard by the roadside when the assault was made upon her, it is for the jury to determine whether the assault occurred while defendant was on her own premises.

**2. Same: Homicide § 27f—**

Where there is evidence that defendant was on her own premises when she was assaulted, it is error for the court, in charging the jury on the plea of self-defense, to fail to instruct the jury in regard to defendant's right to stand her ground, if she was on her own premises, regardless of whether the assault upon her was felonious or nonfelonious.

APPEAL by defendant from *Frizzelle, J.*, August Term, 1955, of LENOIR.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one Henry Frizzelle, Jr. The solicitor announced that the State would not ask for a verdict of murder in the first degree but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant.

The evidence in this case tends to show that the defendant and the deceased were married on 16 December, 1948, and that two children were born of the marriage; that the deceased obtained a divorce from the defendant in October, 1954, but continued to live with her from time to time. That the defendant was upset over the fact that the deceased had not been to see her the week of the homicide; that she had stated to one of the State's witnesses she knew the reason he had not been to see her was because he had been associating with another woman. That the defendant on the day of the alleged homicide was three months pregnant as a result of her cohabitation with the deceased. That on the night of 29 June, 1955, the deceased came to the home of the defendant and called her out to his car which he had parked in the edge of her yard, about 30 feet from her front door. As she approached him, he was sitting in the car, on the side next to her home, and had the

left door open. "He told her that he had been there earlier, that same night, but she had company and he had left. She . . . stated to him that she had not had company; that they had some words and she started to leave him. He grabbed her and held her, and while holding her began to beat her on the head with his fist and kicked her in the stomach; that she tried to get loose from him and could not do so; after he kicked her he turned her loose and started hitting her on the head with his fist and she got her knife out of her pocket and struck at him with it in order to get him off of her; that she did not know what part of his body she hit until after she saw him in the path and discovered that he was dead; . . ." The deceased ran a distance of about 30 yards toward a neighbor's house before he died.

The jury returned a verdict of guilty of manslaughter, and from the judgment imposed on the verdict the defendant appeals, assigning error.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Jones, Reed & Griffin for defendant.*

DENNY, J. The defendant excepts to and assigns as error the following excerpt from the charge: "Now, gentlemen, not only have our courts held that ordinarily one is not required to repel a simple assault with a deadly weapon but it has also held that where one is without fault and an attempted assault is being made upon one, such one ought to retreat if there is an opportunity to retreat with safety but where the assault is felonious, that is, where it is done with the intent to kill or at least to inflict serious bodily injuries, and the person assaulted is without fault, the person that is assaulted is not required to retreat."

The above instruction was proper, if at the time the defendant was assaulted she was not on her own premises. *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530; *S. v. Johnson,* 184 N.C. 637, 113 S.E. 617; *S. v. Dixon,* 75 N.C. 275. But, in light of the evidence tending to show that the defendant was on her own premises when the deceased assaulted her, she assigns as error the failure of the court to explain the law arising on such evidence with respect to her right to stand her ground and defend herself, on her own premises, regardless of the character of the assault. We think this exception is well taken and must be sustained.

The State contends, however, there is no evidence tending to show that the nonfelonious assault made by the deceased on the defendant occurred on her premises. We do not concur in this view. We think the evidence in this respect was sufficient to require its submission to the jury for its determination as to whether the assault occurred on the defendant's premises. The State further contends that, if it should be

conceded that the defendant was on her premises when the nonfelonious assault occurred, the law in this jurisdiction does not give a person the right, in the case of a nonfelonious assault, to stand his ground and return blow for blow "when such person is standing on the edge of his yard by the roadside."

It is true that in most of our cases involving the right of self-defense, where the defendant had been assaulted on his own premises, such assault occurred in the home or place of business of the defendant. However, one's own premises, in this connection, will not be limited to his dwelling house only, but in any event will extend to attacks within the curtilage of the home. And the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings. *S. v. Walker,* 236 N.C. 742, 73 S.E. 2d 868; *S. v. Miller,* 223 N.C. 184, 25 S.E. 2d 623; *S. v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526; *Beard v. United States,* 158 U.S. 550, 39 L. Ed. 1086, 15 S. Ct. 962; 26 Am. Jur., Homicide, section 156, page 264.

In *S. v. Walker, supra, Winborne, J.,* speaking for the Court, said: "Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home, or place of business, or on his own premises, the law imposes upon him no duty to retreat before he can justify his fighting in self-defense,—regardless of the character of the assault," citing numerous authorities.

In the present case, if the jury should find that the defendant was assaulted on her own premises, the doctrine of retreat would have no application to her and it would be immaterial whether the assault on her was felonious or nonfelonious. *S. v. Walker, supra.*

We think the defendant is entitled to a new trial and it is so ordered.

New trial.

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CAESAR BACCHUS PIPER, JR., v. H. F. ASHBURN AND JOHN WESLEY ASHBURN, AND H. F. ASHBURN, GUARDIAN AD LITEM FOR JOHN WESLEY ASHBURN.

(Filed 2 November, 1955.)

**Evidence § 19—**

Where a passenger in a car, in testifying for the driver, states that the driver told her that when he entered the intersection the traffic control light was green, and that his driving did not alarm her so she was assuming he was driving safely, *held,* it is competent for the adverse party, on cross-examination, to elicit from her testimony, for the purpose of impeachment, that in her separate action against the driver she had alleged that he entered the intersection when the red light was against him, and the court's

action in withdrawing from the jury such impeaching evidence must be held for prejudicial error.

APPEAL by defendants from *Sharp, Special J.*, at 18 April, 1955 Civil Term, of FORSYTH.

Civil action to recover damages to person and property allegedly sustained by plaintiff as result of actionable negligence of defendants.

The action arose out of an automobile collision which occurred about 8 o'clock p.m. on 19 October, 1954, at the intersection of Glenn Avenue and 25th Street in the city of Winston-Salem, N. C., between plaintiff's automobile, operated by him in easterly direction on 25th Street, and in which Dr. Vermelle Kelly was riding, and an automobile owned by defendant H. F. Ashburn, and operated by his son, the defendant John Wesley Ashburn, traveling in a northwardly direction on Glenn Avenue. Traffic at this intersection is regulated by an overhead traffic electric signal. The controversy revolved around question as to whether the plaintiff, Dr. Piper, or the defendant, John Wesley Ashburn, had the right of way as they approached the intersection.

Upon the trial in Superior Court Dr. Piper, as witness for himself, testified in pertinent part: "At no time before I entered the intersection did that light turn red for eastbound traffic, the traffic going the way I was going; it did not turn yellow before I entered the intersection. My vehicle got into the intersection first."

John Wesley Ashburn testified in pertinent part: "As I continued north at the intersection the traffic signal was green for me . . . it did not then change to any other color . . ."

And Dr. Vermelle Kelly testified as a witness for plaintiff Dr. Piper. She stated that she did not recall anything about the accident—that she was knocked unconscious. Then on cross-examination she testified that she did not ask Dr. Piper whether he entered the intersection on a green or against a red light; that he told her that when he entered Glenn and 25th the light was green; and that she brought suit against Mr. Ashburn and against Dr. Piper. Then, still on cross-examination, the witness, Dr. Kelly, was asked this question: "Q. And in your complaint you stated that Dr. Piper entered that intersection when the light was red against him, didn't you?", to which she answered "Yes." The court first overruled objection to the question. But when plaintiff rested his case, and before the charge proper, the court called the attention of the jury to the question and answer, and gave this instruction: "Now, there was an objection to that question, which the court overruled. On further consideration, I have come to the conclusion that that objection should have been sustained; that it is not competent for you to consider in this case what Dr. Kelly alleged in her case about

the red light; so I now instruct you not to consider that statement of Dr. Kelly. Remove that from your minds and consideration in this case." To this ruling of the court defendants in apt time excepted. Exception No. 1.

Later on in her cross-examination Dr. Kelly testified in respect to Dr. Piper: "His driving didn't alarm me, so I am assuming he was driving safely."

The case was submitted to the jury upon issues arising upon the pleadings as they relate to plaintiff's alleged cause of action, and to defendant's cross-action and counterclaim.

The jury answered the issues favorable to plaintiff, and from judgment for plaintiff in accordance therewith, defendants appeal to Supreme Court and assign error.

*Weston P. Hatfield and Smith, Moore, Smith & Pope for plaintiff, appellee.*

*Deal, Hutchins & Minor for defendants, appellants.*

WINBORNE, J. Assignment of error No. 1 based upon exception to the ruling of the trial court in excluding the affirmative answer given by Dr. Kelly to the question asked her about statement she made in her complaint that Dr. Piper entered the intersection when the light was red against him is well taken. This answer by her was competent for impeachment. Speaking of the rule as to prior inconsistent statements for impeachment purposes, Stansbury in his treatise on North Carolina Evidence, Section 46, p. 67, has this to say: "A witness may be impeached by proof that on other occasions he has made statements inconsistent with his testimony on the present trial. Such statements may have been made orally, either informally or in the course of the witness' testimony at a former trial or hearing, or they may have been in writing . . .," citing among other cases *Floyd v. Thomas,* 108 N.C. 93, 12 S.E. 740. See also recent case of *S. v. Hart,* 239 N.C. 709, 80 S.E. 2d 901.

It is noted that the record of case on appeal shows that Dr. Kelly, though suing Dr. Piper in another action, is here testifying for him as to statement made by him to her, corroborative of his testimony given in this case; and also saying she is assuming he was driving safely.

We, therefore, hold that there is prejudicial error in excluding her answer to the question asked, for which there must be a new trial. *S. v. Hart, supra.* Other assignments of error need not be expressly considered, since the matters to which they relate may not recur at next trial.

New trial.

VERMELLE C. KELLY v. CAESAR BACCHUS PIPER, JR., H. F. ASHBURN AND JOHN WESLEY ASHBURN, AND H. F. ASHBURN AS GUARDIAN AD LITEM FOR JOHN WESLEY ASHBURN.

(Filed 2 November, 1955.)

**Appeal and Error §§ 1, 2—**

While ordinarily the action of the trial judge in permitting a party to amend so as to plead a judgment obtained by him in another action, is in the exercise of the court's discretion, and an appeal therefrom will be dismissed as premature, the Supreme Court will take judicial notice of its own decision setting aside the judgment pleaded and ordering a new trial in the other action, and in the exercise of its supervisory power over the courts of the State, will order the amendment stricken *ex mero motu*. Constitution of North Carolina, Article IV, Sec. 8.

APPEAL by defendants, H. F. Ashburn and John Wesley Ashburn, and H. F. Ashburn, Guardian *ad litem* for John Wesley Ashburn, from *Johnston, J.*, at 11 July, 1955 Term, of FORSYTH.

Civil action to recover damages to person and property allegedly sustained by plaintiff as result of actionable negligence of defendants,—heard upon motion of defendant Caesar Bacchus Piper, Jr., for an order allowing him to amend his cross-action against the defendants Ashburn so as to plead judgment obtained by him in his action against the Ashburns "as a full and final determination of the rights and liabilities as between and among the defendants in this action, all of whom were parties to the hereinabove mentioned suit instituted by the defendant Caesar Bacchus Piper, Jr., against H. F. Ashburn and John Wesley Ashburn."

The cause coming on to be heard upon the motion above referred to, the court, in the exercise of its discretion, being of the opinion that such motion should be granted, so ordered. The defendants excepted thereto and gave notice of appeal, and appeal to the Supreme Court and assign error.

*Smith, Moore, Smith & Pope for defendant Piper, appellee.*
*Deal, Hutchins & Minor for defendants Ashburn, appellants.*

PER CURIAM. The judgment or order from which this appeal is taken was entered by the judge in the exercise of his discretionary power. Ordinarily such appeal is premature, and will be dismissed.

Nevertheless, the Court takes notice of its decision entered cotemporaneously herewith by which error is found in the judgment sought to be pleaded, and a new trial is ordered therein. Hence the alleged basis

for the order from which appeal is undertaken is wiped out, and the amendment, figuratively, is left suspended in mid-air.

Therefore the Supreme Court in the exercise of its supervisory power over courts of the State, N. C. Const., Art. IV, Sec. 8, *In re Stokley,* 240 N.C. 658, 83 S.E. 2d 703, *ex mero motu,* orders the amendment stricken from the record.

The costs of this appeal will be divided between defendants appellant and defendant appellee.

Appeal dismissed.

Amendment stricken.

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J. B. LEWIS, ADMINISTRATOR OF THE ESTATE OF WILLIAM ISAAC LEWIS, DECEASED, v. FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, AND THOMAS GILLIAM.

(Filed 2 November, 1955.)

**1. Death § 3—**

Right of action for wrongful death is purely statutory, and the statute authorizes such action only when the deceased, if he had lived, could have maintained an action for the wrongful act, neglect or default. G.S. 28-173.

**2. Same: Parent and Child § 1b—**

In this State an action for wrongful death of an unemancipated child cannot be maintained against his mother for ordinary negligence resulting in his death, since, had the child survived, he could not have maintained an action against her to recover damages for his injuries.

**3. Same: Torts § 6—Contribution and indemnity for tort are based upon liability as a joint tort-feasor.**

In an action for wrongful death instituted by the administrator of a deceased unemancipated child against the driver of the car inflicting the fatal injury, defendant is not entitled to have the child's mother joined as a party defendant for the purpose of contribution or indemnity upon allegations that the child's mother was negligent in permitting the child to enter upon the highway unattended, since the mother cannot be liable to the plaintiff as a joint tort-feasor, and the statutory right of contribution and the right to indemnity on the ground of primary and secondary liability are both based upon the liability of a joint tort-feasor.

**4. Negligence § 8—**

The doctrine of primary and secondary liability in tort actions is based on active negligence and negative negligence of joint tort-feasors.

APPEAL by defendants from *Joseph W. Parker, J.,* June Term 1955 of LENOIR.

Civil action for damages for the death of a four-year-old child, when struck by an automobile.

The defendants answered denying the material allegations of the complaint, and alleged ordinary negligence on the part of the child's mother in permitting the child to enter upon the highway unattended as the proximate, or one of the proximate causes of the child's death.

The defendants filed a written motion praying that the child's mother be made a party defendant for the purposes of contribution under G.S. 1-240, and for indemnity.

The court denied the motion, and the defendants excepted and appealed, assigning error.

*Jones, Reed & Griffin for Plaintiff, Appellee.*

*Whitaker & Jeffress for Defendants, Appellants.*

PARKER, J. Under G.S. 28-173, Death by Wrongful Act, the personal representative of the deceased has a right of action only when the death of his intestate "is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor." See: *Cowgill v. Boock,* 189 Or. 282, 218 P. 2d 445, 19 A.L.R. 2d 405, headnote 3, construing a similar provision in the statute for Wrongful Death in Oregon. The right of action for wrongful death is based upon this statute, and must be asserted in conformity therewith. *Webb v. Eggleston,* 228 N.C. 574, 46 S.E. 2d 700.

This unemancipated four-year-old child, if he had lived, could not have maintained an action against his mother to recover damages for injuries caused by her ordinary negligence. *Redding v. Redding,* 235 N.C. 638, 70 S.E. 2d 676; *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135; illuminating annotation 19 A.L.R. 2d 423.

In this State an action for wrongful death of this child cannot be maintained against his mother for ordinary negligence resulting in his death, since, had the child survived, he could not have maintained an action against her to recover damages for his injuries. *Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835; Anno. 19 A.L.R. 2d, Sec. 13. For a case of gross negligence and intoxication see: *Cowgill v. Boock, supra.* As to wilful or malicious acts of negligence see: Anno. 19 A.L.R. 2d, Sec. 14.

The defendants seek to have the child's mother joined as a party defendant under the provisions of G.S. 1-240 as a joint tort-feasor. This cannot be done because the defendants cannot invoke either the statutory right of contribution, or the doctrine of primary and secondary liability, against the mother of the deceased child, who is not liable to the plaintiff in this action as a joint tort-feasor. *Lovette v. Lloyd,*

236 N.C. 663, 73 S.E. 2d 886. The doctrine of primary and secondary liability in tort actions is based on active and negative negligence of joint tort-feasors. *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648.

The defendants cannot invoke the doctrine that a passively negligent tort-feasor, who is compelled to pay damages for a wrongful death, is entitled to indemnity from the actively negligent tort-feasor because the rationale of this doctrine is based upon the principle that the actively negligent tort-feasor and the passively negligent tort-feasor are both liable in damages to the personal representative of the deceased for the joint wrong, and the mother of this child is not liable in damages to plaintiff for ordinary negligence in the death of his intestate, if such should be the fact. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768; *Clothing Store v. Ellis Stone & Co.,* 233 N.C. 126, 63 S.E. 2d 118; *Johnson v. Asheville,* 196 N.C. 550, 146 S.E. 229.

The order of the lower court is

Affirmed.

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COY BILLINGS v. BAXTER H. TAYLOR, TRADING AS TAYLOR CONSTRUCTION COMPANY.

(Filed 2 November, 1955.)

**1. Highways § 4c—Complaint held sufficient to allege negligence in construction of highway resulting in damage to plaintiff's crop.**

Allegations to the effect that defendant, in constructing a highway contiguous to plaintiff's property, caused great clouds of dust to form and settle on plaintiff's tobacco, causing considerable damage to the crop, which the defendant by due diligence could have prevented by watering the roadway with facilities on hand and available, and that defendant negligently failed and neglected to use such facilities, proximately causing damage to plaintiff's crop in a designated sum, *are held* sufficient to allege actionable negligence in the breach of a legal duty owed by defendant to plaintiff, proximately causing the damage to plaintiff, and demurrer was properly overruled.

**2. Negligence § 20—**

In an action for negligence it is not necessary for plaintiff to allege specifically that it was the duty of defendant to do or not to do a particular thing, it being sufficient for plaintiff to state in a concise manner the essential, ultimate facts from which such duty appears or will be implied by law.

**3. Same—**

In an action for negligence it is not necessary that custom or common practice be specifically pleaded, since these are evidentiary facts bearing

on the question of due care, and may be proved under the allegation of ultimate facts showing negligence.

**4. Appeal and Error § 40f—**

On appeal from an order overruling a demurrer, the Supreme Court will not undertake to chart the course of the trial in advance of the hearing.

APPEAL by defendant from *Sharp, Special Judge,* at June Term, 1955, of WATAUGA.

Civil action to recover for damage to growing tobacco crop, located near a new highway project constructed by the defendant under contract with the North Carolina State Highway and Public Works Commission, due to the alleged negligent and wrongful conduct of the defendant.

The defendant demurred to the complaint for failure to state facts sufficient to constitute a cause of action. The demurrer was overruled, and from judgment based on such ruling the defendant appeals.

*Trivette, Holshouser & Mitchell for plaintiff, appellee.*

*Ward & Bennett for defendant, appellant.*

JOHNSON, J. It may be conceded that much of the complaint deals in generalities and conclusions of pleader. However, when it is stripped of such allegations, enough remains to overthrow the demurrer.

These, in substance, are the crucial, determinative allegations of the complaint: (1) that in the early part of 1954, the plaintiff set out a tobacco crop on his land just off the right of way obtained by the North Carolina State Highway and Public Works Commission for the construction of a new highway; (2) that the defendant contractor in building the highway caused great clouds of dust to form and settle on plaintiff's tobacco, thereby causing considerable damage to the crop "which the defendant by due diligence, . . . could have avoided, by the use of water and water wagons"; (3) "that the defendant at the time . . . had facilities on hand for watering said roadway and plenty of water was available for use in keeping down the dust and dirt so that it would not damage the . . . tobacco crop of the plaintiff, *but notwithstanding this the defendant negligently failed and neglected to use the same but deliberately made and caused clouds of dust to form and settle on the plaintiff's tobacco crop,* day after day for several days and which caused considerable and permanent damages to the plaintiff's . . . tobacco crop" (italics added); (4) that the defendant not only failed and neglected to use the water and watering facilities he had on hand for watering the roadway and keeping the dirt and dust off the plaintiff's tobacco, but he negligently caused greater amounts of dirt and dust to

be stirred up than was reasonably necessary under the existing conditions; (5) that the negligent acts and omissions complained of proximately caused damage to the plaintiff's crop in at least the sum of $1,800.

The foregoing allegations, when taken as true and liberally construed in favor of the plaintiff, as is the rule on demurrer, disclose ultimate facts sufficient to show breach of a legal duty owed by the defendant to the plaintiff, proximately causing damage to the plaintiff. This suffices to allege actionable negligence.

The defendant stresses the failure of the plaintiff to specifically allege (1) that the defendant owed the plaintiff a duty to sprinkle the roadway or (2) that "there was any custom or engineering practice which required the sprinkling of a roadway under construction." As to the first of these factors, it suffices to point out that in the law of negligence it is not 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 concise manner the essential, ultimate facts from which such duty appears, or from which the law will imply such duty. *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893. And, secondly, 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. *Pinnix v. Toomey, supra.*

The remaining contentions of the defendant, stated in the brief and debated on the argument, have been considered and found to be without substantial merit. Since the case goes back to the trial court, to afford the plaintiff an opportunity to offer his proofs and see if he can make out his case as alleged, we refrain from further comment on the issuable facts or the principles of law which may be applicable thereto. It is not the province of an appeal from an order overruling a demurrer to have this Court chart the course of the trial in advance of the hearing. See recent amendment to our rules, designated as Rule 4 (a), limiting the right of appeal when demurrer is overruled.

Affirmed.

I. J. SPARROW, JR., TRADING AS SPARROW'S SUPER MARKET, v. AMERICAN FIRE & CASUALTY COMPANY (ORIGINAL PARTY DEFENDANT) AND COMMERCIAL NATIONAL BANK OF KINSTON, NORTH CAROLINA (ADDITIONAL PARTY DEFENDANT).

(Filed 2 November, 1955.)

**1. Insurance § 43½—**

The facts agreed were to the effect that an employee, while using the employer's automobile for the performance of his duties within the municipality, took the insured automobile without the knowledge or consent of insured employer, and that the automobile was later located in a distant state, resulting in loss to insured in a stipulated sum. *Held:* The loss was not covered by a policy obligating insurer to pay for any direct or accidental loss of or to the insured automobile, since under the facts agreed, the loss was not accidental.

**2. Insurance § 45½—**

Where the facts agreed disclose that an employee, while using the employer's car for the performance of his duties within the municipality, took the car without the knowledge or consent of insured, and that later the automobile was found in a distant state, resulting in loss in a stipulated sum, *held*, such loss is not covered by a policy of insurance obligating insurer to pay for loss or damage to the automobile caused by theft, larceny, robbery or pilferage.

**3. Controversy without Action § 4—**

Where a case is tried on an agreed statement of facts, such statement is in the nature of a special verdict, and the court is not permitted to infer or deduce further facts from those stipulated.

APPEAL by plaintiff from *Parker, J.*, at 16 May, 1955, Term of LENOIR.

Civil action to recover on a policy of automobile theft insurance containing comprehensive coverage clause. Jury trial was waived and the case was heard upon an agreed statement of facts. These in substance are the facts agreed:

1. That at the times herein mentioned the plaintiff was the owner of a 1952 model two-door Mercury automobile, insured by the defendant insurance company.

"2. That there is attached hereto and made a part hereof a certified copy of (the) policy issued by the defendant insurance carrier to the plaintiff, which policy was in full force and effect on the date of the wrongful appropriation of the said Mercury automobile by Roland Bell, Jr., from his employer, the plaintiff, I. J. Sparrow, Jr.

"3. That on or about the 8th day of December 1953, Roland Bell, Jr., was in the regular employ of the plaintiff, and that the said Roland Bell, Jr. by the direction, and with the knowledge and consent, of the plaintiff was using the said Mercury automobile in connection with his

employment by the plaintiff for the purpose of collecting within the City of Kinston, Lenoir County, North Carolina, certain accounts receivable which were due to the plaintiff; that on or about the 8th day of December, 1953, the said Roland Bell, Jr., while in possession of the plaintiff's automobile as aforesaid, wrongfully left the City of Kinston and the State of North Carolina in the said 1952 Mercury automobile without the knowledge or consent of the plaintiff; that the said Roland Bell, Jr., and the said Mercury automobile were located on or about the 17th day of December 1953 in the City of San Antonio, State of Texas; that as a result of the said wrongful appropriation of the said automobile by the said Roland Bell, Jr., the plaintiff in this action suffered certain losses and damages, which, it is agreed by all parties hereto, amount to $1,000.00."

The pertinent insuring clauses of the policy are:

1. "Coverage F"—Comprehensive clause, which binds the insurance company "To pay for any direct and accidental loss of or damage to the automobile, . . . except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset."

2. "Coverage I"—Theft (Broad Form) clause, which binds the insurance company "To pay for loss of or damage to the automobile, . . . caused by theft, larceny, robbery or pilferage."

Upon the facts agreed, the court ruled as a matter of law that any loss or damage sustained by the plaintiff was not insured by the defendant insurance company under the terms of the insurance policy. From judgment entered in accordance with such ruling, the plaintiff appeals.

*LaRoque & Allen for plaintiff, appellant.*
*White & Aycock for defendant Insurance Company, appellee.*

JOHNSON, J. The plaintiff insists that he is entitled to recover under the comprehensive clause—"Coverage F," which binds the insurance company to pay for "any direct and accidental loss of or damage to the automobile. . . ." However, to recover under this clause, it is noted that the loss or damage must be both "direct" and "accidental." In the case at hand, the facts agreed establish no element of "accidental" loss or damage as that term is commonly understood and also well defined in our decisions. See *Fletcher v. Security Life & Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687; *Kirkley v. Merrimack Mutual Fire Ins. Co.*, 232 N.C. 292, 59 S.E. 2d 629.

Nor is the plaintiff entitled to recover under the "Theft (Broad Form) clause—Coverage I," which binds the insurance company to pay for loss or damage to the automobile caused by "theft, larceny, robbery or pilferage." The facts agreed do not bring the case within the meaning of this clause. See *Funeral Home v. Insurance Co.*, 216 N.C. 562, 5 S.E. 2d 520; *Auto Co. v. Insurance Co.*, 239 N.C. 416, 80 S.E. 2d 35.

Where, as here, a case is tried on an agreed statement of facts, such statement is in the nature of a special verdict, admitting there is no dispute as to the facts, and constituting a request by each litigant for a judgment which each contends arises as a matter of law on the facts agreed, and consequently the court is not permitted to infer or deduce further facts from those stipulated. *Auto Co. v. Insurance Co., supra.*

The decisions relied on by the plaintiff are distinguishable.

The judgment below is

Affirmed.

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BETTY P. HAWES, WIDOW; AND SHARON LYNN HAWES, MINOR DAUGHTER OF MAYNARD HAWES, DECEASED, v. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION AND UNITED BENEFIT LIFE INSURANCE COMPANY AND MARYLAND CASUALTY COMPANY.

(Filed 2 November, 1955.)

**1. Master and Servant § 55d—**

The findings of fact of the Industrial Commission are conclusive and binding if supported by competent evidence, notwithstanding that there may be competent evidence which would have supported a contrary finding.

**2. Same—**

Conclusions of law of the Industrial Commission based on the facts found are reviewable, and whether the relationship between the parties upon certain facts was that of employer and employee is a conclusion of law and reviewable.

**3. Master and Servant § 39a—**

The facts found by the Industrial Commission in this case *are held* to support its finding that the deceased insurance agent, at the time of his fatal accident, was not an employee of defendant insurance companies within the purview of the Workmen's Compensation Act.

APPEAL by plaintiff from *Johnston, J.*, July Term 1955 of FORSYTH.

Proceeding before the Industrial Commission for compensation for the death of an alleged employee.

The Hearing Commissioner found as facts that Maynard Hawes was district manager of the Durham agencies of the defendant insurance

companies, and carried on his duties pursuant to the terms of two written contracts—one with each defendant,—and that these two contracts contain this language: "No provision in this contract shall be construed to create the relation of employer and employee between the company and the agent, and he shall be free to exercise his own judgment as to the persons from whom he will solicit and the time, place, and manner and amount of solicitation," with the exception that one contract contains the words "between the association and the second party," instead of "between the company and the agent"; these contracts provided that the full compensation to be received by Hawes for his services and expenses was commissions at a fixed schedule based upon premiums paid on policies issued from applications secured by him; that on 3 July 1952 a representative of the State manager's office of the defendants called upon Maynard Hawes in connection with an alleged shortage in Hawes' accounts, and Hawes signed this statement: "I, Maynard Hawes, agree not to solicit any business for Mutual or United Benefit, or collect any premiums after July 6, 1952, at 12:00 midnight, at which time my licenses are cancelled"; that notwithstanding this statement he continued to solicit and sell insurance for the defendants throughout the ensuing week prior to his death and obtained 15 solicitations; that on 11 July 1952 he left Durham to go to Winston-Salem to confer with the defendants' State manager travelling in his own car, and en route his car collided with a bridge abutment instantly killing him; that in a brief case in his car were found these 15 solicitations upon which policies of insurance were later issued by the defendants. Upon the facts found the Hearing Commissioner concluded that the relationship of employee and employer did not exist between Hawes and the defendants, that the Industrial Commission had no jurisdiction of the parties, and an award was issued denying compensation.

Upon appeal to the Full Commission the opinion and award of the Hearing Commissioner was vacated and set aside, and it was ordered that the case be reset before a Hearing Commissioner for the introduction of additional evidence.

Upon the rehearing the Hearing Commissioner made similar findings of fact and conclusions as the former Hearing Commissioner, and issued an award denying compensation.

Upon appeal to the Full Commission, it adopted as its own the findings of fact and conclusions of law of the Hearing Commissioner at the rehearing, and affirmed his decision in all respects.

The plaintiff then appealed to the Superior Court, where the order of the Full Commission was affirmed, and all the exceptions of the plaintiffs were overruled.

Plaintiffs appeal to this Court, assigning error.

*Buford T. Henderson for Plaintiffs, Appellants.*
*Deal, Hutchins & Minor for Defendants, Appellees.*

PARKER, J. Under the Workmen's Compensation Act the Industrial Commission is constituted the fact-finding body, and their findings, if supported by competent evidence, are "conclusive and binding as to all questions of fact." G.S. 97-86; *Cooper v. Ice Co.*, 230 N.C. 43, 51 S.E. 2d 889. This is true even though there may be competent evidence which would have supported a contrary finding. *Creighton v. Snipes*, 227 N.C. 90, 40 S.E. 2d 612. However, this does not mean that the conclusions of the Commission based upon the facts found are in all respects unexceptionable. *Perley v. Paving Co.*, 228 N.C. 479, 46 S.E. 2d 298; *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109.

The relationship created by the facts found here by the Commission is a question of law, and the conclusion of the Commission based on those facts is reviewable. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137.

After a careful analysis of the evidence and the findings of fact we arrive at the decision that the findings of fact are supported by competent evidence, and the conclusion of the Commission founded upon the facts found, that the relationship between Maynard Hawes, the deceased, and the defendants was not that of employee and employer, was correct. *McCraw v. Mills, Inc.*, 233 N.C. 524, 64 S.E. 2d 658; *Perley v. Paving Co., supra; Hayes v. Elon College, supra; Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515; *Bryson v. Lumber Co.*, 204 N.C. 664, 169 S.E. 276; *Mutual Life Ins. Co. v. State*, 71 N.D. 78, 298 N.W. 773, 138 A.L.R. 1115; *Income Life Ins. Co. v. Mitchell*, 168 Tenn. 471, 79 S.W. 2d 572.

It would seem that when the deceased signed the statement that he agreed not to solicit any business for the defendants or collect any premiums after 6 July 1952 at midnight, at which time his licenses were cancelled, that he had severed all relations with the companies.

The judgment of the Superior Court is

Affirmed.

J. S. INGLE AND AUGUSTA INGLE, HIS WIFE, v. ED McCURRY.

(Filed 2 November, 1955.)

1. **Trial § 24a: Constitutional Law § 22: Mortgages § 36—Court may not find facts on issue raised by pleadings in absence of consent.**

Where, in an action on a note, plaintiffs' evidence makes out a *prima facie* case and does not establish defendant's affirmative defense that the action was to recover a deficiency judgment precluded by G.S. 45-21.38, the dismissal of the action by the court prior to the introduction of evidence by defendant, upon the court's finding of facts in accordance with the allegations of defendant's affirmative defense, is reversible error as depriving plaintiffs of their constitutional right of trial by jury, Constitution of North Carolina, Article I, Section 19, Article IV, Section 1, G.S. 1-172, G.S. 1-184, there being no agreement of the parties waiving jury trial or consenting that the court should find the facts.

2. **Appeal and Error §§ 2, 14—**

Attempted appeal from an interlocutory order which affects no substantial right of plaintiffs is fragmentary and premature and may be disregarded in the Superior Court and in the Supreme Court on appeal.

APPEAL by plaintiffs from *Rudisill, J.*, at May Term, 1955, of CATAWBA.

*Childs & Childs and Fred D. Caldwell for plaintiffs, appellants.*

*Russell W. Whitener and J. H. Evans for defendant, appellee.*

JOHNSON, J. This is a civil action to recover the balance alleged to be due on a promissory note. The defendant by answer admits the execution of the note but denies that any sum remains due thereon. Also, by way of affirmative defense the defendant alleges: (1) that the note was given for the balance of the purchase price of real estate and was secured by mortgage; (2) that the note and mortgage were prepared under the direction and supervision of the plaintiffs, sellers of the real estate; (3) that the mortgage has been foreclosed by exercise of the power of sale; and (4) that consequently this action, being one to recover a deficiency judgment against the defendant, may not be maintained by virtue of statute, G.S. 45-21.38.

At the trial below, after the plaintiffs had introduced their evidence and rested their case, the presiding Judge, on facts found substantially in accord with the allegations of the defendant's affirmative defense, *i.e.*, that the note sued on was given for the balance of the purchase price of real estate, entered judgment decreeing that the plaintiffs recover nothing and dismissing the action.

The plaintiffs' appeal challenges the validity of the judgment. In determining the question thus presented, these factors come into focus: (1) the record discloses no stipulation by which jury trial was waived or consent was given for the court to find facts; (2) the plaintiffs' evidence was sufficient to make out a *prima facie* case in accordance with the allegations of the complaint; (3) the defendant offered no evidence; (4) the plaintiffs' evidence does not establish the truth of the defendant's affirmative defense. Hence the dismissal of plaintiffs' action may not be sustained on the ground that the plaintiffs by their own evidence established the defendant's affirmative defense as a matter of law. See *Hedgecock v. Ins. Co.*, 212 N.C. 638, 194 S.E. 86; *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248.

It thus appears that the judgment entered below offends against the plaintiffs' constitutional right of jury trial. N. C. Const., Art. I, Sec. 19 and Art. IV, Sec. 1; G.S. 1-172; G.S. 1-184; *Chasteen v. Martin*, 81 N.C. 51; *Hahn v. Brinson*, 133 N.C. 7, 45 S.E. 359. A new trial is necessary. To that end, let the judgment entered below be vacated.

In this view of the case it is unnecessary for us to discuss the assignments of error directed to the earlier rulings of the trial court, from which the plaintiffs gave notice of appeal to this Court. This earlier attempted appeal, not being based upon an order or determination of the court affecting a substantial right of the plaintiffs, was fragmentary and premature. It was correctly so treated below and will be disregarded here. See G.S. 1-277; *School Trustees v. Hinton*, 156 N.C. 586, 71 S.E. 1087.

New trial.

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MRS. MARY STRICKLAND, GEORGE STRICKLAND AND WIFE, LEE STRICKLAND; HERMAN STRICKLAND AND WIFE, LILLIAN STRICKLAND; GARLAND STRICKLAND AND WIFE, FLORA STRICKLAND; MAJOR STRICKLAND AND WIFE, LUCILLE STRICKLAND; BESSIE STRICKLAND (UNMARRIED); CALLIE STRICKLAND (UNMARRIED); MARY S. REGISTER AND HUSBAND, B. R. REGISTER; EFFIE S. ADAMS AND HUSBAND, BRAXTON ADAMS; ESSIE S. HOWELL AND HUSBAND, B. D. HOWELL; MAYBELLE S. PRICE AND HUSBAND, SIMPSON PRICE; KATIE S. CREECH AND HUSBAND, ROBERT CREECH, v. LIZZIE KORNEGAY AND LAMONT KORNEGAY.

(Filed 2 November, 1955.)

**Trial § 5½—**

In a proceeding to establish the true dividing line between the lands of plaintiffs and the lands of defendants it was stipulated that the only question involved was the location of the true dividing line. *Held:* Neither party is entitled to raise the question of title in the action, the question of title being excluded from consideration by stipulation of the parties, and

therefore final judgment is conclusive as to the location of the dividing line, and also precludes the issuance in the action of restraining orders predicated upon after-judgment pleadings raising the issue of title.

APPEAL by defendants from *Morris, J.*, 18 April, 1955, Term, of WAYNE.

On appeal by defendants, the judgment of Judge Grady, entered in this cause at March Term, 1954, which established the true dividing lines between the lands of plaintiffs and of defendants and taxed the costs against defendants, was affirmed. *Strickland v. Kornegay,* 240 N.C. 758, 83 S.E. 2d 903.

Later, in the Superior Court, plaintiffs, by supplemental petition filed *in this cause,* alleged that defendants were trespassing upon lands within the lines of their boundary and interfering with corner markers, as located by Judge Grady's judgment. Upon said petition, plaintiffs obtained an *ex parte* temporary restraining order against defendants. Answering this petition, defendants denied plaintiffs' title to the land within said boundary, alleging ownership by defendants of a portion thereof by reason of adverse possession under known and visible lines and boundaries for the requisite statutory periods and alleging trespass by plaintiffs thereon and resultant damages. Upon said answer, defendants obtained an *ex parte* temporary restraining order against plaintiffs.

Upon consideration of these *after-judgment* pleadings and orders, Judge Morris ruled that "the question of title to the lands cannot be again put at issue in this action." Thereupon, he dissolved the restraining order issued against plaintiffs and restrained defendants from trespassing upon lands within the lines of plaintiffs' boundary as located by Judge Grady's judgment.

*J. Faison Thomson & Son and George R. Britt for plaintiffs, appellees.*
*Jones, Reed & Griffin for defendants, appellants.*

PER CURIAM. When this cause was before Judge Grady at March Term, 1954, it was stipulated that the only question for determination by the court was the location of the true dividing lines between the lands of plaintiffs and the lands of defendants. When Judge Grady's judgment was affirmed by this Court, this cause had been fully adjudicated. Thereafter, it was not permissible to litigate in this cause issues raised by *after-judgment* pleadings which might have been presented, but by stipulation were excluded from consideration, when the cause came on before Judge Grady for final hearing on the merits.

The location of the true dividing lines has been established. Whether plaintiffs or defendants are entitled to injunctive relief, and whether

defendants are estopped to raise now an issue as to plaintiffs' title, are questions for consideration upon pleadings and evidence in an appropriate independent action.

The judgment of Judge Morris, in so far as it denies to defendants the right to raise now in this cause an issue as to plaintiffs' title and denies injunctive relief against plaintiffs, is affirmed; but said judgment is modified by striking therefrom the order for injunctive relief against defendants. In short, Judge Grady's judgment remains the final judgment in the cause. As so modified, the judgment of Judge Morris, which relates solely to the *after-judgment* proceedings, is affirmed. The costs on this appeal are taxed, one-half against plaintiffs and one-half against defendants.

Modified and affirmed.

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NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION v. N. S. MULLICAN, WIDOWER, ET AL.,

and

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION v. PAUL E. HARPER, ET AL.,

and

NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION v. RAY B. JOHNSON, ET AL.

(Filed 2 November, 1955.)

**1. Courts § 4c—**

The judge of the Superior Court either in term or vacation has jurisdiction over appeals from judgments of the Clerk of the Superior Court in all matters of law or legal inference. G.S. 1-272.

**2. Eminent Domain § 17—**

Acceptance by respondents of voluntary payment by petitioner of award fixed by commissioners settles the question of compensation.

APPEAL by petitioner in each of above special proceedings from *Johnston, Resident Judge* of FORSYTH, in Chambers, in Vacation, August 1955.

Three separate special proceedings, entitled as above, instituted under the provisions of G.S. 136-19 for the purpose of acquiring certain lands of the respective respondents, described in the respective petitions, for use as part of right of way for a certain public highway, and to ascertain and determine the compensation for the taking, consolidated in this Court for purpose of hearing and decision on appeal.

In each of these proceedings the Clerk of Superior Court entered order appointing commissioners to proceed as provided by law to ascertain and determine the damages to the respective respondents by reason of taking title to, and the construction of the road described in the petition over and through the property of the respective respondent owners, and to report to the court.

The respective commissioners so appointed in these several proceedings for the purposes aforesaid, and after hearing, assessed the damages at a specified sum of money in each case. Petitioner filed exceptions to the awards. Thereafter petitioner transmitted by mail to Clerk of Superior Court of Forsyth County voucher for the exact amount of the award in each case with letter stating that "This check is in payment of the award of the commissioners in the above captioned case," and the vouchers bore like endorsements. Thereafter the respective respondents moved that the sum paid into court in payment of said awards be paid over to them, for order of confirmation, and so on. The Clerk made such order and petitioner filed exceptions thereto and appealed therefrom, and demands a jury trial. Over objection of petitioner the matter was heard by the resident judge of Superior Court, who after hearing evidence offered, found facts substantially in accord with those found by the Clerk, and stated conclusions of law accordant therewith, all substantially as was done in former case of *Highway Commission v. Pardington*, reported in 242 N.C. Reports at page 482.

Petitioner excepted thereto, and appeals therefrom in each case to Supreme Court and assigns error.

*R. Brookes Peters and Blackwell, Blackwell & Canady for Petitioner Appellant in No. 400.*

*R. Brookes Peters and Womble, Carlyle, Sandridge & Rice for Petitioner Appellant in No. 401.*

*R. Brookes Peters and McKeithen, Graves & Robinson for Petitioner Appellant in No. 403.*

*Deal, Hutchins & Minor for Respondent Appellees in all cases.*

PER CURIAM. Appellant, petitioner, challenges right of resident judge to hear and pass upon the appeal from the Clerk of Superior Court. As to this, the statute G.S. 1-272 expressly declares that appeals lie to the judge of the Superior Court having jurisdiction, either in term or vacation, from judgments of the Clerk of the Superior Court in all matters of law or legal inference. The appeals here involve matters of law or legal inferences. And the cases are controlled by decision of this Court in former case of *Highway Commission v. Pardington*, 242 N.C 482,

88 S.E. 2d 102, on authority of which the judgments from which these appeals are taken will be, and they are hereby

Affirmed.

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IN THE MATTER OF GEORGE W. EDWARDS, GENERAL GUARDIAN OF MARTHA EXUM, AN INCOMPETENT.

(Filed 2 November, 1955.)

**Insane Persons § 8—**

A proceeding may be maintained under G.S. 33-20 to authorize the guardian of an incompetent to settle the ward's interest in a partnership under a plan providing that each partner should receive in settlement certain property together with stock in a proposed corporation to be formed to carry on the business, the proceeding not being one for sale or mortgaging of the incompetent's estate. G.S. 35-10, G.S. 35-11.

APPEAL by petitioner from *Bone, J.*, at February Term 1955, of GREENE.

Civil action in nature of a proceeding in equity for approval of settlement of all the right, title and interest of the ward Martha Exum, an incompetent, in the properties and assets of the partnership of J. Exum & Company, and in respect to contemplated corporation, heard upon demurrer *ore tenus* of James G. Exum and Ann Berry Exum Thompson, presumptive heirs of said ward, on whom notice of the proceeding was served. G.S. 33-20.

In summary the petition sets forth: (1) That the ward Martha Exum, an incompetent, owns certain interests in the partnership of J. Exum & Company; that the competent persons interested in the partnership desire and have agreed upon a settlement of the partnership and formation of a corporation to carry on the business, each interested party to receive real estate of a given value, cash in certain sum and a given percentage of stock in the contemplated corporation,—to which corporation the remaining property of the partnership will be conveyed, transferred and assigned; (2) that the competent sisters of the ward, who have an equal interest with her in the said partnership, have agreed to the terms of settlement as fair and reasonable; and (3) that such settlement would be to the best interest of the ward. The guardian prays that the court authorize and empower him to accept the terms of the proposed settlement.

The prospective heirs of the ward have been served with notice of the petition and two of them, James G. Exum and Ann Berry Exum Thompson, filed demurrer *ore tenus* to the petition for that upon the

face of it no cause of action is stated, vesting the court with jurisdiction of the matters and things sought to be litigated under the terms of G.S 35-10 and G.S. 35-11. The demurrer was sustained, and the proceeding dismissed. Petitioner excepted thereto, and appeals therefrom to Supreme Court and assigns error.

*K. A. Pittman for Petitioner Appellant.*
*Jones, Reed & Griffin for Respondents, Appellees.*

PER CURIAM. Petitioner appellant in brief filed in this Court aptly states that "the guardian is not asking the court for authority to sell, mortgage, or lease his ward's property, matters cognizable under the statutes set out in the demurrer. He is asking the court to approve a proposed division or partition of properties in which his ward has an interest, or a determination by the court of her rights therein." In this connection it may be said that in this jurisdiction the court has complete supervision and direction of all matters and things affecting the estates of incompetents. See G.S. 33-20. *Reynolds v. Reynolds,* 208 N.C. 578, 182 S.E. 341; *Latta v. Trustees of the General Assembly of the Presbyterian Church U. S.,* 213 N.C. 462, 196 S.E. 862; *Johnson v. Ins. Co.,* 217 N.C. 139, 7 S.E. 2d 475. Hence the petition is well founded, and demurrer is not well taken—and the ruling in respect thereto must be reversed.

It may not be amiss to say that the court may properly appoint a special master to investigate, and find and report the facts to the end that the court may be fully advised and make such order as is fair, just and equitable in the premises.

Reversed.

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EFFIE DAIL, J. I. SPARROW, WILLIE SPARROW, JAMES SPARROW, EUGENE SPARROW AND LEONE CADE v. G. H. SPARROW AND WIFE, CORA LEE SPARROW (ALIAS CORA REA SPARROW).

(Filed 2 November, 1955.)

**Trial §§ 45, 51—**

Where the theory of the trial is confined solely to the single issue whether the deed in question was invalid for want of mental capacity of grantor to execute it, motions after verdict to set aside the verdict as a matter of law and for judgment *non obstante veredicto* on the ground that the deed was invalid because it was not executed according to the formalities of law, are properly denied, the grounds for the motions being at variance with the theory of trial and being unsupported by allegation.

APPEAL by plaintiffs from *Parker, J.*, and a jury, at 16 May, 1955, Term of LENOIR.

Civil action tried below on this issue: "Did J. R. Sparrow have sufficient mental capacity to execute the deed dated December 2, 1949, to his son G. H. Sparrow and his daughter-in-law, Cora Rea Sparrow? Answer: YES."

The plaintiffs moved the court to set the verdict aside as a matter of law, on the ground that the deed to the defendants, introduced in evidence by the defendants and relied on by them, is void upon its face. Motion overruled. Exception No. 1.

The plaintiffs then moved the court for judgment *non obstante veredicto*. Motion overruled. Exception No. 2.

From judgment entered upon the verdict decreeing that the deed is valid and that the defendants are the owners in fee of the lands described therein, the plaintiffs appeal.

*Sutton & Greene for plaintiffs, appellants.*

*Jones, Reed & Griffin for defendants, appellees.*

PER CURIAM. The questions presented by this appeal relate to the denial of the plaintiffs' motions made after verdict. By these motions, the plaintiffs sought to have the trial court declare the deed void on the ground that it was not executed according to the formalities of law.

The question whether the grantor executed the deed according to the formalities of law was not raised by the pleadings, nor was any issue in respect thereto tendered by the plaintiffs. On the contrary, the case was tried upon the single issue of mental capacity of the grantor. The attempt to raise this new question, which was at variance with the theory of the trial and unsupported by allegation, came too late after verdict, and consequently the rulings of the lower court on the motions will be sustained on procedural grounds. However, the deed, when examined in the light of the plaintiffs' challenge, appears to have been executed in substantial compliance with the formalities of law. The deed is sufficient in form to convey title.

The verdict of the jury supports the judgment entered below.

No error.

HOUSING AUTHORITY OF THE CITY OF WINSTON-SALEM, NORTH CAROLINA HOUSING PROJECT N. C. 12-1-A, PETITIONER, v. DAISY T. JENKINS, RESPONDENT.

(Filed 2 November, 1955.)

**Trial § 49½—**

Whether the verdict should be set aside as excessive rests within the discretion of the trial court.

APPEAL by petitioner from *Sharp, Special Judge,* May, 1955, Term, of FORSYTH.

Special proceeding under Public Works Eminent Domain Law. G.S. 40-30 *et seq.*

The controversy relates solely to the amount to which respondent is entitled as compensation for the property condemned by petitioner.

Upon trial in the Superior Court, the issue submitted and the jury's answer were as follows:

"1. What was the fair market value of the real property of the respondent, Daisy T. Jenkins, described in the Petition, as of November 1, 1954, the date of the taking? Answer: $4,500.00."

Judgment was entered in accordance with the verdict. Petitioner excepted and appealed, assigning errors.

*Blackwell, Blackwell & Canady for petitioner, appellant.*

*Buford T. Henderson for respondent, appellee.*

PER CURIAM. The evidence, considered in the light most favorable to respondent, was sufficient to support the verdict; and it was for the trial court, in its discretion, to determine whether the verdict should have been set aside as excessive. This determination was made, adversely to petitioner. Careful consideration of the remaining assignments 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.

IRA C. MOSER v. SOUTHERN RAILWAY COMPANY AND R. L. DAVIS.

(Filed 2 November, 1955.)

**Railroads § 4—**

In this action to recover for injuries sustained in an accident at a railroad grade crossing, the evidence tending to show that the collision occurred in broad daylight at a level crossing, and that plaintiff driver at the stop sign beside the road 45 feet from the tracks could see 300 feet down the tracks in the direction from which the train came, *is held* to disclose contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *Johnston, J., at* 11 July Term, 1955, of FORSYTH.

Civil action to recover for personal injuries sustained in a tractor-trailer-train collision at a grade crossing.

At the close of the plaintiff's evidence, the defendants moved for judgment as of nonsuit. The motion was allowed, and from judgment based on such ruling, the plaintiff appeals.

*Deal, Hutchins & Minor and William S. Mitchell for plaintiff, appellant.*

*W. T. Joyner and Womble, Carlyle, Sandridge & Rice for defendants, appellees.*

PER CURIAM. This case involves no new question or feature requiring extended discussion. The evidence, when tested by settled principles of law, explained and applied in numerous decisions of this Court, fails to make out a case for the jury. The collision occurred in broad daylight at a grade crossing just outside the corporate limits of the City of Greensboro. The weather was clear. The crossing was level. The plaintiff was driving a heavy tractor-trailer unit. He was thoroughly familiar with the crossing. There was a stop sign side of the road about 45 feet from the tracks. The plaintiff testified that at the stop sign he could see 300 feet down the tracks in the direction from which the train came. Conceding that the evidence offered made out a *prima facie* case of actionable negligence against the defendants, nevertheless it is manifest from the evidence that the plaintiff failed to exercise due care under the surrounding circumstances for his own safety, and that such failure to exercise care contributed to and was a proximate cause of his injury.

The judgment below is

Affirmed.

LOREE MAY RANSDELL v. JAMES DOYLE YOUNG.

(Filed 2 November, 1955.)

**1. Automobiles § 54f—**

Where there is no allegation that at the time of the accident the driver was operating the automobile for the benefit of the owner, or that the alleged agent was about the owner's business at the time of and in respect to the very transaction out of which the injuries arose, and the evidence tends to show that plaintiff passenger took the car on a trip of her own and merely permitted the driver to operate the automobile a short distance while on that trip, *held* the evidence is not sufficient to sustain the master-servant relationship between the owner and the driver so as to render defendant liable under the doctrine of *respondeat superior*. G.S. 20-71.1.

**2. Automobiles § 53—**

Evidence in this case *held* insufficient to support the allegation that defendant owner lent his car to an inexperienced driver so as to warrant the submission of the issue to the jury.

APPEAL by plaintiff from *Williams, J.*, May Term, 1955, of FRANKLIN.

This is a civil action in which the plaintiff, a guest passenger in an automobile owned by the defendant and operated by one Mary Helen Harrison, seeks to recover of the defendant compensatory damages for personal injuries sustained on 17 July, 1954, which she alleges resulted from the negligence of the defendant's agent and servant, Mary Helen Harrison, in the operation of said automobile.

The evidence tends to show that on 17 July, 1954, the plaintiff, accompanied by her two-year-old child and two nieces, namely, Mary Helen Harrison, then 16 years of age, and Nancy Jean Medlin, 15 years of age, left her home in her husband's truck for the purpose of buying some chickens. Thereafter, at M. C. Wilder's store, Mary Helen Harrison borrowed from the defendant his 1951 Pontiac automobile. Mary Helen Harrison, who had had a driver's license for about two months, did not want to drive the defendant's automobile on the main highway and requested the plaintiff to drive the car. The plaintiff, after having driven the car on a mission for herself, returned to Wilder's store and found that her truck was not there and decided to go to Bunn to get some groceries. While on the way to Bunn, her niece Mary Helen Harrison requested the plaintiff to let her drive. Mary Helen Harrison took the wheel and while driving along a dirt road (and there is no evidence of excessive speed), she came to a sharp curve, hit a hole in the road and lost control of the car. The car went off the road and turned over, causing injury to the plaintiff.

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

*E. F. Yarborough for appellant.*
*Thomas A. Banks and Charles P. Green for appellee.*

PER CURIAM. The evidence in this case is not sufficient to sustain the master-servant relationship between the defendant and the alleged agent, Mary Helen Harrison, so as to render the defendant liable under the doctrine of *respondeat superior.* Moreover, the plaintiff does not allege in her complaint that the defendant's automobile at the time of the accident, was being operated for the benefit of the owner, or that the alleged agent was about her employer's business at the time of and in respect to the very transaction out of which the injury arose. G.S. 20-71.1; *Parker v. Underwood,* 239 N.C. 308, 79 S.E. 2d 765. Furthermore, the evidence is not sufficient to warrant its submission to the jury on the allegation to the effect that the defendant loaned his car to Mary Helen Harrison knowing her to be an inexperienced driver. We are inclined to the view, in light of the evidence on this record, that this was one of those unfortunate accidents which was not proximately caused by the negligence of the driver of the defendant's automobile.

We think the ruling on the motion for judgment as of nonsuit was proper and must be sustained.

Affirmed.

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NETTIE C. WRENN AND ESTATES ADMINISTRATION, INC., ADMINISTRATOR OF THE ESTATE OF LAWRENCE B. WRENN, DECEASED, *v.* SOUTHERN RAILWAY COMPANY, L. L. LEFLER AND ALBERT O. GRIFFIN.

(Filed 2 November, 1955.)

APPEAL by plaintiffs from *Sharp, Special Judge,* April Term, 1955, of FORSYTH.

This is a civil action to recover damages for the alleged wrongful death of the plaintiffs' intestate, Lawrence B. Wrenn, who was killed on 9 February, 1954, in an automobile-train collision at a crossing near Colfax, North Carolina.

Mr. Wrenn lived near Colfax, 220 feet south of the defendant's railroad. An unpaved road leads from his house northwardly across the tracks to the main highway. On the morning of the accident, Mr. Albert O. Griffin, who lives in Winston-Salem, stopped by Mr. Wrenn's home, as he had been requested to do, for the purpose of giving him a ride to Greensboro. Both men worked for the same company.

According to the plaintiffs' evidence, Mr. Griffin drove his car at a slow rate of speed, approximately ten miles per hour, to within eight feet

of the defendant's railroad crossing, and stopped. That there was a steep incline or grade on each side of the tracks; that the roadway between the tracks was several inches lower than the top of the rails; that before going up the incline, he looked and saw no train coming from the east; that his automobile proceeded up the incline and the front wheels crossed the south rail; that the automobile became stuck on account of the steepness of the grade and the defective condition of the crossing, and the motor died. That there was some growth on the railway's right of way which obstructed the view eastwardly from the crossing. Mr. Griffin attempted to start the automobile several times and it moved back and forth as he was attempting to get it started and extricate it, himself and Mr. Wrenn from the tracks. The automobile crossed the tracks and the train hit the extreme right-hand rear of the car and killed Mr. Wrenn.

According to the defendant's evidence, the Griffin car proceeded slowly across its tracks and never stopped at the crossing. The defendant's fireman testified that he saw the Griffin car from the time it left Wrenn's driveway until it disappeared as it crossed in front of the train; that when he first saw this car the train was approximately 800 feet east of the crossing; that he requested the engineer to blow the whistle which was done and when he saw the car was not going to stop, the emergency brakes were applied when the train was from 100 to 150 feet east of the crossing. The train was stopped, blocking the crossing, with its engine from 75 to 100 feet west of the crossing. The train was on time and consisted of five passenger cars and the locomotive. The defendant offered evidence tending to show that at any point within 95 feet south of the crossing an approaching train from the east could be seen for a distance of approximately 1,000 feet.

The usual issues of negligence, contributory negligence and damages were submitted. The jury answered the issues of negligence and contributory negligence in the affirmative.

From the judgment entered on the verdict, the plaintiffs appeal, assigning error.

*Ratcliff, Vaughn, Hudson, Ferrell & Carter and R. M. Stockton, Jr., for plaintiff appellants.*

*W. T. Joyner and Womble, Carlyle, Sandridge & Rice for defendant appellee.*

PER CURIAM. We have examined the appellants' exceptions and assignments of error and in our opinion they present no error sufficiently prejudicial to warrant a new trial.

No error.

AARON R. BROWN AND WIFE, CARRIE L. BROWN, v. WILL A. MOORE, SAM RASBERRY, JAMES H. LOCUST, NORMAN BATTLE, JOHN KORNEGAY, JESSE KORNEGAY, JAMES KIRKMAN AND JOHN LEWIS EXUM, TRUSTEES OF ZION CHURCH, AFRICAN METHODIST EPISCOPAL ZION CHURCH IN AMERICA, OF CONTENTNEA TOWNSHIP, LENOIR COUNTY.

(Filed 2 November, 1955.)

APPEAL by plaintiffs from *Parker (Joseph W.), J.,* June Term, 1955, LENOIR.

Civil action to nullify report of arbitrators made after plaintiffs had withdrawn their consent, heard on motion to reform consent judgment entered.

This action involves a controversy as to the true dividing line between the land of the plaintiffs and the land of the defendants in which a judgment by consent establishing the true dividing line was entered. Plaintiffs now move to vacate for that they did not give their "true consent" and the line agreed upon is too indefinite and uncertain to be established on the ground. The court heard the motion, found the facts, and rendered judgment on the facts found, decreeing that the line run by the surveyor under the consent judgment is the true boundary line between the land of the plaintiffs and the land of the defendants, and that the consent judgment is binding upon all parties. Plaintiffs excepted and appealed.

*Albion Dunn for plaintiff appellants.*

*Wallace & Wallace and William F. Simpson for defendant appellees.*

PER CURIAM. The court below found the facts, particularly that the line established in said judgment "is not indefinite or ambiguous," and that the line run by the surveyor "is the true boundary line between the lands of plaintiffs and lands of defendants as set forth in said Consent Judgment." There is no exception to the findings of fact, and no exceptive assignment of error presents any question which requires discussion. Therefore, without approving or disapproving the procedure adopted, the judgment entered in the court below is

Affirmed.

ANNIE GRACE YOW v. EARL R. YOW.

(Filed 9 November, 1955.)

**1. Divorce and Alimony §§ 12, 14—**

G.S. 50-16 provides two separate remedies, one for alimony without divorce, and the other for subsistence and counsel fees *pendente lite*, so that both temporary and permanent alimony may be awarded under the statute.

**2. Divorce and Alimony § 12—**

Under the provisions of G.S. 50-11, a decree for absolute divorce on the ground of two years' separation in the husband's action does not destroy the wife's right to receive subsistence *pendente lite* under prior orders rendered in her action for alimony without divorce theretofore instituted, since the word "alimony" used in the statute includes subsistence *pendente lite*. The amendment of the statute by Chapter 1313, Session Laws of 1953 and by Chapter 872, Session Laws of 1955, were not applicable in this case since they were enacted subsequent to the decree of absolute divorce.

**3. Same—**

Order for subsistence *pendente lite* was entered in the wife's action for alimony without divorce. While her action was pending, the husband obtained a decree for absolute divorce on the ground of two years' separation. *Held:* The wife will not be denied her rights to payments in arrears under the order for subsistence *pendente lite* on the ground that she had unreasonably delayed the trial of her action when it appears that defendant had never filed answer in her action, and there is no evidence of record that he had ever requested a final determination of her suit.

**4. Divorce and Alimony § 16—**

A finding that defendant possessed the means to comply with the orders for payments of subsistence *pendente lite* at some time during the period he was in default in such payments, is necessary to support the court's finding that the failure to make the payments was deliberate and wilful, and in the absence of such finding, the decree committing him to prison for contempt must be set aside.

**5. Appeal and Error § 29—**

Upon defendant's appeal from an order holding him in contempt for failure to pay subsistence and counsel fees ordered in the wife's action for alimony without divorce, the failure of specific assignment of error to the allowance of counsel fees and the failure to discuss same in the brief will be treated as an abandonment of attack on this part of the order.

**6. Divorce and Alimony § 12—**

The wife has a legal right to the allowance in proper cases of subsistence and counsel fees *pendente lite* in her action for alimony without divorce, G.S. 50-16, and while the action remains pending, the court, upon proper circumstances, has authority in its sound discretion to enter a second order allowing additional counsel fees. Such additional order is proper for counsel instituting proceeding to enforce the payment to the wife of subsistence *pendente lite* in arrears.

**7. Same—**

A final decree in the wife's action for alimony without divorce would terminate orders in the action for subsistence *pendente lite* but would not affect payments in arrears due thereunder.

**8. Divorce and Almony § 15—**

Pending the wife's action for alimony without divorce, the husband obtained decree of absolute divorce on the ground of two years' separation. *Held:* The final judgment in her action would be rendered after absolute divorce, and therefore she would not be entitled to permanent alimony in her action, since under the common law she would not be entitled to alimony after a divorce *a vinculo*, and the proviso of G.S. 50-11 would not be applicable.

BOBBITT, J., concurring in result.

BARNHILL, C. J., joins in concurring opinion.

APPEAL by defendant from *Hobgood, J.*, July Term 1955 of GRANVILLE.

Contempt proceeding in civil action for alimony without divorce under G.S. 50-16.

In July 1949 the plaintiff instituted an action in the Superior Court of Granville County under G.S. 50-16 for alimony without divorce. In August 1949 the Honorable John J. Burney, Presiding Judge of the District, after a hearing, entered an order that pending the trial of the action in the Superior Court the defendant pay to plaintiff subsistence for herself and their infant child and counsel fees. In March 1950 the Honorable W. C. Harris, Presiding Judge of the District, after a hearing, entered an order that the defendant without any satisfactory justification was in default in the payment of subsistence to his wife and child, as required by the order of Judge Burney, and held him in contempt: he made a small modification of the former order. The defendant failed to comply with the order of Judge Harris, and was cited to appear before the Honorable Henry L. Stevens, Jr., Presiding Judge of the District, on 20 September 1950. Judge Stevens, after a hearing, found that the defendant had adjusted his arrears of payment for subsistence, and ordered that he continue his payments of subsistence *pendente lite*, as required by the order of Judge Burney, with a slight modification as to the amount. Since the order of Judge Stevens the defendant has paid to his wife for subsistence *pendente lite* the sum of $4,015.00, when he should have paid her under this order $4,981.50. The defendant is now in arrears under this order $966.50. The defendant never filed an answer in this action. No trial and final determination has been had.

The defendant instituted an action in Granville County on 9 August 1951 against the plaintiff for absolute divorce on the ground of two

years separation, as provided by G.S. 50-6. At the November Term 1951 of the Superior Court of Granville County a judgment was entered granting the defendant here an absolute divorce from the plaintiff here on the ground alleged in his complaint.

A citation was served upon the defendant to appear on 27 July 1955 before the Honorable Hamilton Hobgood, Presiding and also Resident Judge of the District, and show cause, if any he could, why he should not be attached for contempt for failing to pay subsistence to his wife as required by the order of Judge Burney, as modified by Judge Harris and Judge Stevens.

At the hearing upon this citation Judge Hobgood found that the defendant was in arrears in the amount of $966.50 in his payments of subsistence, as required by former orders of the court; that the defendant offered no evidence, but is relying upon his decree of absolute divorce as a defense; that the defendant's failure to make the payments of subsistence was deliberate and wilful, and that he is guilty of contempt; and that he is employed as manager of the Tip Top Grocery at Franklinton, North Carolina. Whereupon his Honor entered an order that the defendant be confined in the common jail of Granville County until he pays the arrears of $966.50 and counsel fees of $250.00 to plaintiff's lawyer allowed by Judge Hobgood in the hearing, or until he may be lawfully released.

To the judgment entered, the defendant excepted and appealed, assigning error.

*Royster & Royster for Plaintiff, Appellee.*

*Hubert H. Senter and Hill Yarborough for Defendant, Appellant.*

PARKER, J. This question is presented for decision: Does a decree of absolute divorce obtained by her former husband in 1951 under the two-year separation statute G.S. 50-6 annul the right of his former wife to receive subsistence *pendente lite* under orders rendered in her action for alimony without divorce, G.S. 50-16, before the commencement of the proceeding for absolute divorce: her action for alimony without divorce having been instituted in 1949, and never having been finally determined.

G.S. 50-16 provides two separate remedies: one for alimony without divorce, and two, for subsistence and counsel fees *pendente lite*. *Fogartie v. Fogartie*, 236 N.C. 188, 72 S.E. 2d 226; *Bateman v. Bateman*, 233 N.C. 357, 64 S.E. 2d 156; *Oldham v. Oldham*, 225 N.C. 476, 35 S.E. 2d 332; *McFetters v. McFetters*, 219 N.C. 731, 14 S.E. 2d 833.

Under G.S. 50-16 both temporary and permanent alimony may be awarded. *Stanley v. Stanley*, 226 N.C. 129, 37 S.E. 2d 118.

G.S. 50-11 provides "that a decree of absolute divorce upon the ground of separation for two successive years as provided in Sec. 50-5 or Sec. 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgement or decree of the court rendered before the commencement of the proceedings for absolute divorce." The amendments to this statute by Session Laws 1953, Chapter 1313, and by Session Laws 1955, Chapter 872, are inapplicable, because enacted subsequent to the defendant's judgment for absolute divorce in 1951.

We have held that a judgment or decree of the court for permanent alimony rendered before the commencement of a proceeding for absolute divorce is not destroyed by 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. *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E. 2d 399; *Deaton v. Deaton*, 237 N.C. 487, 75 S.E. 2d 398; *Simmons v. Simmons*, 223 N.C. 841, 28 S.E. 2d 489 ("the judgment shows on its face that it was intended as a final settlement between the parties, and it was so regarded at the time").

These were the facts in *Howell v. Howell*, 206 N.C. 672, 174 S.E. 921: Plaintiff instituted an action for alimony without divorce against her husband. On 3 February 1930 an order was entered in the action by Judge Daniels reciting: "It is, therefore, by consent, ordered that the said C. S. Howell pay to the plaintiff the sum of $50.00 as counsel fees and $75.00 per month, beginning on 12 February 1930, until the further order of the court." On 24 December 1932, upon motion of the defendant, the amount of monthly payments was reduced by Judge Sinclair to $50.00 per month, to continue until the further order of the court. In 1933 the defendant was granted an absolute divorce from the plaintiff in an action instituted by him in Chatham County on the ground of a two-year separation: the judgment reciting that it "is entered without prejudice to the action pending in the Superior Court of Wake County, North Carolina, entitled: 'Mrs. Pearl D. Howell *v.* C. S. Howell,' and all orders heretofore made in said action pending in the Superior Court of Wake County shall not be affected by this judgment." At the February Term 1934 of the Superior Court of Wake County the defendant was cited to appear before the Presiding Judge to show cause as to why he should not be attached for contempt in failing to pay his wife subsistence ordered paid by the order of 1930, as modified by the order of 1932. The defendant denied that he was liable to the plaintiff in any sum because of his decree of absolute divorce. It is to be noted that the order was to pay subsistence *pendente lite*. There had been no final determination of the action for alimony without divorce. The defendant was held in contempt, and this Court affirmed the order of the lower court holding the judgment for absolute divorce did not

destroy the order for temporary subsistence entered in the wife's action for alimony without divorce by virtue of N. C. Code, 1931, Sec. 1663 (Now G.S. 50-11), saying: "The judgment in the present action of Judge Sinclair remains in full force and effect." The opinion states the language of the divorce decree that it was entered without prejudice to the plaintiff's pending action for alimony without divorce, but the decision was based upon the language of N. C. Code, 1931, Sec. 1663, and not upon this language of the divorce decree.

In *Simmons v. Simmons, supra,* the wife was awarded permanent alimony in a suit for alimony without divorce, and the judgment recites: "This judgment shall remain in full force and effect pending further orders of the court and its binding effect upon the defendant shall not be impaired by any judgment of absolute divorce which may hereafter be entered in any suit instituted by the defendant against the plaintiff for an absolute divorce on the grounds of two years' separation." An absolute divorce was afterwards granted, which the Court held did not destroy the alimony allowance. The Court said: "Of course, the declaration that defendant would still be liable for future installments under the original judgment adds nothing to its effectiveness."

*Winborne, J.,* said for the Court in *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278: "The words 'alimony' and 'subsistence' have a kindred meaning. . . . Each is appropriate for use in dealing with the subject of support for the wife." Later on in this opinion he said, speaking of Ch. 52, Public Laws 1923, entitled: "An act to amend Sec. 1667 of the Con. St., relating to alimony without divorce," where the word "alimony" appears: "Thus it is clear that the Legislature, in enacting the original sections, and all along the line, used the word 'alimony' in its broad rather than technical meaning."

G.S. 50-16 provides that the defendant's decree of divorce shall not impair or destroy the right of the plaintiff to receive alimony under the decrees of court rendered in her favor before the commencement of his action for absolute divorce. The word "alimony" used in the statute includes subsistence for her, and we have decided in *Howell v. Howell, supra,* that the word "alimony" includes subsistence *pendente lite.* The question asked at the beginning of this opinion is answered No.

In plaintiff's action for alimony without divorce the defendant has never filed an answer. There is no evidence in the record that he has ever requested a final determination of that action. After his decree of absolute divorce, he has made large payments of subsistence *pendente lite.* Under these facts she will not be denied temporary subsistence on the ground that she has unreasonably delayed the trial of her action to the extent that her conduct raises a presumption of bad faith on her part. 60 Am. Dec. 678; 17 Am. Jur., Divorce and Separation, p. 435.

The lower court has not found as a fact that the defendant possessed the means to comply with the orders for the payment of subsistence *pendente lite* at any time during the period when he was in default in such payments. Therefore, the finding, that the defendant's failure to make the payments of subsistence was deliberate and wilful, is not supported by the record, and the decree committing him to imprisonment for contempt must be set aside. *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403; *Smithwick v. Smithwick,* 218 N.C. 503, 11 S.E. 2d 455; *Berry v. Berry,* 215 N.C. 339, 1 S.E. 2d 871; *Vaughan v. Vaughan,* 213 N.C. 189, 195 S.E. 351; *West v. West,* 199 N.C. 12, 153 S.E. 600.

Judge Hobgood made an allowance of $250.00 counsel fees to plaintiff's counsel, holding that the allowance of $100.00 counsel fees by Judge Burney in 1949 was wholly inadequate compensation for the services her counsel had rendered. The defendant has no assignment of error as to the allowance of the counsel fee of $250.00, except as it may be included in his general assignments of error that the court had no jurisdiction to hear the citation for contempt, and that the judgment was void. In his brief he makes no mention of the allowance of this counsel fee, and it seems he has abandoned any attack upon it. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544.

Plaintiff's action is still pending, there having been no final determination of it. *McFetters v. McFetters, supra.* The allowance in a proper case of subsistence and counsel fees *pendente lite* to the wife in an action for alimony without divorce is authorized by G.S. 50-16, and is so entrenched in our practice as to be considered an established legal right. *Perkins v. Perkins,* 232 N.C. 91, 59 S.E. 2d 356; *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745. Under proper circumstances the court, in its sound discretion, may in such a case enter a second order allowing additional counsel fees. *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899.

As the plaintiff's right to receive subsistence *pendente lite* was not destroyed by the judgment of absolute divorce, and her action is still pending, it would seem that the proviso in G.S. 50-11 is broad enough to include counsel fees to the plaintiff to enforce the payment to her of subsistence *pendente lite* in arrears, for without counsel her right to enforce such payments might be impaired or destroyed. For interesting annotations upon somewhat similar questions see: Annos., 15 A.L.R. 2d 1252 and 15 A.L.R. 2d 1270.

Since the institution of plaintiff's action for alimony without divorce, the defendant has always had, and has now, the right to bring that action to a final determination. A final determination would terminate the orders herein for subsistence *pendente lite.* However, it would not

affect the payments in arrears. The defendant has no one to blame except himself that these orders are still effective.

When, and if, this action for alimony without divorce is finally determined, it would seem that plaintiff would not be entitled to a decree for permanent alimony. First, she is no longer the defendant's wife by reason of the decree of absolute divorce. Second, the allowance of alimony payable after a decree of divorce *a vinculo* was unknown to the common law, and there is no statute of the State permitting the court to enter an order for the payment of alimony, after the rendition of a decree of absolute divorce. *Feldman v. Feldman,* 236 N.C. 731, 73 S.E. 2d 865. If, and when, this action is finally determined, a decree for permanent alimony should be entered, it would be destitute of legal effect, because the proviso of G.S. 50-11 applies only to decrees or judgments of the court for alimony "rendered before the commencement of the proceeding for absolute divorce." Whether this proviso should be restricted to the payment of permanent alimony, and should not include subsistence *pendente lite* in an action for alimony without divorce, is a matter for the consideration of the General Assembly, and not for us.

The part of the order awarding additional counsel fees will not be disturbed. The part of the order committing the defendant to imprisonment for contempt is vacated. It is so ordered.

Error and remanded.

BOBBITT, J., concurring in result: The decision is to remand the case because the findings of fact are insufficient to support the order committing defendant to jail for wilful contempt of the court's prior orders. With this I am in full accord.

Too, I agree that *Howell v. Howell,* 206 N.C. 672, 174 S.E. 921, is direct authority for decision here. The differences I regard as immaterial.

In the action for absolute divorce brought by the husband (defendant herein), the wife (plaintiff herein) pleaded the orders entered *pendente lite* in her prior action for alimony without divorce; and her said pleading indicated that her primary interest was to preserve her rights thereunder. Apparently, she did not actively resist the husband's effort to obtain an absolute divorce. In any event, the decree of absolute divorce made no mention of the *pendente lite* orders in the prior action. Notwithstanding, the husband continued to make payments under such orders. It would seem that both husband and wife and their respective counsel relied upon *Howell v. Howell, supra,* as authority to the effect that said *pendente lite* orders were not impaired or destroyed by the decree of absolute divorce. Hence, I agree that *Howell v. Howell, supra,* should be followed as authority for decision here.

But I would not recognize *Howell v. Howell, supra,* as applicable to *pendente lite* orders entered subsequent to this decision. Rather I would limit its authority to orders heretofore made, for these reasons:

1. Such *pendente lite* orders are interlocutory, designed to insure that a dependent wife suffer no disadvantage in the prosecution of her action on account of lack of funds for subsistence and counsel fees during its pendency. *Oliver v. Oliver,* 219 N.C. 299, 13 S.E. 2d 549.

2. Since Ch. 814, Session Laws of 1955, a wife may file a cross action for alimony without divorce in her husband's action for absolute divorce; and conversely, a husband may file a cross action for absolute divorce in his wife's action for alimony without divorce.

3. A trial of an action for alimony without divorce, subsequent to a valid decree of absolute divorce, would present, to say the least, an anomalous situation. If such action could be tried, and the wife obtained a final decree for alimony without divorce after trial on the merits, the judgment in her favor, which would supersede all *pendente lite* orders, would be rendered subsequent to the commencement of the action for absolute divorce and so not within the protection of G.S. 50-11.

In short, while I approve the decision here under the doctrine of *stare decisis,* I think it appropriate to indicate that I would not approve such decision in relation to such order *pendente lite* made hereafter except for such period as precedes the rendition of final judgment of absolute divorce.

BARNHILL, C. J., joins in this opinion.

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IN THE MATTER OF JOE SWINK.

(Filed 9 November, 1955.)

**1. Criminal Law § 60a—**

A valid judgment of a court of competent jurisdiction is the real and only authority for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense.

**2. Same—**

A commitment has no validity except that derived from the judgment, and to the extent it fails to set forth or certify the judgment accurately, the commitment is void and the judgment itself controls.

**3. Criminal Law § 62e—**

Where judgments appear on the minutes of the court in immediate succession and are consecutively numbered, a provision in a subsequent judgment that it should begin at the expiration of the sentence imposed in the

preceding numbered judgment, is effective, the reference to the preceding numbered judgment being sufficient identification thereof.

**4. Same—**

Where a judgment provides that the sentence therein imposed is "to begin at the expiration of existing sentences" and it appears that the sentences the defendant was then serving were imposed in another court, the sentences run concurrently, since the provision in the later judgment that it was to begin at the expiration of existing sentences has no meaning apart from what may be disclosed by investigations and evidence *dehors* the record, and is, therefore, void for uncertainty.

**5. Same—**

Sentences imposed by different courts to the same place of confinement run concurrently in the absence of valid provisions in the judgments to the contrary.

**6. Same—**

Sentences imposed to different places of confinement do not run concurrently. Sentences in the present case were imposed prior to the enactment of Chapter 57, Session Laws of 1955, and therefore this statute has no application thereto.

**7. Habeas Corpus § 7—**

The sole question for determination upon *habeas corpus* hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty, and when it appears that defendant had not completed prison sentence lawfully imposed under one of several judgments, order remanding the petitioner to custody to complete the serving of the sentence will be affirmed, but the order is modified by striking therefrom the computation by the court of the date petitioner would be eligible for release.

**8. Criminal Law § 62i—**

Where the Governor commutes a sentence "from two years, four months, thirteen days to four years, four months and thirteen days" the sentence, as commuted, remains an indeterminate sentence for the minimum and maximum terms stated therein, and whether the petitioner is to be discharged at the conclusion of the minimum term or at some time thereafter prior to the expiration of the maximum term is for determination by the State Highway and Public Works Commission. G.S. 148-13, G.S. 148-42.

ON writ of *certiorari*, to review the order of *Williams, J.*, entered 12 January, 1955, in Raleigh, N. C., after hearing on return of writ of *habeas corpus*.

Judgments imposing sentences were pronounced, in Rutherford County, Gates County and Hertford County. This Court, in its discretion, issued its writ of *certiorari* to clarify petitioner's status under these judgments and the status of others similarly situated.

JUDGMENTS OF RUTHERFORD SUPERIOR COURT.

On 16 November, 1950, petitioner was before the court in three cases, #203, #204 and #205. In #203 and also in #204, petitioner tendered and the State accepted a plea of guilty of larceny of personal property of the value of less than $100.00. In #205, petitioner tendered and the State accepted a plea of guilty of malicious injury to personal property. Thereupon, the court pronounced separate judgments in the three cases, viz.:

In #203, the judgment pronounced was that "the defendant be confined in the common jail of Rutherford County for a term of two years and assigned to the State Highway and Public Works Commission for the service of said term." In the commitment in #203, the judgment was certified correctly by the clerk.

In #204, the judgment pronounced was that "the defendant be confined in the common jail of Rutherford County for a term of two years to be assigned to the State Highway and Public Works Commission for the service of said term." This judgment provided further: "This sentence to begin at the expiration of the sentence pronounced in #203, it being the purpose of the Court that these sentences shall not run concurrently but that one shall follow the other."

In the commitment in #204, the clerk certified that the judgment imposing sentence in that case was: "Judgement (*sic*) of the court is that *he* be imprisoned in the county jail for the term of *two (2) years to begin at expiration of sentence in #203* and assigned to work upon the public roads, and then be discharged according to law, said sentence to commence on (date) *November 16, 1950.*" (Words in italics typed, others part of printed form.)

In #205, the sentence imposed by judgment pronounced was suspended upon specified conditions. This sentence, not having been put into effect, has no bearing on the questions here presented.

JUDGMENTS OF GATES COUNTY CRIMINAL COURT.

On 22 January, 1952, in #249, petitioner pleaded guilty to wilful escape in violation of G.S. 148-45. Judgment pronounced was that "defendant to be confined to the common jail of Gates County for a term of four months, to be assigned to work the roads under the supervision of N. C. Highway and Public Works Commission. Sentence to begin at expiration of existing sentences."

In the commitment in #249, the clerk certified that the judgment imposing sentence in that case provided, in part, that "said sentence to commence on (date) *at the expiration of sentence imposed in case #204*

*imposed in Superior Court, Rutherford County, November, 1950.*" (Words in italics typed, others part of printed form.)

On 26 February, 1952, in #292, petitioner pleaded guilty to wilful escape (a subsequent offense) in violation of G.S. 148-45. Judgment pronounced was that "defendant to be confined to the common jail of Gates County for a term of six months, to be assigned to work the roads under the supervision of N. C. Highway and Public Works Commission, to begin at expiration of existing sentence."

In the commitment in #292, the clerk certified that the judgment imposing sentence in that case provided, in part, that "said sentence to commence on (date) *at the expiration of sentence imposed in case #249, imposed in County Court, Gates County, January 22, 1952.*" (Words in italics typed, others part of printed form.)

JUDGMENT IN GATES SUPERIOR COURT.

At March Term, 1952, in #205, upon conviction of larceny of an automobile, judgment pronounced was that "defendant to be confined to the State's Prison at Raleigh and assigned to work the roads under the supervision of the State Highway and Public Works Commission for a term of not less than two nor more than three years, sentence to begin at expiration of sentence now being served imposed in Case #292, County Criminal Court of Gates County."

In the commitment in #205, the clerk certified that the judgment imposing sentence in that case provided, in part, that "said sentence to commence *at expiration of sentence imposed in case No. 292 in Gates County Criminal Court on Feb. 26, 1952.*" (Words in italics typed, others part of printed form.)

JUDGMENT IN HERTFORD SUPERIOR COURT.

At April Term, 1952, in #130, upon conviction of larceny of an automobile, judgment pronounced was "that the defendant Joe Swink be confined in the State's Prison for a term of not less than five (5) years nor more than seven (7) years, sentence to run concurrently with sentences he is now serving." In the commitment in #130, the judgment was correctly certified by the clerk.

On 12 January, 1955, upon return of writ of *habeas corpus*, Judge Williams held that the indeterminate prison sentences imposed by the judgment pronounced in Gates Superior Court and in Hertford Superior Court "commenced on December 2, 1954, following the petitioner's completion of the last of a series of consecutive road sentences from Rutherford and Gates Counties"; that the said prison sentences ran concurrently; and that petitioner "will be eligible for consideration for his

release by Prison Authorities on or about June 24, 1958." Petitioner was remanded to the custody of the Warden of the State Prison pending completion of service of the said prison sentences.

On 24 May, 1955, upon return of another writ of *habeas corpus,* Judge Williams dismissed the writ, remanded petitioner to custody, for the reason that the matter had been fully adjudicated in his previous order of 12 January, 1955. A finding of fact in Judge Williams' order of 14 May, 1955, is that the judgment of the Hertford Superior Court imposing a prison sentence of not less than five nor more than seven years was commuted by the Governor of North Carolina on 4 May, 1955, to a prison sentence of "from two years, four months, thirteen days to four years, four months and thirteen days."

It is noted that Judge Williams had before him only the commitments, which purported to contain true copies of the several judgments.

*Bert M. Montague for petitioner, appellant.*

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*R. Brookes Peters, General Counsel, and Parks H. Icenhour for State Highway and Public Works Commission.*

BOBBITT, J. A valid judgment of a court of competent jurisdiction is the real and only authority for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense. Hence, we must look to the judgments to determine the lawfulness of petitioner's present imprisonment. The purpose of a commitment is to advise the prison authorities of the provisions of the judgment. Since a commitment has no validity except that derived from the judgment, to the extent it fails to set forth or certify the judgment accurately the commitment is void and the judgment itself controls. 15 Am. Jur., Criminal Law secs. 502-503; 24 C.J.S., Criminal Law sec. 1607.

Having obtained certified copies of the several judgments as entered on the minutes of the courts, we look to these only in further consideration of the questions presented. We disregard the portions of commitments in conflict with judgments pursuant to which the respective commitments were issued. We would impress upon the clerks that, when issuing a commitment, they are to certify a copy of the judgment exactly as it appears in the court minutes and nothing else.

It is clear that the two cases, #203 and #204, as well as #205, were considered by the Rutherford Superior Court at the same time. The judgments appear on the minutes in immediate succession. Thus, the minutes disclose affirmatively the identity of the judgment pronounced "in #203." Under these circumstances, the reference in the judgment in

#204 to the sentence pronounced "in #203" is a sufficient identification thereof. Therefore, the sentence imposed by judgment in #204 began upon completion of the sentence imposed by judgment in #203.

In cases #249 and #292, the judgments were pronounced by the Gates County Criminal Court at separate terms. In #249, the sentence imposed was "to begin at expiration of existing sentences." In #292, the sentence was "to begin at expiration of existing sentence." These provisions lack the degree of certainty required in judgments in criminal cases. They have no meaning apart from what may be disclosed by investigations and evidence *dehors* the record. Indeed, there is much less certainty in these judgments than in that considered in *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169. As emphasized in the cited case, a high degree of exactitude is required in the pronouncement of judgments imposing penal servitude. Hence, nothing else appearing, they would run concurrently with the sentences imposed by the judgments pronounced in Rutherford Superior Court.

We have not overlooked that portion of G.S. 148-45 which provides that a sentence imposed thereunder for wilful escape shall "commence at the termination of the sentence being served at the time of the offense." It clearly appears, and is so stated in the briefs, that when the judgments were pronounced in Gates County Criminal Court petitioner was then serving the sentence imposed by the judgment pronounced in Rutherford Superior Court in its case #203. Application of this statute would cause the sentences for wilful escape to run concurrently with the sentence imposed by the judgment pronounced in Rutherford Superior Court in its case #204.

Also, upon authority of *In re Parker, supra,* the prison sentences imposed by the judgments pronounced by the Gates Superior Court and the Hertford Superior Court are to be served concurrently.

But, upon authority of *In re Smith,* 235 N.C. 169, 69 S.E. 2d 174, followed in *In re Bentley,* 240 N.C. 112, 81 S.E. 2d 206, the said prison sentences cannot be served concurrently with the road sentences imposed by judgment pronounced by the Rutherford Superior Court and the Gates County Criminal Court because the places of confinement are different. Therefore, the prison sentences began upon completion of the road sentences imposed by the judgments pronounced by the Rutherford Superior Court. Since then they have run concurrently. Apparently, the commutation of prison sentence imposed by the judgment of the Hertford Superior Court was intended to give to petitioner credit thereon for the period between the date of the pronouncement of that judgment and the date of the completion of the road sentences.

For the reasons stated, the order of Judge Williams of 12 January, 1955, is modified by striking therefrom the date of completion of the

road sentences and the date when petitioner will be eligible for release. His order remanding petitioner to custody to complete the serving of the prison sentences is affirmed. The sole question for determination upon *habeas corpus* hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty.

It is apparent that the Hertford prison sentence, after commutation by the Governor of North Carolina, has not expired. As commuted, it remains an indeterminate sentence, for the minimum and maximum terms stated above. Whether the petitioner is to be discharged at the conclusion of the minimum term or at some time thereafter prior to the expiration of the maximum term is for determination by the State Highway and Public Works Commission. G.S. 148-42.

The State Highway and Public Works Commission, in accordance with law as stated herein, the petitioner's gained time, if any, earned by good behavior, G.S. 148-13, and the provisions of G.S. 148-42, will determine the date of petitioner's release.

It appears that the rule laid down in *In re Smith, supra,* has been changed by Ch. 57, Session Laws of 1955. However, this statute has no bearing upon sentences imposed by judgments pronounced prior to its enactment.

It seems appropriate to add that Bert M. Montague, Esq., who appeared by brief and oral argument in the presentation of petitioner's cause here, did so at the request and by appointment of this Court.

Except as modified herein, the orders of Judge Williams, of 22 January, 1955, and of 24 May, 1955, are affirmed.

Modified and affirmed.

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R. E. HOUGHTON v. H. V. HARRIS.

(Filed 9 November, 1955.)

**1. Judgments § 19—**

Where the judge acquires jurisdiction at term, he has jurisdiction to sign judgment out of term and out of the county by consent of the parties.

**2. Abatement and Revival § 6½—**

Whenever the existence of a prior action between the same parties involving the same subject matter is brought to the attention of the court by answer or other proper plea, the court must dismiss the second action and relegate the plaintiff therein to his right to plead a cross action or counterclaim in the former action; nevertheless the matter is not jurisdictional, but is merely procedural and designed to prevent a multiplicity of actions.

**3. Judgments § 32—**

Where a second action between the same parties involving the same subject matter is prosecuted to final judgment before the first cause is heard, the judgment in the second action is valid and binding on the parties and estops the parties and their privies not only as to the issues arising on the pleadings, but also as to all relevant and material matters within the scope of the pleadings which the parties in the exercise of reasonable diligence could and should have brought forward, and constitutes a bar to the further prosecution of the action first instituted.

**4. Judgments § 1—**

A consent judgment is a contract between the parties.

**5. Judgments § 33b: Compromise and Settlement § 2—Compromise in action by one driver against the other precludes recovery by such other in separate action.**

The driver of one car involved in a collision instituted suit against the other. Shortly thereafter the driver of the other car instituted suit against the driver of the first car, based on the same collision. A consent judgment was entered in the second suit, and on the same day the plaintiff therein executed for a consideration a release of the defendant therein for all damages arising to the plaintiff therein as a result of the collision. *Held:* The adjustment of the claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the defendant therein and the nonliability of plaintiff therein, or at least a waiver of his liability, and neither party thereafter has any right to pursue the other in respect to any liability arising out of the collision. Therefore, in the action first instituted, judgment on the pleadings disclosing the consent judgment and the execution of the release was properly entered.

**6. Compromise and Settlement § 2—**

A concluded agreement of compromise must in its nature be as obligatory in all respects as any other, and either party may use it whenever its stipulations or statements of fact become material evidence for him.

APPEAL by plaintiff from *Frizzelle, J.*, March Term, 1955, NEW HANOVER. Affirmed.

Civil action to recover compensation for personal injuries and property damage resulting from collision of two automobiles.

On 5 August 1950, at about 8:00 p.m., an automobile being operated by plaintiff and an automobile being operated by defendant were involved in a head-on collision on Highway 74-76. Both automobiles were damaged, and both plaintiff and defendant suffered personal injuries.

On 15 January 1951, plaintiff instituted this action in the New Hanover Superior Court to recover compensation for personal injuries and property damage sustained as a result of said collision. Five days thereafter, on 20 January 1951, defendant in this cause instituted an action against plaintiff herein in the New Hanover Superior Court to

recover compensation for personal injuries and property damage which he sustained as a result of the collision.

On 22 February 1951, a consent judgment was entered in the second action entitled *Harris v. Houghton* in which it is provided that "all matters and things in controversy between the parties arising out of the allegations contained in the Complaint in this cause, and as set forth in the Complaint in this cause, have been compromised, settled, adjusted and disposed of." On the same day plaintiff Harris executed two releases in which it is recited: "WHEREAS, the undersigned sustained personal injuries and property damages on or about the Fifth day of August, 1950, at or near U. S. Highway 74-76 near Delco, N. C., under circumstances claimed to render Roscoe E. Houghton liable to damage; and whereas said Roscoe E. Houghton denies liability therefor, and whereas, both parties desire to compromise and have agreed to adjust and settle the matter for the sum of Six thousand and seven hundred and fifty and no/100 DOLLARS," in consideration of which Harris forever released and discharged Houghton "from any and all actions, causes of action, claims and demands accrued or to accrue for, upon or by reason of any damage, loss or injury to person or property, or both, and of whatsoever character, which heretofore has been or which hereafter may be sustained, whether or not such injury or loss now exists or is known or unknown, permanent or progressive, anticipated or unanticipated, or recovery therefrom uncertain and indefinite, including all loss for services, resulting or to result directly or indirectly, and of and from any and all claims and demands whatsoever in law or in equity, which I, my heirs, executors, administrators or assigns can, shall or may have by reason of any matter, or cause or thing done, omitted, or suffered to be done by the said Roscoe E. Houghton, his agents or employees, prior to the date hereof."

Thereafter, the defendant herein filed an answer herein in which he pleads the consent judgment entered in *Harris v. Houghton* and the releases as *res judicata.*

Thereupon, plaintiff filed a reply in which he alleges that in executing the consent judgment he was merely buying his peace and moved to strike from the answer all reference thereto; and the defendant moved for judgment on the pleadings.

The cause coming on to be heard on said motions before Frizzelle, J., at the March Term, 1955, New Hanover Superior Court, it was agreed that the judge should take the cause under advisement and sign judgment out of term and out of the county. On 29 June 1955 the judge signed judgment in which he denied plaintiff's motion to strike and rendered judgment on the pleadings in favor of the defendant on the grounds that the consent judgment duly entered in the cause entitled

*Harris v. Houghton* is *res judicata,* and that the subject matter involved in said suit cannot again be litigated. Plaintiff excepted and appealed.

*I. C. Wright and Stevens and Burgwin & McGhee for plaintiff appellant.*

*Robert D. Cronly and Varser, McIntyre & Henry for defendant appellee.*

BARNHILL, C. J. The judgment signed by Frizzelle, J., is not void for want of jurisdiction. He acquired jurisdiction at term and signed the final judgment out of term and out of the county by consent of the parties. *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 237; *Killian v. Chair Co.,* 202 N.C. 23, 161 S.E. 546; *Strickland v. Kornegay,* 240 N.C. 758, 83 S.E. 2d 903.

The rule that a second action involving the same subject matter as one theretofore duly instituted will be dismissed whenever the existence of the former action is called to the attention of the court by answer or other proper plea is not jurisdictional. It is merely procedural, and is designed to prevent a multiplicity of actions. Whenever the existence of the former action is called to the attention of the court, he must dismiss the second action and relegate the plaintiff therein to his right to plead a cross action or counterclaim in the former action. When, however, the second action is prosecuted to final judgment before the first cause is heard, the judgment entered is valid and binding on the parties. It estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings which the parties in the exercise of reasonable diligence could and should have brought forward. *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822; *Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567; *Herring v. Coach Co.,* 234 N.C. 51, 65 S.E. 2d 505; *Snyder v. Oil Co.,* 235 N.C. 119, 68 S.E. 2d 805; Anno. 2 A.L.R. 2d 511.

There is a further reason why the judgment entered in the court below must be affirmed. The judgment entered in the case entitled *Harris v. Houghton* was entered by consent, and a consent judgment is a contract between the parties. By said compromise settlement, each party bought his peace respecting any liability created by the collision. The adjustment of said claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of Houghton and the nonliability of Harris, or at least a waiver of his liability. Neither party thereafter had any right to pursue the other in respect to any liability arising out of any alleged negligence proximately causing the collision which is the subject matter of the suit. *Snyder v. Oil Co., supra.*

A concluded agreement of compromise must in its nature be as obligatory in all respects as any other, and either party may use it whenever its stipulations or statements of fact become material evidence for him. *Sutton v. Robeson,* 31 N.C. 380; *Snyder v. Oil Co., supra; Herring v. Coach Co., supra.* See also *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908; *Coach Co. v. Stone,* 235 N.C. 619, 70 S.E. 2d 673; *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909.

"It is to be noted that the phase of the doctrine of *res judicata* which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action. The bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action. *Bruton v. Light Co., supra.*" *Gaither Corp. v. Skinner, supra.*

The pleaded judgment is regular upon its face. It was rendered by a court of competent jurisdiction in a case in which this plaintiff was the defendant, and want of jurisdiction of the person is not suggested. So long as it remains of record, it constitutes a complete bar to plaintiff's right to recover in this cause. *Coach Co. v. Stone, supra,* and cases cited.

For the reasons stated the judgment entered in the court below is Affirmed.

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BETTY WILSON, WIDOW AND GUARDIAN FOR LARRY JOE PHILLIPS, WILLIAM RANDLE WILSON, JANICE JEAN WILSON, AND BEVERLY ANN WILSON, MINOR CHILDREN; GEORGE T. BLACKBURN, NEXT FRIEND FOR VERLINE MEALER, BILLY MEALER (WILSON), JEANNINE MEALER, AND WENDOM MEALER YORK, MINOR CHILDREN; J. T. WILSON, ADMR. OF ESTATE, BILLY WILSON, DECEASED (EMPLOYEE), CLAIMANTS, v. UTAH CONSTRUCTION COMPANY (EMPLOYER); EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY (CARRIER).

(Filed 9 November, 1955.)

**1. Master and Servant § 55c—**

On appeal from award of the Industrial Commission, appellants are not required to serve their assignments of error at the time they serve notice of their appeal, but have a reasonable time after the certification of the record by the Industrial Commission to file their assignments of error along with the certified copy of the record. Five days *is held* a reasonable time within the meaning of this rule. G.S. 97-86.

**2. Master and Servant § 53d—**

Where it appears that a child was born to the common law wife of the employee shortly after the employee's death, but there is no sufficient evidence that the child was an acknowledged illegitimate child of the employee, such child is not entitled to participate in the distribution of the award as a dependent.

**3. Same—**

The employee died leaving surviving him his widow and three children. At the time of his death the employee was not living with his wife, but was living with another as his common law wife and was supporting her and her three children of whom he was not the father. *Held:* The employee's widow and three children are conclusively presumed to be his dependents to the exclusion of all others, and are entitled to the entire compensation payable for his death, share and share alike.

**4. Same—**

Under the Workmen's Compensation Act those entitled to benefits for the death of an employee resulting from one of the risks of industry are entitled to make claim directly before the Industrial Commission in lieu of the old action for wrongful death, and if the employee leaves no widow or children surviving, actual dependency must be established, and if there is no actual dependent, the compensation is to be commuted and paid to the employee's next of kin. G.S. 97-40.

APPEAL by plaintiff Blackburn, next friend, from *Carr, J.*, June Term, 1955, VANCE. Affirmed.

Proceeding before the Industrial Commission to determine claimants to the benefits accruing due to the death of Billy Wilson, deceased employee of the defendant construction company.

Said employee received injuries in the course of and arising out of his employment which caused his death. Defendant admits liability and desires the court to determine to whom the benefits should be paid.

At the time of his death the deceased employee left surviving his widow and three children. His widow had a child born out of wedlock of which the employee was not the father. This child was living with and being supported by its grandparents. The employee and his wife were living separate and apart.

At the time of his death the employee was living with one Loretta Mealer as his common law wife. She had three children of which the employee was not the father. He had, however, taken the three children into his home and was voluntarily furnishing them with necessary support and maintenance. Both the widow and the guardian for her children, hereinafter referred to as the Wilsons, and the guardian for the minor children of the common law wife claim the benefits to be paid on account of the death of the employee. The Mealer woman had a child

born to her after the death of the employee. Claim is also made in its behalf.

The Industrial Commission allowed compensation to the three Mealer children and to the widow and the three children of the deceased employee, one-seventh each. Both the Mealers and the Wilsons appealed.

When the cause came on to be heard in the court below, the judge ruled that the Mealers were not dependents within the meaning of the law, and that the widow and children were conclusively presumed to be the dependents as a matter of law. It thereupon entered judgment awarding compensation to the widow and three children of the employee. The Mealers excepted and appealed.

*Blackburn & Blackburn for appellant.*

*Charles E. Hamilton and Wade W. Mitchem, Jr., for Betty Wilson, Widow and Guardian for Larry Joe Phillips, William Randle Wilson, Janice Jean Wilson and Beverly Ann Wilson, Minor Children, appellee.*

*Perry & Kittrell for defendant appellees.*

BARNHILL, C. J. Counsel for the Mealers moved the court below to dismiss the appeal of the Wilsons from the award made by the Industrial Commission. The motion is grounded upon the fact that the bill of exceptions and assignments of error relied on by the Wilsons were not served together with the service of the notice of appeal. The guardian excepts to the ruling of the court denying the motion. The exception is without merit.

The award was made 3 January 1955, and notice of appeal was served 24 January 1955, within thirty days after the entry of the award. The Commission then had sixty days within which to prepare and furnish the appellant with a certified transcript of the record in the case for filing in the Superior Court. G.S. 97-86. Since the bill of exceptions and assignments of error must include the page of the record at which each exception may be found, it was impossible for the Wilsons to serve the assignments of error at the time they served notice of their appeal, and the Legislature did not intend to require the impossible.

The Industrial Commission furnished the Wilsons with a certified copy of the record on 16 March 1955, and the Wilsons filed their assignments of error 21 March 1955 along with the certified copy of the record. Thus it appears that the assignments of error were prepared and filed within a reasonable time after the receipt of the record. This is all that the law requires.

While it appears that there was born to the common law wife of the employee a child shortly after his death, there is no sufficient evidence in the record tending to show that this child was an acknowledged

illegitimate child of the deceased so as to entitle it to compensation in accord with our opinion in *Lippard v. Express Co.*, 207 N.C. 507, 177 S.E. 801.

When an employee of a corporation which is subject to the Workmen's Compensation Act suffers death from an accident arising out of and in the course of his employment, and he leaves a widow and children him surviving, the widow and children "shall be conclusively presumed to be wholly dependent for support upon the deceased employee." G.S. 97-39. And they *"shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons."* (Italics supplied.) G.S. 97-38 (1).

There is nothing in the record which would tend to preclude the right of the widow to receive her share of the compensation. And even if we should concede that she is precluded, the three children would receive the compensation. Thus, the Mealers would not be placed in any better position by such a holding.

The Mealers were in no sense dependents within the meaning of the Workmen's Compensation Act. The arrangement between the employee and the mother of the Mealer children was illicit, and his act in maintaining the children was purely voluntary. He was not under any legal obligation so to do. Decision as to them is controlled by what is said by *Winborne, J.*, speaking for the Court, in *Fields v. Hollowell*, 238 N.C. 614, 78 S.E. 2d 740.

It may be noted that the Workmen's Compensation Act was substituted for the old Wrongful Death Act where the death results from one of the risks of industry. Under the old procedure an administrator sued and, upon recovery, distributed the proceeds among those entitled thereto under the law. Under the new procedure those who are entitled to the benefits make claim directly before the Industrial Commission. If the employee leaves no widow or children surviving, that is, "in all other cases," actual dependency must be established, and if there was no one actually dependent upon the employee at the time of his death, the compensation is to be commuted and paid to the next of kin. G.S. 97-39, 40.

For the reasons stated judgment entered in the court below is affirmed on authority of *Fields v. Hollowell, supra.*

Affirmed.

STATE v. HAROLD F. NUGENT, LOUIS HARDY STRICKLAND, B. T. WILLIAMS AND ROMMIE GREEN.

(Filed 9 November, 1955.)

1. **Constitutional Law § 32: Indictment § 9—**

A defendant has the constitutional right, as an essential of jurisdiction, that the warrant or indictment charge the offense against him with such exactness that he can have a fair and reasonable opportunity to prepare his defense and to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and further the charge must enable the court, on conviction, to pronounce sentence according to law. Constitution of North Carolina, Article I, Sec. 11.

2. **Same—**

G.S. 15-153 does not abolish the requirement that the charge against a defendant must be sufficiently definite to safeguard his constitutional guarantees.

3. **Indictment § 9: Larceny § 4: Receiving Stolen Goods § 3—**

An indictment charging larceny and receiving stolen goods knowing them to have been stolen, which describes the property in each count as a "quantity of meat" of a specified value belonging to a designated company, *is held* an insufficient description of the property to meet constitutional requirements, and judgment upon conviction under such indictment must be set aside.

4. **Criminal Law §§ 56, 81a—**

The Supreme Court will take cognizance of a fatal defect in the bill of indictment and arrest the judgment *ex mero motu*.

5. **Criminal Law § 56—**

The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, but the State may thereafter proceed upon a sufficient bill of indictment, if so advised.

APPEAL by defendant Louis Hardy Strickland from *Fountain, Special J.*, July Regular Criminal Term 1955 of WAKE.

Criminal prosecution for larceny and receiving stolen goods knowing them to have been stolen.

The defendants Harold F. Nugent and Rommie Green pleaded guilty. The defendant B. T. Williams entered a plea of *nolo contendere*. The defendant Louis Hardy Strickland pleaded Not Guilty.

Verdict: Guilty. Judgments: As to Strickland and Williams, imprisonment in the State's Prison; as to Nugent and Green, imprisonment in the State's Prison, but their sentences were suspended, and they were placed on probation on condition, among other conditions, that they pay to R. & S. Packing Company certain sums of money in restitution.

The defendant Williams gave notice of appeal, but did not perfect it. The defendant Strickland appeals, assigning error.

*William B. Rodman, Jr., Attorney General, and Harry McGalliard, Assistant Attorney General, for the State.*

*Carl E. Gaddy, Jr. and E. R. Temple for Defendant, Appellant.*

PARKER, J. The bill of indictment has two counts: one for larceny, and one for receiving stolen property knowing it to have been stolen. The description of the property in the larceny count is a "quantity of meat of the value of fifteen hundred dollars, of the goods, chattels and moneys of one R & S Packing Company." A similar description occurs in the receiving count. Are the descriptions of the property in the two counts of the bill of indictment sufficient?

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment. *S. v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140; *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

Art. I, Sec. 11, of the North Carolina Constitution, guarantees to every person charged with crime the right to be informed of the accusation against him. This constitutional guarantee is a substantial redeclaration of the common law rule requiring the charge against the defendant to be set out in the warrant or indictment with such exactness that the defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and can enable the court, on conviction, to pronounce sentence according to law. *S. v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796; *S. v. Green,* 151 N.C. 729, 66 S.E. 564; *S. v. Lunsford,* 150 N.C. 862, 64 S.E. 765; 42 C.J.S., Indictments and Informations, Sec. 90. This right of the accused is a substantial right that may not be ignored, and not a mere technical or formal right. *People v. Green,* 368 Ill. 242, 13 N.E. (2d) 278, 115 A.L.R. 348.

G.S. 15-153 has abolished the requirement that the detailed particulars of a crime must be stated in the meticulous manner prescribed by the common law, but the requirement remains that in every prosecution by warrant or indictment the defendant shall be informed of the accusation against him, and this accusation must be set forth with sufficient certainty for the purposes above stated. *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883; *S. v. Lunsford, supra.*

As to the sufficiency of description of property in an indictment for larceny, this is stated in a note to *Jones v. State,* 64 Fla. 92, 59 So. 892, L.R.A. 1915 B 71, in the L.R.A. volume: "To apply the rules deducible from the cases it seems that property alleged to have been taken should

be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof."

The case of *S. v. Patrick,* 79 N.C. 655, 28 Am. Rep. 340, is directly in point. In that case the description of the property in the bill of indictment, to-wit, "one pound of *meat* of the value of five cents" was held fatally defective, and the judgment was arrested. This Court said: "Such articles" (referring to meats) "have more specific names in commerce and in the country, which ought to be employed in criminal proceedings." See: *S. v. Moore,* 129 N.C. 494, 39 S.E. 626, 55 L.R.A. 96.

In the *Patrick case* the Court relied upon *S. v. Morey,* 2 Wis. 362, 60 Am. Dec. 439. In the *Morey case* the description, "one hundred pounds of *meat* of the value of fifteen dollars," was held bad for uncertainty, and the judgment was arrested. The Wisconsin Court said: "In an indictment for larceny, the property which is alleged to have been stolen, should be described with reasonable certainty; and a charge of stealing meat, which applies not only to the flesh of all animals, used for food, but in a general sense to all kinds of provisions, is too vague and uncertain."

As was pointed out in *S. v. Patrick, supra,* in *S. v. Jenkins,* 78 N.C. 478, the word *meat* is used in the syllabus and report of the case. It should have been *bacon,* as appears from the original papers on file. The description of the property in the bill of indictment for larceny is, "five pounds of bacon."

*S. v. Oakley,* 51 Ark. 112, 10 S.W. 17, was a case of larceny of money, where the court was concerned with the sufficiency of the description of the money in the bill of indictment. The Court said, without citation of authority: "It has been adjudged that the description of property stolen as 'one pound of meat' was insufficient. . . ."

In *S. v. Allen,* 103 N.C. 433, 9 S.E. 626, the defendant was charged with the larceny of pork, which is the flesh of swine. The description of the property in the bill of indictment from the original papers on file is, "four hundred pounds of bacon of the value of forty dollars, and four hundred pounds of fresh pork of the value of forty dollars."

Webster's New International Dictionary, 2nd Ed., defines meat: "The flesh of animals used as food. . . . Commercially, in the United States, *meat* means the dressed flesh of cattle, swine, sheep or goats, except where used with a qualifying word, as in *reindeer meat, crab meat.*" It is common knowledge that we have different kinds of dried meat and canned meat. It is well known that horse meat is used extensively as a food for dogs.

Applying the principles of law above stated, we reach the conclusion that the description of the property in both counts of the bill of indict-

ment is fatally defective. The defendant has a constitutional right to have the bill of indictment state the kind of meat he is alleged to have taken or received, so that he can know precisely what he is called upon to meet, in order to have a fair and reasonable opportunity to prepare his defense, and so that, in the event of a conviction, the record may show with accuracy the exact offense of which he was convicted. The use of the embracive word *meat* in the bill of indictment has deprived the defendant of this substantial constitutional right.

The defendant made no motion in the Trial Court to arrest the judgment because the description of the property in both counts of the bill of indictment is fatally defective. However, the defects in the bill of indictment are insurmountable, and this Court *ex mero motu* will direct the judgment to be arrested. *S. v. Thorne, supra; S. v. Scott, supra.*

The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment. *S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81; *S. v. Scott, supra; S. v. Sherrill,* 82 N.C. 694.

Judgment arrested.

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DWIGHT T. BARKER v. GILBERT ENGINEERING COMPANY, INCORPORATED, AND GEORGE O. WETHERFORD.

(Filed 9 November, 1955.)

**1. Automobiles §§ 41h, 42f—In this action based on collision occurring when defendant turned into side road, evidence held for jury on issues of negligence and contributory negligence.**

The evidence tended to show that plaintiff, driving north, cleared the crest of the hill, enabling him to see for the first time the truck driven by the individual defendant, traveling south, about 130 feet distant, that the truck was veering to its left of the highway, that plaintiff sounded his horn, but that the driver of the truck, without giving any signal for a left turn, continued to veer to his left to enter a side road on the east, and that the vehicles collided at the entrance of the side road. *Held:* The evidence is sufficient to justify, though not necessarily to impel, the inference that the collision was proximately caused by the negligence of the driver of the truck in turning into the side road without complying with statutory requirements, and does not disclose contributory negligence as a matter of law on the part of plaintiff, and nonsuit was improperly entered.

**2. Automobiles § 8—**

A motorist proceeding along a highway ordinarily has the right to assume, and to act on the assumption, that the driver of a vehicle approaching from the opposite direction will comply with statutory rules of the road before making a left turn across his path; but he may not indulge this

assumption after he sees, or by the exercise of due care should see, that such assumption is unwarranted. G.S. 20-154.

APPEAL by plaintiff from *McSwain, Special Judge,* at March Special Term, 1955, of IREDELL.

Civil action to recover for personal injuries and property damage resulting from a collision of two motor vehicles, due to the alleged negligence of the individual defendant in attempting to make a left turn into a side road in front of the plaintiff's approaching automobile.

At the close of the plaintiff's evidence, the defendants' motion for nonsuit was allowed, and from judgment based on such ruling, the plaintiff appeals.

*Fred G. Chamblee for plaintiff, appellant.*

*Scott, Collier & Nash and Jack R. Harris for defendants, appellees.*

JOHNSON, J. The collision occurred on U. S. Highway No. 21 at the junction of a side road (leading to Shiloh Church) half a mile south of the Town of Troutman in Iredell County. Highway No. 21 runs north and south. The side road joins it on the east side. The two vehicles involved in the wreck were traveling in opposite directions on Highway No. 21, meeting each other. It was in the daytime and the weather was clear. The plaintiff was driving north in his Chrysler; the defendant Wetherford, agent of the corporate defendant, was going south in a truck. The two vehicles collided at the juncture of the side road as the defendant Wetherford undertook to make a left turn from the highway into the side road across the traffic lane of the plaintiff's oncoming automobile. As a result, both vehicles were damaged and the plaintiff suffered personal injuries.

Just south of the junction there is a hill crest which prevents approaching motorists from seeing each other over the hill. From the crest of the hill down to the junction it is about 100 feet. The grade is about 35 degrees. A motorist approaching from the south, as was the plaintiff, could not see the side road junction until he reached the crest of the hill.

The plaintiff testified in substance: that when he reached the top of the hill, driving between 45 and 50 miles per hour, he saw the defendants' oncoming truck. It was then about 130 feet down the hill from him—about 30 feet below the junction, and was "varying across" the center line. It was about one foot over the line in plaintiff's lane and was traveling 15 or 20 miles per hour. The plaintiff saw no turn-signal given by the operator of the truck, and not knowing "whether (he) was going to turn off or what," the plaintiff blew his horn and held it on.

The truck continued to vary to its left. It was not turning sharply—"just bearing over." The plaintiff then slammed on his brakes and pulled to the right toward the shoulder of the highway, but was unable to stop before colliding with the truck, as it angled on into the entrance of the side road.

The evidence discloses these further facts: Both vehicles came to rest in the entrance to the side road. The left front wheel of the defendants' truck was in the ditch and the right front wheel was on the hard surfaced portion of the side road. The rear of the truck extended back to about one foot from the center line of the highway. The plaintiff's Chrysler was headed north—"sitting in a northeasterly position." There were "53 feet of skidmarks extending southward up the highway from the front wheels of the plaintiff's automobile. These skidmarks angled off to the right side of the highway and the skidmark leading from the left front wheel . . . left the highway at a point approximately six feet from where the automobile was sitting. . . . The skidmarks leading to the . . . right front wheel (of the Chrysler) went off the shoulder for approximately four feet, the . . . skidmark leading to the left front wheel . . . stayed on the road until it made a definite turn . . . into the alternate road." The plaintiff's car showed damage to the left front and left side; the defendants' truck was damaged on the right front and right side. The plaintiff was familiar with the highway and knew of the location of the side road. The evidence does not disclose: (1) that there was any other traffic in the vicinity of the collision, (2) that the collision was within either a business or a residential district, or (3) that there were any nearby highway markers indicating a reduced speed zone.

Our analysis of the evidence leaves the impression it is sufficient to justify, though not necessarily to impel, the inference that the collision was proximately caused by the negligence of the defendant truck driver in turning into the side road without complying with statutory requirements. We also conclude that while the evidence may justify the inference that the plaintiff was contributorily negligent, nevertheless we think it sufficient to support the opposite inference. This makes it a case for the jury.

A motorist proceeding along a highway ordinarily has the right to assume, and to act on the assumption, that the driver of a vehicle approaching from the opposite direction will comply with statutory rules of the road (G.S. 20-154) before making a left turn across his path. *Brown v. Products Co.*, 222 N.C. 626, 24 S.E. 2d 334; *Webb v. Hutchins*, 228 N.C. 1, 44 S.E. 2d 350. True, the motorist is not permitted by law to continue to indulge this assumption after he sees, or by the exercise of due care should see, from the conduct of the oncoming driver that

such assumption is unwarranted. *Brown v. Products Co., supra; Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593.

The judgment below is

Reversed.

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STATE v. FRANK W. CARTER, JR.

(Filed 9 November, 1955.)

**Homicide § 27i—**

Under the amendment of G.S. 14-17 by Chapter 299, Session Laws of 1949, the trial court in a prosecution for murder must not only instruct the jury that they may recommend life imprisonment, but must also instruct them that the legal effect of such recommendation will be to mitigate the punishment to imprisonment for life in the State's Prison, and the failure of the court to do so must be held for prejudicial error upon appeal from conviction of murder in the first degree without recommendation of life imprisonment.

APPEAL by defendant from *Williams, J.,* and a jury, at February, 1955, Criminal Term of FRANKLIN.

Criminal prosecution upon a bill of indictment charging the defendant with the murder of Mrs. Janie Etheridge Wilder.

The jury returned a verdict of guilty of murder in the first degree, without recommendation of life imprisonment, and judgment was pronounced imposing sentence of death by asphyxiation, from which the defendant appeals.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*Willard Wilder and Ellis Nassif for the defendant, appellant.*

JOHNSON, J. The trial court did not tell the jury what the legal effect of a recommendation of life imprisonment would be, as required by statute. Decision turns on whether this failure to instruct was prejudicial error.

Prior to 1949, the punishment for murder in the first degree was death. A recommendation of mercy by the jury meant nothing as bearing on the duty of the judge to impose punishment. The recommendation was treated as surplusage. The death sentence followed as a matter of course. It was so fixed by statute, G.S. 14-17.

But this has been changed. Now, by virtue of Chapter 299, Session Laws of 1949, the statute (G.S. 14-17) contains a proviso which directs

that "if, at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, *and the court shall so instruct the jury.*" (Italics added.)

The jury now has the discretionary right to recommend "imprisonment for life in the State's prison." Now the recommendation when made may not be treated as surplusage. The recommendation has the salutary effect of mitigating the punishment from death to imprisonment for life, and the Act of 1949 expressly provides that the "court shall so instruct the jury." Since the amendment, it is not enough for the judge to instruct the jury that they may recommend life imprisonment. The statute now requires that he go further and tell the jury what the legal effect of such recommendation will be, *i.e.*, that if they make the recommendation, it will mitigate the punishment from death to imprisonment for life in the State's prison.

In the case at hand, the jury were instructed that they might return a verdict of "guilty of murder in the first degree with a recommendation of life imprisonment, . . ." Nevertheless the record nowhere discloses any instruction to the effect that in the event of such recommendation, the punishment would be mitigated from death to imprisonment for life in the State's prison. It thus appears that the court inadvertently failed to comply with a mandatory requirement of the statute as now written.

The jury may have known, or correctly inferred from the instruction as given, that any such recommendation, if made, would have the effect of mitigating the punishment to life imprisonment, and it may well be that the jury gave due consideration to the question of such mitigation of punishment. On the other hand, there is the probability that the jury may not have understood the impact of the statutory amendment and the change wrought by it on the old law, under which a recommendation as to punishment was mere surplusage. Therefore the jury may have treated too lightly their right to recommend life imprisonment. Room is left for doubt. The mandate of the statute was not complied with. A new trial is necessary.

New trial.

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DELMA C. GRAY, ADMINISTRATOR OF THE ESTATE OF EVELYN GRAY SNUGGS, DECEASED, v. THE CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

(Filed 9 November, 1955.)

**1. Railroads § 4—**

**Though a traveler and the railroad have equal rights to cross at a grade crossing, the traveler must yield the right of way to the railway company in the ordinary course of its business.**

**2. Same: Pleadings § 31—**

In an action against a railroad company to recover for the wrongful death of a passenger in an automobile fatally injured in a railroad crossing accident, allegations in the complaint to the effect that before entering the crossing, defendant was under duty to stop its train to ascertain whether the running of the train across the highway would endanger the life of any person thereon, are properly stricken on motion.

**3. Death § 6: Pleadings § 31—**

In this action for wrongful death, allegations in respect to damages *held* properly stricken in the light of the established rule for the admeasurement of damages in such cases. G.S. 28-174.

APPEAL by plaintiff from *Gwyn, J.*, at 16 May, 1955 Civil Term, of STANLY.

Civil action to recover damages for alleged wrongful death of intestate of plaintiff (G.S. 28-173) from injuries sustained in a collision between an automobile in which she was riding as a passenger along a public highway between Badin and New London, and a train operated by defendant on its railroad track where it crosses the highway about five miles from Badin.

The case was heard upon motion of defendant to strike certain allegations from the amended complaint on the grounds that same are conclusions of the pleader, and are redundant, irrelevant, immaterial, argumentative and evidentiary. The court allowed the motion in the respect indicated. Plaintiff excepted to the order entered in accordance therewith and appeals to Supreme Court, and assigns error.

*Henry C. Doby, Jr., and Edward Jerome for Plaintiff, Appellant.*

*W. T. Joyner, Wiley F. Mitchell, Jr., and R. L. Smith & Sons for Defendant, Appellee.*

PER CURIAM. First: The gravamen of certain of the allegations ordered stricken is that before entering the crossing defendant was under duty to stop its train to ascertain whether running the train across the highway "then and there, would endanger the life of any person thereon," and that failure of defendant to do so was negligence. In the light of the settled principle of law long prevailing in this State that where a railroad track crosses a public highway, though a traveler and the railroad have equal rights to cross, the traveler must yield the right of way to the railroad company in the ordinary course of its business, *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690, the rulings of the court in striking the allegations so specified were proper.

And, second, in the light of the established rule for the admeasurement of damages in cases of wrongful death, G.S. 28-174, the portions of the allegations in respect thereto were properly stricken.

Hence the judgment from which appeal is taken is

Affirmed.

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STATE v. L. B. COLEMAN.

(Filed 9 November, 1955.)

**Criminal Law § 62f—**

Where defendant appeals from judgment imposing a suspended sentence, and there is no error in the trial, the cause must be remanded for proper judgment, since the suspended sentence cannot stand in the absence of defendant's consent thereto.

APPEAL by defendant from *Martin, Special Judge,* May Term, 1955, of WAKE.

Criminal prosecution tried upon a warrant charging the defendant with the operation of a motor vehicle on the public roads of North Carolina and on the streets of the City of Raleigh while under the influence of intoxicating liquor.

The jury returned a verdict of guilty and the court sentenced the defendant for a term of four months in the common jail of Wake County, to be assigned to work the roads under the supervision of the State Highway and Public Works Commission, prison sentence to be suspended for a period of two years upon the payment of a fine of $100.00 and costs and the compliance with certain conditions set forth in the judgment.

The defendant appeals, assigning error.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*Alphonso Lloyd and Carl E. Gaddy, Jr., for defendant.*

PER CURIAM. We have examined the defendant's exceptions and assignments of error directed to the admission of certain evidence. In our opinion no sufficient prejudicial error has been shown to warrant a new trial. Likewise, the defendant's motion for judgment as of nonsuit was properly denied.

However, since the defendant did not consent to the suspension of the sentence entered below, or the conditions imposed, the judgment entered is stricken out and the cause remanded for proper judgment. *S. v. Cole,*

241 N.C. 576, 86 S.E. 2d 203; *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *S. v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793.

Error and remanded.

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NORFOLK SOUTHERN RAILWAY COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 9 November, 1955.)

**Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, the decision of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Williams, J.,* at May Civil Term, 1955, of WAKE.

*Simms & Simms, attorneys for plaintiff, appellee, and A. J. Winder and C. J. Collins of Norfolk, Virginia, and E. B. Ussery of Columbia, South Carolina, of counsel for plaintiff, appellee.*

*Smith, Leach, Anderson & Dorsett and Joyner & Howison for defendant, appellant.*

PER CURIAM. This is a civil action to enjoin the threatened abrogation of an operating contract involving the interchange of freight and division of revenue between the plaintiff and the defendant, common carriers by rail.

The plaintiff moved the trial court for a temporary order restraining abrogation of the contract pending final hearing of the cause. The motion was allowed, and from judgment entered in accordance with such ruling, the defendant appeals.

The Court being evenly divided in opinion as to the correctness of the foregoing ruling, *Justice Higgins* not sitting, the judgment of the Superior Court is affirmed, without becoming a precedent. *Trust Co. v. Merrick,* 211 N.C. 739, 191 S.E. 5. The plaintiff's motion, made in this Court, to amend the complaint is denied.

Affirmed.

## STATE v. FLONNIE WALDEN THOMAS.

(Filed 9 November, 1955.)

**Homicide § 25—**

Evidence in this case *held* sufficient to support conviction of defendant for manslaughter.

APPEAL by defendant from *Fountain, Special Judge,* at July Criminal Term, 1955, of WAKE.

Criminal prosecution tried upon a bill of indictment charging the defendant with the murder of her husband, Lattie Thomas.

There was a verdict of guilty of manslaughter. From judgment imposing penal servitude of not less than three nor more than five years, the defendant appeals.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*Thomas W. Ruffin for defendant, appellant.*

PER CURIAM. The only exceptions brought forward challenge the sufficiency of the evidence to carry the case to the jury over the defendant's motions for judgment as of nonsuit. The exceptions are untenable. The evidence discloses that the deceased came to his death as a result of a pistol wound inflicted by the defendant under circumstances justifying the inference that the defendant was guilty of manslaughter. The jury rejected her contention that the killing was accidental. The verdict is amply sustained by the evidence, and the judgment is supported by the verdict.

No error.

## FRED R. DENNIS v. FRANK DETELS.

(Filed 9 November, 1955.)

**Appeal and Error § 40f—**

The denial of a motion to strike will not be disturbed on appeal when it does not appear that retention of the challenged allegation will materially prejudice defendant on the final hearing.

APPEAL by defendant from *Gwyn, J.,* April Term, 1955, of STANLY.

Civil action to recover damages to person and property, growing out of a collision on 10 July, 1954, at the intersection of U. S. Highway 52

and N. C. Highway 49, near Richfield, Stanly County, allegedly caused by the negligence of defendant.

Defendant, in apt time, filed motion under G.S. 1-153 to strike as irrelevant and redundant designated allegations of the complaint.

After hearing in due course, Judge Gwyn entered an order denying defendant's said motion. Defendant excepted and appealed, assigning as error the denial of his motion in respect to each designated allegation challenged thereby.

*R. L. Smith & Son and Morton & Williams for plaintiff, appellee.*

*Brown & Mauney for defendant, appellant.*

PER CURIAM. Careful consideration of each challenged allegation fails to disclose that its retention in the complaint will materially prejudice defendant on the final hearing of this cause. Hence, Judge Gwyn's order is

Affirmed.

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STATE v. JOHN WASHINGTON.

(Filed 9 November, 1955.)

APPEAL by defendant from *Sharp, Special J.*, August Term 1955 of MOORE.

Criminal prosecution for operating a motor vehicle on the public roads of North Carolina and on the streets of the Town of Southern Pines, while under the influence of intoxicating liquor.

Verdict: Guilty. Judgment: Imprisonment for four months.

Defendant appeals, assigning error.

*William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.*

*Seawell & Wilson for Defendant, Appellant.*

PER CURIAM. The defendant assigns as error the court's denial of his motion for judgment of nonsuit made at the close of the State's case, and renewed at the close of all the evidence. A careful reading of the record discloses there was ample evidence to carry the case to the jury.

The other assignments of error are to the charge. A study of the charge fails to disclose any error therein of sufficient prejudicial effect to justify a new trial.

There are no exceptions to the admission or rejection of evidence, which was in sharp conflict. Under a charge free from prejudicial error the jury found the defendant guilty. The verdict and judgment will not be disturbed.

No error.

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CLARA MAE BALDWIN, LUCILLE BALDWIN AND WILLIE JAMES BALDWIN, AND CLARA MAE BALDWIN, NEXT FRIEND OF MARY FRANCES BALDWIN MOTEN AND HUSBAND, J. W. MOTEN, AND LEOLA BALDWIN, MINORS, v. G. C. HINTON AND WIFE, EUNICE W. HINTON.

(Filed 23 November, 1955.)

**1. Quieting Title § 1: Ejectment § 10—**

Even though an action is nominally to remove cloud from title, where defendants are in actual possession, and plaintiffs seek to recover possession, the action in essence is in ejectment.

**2. Partition § 6—**

A parol partition by tenants in common is not void, but is voidable only by the parties thereto or their heirs or assigns.

**3. Tenants in Common § 8—**

While one tenant in common may recover judgment for trespass only for his proportionate part of the damages, one tenant in common may recover possession of the entire tract in an action in ejectment against a third party.

**4. Appeal and Error § 2—**

An appeal does not lie from the denial of a motion for judgment on the pleadings.

**5. Judgments § 33f: Courts § 5—**

In an action involving the validity of a deed of trust, attacked on the ground of insufficiency of the description, denial of plaintiffs' motion for judgment on the pleadings does not preclude another Superior Court judge, on the hearing on the merits, from adjudicating the sufficiency of the description, when plaintiffs' allegation of ownership is denied in the answer and thus an issue of fact for the jury is raised by the pleadings, certainly when the motion for judgment on the pleadings relates to the original pleadings and amended pleadings are filed by permission of the court without objection.

**6. Boundaries § 5a—**

An instrument conveying an interest in land must contain a description sufficiently definite to identify the land, either in itself or by reference to some source *aliunde*, pointed out in the instrument. G.S. 8-39.

**7. Same: Mortgages § 4—**

A deed of trust describing the land as located in a certain township and settlement, and consisting of 10.65 acres, more or less, is void for insufficiency of the description, nor is reference in the instrument to the item of a will disclosing that the trustor was devised a 19-acre tract on the west end of a 54-acre tract a sufficient aid to the description when it appears that the trustor had been allotted 19 acres in the center of the 54-acre tract, and intended to convey a part of such tract as security.

**8. Ejectment § 19—**

Ordinarily, an action in ejectment must be dismissed when the land in controversy is not identified in the pleadings or the stipulations of the parties, but where the parties stipulate that plaintiffs were in possession of a certain 5-acre tract staked off, and that defendants are now in possession thereof, and no contention is made as to the identity of the 5-acre tract, judgment for plaintiffs will be vacated and the cause remanded for identification of the land so that judgment may be entered affirmatively adjudicating plaintiffs' title to an identified tract.

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

APPEAL by defendants from *Sharp, Special J.*, September Term, 1955, of JOHNSTON.

Civil action commenced 7 June, 1954, to determine ownership of, and for an accounting for rents and profits from, a 5-acre tract of land in possession of defendants, heard by the court below upon *amended* complaint and answer and stipulated facts.

Atlas Richardson owned a tract of 54 acres, more or less, in Selma Township, Johnston County, when he died, testate, about 1912. He devised to each of his three daughters, Millie Stancil, Loumenda Richardson and Claudia Watson, a life estate in 19 acres of said 54-acre tract, with provisions as to remainder. The Millie Stancil tract was identified as 19 acres "to be surveyed and cut from the eastern portion of said tract of land." The Loumenda Richardson tract was identified as 19 acres "to be cut and surveyed as to be in the center of the tract including the house and premises." The Claudia Watson tract was identified as 19 acres "on the west end" of said tract.

Plaintiffs, except J. W. Moten, are the heirs of Claudia Mary Etha Baldwin, the daughter and only child of Loumenda Richardson. They allege that Claudia Mary Etha Baldwin, their mother, became owner of the 5 acres, not by inheritance from Loumenda Richardson, her mother, but that, under the provisions of Atlas Richardson's will, Claudia Mary Etha Baldwin and the four children of Millie Stancil became owners of the 19 acres devised to Claudia Watson, who died, without children, on 3 March, 1938; and that thereafter the said 19 acres were divided as between the five tenants in common and the 5 acres in controversy allotted to Claudia Mary Etha Baldwin in ex-

change for her undivided one-fifth interest in the other 14 acres of said 19-acre tract.

In their original complaint, plaintiffs alleged ownership of an undivided interest in the 19 acres *on the west end* of said tract of 54 acres, more or less. Answering, defendants denied plaintiffs' said allegation; and defendants further alleged the ownership by them, in consequence of their purchase upon foreclosure of a deed of trust executed by Claudia Mary Etha Baldwin, of plaintiffs' interest in the Atlas Richardson land.

Upon these original pleadings, plaintiffs moved (1) for appointment of a receiver to take charge *pendente lite,* and (2) for judgment on the pleadings. At September Term, 1954, an order was entered by Judge Bone denying plaintiffs' said motions, to which plaintiffs excepted. At January Term, 1955, on plaintiffs' motion and without objection by defendants, Judge Martin allowed the parties to file amended pleadings. Under the *amended* pleadings, the land in controversy is a 5-acre tract, a part of the 19 acres *in the center* of said Atlas Richardson tract of 54 acres, more or less.

When the cause came before Judge Sharp for final hearing, defendants contended that Judge Bone's said order denying plaintiffs' motion for judgment on the original pleadings was, in effect, a ruling that the description in the deed of trust, foreclosure advertisement and trustee's deed, under which defendants claimed ownership, which had been attacked by plaintiffs as void because of uncertainty, was sufficient; and that, since plaintiffs did not perfect an appeal from Judge Bone's order, Judge Sharp was bound by Judge Bone's ruling. Judge Sharp rejected this contention. Thereupon, after excepting to this ruling by Judge Sharp and expressly reserving their position with reference to the significance of Judge Bone's order, plaintiffs and defendants agreed upon the facts. A summary of the facts stipulated is set out below.

1. The widow of Atlas Richardson died about 1922. Shortly thereafter, Millie Stancil, Loumenda Richardson and Claudia Watson made a parol partition of the Atlas Richardson land. It was disclosed by survey then made that "the house and premises" were on the 19 acres *on the west end* rather than on the 19 acres *in the center* of the Atlas Richardson land. For this reason, in the parol partition of 1922, it was agreed that Millie Stancil owned the 19 acres *on the east end;* that Loumenda Richardson owned the 19 acres *on the west end,* on which "the house and premises" were located; and that Claudia Watson owned the 19 acres *in the center.* Since then, "each of said daughters, or their heirs or assigns, has been in continuous, open and notorious adverse possession of their respective tracts, claiming the same against the world

and against each other, until the defendants took possession of the lands in controversy in May, 1954."

2. It was stipulated that upon the death of Claudia Watson, without children, on 3 March, 1938, "the children of Millie Stancil and Loumenda Richardson became the owners in fee simple of the 19 acres in the center of said 54-acre tract, and each child owned one-fifth undivided interest."

3. Thereafter, about 1949, Claudia Mary Etha Baldwin and the four children of Millie Stancil made a parol partition of the 19 acres, formerly owned by Claudia Watson, located *in the center* of said 54-acre tract. In this parol partition, it was agreed that the children of Millie Stancil owned the 14 acres on the east side, adjoining the original 19-acre tract of Millie Stancil, and that Claudia Mary Etha Baldwin owned the 5 acres on the west side of the 19 acres in the center of the Atlas Richardson land. Pursuant to this parol partition of 1949, the 14-acre tract and the 5-acre tract, respectively, were "surveyed and properly set forth and designated on the ground by stakes, metes and bounds." Thereupon, Claudia Mary Etha Baldwin went into possession of the 5-acre tract, and was in possession thereof at the time of the execution of the deed of trust referred to in the next paragraph.

4. On 28 November, 1952, (Claudia) Mary Etha Baldwin and husband, John W. Baldwin, executed a deed of trust to A. M. Noble, Trustee, which was duly recorded, securing an indebtedness of $436.22 to W. S. Hicks, which deed of trust purported to convey land described therein as follows:

"Being a tract of land in Selma Township, in the settlement called 'Coonsboro' about three miles north of Selma, North Carolina, consisting of 10.65 acres, more or less. See Will Book 6, page 5, of the Atlas Richardson Will, and Item 7 of said Will, Office of Clerk of Superior Court, Johnston County."

5. Claudia Mary Etha Baldwin died 17 May, 1953, intestate; and John W. Baldwin died 17 September, 1953, intestate. As stated above, plaintiffs, except J. W. Moten, are the children and only heirs at law of Claudia Mary Etha Baldwin.

6. In March, 1954, said deed of trust was foreclosed by A. M. Noble, Trustee, upon request of W. S. Hicks; and defendants became the purchasers at their bid of $475.00. Pursuant to such foreclosure A. M. Noble, Trustee, executed and delivered a deed to defendants. Thereupon, defendants entered into possession of the said 5-acre tract identified and staked off as stated above in the parol partition of 1949, and have remained in possession since then. The description contained in said deed of trust, quoted above, was used in the foreclosure advertisement and in the trustee's deed.

7. The said tract of 54 acres, more or less, was the only real property owned by Atlas Richardson at the time of his death.

8. Claudia Mary Etha Baldwin owned no other property than that which she acquired under the will of Atlas Richardson.

9. The 19 acres *on the west end* of the Atlas Richardson land, allotted to Loumenda Richardson in the parol division of 1922, is now owned by William B. Wellons. Presumably, Millie Stancil, who is now 76 years of age, still owns the 19 acres *on the east side* of the original Atlas Richardson land.

Upon these stipulated facts, Judge Sharp held that the description in the deed of trust and in the trustee's deed was patently ambiguous and void for uncertainty and that parol evidence was not admissible to identify the land. Judgment was entered that said deed of trust and said trustee's deed were void and of no effect; that plaintiffs are entitled to an accounting from defendants of the rents and profits from the 5 acres which defendants have had in possession since May, 1954, but that a full accounting could not be had because the tobacco crop grown thereon during the year 1955 had not been sold; and the cause was retained and continued until on or after the November Term, 1955, for the determination of the amount of the rents and profits due by defendants to plaintiffs upon such accounting.

Defendants excepted to the judgment as entered and appealed, assigning errors.

*Lyon & Lyon for plaintiffs, appellees.*

*A. M. Noble for defendants, appellants.*

BOBBITT, J. While nominally a cause of action to remove a cloud from plaintiffs' title, this is essentially an action in ejectment. True, possession by plaintiffs is not a prerequisite to an action brought under G.S. 41-10. *Satterwhite v. Gallagher,* 173 N.C. 525, 92 S.E. 369; *Vick v. Winslow,* 209 N.C. 540, 183 S.E. 750. Nor is it necessary in such an action to allege or establish either trespass or unlawful possession by defendants. But where, as here, defendants are in actual possession, and plaintiffs seek to recover possession, the action in essence is in ejectment. *Hines v. Moye,* 125 N.C. 8, 34 S.E. 103.

The parties stipulated that, upon the death of Claudia Watson on 3 March, 1938, the children of Millie Stancil and of Loumenda Richardson became the owners in fee simple of the 19 acres *in the center* of the Atlas Richardson tract of 54 acres, more or less. Accepting this as established, the proper construction of the Atlas Richardson will (which is not set out in full in the record), need not be considered; nor do we need to consider the parol division of 1922.

The owners of the 19 acres *in the center* of the Atlas Richardson tract of 54 acres, more or less, made a parol partition thereof in 1949. A parol partition is voidable, not void. *Collier v. Paper Corp.*, 172 N.C. 74, 89 S.E. 1006; *Thomas v. Conyers*, 198 N.C. 229, 151 S.E. 270. As of now, *the parties* to said parol partition of 1949, their heirs or assigns, could have it declared void and be restored to their original status as tenants in common. *Duckett v. Harrison*, 235 N.C. 145, 69 S.E. 2d 176. They have not done so.

It makes no difference for present purposes whether plaintiffs be treated as owners of the 5 acres identified and staked out as the Claudia Mary Etha Baldwin land in said parol partition of 1949 or as owners of an undivided interest in the 19 acres *in the center* of the Atlas Richardson land. This may become material upon the accounting for rents and profits from May, 1954. In an action for trespass, a tenant in common may recover judgment only for his proportionate part of the damages; but in an action in ejectment, one tenant in common may recover the entire tract against a third party. *Winborne v. Lumber Co.*, 130 N.C. 32, 40 S.E. 825; *Lance v. Cogdill*, 238 N.C. 500, 78 S.E. 2d 319, and cases cited therein.

Both plaintiffs and defendants claim under Claudia Mary Etha Baldwin, plaintiffs claiming by inheritance and defendants claiming under deed pursuant to foreclosure of the deed of trust executed by Claudia Mary Etha Baldwin to A. M. Noble, Trustee. Thus, the vital question is whether the description in the deed of trust and in the trustee's deed is void for uncertainty.

Defendants' assignment of error, based on Judge Sharp's refusal to treat Judge Bone's order as having established the sufficiency of the description, is wholly without merit. Judge Bone made no such determination. He simply denied plaintiffs' motion for judgment on the pleadings. Plaintiffs excepted, but did not appeal. They were well advised. It is well established that an appeal does not lie from a denial of a motion for judgment on the pleadings. *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843; *Howland v. Stitzer*, 240 N.C. 689, 84 S.E. 2d 167, and cases cited therein. Furthermore, the motion for judgment on the pleadings related to the *original* pleadings. Plaintiffs' allegation of ownership was denied. This raised an issue of fact, to be determined by jury trial or other approved procedure. *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16. Aside from all this, the controversy under the *amended* pleadings was an entirely different case, involving different land.

The principles applicable in determining the sufficiency of the description are well established. *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723, and cases cited therein. "The description must identify the land,

or it must refer to something that will identify it with certainty. Otherwise the description is void for uncertainty." *Higgins, J.*, in *Deans v. Deans*, 241 N.C. 1, 84 S.E. 2d 321. Parol evidence is admissible to fit the description to the land. G.S. 8-39. "Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description complete is to be sought." *Winborne, J.*, in *Self Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889.

Here the description calls for *a* tract of land in *Selma Township*, in the settlement called "Coonsboro" *about* three miles north of Selma, N. C., consisting of 10.65 acres, more or less. This fits equally well any tract of the indicated acreage in "Coonsboro" about three miles north of Selma. It refers to nothing from which the land can be identified with certainty. The additional sentence, "See Will Book 6, page 5, of the Atlas Richardson Will, and Item 7 of said Will, Office of Clerk of Superior Court, Johnston County," affords no assistance. If it be conceded that the mere reference to the Atlas Richardson will, particularly Item 7 thereof, is a sufficient reference to admit testimony as to the contents of Item 7 of said Will, the stipulations disclose that the tract devised in Item 7 was "19 acres of my tract of land on the west end." Clearly, this does not identify the tract of 5 acres in controversy, in possession of Claudia Mary Etha Baldwin when she executed the deed of trust to A. M. Noble, Trustee, which is a part of the 19 acres *in the center* of the Atlas Richardson tract of 54 acres, more or less.

It is quite probable that Claudia Mary Etha Baldwin intended to convey to A. M. Noble, Trustee, whatever part or interest she owned in the original tract of 54 acres, more or less, albeit the explanation of the reference to a tract of 10.65 acres, more or less, does not appear. Even so, we are concerned only with the sufficiency of the description, not what we conceive Claudia Mary Etha Baldwin may have intended. Since the description does not point to any source from which it can be made certain, we agree with the ruling of Judge Sharp that the deed of trust and the trustee's deed are void because of uncertainty in the description of the land conveyed thereby.

Apparently, the deed of trust to A. M. Noble, Trustee, secured the payment of an indebtedness due and owing by Claudia Mary Etha Baldwin. What amount, if any, defendants may be entitled to recover from plaintiffs on account of such indebtedness or otherwise is not before us for consideration. It is noted that plaintiffs, in their amended complaint, tendered to defendants the sum of $475.00, the amount of their bid at the foreclosure sale.

While the ruling that the description is insufficient and void is upheld, we are confronted here by the fact that the 5-acre tract in controversy

is not described by metes and bounds in the pleadings, or in the stipulations, or in the judgment. Nor is there a particular description of the tract of 54 acres, more or less, or of any of the three tracts of 19 acres each. Moreover, the judgment does not adjudge plaintiffs' ownership of the 5-acre tract in controversy. It adjudges that the instruments under which defendants claim are void and that defendants are accountable to plaintiffs for rents and profits since they went into the possession of the undescribed 5-acre tract in May, 1954.

Ordinarily, an action in ejectment will be dismissed if plaintiff either fails to prove his title or fails to locate the land claimed by him. But since these parties have stipulated that Claudia Mary Etha Baldwin was in possession of the 5-acre tract, as identified and staked off, when she executed the deed of trust to A. M. Noble, Trustee, and that defendants are now in possession thereof, and no contention is made as to the identity of the 5 acres in controversy, instead of reversing the judgment and dismissing plaintiffs' action we have decided to vacate the judgment and remand the cause. The new judgment must adjudicate affirmatively plaintiffs' title to the 5-acre tract in controversy and contain a correct description thereof as well as determine the amount, if any, due by defendants to plaintiffs upon an accounting. In the absence of agreement as to the location of the 5 acres in controversy, the parties must proceed upon amended pleadings to have the location thereof determined.

Under this disposition of the appeal, the costs on appeal will be taxed, one-half to plaintiffs and one-half to defendants.

Error and remanded.

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

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GLENN M. BURCHETTE v. DAVIS DISTRIBUTING COMPANY OF DURHAM, INCORPORATED.

(Filed 23 November, 1955.)

**1. Constitutional Law §§ 8a, 10c—**

It is the duty of the courts to construe a statute as written, the wisdom of the enactment being the legislative function.

**2. Automobiles §§ 41f, 42d—**

Under the amendment of G.S. 20-141 (e) by Chapter 1145, Session Laws of 1953, the failure of a motorist to stop his vehicle within the radius of his lights or the range of his vision may not be held negligence *per se* or con-

tributory negligence *per se*, provided the motor vehicle is not being operated in excess of the maximum speed limit under the existing circumstances as prescribed by G.S. 20-141 (b).

**3. Automobiles § 42d—**

The evidence tended to show that the operator of a tractor-trailer, in the act of turning around, backed on the highway while dark in such manner that the trailer was across his left of the highway while the tractor was on his right with its lights shining down the road, and that plaintiff, traveling in the opposite direction, was blinded by the lights of the tractor and struck the trailer. There was no evidence that plaintiff was exceeding the applicable speed limit prescribed by G.S. 20-141 (b) (4). *Held:* Under the 1953 amendment to G.S. 20-141 (e) defendant's motions for nonsuit on the grounds of contributory negligence were properly denied.

**4. Pleadings § 22—**

The trial court has the discretionary power to permit plaintiff to amend his complaint, prior to the introduction of any evidence, so as to allege damages in a larger amount. G.S. 1-163.

APPEAL by defendant from *Rousseau, J.*, at June 1955 Civil Term, of WILKES.

Civil action to recover for damages to person and property allegedly sustained by plaintiff as result of actionable negligence by defendant.

The uncontradicted facts shown in the record and case on appeal show that this action grows out of a collision on morning of 31 January, 1955, at a point on North Carolina Highway 268, running from town of North Wilkesboro to Elkin, North Carolina, about one mile east of said town. The collision occurred before seven o'clock—and before the break of day. It was still dark. The highway was straight for considerable distance, two to three-tenths of mile to the east, and something like a half mile or more to the west from the point of collision, between plaintiff's half-ton truck, hereinafter referred to as the truck, operating in westerly direction by plaintiff, and defendant's tractor-trailer operated by its agent Calvin Caley Bryant, hereinafter referred to as Bryant, on a mission for it,—the tractor-trailer in the act of turning around backed on the highway in such manner that same was in an "L" shape—the tractor on its right-hand side, that is, south side of highway headed east, and the trailer across the highway to the north side.

The parties stipulated that the accident occurred outside of the city limits of North Wilkesboro and not within a speed zone, on the open highway; and that there is a driveway or roadway leading off to a residence on the north side of the road; and one such roadway on the right side of the road—which the evidence indicates to be the south side.

Plaintiff alleges in his complaint, and upon trial in Superior Court offered evidence tending to show that the lights of the tractor were

shining bright down the highway facing him, so that he was unable to see the trailer and to stop in time to avoid striking it.

And plaintiff testified that when he came around the curve, east of the point of the collision, he was traveling 35 to 40 miles per hour; that he saw the lights after he first came around the curve; that the lights were on bright; that the lights blinded him; that he blinked his lights "two times if not three"; and that "the man never dim his."

And plaintiff further testified that the first time he saw the trailer was after he had passed the headlights of the tractor; that there was not any portion of the highway open in his lane of traffic; that the trailer was connected to the tractor; that he did not see any lights on the trailer itself; that there were not any lights on it; and that he was operating his truck between 35 and 40 miles per hour at the time of the impact—"the time I hit the tractor-trailer" at the rear wheels.

Plaintiff testified in detail as to his injuries and the extent thereof.

Plaintiff alleges that as the proximate cause of the collision and the resulting injuries to plaintiff's person and damage to his property, the defendant was negligent in these respects:

"(a) . . . he, or his agent, operated said motor vehicle negligently, carelessly and heedlessly, in willful and wanton disregard of the rights of the plaintiff and others traveling along said roadway, and at a speed and in a manner so as to endanger and be likely to endanger the person and property of the plaintiff;

"(b) . . . he suddenly backed said vehicle across the roadway without exercising a proper lookout for oncoming traffic and completely blocking said roadway;

"(c) . . . he failed to dim his lights on said tractor, blinding the plaintiff in the approaching car;

"(d) . . . he failed to yield the right of way to the plaintiff;

"(e) . . . he backed said motor vehicle into the highway in such a manner as to leave the trailer across the lane of traffic of the plaintiff and leave it in such a manner that it was not possible to see the same."

On the other hand, defendant, answering the complaint, denies that it was negligent in any respect, and avers that allegations just stated are untrue and are denied; but that if the court and jury should find that it was negligent, plaintiff was guilty of contributory negligence which is pleaded in bar of his right to recover.

And for a further answer and counterclaim defendant avers that at the time alleged in the complaint Bryant was operating the tractor-trailer of defendant in a careful and prudent manner and with due regard to the rights and safety of others using the highway when plaintiff came down the highway in a negligent, careless and reckless manner and at a high rate of speed, and in excess of that speed allowed by law,

and that the collision and resulting damages were due to the negligence and carelessness of plaintiff as the sole and proximate cause in that:

"(a) He operated his vehicle at a high and excessive rate of speed, to wit, in excess of 55 miles per hour;

"(b) He failed to operate said vehicle within the range of his lights;

"(c) He failed to keep his vehicle under proper control and to stop within the range of his lights and avoid a collision;

"(d) He failed to observe the oncoming traffic;

"(e) When he saw the lights of the defendant's vehicle on the highway he failed to reduce his speed and bring his vehicle under proper control;

"And that the negligence on the part of the plaintiff as hereinabove alleged is pleaded in bar of the plaintiff's right to recover" by reason of which defendant's vehicle has been damaged in amount stated.

The witness, Bryant, testifying in behalf of defendant, gave a narrative of events leading up to the collision substantially as follows: That on the morning of 31 January, 1955, he was bringing a load into Chick-Haven Farm, about two to three miles out, south of Highway No. 268, that is, on the right-hand side going east; that he passed the road leading into this farm, and started to turn around; that he pulled up far enough to back into a side road on left-hand or north side of the highway; that he looked both ways at the time he started to back, and "did not see anything approaching"; that his headlights were on dim,—"kind of shining off to the right of the road"; that the left-hand front wheel of the tractor "was sitting on the right-hand side of the line, going east," and that the back wheel "was sitting right on top of the center line"; that there were lights on the trailer; that he had the door open "looking to the back" as he was turning around; that he backed the tractor over on his left side of the road, and the entire left-hand side was blocked; that "the collision took place just about where the trailer is fastened to the tractor, and then went on back to the back end"; and that in his opinion at the moment of the impact plaintiff was traveling at 55 miles per hour. This witness also testified that plaintiff told him the same day of the collision, and at the hospital, that his windshield was fogged up and "he didn't see the truck until he got right on it and he did not put on brakes at all."

The case was submitted to the jury upon five issues, three in respect to plaintiff's alleged cause of action, that is, as to (1) negligence of defendant, (2) contributory negligence of plaintiff, and (3) damages, and two in respect to defendant's alleged counterclaim, that is, (4) as to negligence of plaintiff, and (5) damages. The jury answered the first issue "Yes," the second "No," the third "$6,000," and the fourth "No." Judgment was signed by the court in accordance with the ver-

dict. Defendant excepted, and appeals to Supreme Court, and assigns error.

*W. H. McElwee for plaintiff, appellee.*
*Hayes & Hayes for defendant, appellant.*

WINBORNE, J. While appellant brings forward for consideration on this appeal several assignments of error, those two, Numbers 2 and 3, based upon exceptions to denial of its motions, aptly made, for judgment as of nonsuit are most strongly stressed. The principal argument advanced is that upon plaintiff's own statement as to the facts of the case he was guilty of contributory negligence as a matter of law. And defendant relies upon the principle enunciated in *Weston v. R. R.* (1927), 194 N.C. 210, 139 S.E. 237, that a motorist must operate his motor vehicle at night in such manner and at such speed as will enable him to stop within the radius of his lights, or within the range of his vision, and that failure to do so is negligence. The principle has been applied in these cases: *Baker v. R. R.* (1933), 205 N.C. 329, 171 S.E. 342; *Lee v. R. R.* (1937), 212 N.C. 340, 193 S.E. 395; *Beck v. Hooks* (1940), 218 N.C. 105, 10 S.E. 2d 608; *Sibbitt v. Transit* (1942), 220 N.C. 702, 18 S.E. 2d 203; *Dillon v. Winston-Salem* (1942), 221 N.C. 512, 20 S.E. 2d 845; *Pike v. Seymour* (1942), 222 N.C. 42, 21 S.E. 2d 884; *Austin v. Overton* (1942), 222 N.C. 89, 21 S.E. 2d 887; *Montgomery v. Blades* (1943), 222 N.C. 463, 23 S.E. 2d 844; *Allen v. Bottling Co.* (1943), 223 N.C. 118, 25 S.E. 2d 388; *Atkins v. Transportation Co.* (1944), 224 N.C. 688, 32 S.E. 2d 209; *McKinnon v. Motor Lines* (1947), 228 N.C. 132, 44 S.E. 2d 735; *Riggs v. Oil Corp.* (1948), 228 N.C. 774, 47 S.E. 2d 254; *Tyson v. Ford* (1948), 228 N.C. 778, 47 S.E. 2d 251; *Bus Co. v. Products Co.* (1948), 229 N.C. 352, 49 S.E. 2d 623; *Cox v. Lee* (1949), 230 N.C. 155, 52 S.E. 2d 355; *Brown v. Bus Lines* (1949), 230 N.C. 493, 53 S.E. 2d 539; *Wilson v. Motor Lines* (1949), 230 N.C. 551, 54 S.E. 2d 53; *Hollingsworth v. Grier* (1949), 231 N.C. 108, 55 S.E. 2d 806; *Marshall v. R. R.* (1950), 233 N.C. 38, 62 S.E. 2d 489; *Morris v. Transport Co.* (1952), 235 N.C. 568, 70 S.E. 2d 845; *Morgan v. Cook* (1952), 236 N.C. 477, 73 S.E. 2d 296; *Express Co. v. Jones* (1952), 236 N.C. 542, 73 S.E. 2d 301; *Singletary v. Nixon* (1954), 239 N.C. 634, 80 S.E. 2d 676; *Sheldon v. Childers* (1954), 240 N.C. 449, 82 S.E. 2d 396.

In connection with these cases it must be borne in mind that the speed statute, G.S. 20-141, in effect on 31 January, 1955, the date on which the collision involved in the present action took place, in so far as pertinent to case in hand, declares:

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Except as otherwise provided in this chapter, it shall be unlawful to operate a vehicle in excess of the following speeds:

1. Twenty miles per hour in any business district;

2. Thirty-five miles per hour in any residential district;

3. Forty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for vehicles other than passenger cars, regular passenger vehicles, pick-up trucks of less than one ton capacity, and school buses loaded with children;

4. Fifty-five miles per hour in places other than those named in paragraphs 1 and 2 of this subsection for passenger cars, regular passenger carrying vehicles, and pick-up trucks of less than one ton capacity.

"(c) The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . when a special hazard exists with respect . . . other traffic or by reason of weather . . . conditions, and speed shall be decreased as may be necessary to avoid colliding with . . . any vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

"(d) . . .

"(e) The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action of the burden of proving negligence upon the part of the defendant as the proximate cause of an accident."

However, the General Assembly passed an Act, Chapter 1145 of 1953 Session Laws amending G.S. 20-141 (e) by adding thereto the proviso "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits described by G.S. 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

And in Section 3 of Chapter 1145 of 1953 Session Laws the General Assembly declared that "All laws and clauses of laws in conflict with this act are hereby repealed."

So the courts must interpret the statute as it is written,—the wisdom of it being the legislative function.

Hence, interpreting the amendatory act, if the driver of a motor vehicle who is operating it within the maximum speed limits prescribed by G.S. 20-141 (b) fails to stop such vehicle within the radius of the lights of the vehicle or within the range of his vision, the courts may no longer hold such failure to be negligence *per se*, or contributory negli-

gence *per se*, as the case may be, that is, negligence or contributory negligence, in and of itself, but the facts relating thereto may be considered by the jury, with other facts in such action in determining whether the operator be guilty of negligence, or contributory negligence, as the case may be. However, this provision does not apply if it is admitted, or if all the evidence discloses, that the motor vehicle was being operated in excess of the maximum speed limit under the existing circumstances as prescribed under G.S. 20-141 (b).

Therefore, the principle applied in the cases hereinabove cited is modified only in accordance with the provisions of the amendatory act as so interpreted here by this Court.

In the light of the amendatory act, as so interpreted, the issue as to contributory negligence of plaintiff was one for the jury in the instant case. All the evidence is to the effect that the speed of the plaintiff's truck was within the maximum allowed by G.S. 20-141 (b) (4). Hence the motions for judgment as of nonsuit were properly overruled.

Appellant assigns as error the ruling of the trial court in permitting plaintiff to amend his complaint so as to allege damage for personal injury in sum of $10,000 in lieu of $3,500 as originally set forth, to which exceptions Numbers 1 and 4, on which assignments of error of like numbers are based. The record of case on appeal shows that upon reading the pleadings and before any evidence was introduced plaintiff made motion to be allowed to so amend his complaint. The trial judge, in his discretion, allowed the motion. It is sufficient to say that this ruling is accordant with power vested in the judge by statute, G.S. 1-163.

Other assignments of error have been given due consideration and in them prejudicial error is not made to appear.

Therefore, in the judgment from which this appeal is taken, the Court finds

No error.

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GENEVA EDWARDS MABRY v. RUSSELL MABRY.

(Filed 23 November, 1955.)

**1. Divorce § 2d—**

The statutory right to divorce on the ground of insanity requires that insanity must have been the reason for the separation, but does not require any greater proof of separation and its continuance than is required in a divorce based on two years separation.

**2. Same—**

The statutory requirement for divorce on the ground of insanity that the insane spouse should have been confined in an institution for five consecutive years next preceding the bringing of the action is for the purpose of

determining the mental condition of the spouse after five consecutive years' treatment for mental disorder, in order that the incurability or permanence of the mental disorder, which constitutes the basis for the right to the divorce, may be established. G.S. 50-5 (6), as amended.

**3. Same—**

The fact that a husband, during his five years of confinement in the State Hospital, had twice been released to his relatives for short probationary periods, does not preclude the wife's right to divorce on the ground of his insanity, since such release on probation did not discharge the husband or remove him from the constructive custody of the State Hospital. G.S. 50-5 (6), G.S. 122-67.

APPEAL by plaintiff from *Carr, J.*, May Term, 1955, of WARREN.

The plaintiff, a resident of Warren County, North Carolina, instituted this action on 30 November, 1954, against the defendant for absolute divorce under the provisions of G.S. 50-5, subsection 6, as amended by Chapter 1087 of the 1953 Session Laws of North Carolina, alleging that the defendant had been confined for more than five years in the State Hospital at Raleigh, North Carolina, and was incurably insane. Summons was served on Dr. Walter A. Sikes, Superintendent of said Hospital, on 3 December, 1954. James D. Gilliland was appointed guardian *ad litem* for the defendant on 1 December, 1954, and summons was served on him on 6 December, 1954, and an answer was filed by the guardian in behalf of his ward on 21 January, 1955.

When this cause was heard in the trial below, the evidence tended to show these facts: That the plaintiff and defendant were married on 27 May, 1939; that no children were born of the marriage; that for two years prior to the commitment of the defendant to the State Hospital he was in ill health and contributed nothing to the plaintiff's support, nor has he contributed anything either directly or indirectly since his commitment; that the defendant was committed to the State Hospital on 14 June, 1949; and that the plaintiff at no time since the commitment has lived with the defendant. That during the time of the defendant's confinement in the State Hospital he was released on probation on two different occasions: once for a period of ten days and another for a period of six months, and while the defendant was on probation he did not reside with the plaintiff but with his relatives in Halifax County. He has never been discharged and is still an inmate of the State Hospital.

The testimony of Dr. Walter A. Sikes is to the effect that the defendant is incurably insane. Likewise, Dr. C. H. Woodburn, a regularly practicing physician in Warren and Halifax Counties, testified that he treated the defendant prior to the date of his commitment and is famil-

iar with his mental and physical condition and that in his opinion the defendant is incurably insane.

In his charge to the jury the trial judge charged in substance that the releases of the defendant on probation did not constitute such an act on the part of the Hospital as to terminate the period of confinement within the meaning of the statute. The jury answered the issues as follows:

"1. Were the plaintiff and defendant married, as alleged in the amended complaint?

"Answer: Yes.

"2. Have the plaintiff and the defendant lived separate and apart from each other continuously for more than five (5) years next preceding the filing of the complaint, as alleged in the complaint?

"Answer: Yes.

"3. Is the defendant suffering from incurable insanity?

"Answer: Yes.

"4. Has the defendant been confined for five (5) consecutive years next preceding the bringing of this action in an institution for the care and treatment of the mentally disordered?

"Answer: Yes.

"5. Has the plaintiff been a resident of the State of North Carolina for six (6) months or more preceding the filing of the complaint?

"Answer: Yes."

The plaintiff tendered an appropriate judgment on the verdict but the trial judge refused to sign it on the ground that in his opinion his instruction, referred to above, was erroneous. He therefore set the verdict aside and the plaintiff appeals, assigning error.

*John Kerr, Jr., for plaintiff.*

*James D. Gilliland, guardian ad litem for defendant.*

DENNY, J. The sole question for determination on this appeal is whether or not the two periods of probation referred to above constitute such release from confinement in the State Hospital as to defeat the plaintiff's right to a divorce.

The pertinent part of G.S. 50-5, subsection 6, as amended, reads as follows: "In all cases where a husband and wife have lived separate and apart for five consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered."

Insanity is not generally recognized in any of the States of the United States as a ground for divorce unless made so by statute. *Lee v. Lee,* 182 N.C. 61, 108 S.E. 352. A majority of the States, however, have adopted statutes which authorize the granting of a divorce on such ground. The right to divorce, pursuant to the terms of our statute, is bottomed on the ground of incurable insanity, and such insanity must have been the reason for the separation of the parties. We do not construe this statute to require any greater proof of the separation and its continuance during the period involved in this action than is required in a divorce based on two years separation. G.S. 50-5, subsection 4. This being so, there must have been some specific legislative intent that motivated the enactment of the requirement that the insane spouse must have been confined "in an institution for the care and treatment of the mentally disordered," for a period of five consecutive years, before the sane spouse may obtain a divorce.

The State is interested in the marital status of its citizens, and it guards with care the marital rights as well as the property rights of its insane. Therefore, we think the purpose of the above provision is to require that a person alleged to be incurably insane, shall not have his or her marital status altered until such person has been committed to an institution for the care and treatment of the mentally disordered for a period of five successive years in order that it may be ascertained whether or not the inmate's insanity is incurable. Mere confinement for a period of five successive years in such an institution would fulfill the literal meaning of the statute but it would not be in compliance with its spirit or purpose. What the State is interested in is simply this: What is the mental condition of this defendant after having been treated for five consecutive years for his mental disorder? Certainly, by the use of the word "confined" in the statute, the Legislature did not contemplate such confinement as would require an inmate to be at all times under lock and key. Moreover, this defendant has been at all times, since 14 June, 1949, in the actual or constructive custody of the State Hospital. He has never been discharged. When he was permitted to leave the hospital for the periods referred to hereinabove, he was on probation. Probation simply means a period of testing, or trial. This is a method that may be used to ascertain whether or not a mentally deranged person has improved to the extent that he or she might be discharged. While on the other hand it might be used if the patient is docile and harmless, to ascertain whether or not a change of environment would be helpful to him. Not all persons suffering from incurable insanity are violent or dangerous.

Furthermore, it is expressly provided in G.S. 122-67, in pertinent part, that "When it shall appear that any mentally disordered person under

commitment to and confined in a hospital for the mentally disordered . . . when he shall have become no longer dangerous to the community and to himself, or when it shall appear that suitable provision can be made for the alleged mentally disordered person so that he will not be injurious or dangerous to himself or the community, the superintendent of the hospital may in his discretion release him on probation to the care of his guardian, relative, friends or of any responsible person or agency in the community, and may receive him back into the hospital without further order of commitment during the continuance of the order of commitment which shall not have been terminated by the action of the superintendent in releasing him on probation."

In the case of *Dodrer v. Dodrer,* 183 Md. 413, 37 A. 2d 919, the Maryland Court of Appeals in considering the identical question we now have before us, said: "It does not matter for the purposes of the divorce statute whether the insane person is able to perform any work, or to be outside of the hospital, or other place of confinement at times. The point with which our Legislature is dealing is whether her mental condition is such that she must have supervision of the kind given by a hospital. The fact that a patient is harmless enough to be placed outside of the hospital in a private home, although still kept under hospital supervision, does not indicate that she is not incurably insane. It is not intended to grant the right of divorce only from those persons who are so violently insane that they have to be incarcerated at all times. The test is not the manifestation of the mental disease. It is permanence and incurability. . . . We think a construction should be placed upon the insanity divorce statute, based, not upon a strict interpretation of its words, but upon what it was intended to do. Real intent must prevail over literal intent."

Likewise, in *Jacobs v. Jacobs,* 45 Del. 544, 76 A. 2d 742, it is said: "The requirement in our statute, that there should have been supervision by an institution for a period of at least five years, can be nothing more than a safeguard that complaints for divorce on the ground of insanity shall not be filed lightly, or without just cause."

We also find that the English cases are in accord with the view expressed in *Dodrer v. Dodrer, supra.* The English Matrimonial Causes Act of 1937, permitting actions for divorce on the ground that the defendant spouse is incurably insane, requires also that the insane spouse shall have been continually under care and treatment for a period of at least five years immediately preceding the petition, and that a person of unsound mind shall be considered to have been under care and treatment while detained in pursuance of any order under the lunacy and mental treatment acts. A number of cases have arisen in England under the provisions of the above act, involving what does and what

does not constitute an interruption of care and treatment preventing the fulfillment of a necessary condition of the divorce. See 24 A.L.R. 2d, Anno.: Divorce or Separation—Insanity, page 873, *et seq.*

In the case of *Safford v. Safford* (Eng.) (1944), Probate and Divorce, 61-CA, the court held that absences within the five-year period, where the husband was placed in every instance under the care of a relative, were not interruptions of the detention required by the Matrimonial Causes Act, but that the reception or detention order remained in full force during the entire period. *Lord Greene, M. R.*, speaking for the Court, said: "The absence is merely a method of the care and treatment which is given under and by virtue of the reception order and pursuant to the statutory powers given to the persons authorized to receive the patient under the order. In fact, the learned President is, I think, paying too much attention to detention as a physical fact and is not regarding it, as I think it ought to be regarded, as a status."

The District Court of Appeals, 2nd District, Division 1, California, in the case of *Finkelstein v. Finkelstein,* 88 App. 2d Cal., 198 P. 2d 98, in construing a question similar to that before us, held that when the insane spouse was paroled to the defendant's mother, the detention ended. Hence, it was held that the defendant had not been detained for a period of three years as required by the statute.

We have concluded, however, that the spirit and purpose of the provisions of G.S. 50-5, subsection 6, as amended, have been met; that the periods of probation were permissible under the above statute as well as under G.S. 122-67, and may be deemed not to have constituted an interruption of the confinement or a discharge from the hospital within the meaning of these statutes. Therefore, the order setting aside the verdict below is reversed and the cause remanded for judgment on the verdict.

Reversed and remanded.

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ANDREWS & KNOWLES PRODUCE COMPANY, INC., v. BUCK CURRIN, HANK CURRIN, JACK CALHOUN, AND TOM SMOTHERS, TRADING AS BIG FOUR WAREHOUSE.

(Filed 23 November, 1955.)

**1. Landlord and Tenant § 12—**

The lease provided that lessee should enclose space in lessors' warehouse and pay lessors a stipulated rent per 1,000 square feet of space enclosed. *Held:* The enclosure of space by lessees pursuant to the agreement fixed the location and dimensions of the space leased, and during the term lessors

had no right to dismantle any part of the enclosure or take possession of the leased space.

**2. Same—**

Plaintiff leased certain space in defendants' warehouse. The lease provided that lessors should have the right to use the space for the sale of tobacco from the beginning of the season of any year until October 15. During the term, lessors dismantled part of the enclosure. Lessors offered evidence that the reason the enclosure was dismantled was in order for lessors to have the space considered by the Tobacco Board of Trade in calculating the selling time to be allotted to lessors. *Held:* The evidence is irrelevant, since it explains why lessors dismantled the enclosure, but does not establish legal justification thereof.

**3. Landlord and Tenant § 8—**

In the absence of provision to the contrary, there is an implied covenant that the lessee shall have the quiet and peaceable possession of the leased premises during the term.

**4. Landlord and Tenant § 12—**

The unauthorized entry and repossession of the leased premises by lessors, or others acting under their direction, constitutes a breach of the lease agreement, entitling lessee at his election to sue for damages.

**5. Same—**

The measure of damages for the lessors' unauthorized repossession of the premises during the term is the difference between the rent agreed upon and the market rental value for the remainder of the term, plus any special damages alleged and proved.

**6. Same—**

Where lessee makes improvements on the property as authorized by the lease agreement, and during the term lessors take unauthorized possession of the premises, the measure of damages, in the absence of allegation and proof of special damages, is the difference between the rent agreed upon and the fair rental value of the leased premises, as improved, for the remainder of the term.

**7. Same—**

Where lessee, under the provisions of the lease, encloses a part of lessors' warehouse, under agreement that the cost of such improvements should apply to rent, evidence of the cost of the improvements is competent for the purpose of showing that lessee had paid the rent by application of the costs of the improvements for the full five-year term, and is not objectionable as tending to prove special damages without allegation thereof.

**8. Same—**

Where the issue of damages for lessors' breach of the lease agreement involves solely the determination of the fair value of the leased premises, as improved by lessee, for the remainder of the term, an instruction giving the jury the basic rule for measuring damages for breach of contract, together with the conflicting contentions of the parties based thereon, will not be

held erroneous for asserted failure of the court to apply the general rule to the evidence in the case.

**9. Same: Damages § 6—**

When the rule as to the duty to minimize damages applies, the party who breached the contract has the burden of showing matters in mitigation.

**10. Same—**

Lessors breached the lease agreement by taking unauthorized possession of the premises during the term. No special damages were alleged or proved, and the issue of damages related solely to the difference between the rent agreed and the rental value of the premises as improved by lessee. *Held:* The rule requiring a party to minimize his damages has no application to lessee.

APPEAL by defendants from *Paul, J.*, April Civil Term, 1955, of WAYNE.

Civil action commenced 25 February, 1954, to recover damages of $2,000.00 on account of alleged breach of a lease agreement.

It is undisputed that, under date of 20 October, 1950, defendants-lessors, designated therein as "first party," and plaintiff-lessee, designated therein as "second party," executed a lease agreement, which, except as to formal provisions, was as follows:

"First party does hereby lease second party up to 5,000 square feet of space in the Big Four Warehouse, located at Dunn, North Carolina, (the warehouse that is being used as a sweet potato market) at $30.00 per thousand square feet per annum for the space enclosed by second party. It is agreed and understood that this lease will continue in force for a period of 5 years beginning October 15, 1950, unless terminated prior to that time by second party. Second party may terminate lease by notifying first party in writing any year prior to October 1st.

"Second party agrees to construct walls, etc., necessary to make suitable for storing sweet potatoes and other merchandise. The cost of said construction including stove flues is to be applied on rent. However, party of the second part is to bear the expense of heating equipment. First party agrees to keep roof in condition to prevent leaking.

"In case first party desires to use warehouse for the operation of tobacco market, it is agreed and understood that said space may be used for the sale of tobacco from the beginning of season, in any year, until October 15th."

After the signatures, these words appear: "Should contents cause increase in insurance rate on building parties are to adjust same."

After the lease agreement was executed, plaintiff, in the Fall of 1950, enclosed a space 80 x 40 feet, on the floor of defendants' warehouse. It appears that the posts in the warehouse floor were in rows, 20 feet apart. Plaintiff constructed walls (about 14' high) to the ceiling,

together with necessary doors, windows and ventilation, cornering the enclosure at certain of the warehouse posts. A partition was built through the center, thus dividing the enclosed space into two separate compartments. Heating equipment, including flues, was installed.

Plaintiff's evidence tends to show that the actual cost of such construction was as follows: for materials, including uprights, weatherboarding, doors, windows, etc., $672.50, and $463.57 for labor, a total of $1,136.07. Defendants' evidence tends to show that the reasonable cost of such construction was between $400.00 and $500.00.

The space so enclosed by plaintiff was used by it for the storage of sweet potatoes during the 1950 and 1951 seasons. It was not used during the 1952 season, plaintiff's evidence tending to show there was a short crop, almost a failure, that year.

In the summer of 1953 the storage enclosure so constructed by plaintiff was dismantled by defendants except for two sides thereof. These became a part of a new enclosed space, 160′ x 100′, 16,000 square feet as compared with the 3,200 square feet enclosed by plaintiff. As defendants' evidence tends to show, they "took down" a portion of plaintiff's construction and "laid it aside."

Plaintiff's evidence tends to show that it discovered this condition when visiting the warehouse to get the leased storage space in shape for the storage of sweet potatoes in the 1953 season; that, notwithstanding notice that it wanted its leased space for this purpose for the 1953 season, use thereof by plaintiff was denied by defendants; that the space (within the larger enclosure) was actually used for the storage of sweet potatoes in the 1953 season by Godwin Produce Company, a partnership composed of E. E. Godwin and Buck Currin, one of the defendants; and that the space was used by one C. C. Barefoot in the 1954 season under lease from the then owners of the warehouse.

Plaintiff alleged damages for breach of contract in the amount of $2,000.00. It offered evidence tending to show that the fair rental value of the space leased, as enclosed by plaintiff and made suitable for the storage of sweet potatoes, was $1,000.00 or more for each of the two seasons, 1953 and 1954. There was opinion testimony to this effect and also evidence that the leased (enclosed) space was sufficient for the storage of between 11,000 and 12,000 bushels of sweet potatoes. E. E. Godwin, a witness for defendants, testified that the regular price for the storage of sweet potatoes was between 10c and 15c per bushel.

Defendants offered evidence to the effect that the fair rental value of the leased space was $112.00 per year for each of the 1953 and 1954 seasons. This figure is based on 3,200 square feet at $35.00 per thousand.

The first issue, answered by consent, related to the making of the quoted lease agreement. The jury found (second issue) that defendants breached the agreement, and (third issue) awarded damages in the amount of $2,000.00.

Judgment was entered, in plaintiff's favor, for $2,000.00 and costs. Defendants excepted and appealed, setting forth 83 assignments of error.

*Taylor, Allen & Warren for plaintiff, appellee.*

*J. Faison Thomson & Son, I. R. Williams, and Franklin Dupree for defendants, appellants.*

BOBBITT, J. The location and dimensions of the leased floor space were identified and fixed when enclosed by plaintiff in the Fall of 1950 and made available for the storage of sweet potatoes as contemplated and actually used by plaintiff for such purpose during the 1950 and 1951 seasons. True, as contended, defendants had the right to use the space for the sale of tobacco from the beginning of the season, in any year, up to October 15th. The lease so provides. But defendants had no right to dismantle plaintiff's enclosed storage space and take possession of this space for the storage of sweet potatoes. It is noted that this space was not used for the sale of tobacco.

The court excluded testimony offered by defendants tending to show that the reason plaintiff's enclosure was dismantled in the summer of 1953 was to enable defendants to have the space considered by the Tobacco Board of Trade in calculating the selling time to be allotted to defendants on the tobacco sales market. Defendants owned other tobacco warehouses. The rulings were correct. Even so, some evidence along this line was developed and received without objection. It is irrelevant. It explains why defendants dismantled plaintiff's enclosed storage space but is not a legal justification thereof.

With one minor exception, the only authorities cited in defendants' brief are in support of their assignments of error directed to the court's instructions bearing on the issue of damages. Only these assignments merit further discussion.

In the absence of a provision to the contrary, there is an implied covenant that the lessee shall have the quiet and peaceable possession of the leased premises during the term. *Sloan v. Hart,* 150 N.C. 269, 63 S.E. 1037; *Huggins v. Waters,* 154 N.C. 443, 70 S.E. 842; *Smithfield Improvement Co. v. Coley-Bardin,* 156 N.C. 255, 72 S.E. 312, 36 L.R.A. (N.S.) 907; 32 Am. Jur., Landlord and Tenant sec. 268; 51 C.J.S., Landlord and Tenant sec. 323. Unauthorized entry and repossession of the leased premises by the lessors or those acting under their

direction constitutes an invasion of the lessee's rights, in short, a breach of the lease agreement. 51 C.J.S., Landlord and Tenant sec. 319. In such case, the lessee, at his election, may sue for damages. 51 C.J.S., Landlord and Tenant sec. 320.

What then is the measure of damages when the lessors, during the term the lease is in effect, wrongfully exclude the lessee from the leased premises and deny to the lessee the possession thereof during the unexpired portion of the term?

It was held in *Sloan v. Hart, supra,* that lessee's cause of action accrues immediately upon such breach. "The measure of damages appears settled by practically all the authorities to be the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved." "By rental value is meant, not the probable profits that might accrue to the plaintiffs, but the value, as ascertained by proof, of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined." Quotations are from opinion of *Brown, J.,* in *Sloan v. Hart, supra.* See *Sloan v. Hart,* 153 N.C. 183, 69 S.E. 50.

Plaintiff's evidence, accepted by the jury, established that plaintiff had paid the rental for the full term of five years. It is noted that the amount expended by plaintiff in the construction of the enclosure was to be credited against the rent due, which was $30.00 per thousand square feet or $96.00 per year for 3,200 square feet, a total of $480.00.

The lessee having paid the rental for the entire term of five years, the measure of damages, in the absence of allegation and proof of special damages, is the fair rental value of the leased premises as enclosed by plaintiff for the 1953 and 1954 seasons, to wit, the portion of the term that had not expired when the breach occurred. At the time of trial, the 1954 season had passed. Hence, there was no need to restrict the recovery to the present value, appropriate when any part of the unexpired term is subsequent to date of trial.

Here plaintiff did not allege nor did he undertake to prove the loss of profits or other special damages. The evidence offered, bearing upon the issue of damages, was directed solely to the fair rental value of the leased premises as enclosed by plaintiff for the 1953 and 1954 seasons. The evidence as to the amount expended by plaintiff in construction of the enclosure was directed solely to the question as to whether plaintiff, in accordance with the terms of the lease, had paid the rent for the full term of five years.

The court gave the jury the basic rule for measuring damages for breach of contract, established law since *Hadley v. Baxendale,* 9 Exch. 341. *Sloan v. Hart,* 150 N.C. 269, 63 S.E. 1037; *Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634. While not challenging the correctness of

this basic rule, defendants assign as error the court's failure to indicate its precise application to the present case. The assignment is without merit, for the conflicting evidence and the court's array of the conflicting contentions based thereon show clearly that the issue as to damages involved only a determination of what was the fair rental value of the leased premises as enclosed by plaintiff for the 1953 and 1954 seasons.

Defendants further challenge the charge because the court failed to instruct the jury that plaintiff was under the legal duty to show that it had exercised reasonable prudence and diligence to minimize its loss. It is noted that when the rule as to the duty to minimize damages applies, the party who breached the contract has the burden of showing matters in mitigation of damages. *Monger v. Lutterloh,* 195 N.C. 274, 142 S.E. 12. But apart from this, the rule has no application here.

True, such rule ordinarily applies when special damages are alleged and shown, such as gains prevented and losses incurred, on account of breach of an executory contract. *Chesson v. Container Co.,* 215 N.C. 112, 1 S.E. 2d 357; *Perkins v. Langdon, supra.* In *Monger v. Lutterloh, supra,* an entirely different situation was presented. There the lessee refused to accept the leased premises and to pay the rent therefor. The lessor took possession thereof for the benefit of the lessee. In the lessor's action against the lessee for rent, it was held that the lessor must account to the lessee, that is, give him credit against the stipulated rent, either for the fair rental value of the leased premises or for the amount the lessor could have obtained by the exercise of reasonable prudence and diligence in reletting the premises, depending upon whether the lessor did or did not make actual use of the premises for his own purposes. The cases cited in this paragraph, relied on by defendants, are readily distinguishable from this case.

After defendants had dismantled plaintiff's enclosure and sweet potatoes were stored by others in the leased space (then within a larger enclosure), there was a conversation between an officer of plaintiff (Andrews) and defendant Buck Currin in which they tried to adjust the damages to which plaintiff was entitled. This evidence was received without objection. As defendant Buck Currin put it: "We didn't get together." The jury's verdict, after consideration of conflicting evidence as to the fair rental value of the leased space for the 1953 and 1954 seasons, resolved the uncertainty as to the amount justly due and owing plaintiff on account of defendants' breach of contract.

All assignments of error brought forward in the brief, a total of 51, have been considered. Examination thereof discloses no error of law deemed of sufficient prejudicial effect to warrant a new trial.

No error.

P. E. BROWN v. W. H. HURLEY, MRS. W. H. HURLEY AND ROBERT N. HOLLAND.

(Filed 23 November, 1955.)

1. **Boundaries § 5a—**

The fact that the boundaries do not go entirely around the land does not necessarily invalidate the description for uncertainty, and the description in the deed in question *is held* sufficiently certain to permit proof *aliunde* as to the land intended to be conveyed thereby, and parol evidence was competent to identify the land and fit it to the description contained in the instrument. G.S. 8-39, G.S. 39-2.

2. **Adverse Possession § 19—**

Evidence tending to show that the land in question was mountain land and that plaintiff had timber cut from the land, employed a caretaker to look after the property and keep off trespassers, and had listed the land for taxation for more than seven years since he had purchased the property, together with evidence fitting the description in the deed to the land claimed, is sufficient to sustain the court's finding, in a trial by the court under agreement of the parties, that plaintiff had been in the adverse possession of the *locus in quo* under known and visible boundary lines for seven years under color of title.

3. **Adverse Possession § 8—**

Adverse possession means actual possession with intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which the land is susceptible in its present state.

4. **Adverse Possession § 18—**

It is competent for witnesses to state what acts of ownership have been exercised over the property by claimant, it being for the jury, or the judge when the parties agree to trial by the court, to determine whether such acts of ownership constitute open, notorious and adverse possession.

5. **Appeal and Error § 40d—**

Where one finding of fact, supported by evidence, is sufficient predicate for the judgment, other findings of fact need not be considered.

APPEAL by defendants from *Rousseau, J.*, May Term, 1955, WILKES. Affirmed.

Plaintiff alleges that he is the owner of the tract of land in "Elk Township, Wilkes County, State of North Carolina, adjoining the lands of Marley Tugman and others and bounded as follows, viz.: BEGINNING on said Miller's Northwest corner on a persimmon and running a southern direction passing a few yards west of the barn making an apple tree and plum tree, marked in the line, continuing in the same direction to a forked popular on the branch bank; thence by crossing said branch running with the old road on the top of the first ridge opposite the

dwelling house to said Miller's line adjoining Tugman's line including all the land said Miller formerly owned west of their boundary and adjoining the Marley and Tugman land." He further alleges that defendants have trespassed upon said land and cut and removed timber therefrom.

In their answer defendants denied the title of plaintiff to the lands described in the complaint and also denied a trespass committed on the lands of plaintiff.

The parties waived trial by jury and agreed that the cause should be submitted to the judge who should find the facts and enter judgment upon the facts found. The plaintiff waived his claim to damages for trespass. Thus the action resolved itself into an action to try title to real property.

The plaintiff offered in evidence (1) a deed dated 28 August 1865 from Thomas C. Miller and wife to Anderson Winkler, (2) deed dated 15 April 1939 from "the undersigned heirs at law of Laura Winkler Bullis" to Herman Elmore, (This deed is signed by two men and their respective wives.), and (3) deed dated 26 July 1943 from Herman Elmore and wife to plaintiff. The description in each of the deeds is the same.

In the deed from Herman Elmore to plaintiff there is added to the description the following sentence: "For full description see deed to Mrs. Laura Winkler Bullis the description in which deed is made the description in this deed." However, no such deed to Laura Winkler Bullis appears of record or was offered in evidence.

The plaintiff offered the testimony of a surveyor and others tending to fit the description contained in these deeds to the land claimed by him. There was evidence as to the location of corners, marked trees, and other natural objects. One line runs along the top of a ridge. Another line follows an old road. The property was surveyed in 1903, in 1923, and in 1939, and the surveyor's markings were found and identified by the witnesses. One witness testified that while she was not on the survey, she could walk the line at any time.

Plaintiff offered evidence that the grantors in the deed dated 15 April 1939 were generally reputed to be the niece and nephew of Laura Winkler Bullis, now deceased, and that Laura Winkler Bullis was the daughter of Anderson Winkler, grantee in the first deed. There was no evidence, however, as to how many children Anderson Winkler had or as to whether any such children were living or as to whether they were dead, leaving children surviving.

Plaintiff offered further evidence tending to show that he had the timber cut and removed from the said land in 1943, that he has listed said land for taxation since his purchase thereof, that he has been back

on the land occasionally, and that he employed a caretaker to look after the property and to keep off trespassers. The caretaker, who was the same person who cut and removed the timber for plaintiff, testified: "I have been looking after some property up there where I cut some timber, what I did was, I looked around to see nobody wasn't in on the place where I cut the timber." Plaintiff testified he purchased the land for the purpose of growing trees.

The defendants offered no evidence.

The court found the facts, including the following: (1) that the plaintiff has been in the adverse possession of the land described in the complaint since he purchased the same from Herman Elmore 26 July 1943, "having had the timber cut therefrom, having listed and paid tax thereon and having had caretakers looking after and otherwise exercising control and possession of said lands;" (2) that plaintiff and those under whom he claims have been in the adverse possession of said lands since 1869; and (3) that the grantors in the deed to Herman Elmore "are grandchildren of Anderson Winkler and nieces and nephews and next of kin of Anderson Winkler and Laura Winkler Bullis, said Laura Winkler Bullis having died without issue." It thereupon entered judgment "that the plaintiff is the owner of the lands set out in the court map and described in the complaint . . ." The defendants excepted and appealed.

*Whicker & Whicker for plaintiff appellee.*

*Ralph Davis and W. H. McElwee, Jr., for defendant appellants.*

BARNHILL, C. J. The contention of the defendants that the description in the complaint and in the plaintiff's deed is too vague to permit proof *aliunde* as to the land intended to be conveyed thereby is without merit. That the boundaries do not go entirely around the land does not invalidate the description. G.S. 39-2. Parol evidence to identify the land sued for and to fit it to the description contained in the paper writing offered as evidence of title was admissible. G.S. 8-39. *Timber Co. v. Yarbrough,* 179 N.C. 335, 102 S.E. 630; *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440; *Williams v. Robertson,* 235 N.C. 478, 70 S.E. 2d 692; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889.

The plaintiff testified that he had been in possession of the *locus* since it was conveyed to him by Elmore, and there was other evidence of possession sufficient to sustain the finding of the judge, acting as a jury, that plaintiff had been in the adverse possession of said land under color of title for more than seven years next preceding the institution of this action.

Possession "is exercising that dominion over the thing and taking that use and profit which it is capable of yielding *in its present state.* It is all that can be done until the subject shall be changed. It is like the case stated in the books of cutting rushes from a marsh. This is sufficient, though it might appear that dykes and banks would make the marsh arable." *Loftin v. Cobb,* 46 N.C. 406; *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347.

"Adverse possession means actual possession, with an intent to hold solely for the possessor to the exclusion of others and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser . . ." *Lindsay v. Carswell,* 240 N.C. 45, 81 S.E. 2d 168.

"Where it is established that the land in controversy is swamp land (here mountain land), valuable only for timber, evidence that plaintiff, claiming under known and visible lines and boundaries under color, from time to time cut and sold timber from the tract for over seven years, is sufficient to take the case to the jury." *Berry v. Coppersmith,* 212 N.C. 50, 193 S.E. 3. (Headnote.)

". . . 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 (here the judge) to say, under proper instructions, whether that constitutes open, notorious and adverse possession." *Memory v. Wells,* 242 N.C. 277, 87 S.E. 2d 497.

We conclude, therefore, that the plaintiff offered sufficient testimony of adverse possession under color to sustain the first finding of fact made by the judge, acting as a jury, to the effect that the plaintiff had been in the open, notorious, continuous adverse possession of the land in controversy under known and visible boundary lines and under color of title conveyed to him by the deed from Elmore dated 26 July 1943 for more than seven years.

In view of our conclusion on the first finding of fact, it is unnecessary for us to consider or discuss questions raised as to whether (1) the names of the heirs of a deceased person may be proved by general reputation, or (2) the failure of proof that the grantors in the deed to Elmore were the only heirs at law and next of kin of Anderson Winkler. In this connection it is to be noted that the reference to a deed to Laura Winkler Bullis contained in the description in the deed from Herman Elmore to the plaintiff would seem to indicate that she claimed the property by purchase and not by inheritance.

In any event, the first finding of fact made by the judge is sufficient to sustain the judgment entered. For that reason the judgment must be

Affirmed.

STATE v. J. WALL ELLIS.

(Filed 23 November, 1955.)

**1. Homicide §§ 11, 22—**

In a prosecution of a wildlife protector for homicide, it is error for the court to exclude defendant's testimony tending to explain that he was on the property of deceased's brother for the purpose of discharging a duty of his office, particularly in view of instructions predicating his right to kill in self-defense upon whether he was a trespasser upon the property or was there in the discharge of the duties of his office.

**2. Criminal Law § 40d—**

A witness may not testify as to defendant's bad character when the testimony is not based upon defendant's general reputation and character in the community in which he lives, but upon defendant's reputation in the community in which the homicide occurred, since character evidence may not be based upon the opinions which any person or any number of persons have expressed, unless such opinions have created or indicate defendant's general reputation.

**3. Same—**

Where a character witness testifies that he does not know the general character of defendant, he is disqualified as a character witness against defendant.

APPEAL by defendant from *Huskins, J.*, July Term, 1955, of AVERY.

Criminal prosecution tried upon a bill of indictment charging the defendant with the murder of one Charlie Young. The homicide occurred in Mitchell County, but the cause was transferred to Avery County for trial pursuant to motion for change of venue.

This case was here at the Spring Term, 1955. The opinion of the Court granting a new trial is reported in 241 N.C. 702, 86 S.E. 2d 272. The facts stated in our previous decision will not be restated herein except in so far as it may be necessary to an understanding of this appeal.

When this cause was again called for trial, the solicitor announced, as he did at the former trial, that he would not prosecute the defendant for murder in the first degree, but would ask for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant.

The defendant again, under plea of not guilty, admitted the intentional killing and assumed the burden of justification.

The evidence tends to show that the defendant, a man 64 years of age, had served at the time of the trial below for more than ten years as a Wildlife Protector for the State of North Carolina; that during nine of the ten years he had been stationed in Mitchell County.

The homicide occurred on 5 April, 1954. The trout season had opened that day and the defendant had been assigned three other Wildlife enforcement officers to assist him in his work. They had spent the day in various parts of Mitchell County in the performance of their duties. About 5:00 o'clock in the afternoon they were on their way to take one of the deputies home when they came upon two boys and an older man fishing in a trout stream. The boys did not have licenses, and the older man left the scene without being checked. Thereupon, the officers, in an effort to head him off, returned to their car and drove up the road, across the bridge spanning the creek, and parked. One of the deputies walked down to the stream where the older man was talking with other fishermen. The defendant followed some little distance behind the deputy; the other two deputies remained in the car. When the defendant crossed a board fence some 30 feet from the car on his way to the trout stream, Charlie Young, who had not been seen by the defendant, called to his brother, Ralph Young, who was standing nearby, and said, "Ralph, can't you get that s.o.b. off your land?" The additional facts with respect to what occurred that lead to the death of Charlie Young are fully set out in our former opinion.

The jury returned a verdict of guilty of manslaughter. From the judgment imposed, the defendant appeals, assigning error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Charles Hughes, Robert Lacey, Nance & Barrington, G. D. Bailey, and W. E. Anglin for defendant.*

DENNY, J. The evidence tends to show that for several years there had been considerable ill feeling between the deceased and the defendant. Therefore, the State vigorously contended in the trial below that the defendant shot and killed the deceased, not while acting in his official capacity as Wildlife Protector but because of his malice and ill will toward him, and was, therefore, not acting in good faith as a peace officer. Notwithstanding this contention on the part of the State, when the defendant undertook to explain why he was going to where his deputy had gone to check the license of the man they had been following, the court sustained the State's objection thereto and would not permit the jury to consider his explanation, which was as follows: "The reason I went was because it is customary for the game warden, the game protector of the county to take charge of the citations, if any are to be written, and take care of proceedings in law, and that is why I went down there to the fishermen."

We think this was prejudicial error. Particularly in view of the fact that the court submitted this phase of the case to the jury strictly in accord with the State's contention. His right of self-defense in every portion of the charge was conditioned upon whether he was a trespasser upon the property of Ralph Young, or whether he was there in the discharge of his duties as a Wildlife Protector. The express language of the charge, to which Exception No. 62 is directed, is as follows: "He (the defendant) had a right to be where he was at the time of the alleged shooting if he were there in the capacity of Wildlife Protector, engaged in the discharge of his duties, as such, that is, engaged in the discharge of his official duties. It is a matter for you gentlemen to decide, whether he was actually engaged in that capacity."

Furthermore, the defendant having testified in his own behalf, and having offered numerous witnesses who testified they knew his general character and reputation in the community in which he lived, and that it is good, the State offered testimony tending to show that the character of the defendant is bad. One of these witnesses, the Reverend Bruce Buchanan, testified that he was the pastor of Roan Mountain Church; that he knew the general character and reputation of Ralph Young and Dewey Young, brothers of the deceased, and of Mrs. Charlie Young, wife of the deceased, and that the character of each is good. He was then asked if he knew the defendant, and he stated that he knew him only when he saw him. He said: "Personally, I do not know his general character." He was then asked this question: "Do you know it from the esteem in which he is held in the community in which he lives, what the people generally say about him?" Answer: "Yes. Well, it certainly is not good. It is bad." Exceptions were interposed to the question and answer and were overruled. However, on cross-examination, this witness said: "I don't know what his (J. Wall Ellis') reputation is in his community. I am not talking about just the Young community, but in my own immediate community. Yes, that is the Young community. I don't know what it is in the community in which he lives." Thus, this witness was permitted to testify that the defendant's character is bad, based not on his general reputation and character in the community in which he lives, but on what people generally say about him in the Young community where the homicide occurred. The witness, without any limitation as to the community in which the defendant lived, or otherwise, testified on direct examination that he did not know his general character. This disqualified him as a character witness against the defendant.

In *S. v. Parks*, 25 N.C. 296, *Gaston, J.*, speaking for the Court on this subject, said: "It is essential to the *uniform* administration of justice, which is one of the best securities for its *faithful* administration, that

the rules of evidence should be steadily observed. Among these, the rule which regulates the admission of testimony, offered to impeach the character of a witness, is now so well established and so clearly defined, that a departure from it must be regarded as a violation of law. The witness is not to be discredited, because of the opinions which any person or any number of persons may have expressed to his disadvantage, unless such opinions have created or indicate a *general reputation* of his want of moral principle. The impeaching witness must, therefore, profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinion or of the opinions of others, as to the reliance to be placed on the testimony of the impeached witness."

*Avery, J.*, in delivering the opinion of this Court in *S. v. Coley,* 114 N.C. 879, 19 S.E. 705, said: "No principle of evidence is more clearly settled in North Carolina, nor by a longer line of decisions, than that a witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question."

In considering the identical question now before us, our Court, in the case of *Edwards v. Price,* 162 N.C. 243, 78 S.E. 145, said: ". . . it is only competent to ask the witness if he 'knows the general character of the party.' If he answers 'No,' he must be stood aside. If he answers 'Yes,' then the witness can, of his own accord, qualify his testimony as to what extent the character of the party attacked is good or bad."

It is said in Greenleaf on Evidence, section 461, "It is not enough that the impeaching witness professes merely to state what he has heard 'others say'; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. And, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question." *Gaines v. Relf, et al.,* 12 Howard 555, 13 L. Ed., page 1106.

Likewise, in 20 Am. Jur., Evidence, section 326, page 305, it is said: "Although there is some difference of opinion as to the kind of evidence by which character may be proved, the generally prevailing rule is that testimony to prove the good or bad character of a party to a civil action or of the defendant in a criminal prosecution must relate and be confined to the general reputation which such person sustains in the community or neighborhood in which he lives or has lived," citing numerous authorities.

For the reasons stated, we have concluded that the defendant is entitled to a new trial and it is so ordered. Therefore, it becomes

unnecessary to consider or discuss the remaining exceptions and assignments of error.

New trial.

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LOUISE M. LANDINI v. WILLIAM H. STEELMAN.

(Filed 23 November, 1955.)

**1. Automobiles § 33—**

A pedestrian crossing within the block where there is no marked crosswalk and between intersections where no traffic control signals are maintained, is under duty to yield right-of-way to vehicular traffic, but his failure to do so is not contributory negligence *per se*, and does not relieve the driver of a motor vehicle of the duty, both at common law and under the statute, to exercise due care to avoid hitting him. G.S. 20-174 (a), G.S. 20-174 (e).

**2. Automobiles §§ 41l, 42k—Issues of negligence and contributory negligence held for jury in this action to recover for injuries to pedestrian struck while crossing street.**

Plaintiff's evidence tended to show that she was crossing a street within a block at nighttime, that no traffic control signals were maintained at the adjacent intersections, that the view to the south was free of traffic and unobstructed for 250 yards to a hill crest, and that plaintiff looked both ways and saw no vehicle approaching before attempting to cross the street, 64 feet wide, and was struck by defendant's car approaching from the south when plaintiff was 23 feet west of the east curb of the street. There was also evidence that defendant was traveling at a speed in excess of the statutory maximum permitted within a residential district. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence and does not establish contributory negligence as a matter of law on the part of plaintiff.

BARNHILL, C. J., dissents.

APPEAL by plaintiff from *Crissman, J.*, at 18 April, 1955, Term of FORSYTH.

*Craige & Craige and Roger B. Hendrix for plaintiff, appellant.*

*Ratcliff, Vaughn, Hudson, Ferrell & Carter for defendant, appellee.*

JOHNSON, J. This is a civil action in tort to recover damages for personal injuries sustained by the plaintiff, who while crossing a street in the City of Winston-Salem on foot was hit by an automobile driven by the defendant. The trial court allowed the defendant's motion for judgment as of nonsuit at the close of the plaintiff's evidence. The appeal challenges the correctness of this ruling and brings into focus these facts disclosed by the evidence:

The plaintiff is a resident of Concord, Massachusetts. On 7 December, 1951, she was a visitor in the City of Winston-Salem on the occasion of the Piedmont Bowl football game. Her son was a member of the championship high school team from Concord which was playing a local team.

Shortly before being injured, the plaintiff had boarded a Greyhound bus at a local hotel, along with 35 to 40 other visitors from Concord, to be taken to the U. S. Armory for a barbecue given in their honor before the game. The Armory is located on the east side of Stadium Drive, which runs north and south. At about 5:50 o'clock p.m., the bus stopped on the west side of Stadium Drive, across the street from the Armory. It was cloudy and dark and the street was wet, but it was not raining. The passengers alighted and started crossing the street to enter the Armory. The plaintiff and her friend, Mrs. Lips, were the last to leave the bus. After alighting they walked around in front of the parked bus, looked first to the north and then to the south, saw no oncoming traffic in either direction, and then started walking across the street toward the Armory, at a slightly diagonal angle to the north. The street at that point is 64 feet 7 inches wide. When about two-thirds of the way across, the two ladies observed the lights of the defendant's car approaching from the south. Both attempted to get out of its way by increasing their pace toward the Armory-side of the street, but both were struck before they could reach safety. The plaintiff was struck on her right back side, and sustained substantial injuries. The point of impact was 23 feet west of the east curb of Stadium Drive in front of the driveway leading to the Armory. The defendant's car came to rest about 15 feet from the east curb. Skidmarks extended back from its front wheels about 45 feet. Street lights were scattered at intervals along Stadium Drive. One was approximately 25 feet north of the curb near the driveway to the Armory. It was on the west side of the street. Other street lights were in the center of the street in either direction from the point of impact, some distance north and south.

Mrs. Elizabeth Lips testified in part: "We went around the front end of the bus and looked both ways. The visitors from Concord had just crossed the street, and some of them had not even gotten upon the sidewalk there. . . . I would say we were going at a good pace across the street because we were all together, . . . We weren't running. We were walking fast, . . . and all of a sudden I didn't know whether it was lights that slapped on, I could see a glare, and I grabbed Mrs. Landini's hand and I said, 'Come on!' But before we made it, he was immediately on us and we got hit. I don't think we took more than two steps between the time I noticed the glare of the lights and grabbed her arm, and the automobile struck Mrs. Landini. . . . He was immediately on

us. He was coming fast, and that is all. . . . I don't think there was any lights on the bus. No horn was blown whatsoever before the impact." Cross Examination: "When we were crossing it appeared to me he just put his lights on. . . . he must have just come over the top of the hill so fast he came on us before we could get over. . . . He wasn't there when we looked to cross the street, Sir he wasn't there, . . . but he was there mighty quick afterwards."

Looking south from where the bus stopped, the street is straight but slightly upgrade for a distance of 250 or 300 yards to a hill crest which rises and cuts off vision of traffic beyond. The plaintiff was crossing the street at a point which was neither at an intersection nor within a marked cross-walk. She was crossing within the block, and there were no traffic control signals at the adjacent intersections. It was in a residential district where the maximum speed limit was 35 miles per hour. No other traffic was nearby or approaching at the time.

Jean Caldwell testified in part: "When I had completed crossing Stadium Drive, I heard brakes screeching. As I turned around I saw a car coming in a northerly direction between 65 and 70 miles per hour. The automobile struck Mrs. Landini and just grazed Mrs. Lips . . . The front of the car struck Mrs. Landini, throwing her into the air and she landed on the pavement about 10 feet from the point of impact.

Two other witnesses gave opinions as to the speed of the defendant's car. One's estimate was 70, the other's 45 miles per hour.

It is apparent that the motion for nonsuit was allowed below either on the ground that the plaintiff's evidence (1) was insufficient to show negligence of the defendant as the proximate cause of the injury, or (2) that it disclosed contributory negligence of the plaintiff as a matter of law. In either event we think the ruling erroneous. Here the evidence must be tested in the light of the correlative duties imposed upon both the plaintiff and the defendant by these portions of G.S. 20-174: "(2) Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way to all vehicles upon the roadway. . . . (e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, . . ."

If it be conceded that the plaintiff failed to yield the right-of-way as required by G.S. 20-174 (a), even so, it was the duty of the defendant, both at common law and under the express provisions of G.S. 20-174 (e), to "exercise due care to avoid colliding with" the plaintiff. Our decisions hold that a failure so to yield the right-of-way is not contributory negligence *per se*, but rather that it is evidence of negligence to be considered with other evidence in the case in determining whether the

actor is chargeable with negligence which proximately caused or contributed to his injury. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, and cases cited. See also *Goodson v. Williams,* 237 N.C. 291, 74 S.E. 2d 762; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649.

We conclude that the evidence adduced below is sufficient to justify a jury-finding of actionable negligence against the defendant, free of contributory negligence on the part of the plaintiff. It is true also that the evidence in some of its aspects is sufficient to justify the inference (1) that the defendant's negligence, if such be found, was not the proximate cause of the injury or (2) that the plaintiff was contributorily negligent. The evidence being susceptible of these diverse inferences, the case was one for the jury.

The cases cited and relied on by the defendant are factually distinguishable. In *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589, the collision occurred in broad daylight, outside of a residential or business district, and there was no evidence of excessive speed on the part of the defendant. Also, there was other traffic on the highway immediately in front of the defendant's truck. In *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, the collision occurred in the daytime. There a pedestrian, facing an oncoming truck with unobstructed view of at least 300 yards, stepped off the side of the road and "walked right into the side of the truck." Clearly he was contributorily negligent.

The judgment as of nonsuit entered below is

Reversed.

BARNHILL, C. J., dissents.

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STATE v. T. L. MUNDY.

(Filed 23 November, 1955.)

**1. Criminal Law § 52a (9)—**

The trial court's election not to submit to the jury one of the charges will be treated as the equivalent of a verdict of not guilty on that count.

**2. Criminal Law § 21—**

Defendant was charged with reckless driving, with speeding and with homicide. Nonsuit was allowed on the charge of reckless driving, and the court did not submit the charge of speeding to the jury. *Held:* The elimination of the charges of reckless driving and speeding at the nonsuit level did not preclude prosecution of the charge of homicide.

**3. Automobiles § 59—**

The evidence tended to show that a passenger in an automobile driven by defendant was killed when defendant, in traversing a curve, ran off the road to the right, then to the left, then to the right into a yard, and struck a parked vehicle, knocking it some 47 feet. There was also evidence that defendant was traveling at excessive speed. *Held:* The evidence was sufficient to be submitted to the jury on the charge of manslaughter.

**4. Automobiles § 57—**

Even though the acts of defendant are sufficient to constitute reckless driving, defendant may not be convicted of homicide predicated thereon unless the jury also finds beyond a reasonable doubt that such reckless driving was the proximate cause of the wreck resulting in the death of a person.

**5. Automobiles § 60—**

An instruction correctly defining the elements of reckless driving, but failing to charge the jury that such acts must be the proximate cause of the wreck and resultant death of the deceased in order for defendant to be guilty of manslaughter, is erroneous, and is prejudicial, particularly when defendant's testimony is to the effect that he fell asleep at the wheel while traveling at a lawful speed, and the court fails to instruct the jury on the law in regard to culpable negligence in falling asleep at the wheel.

**6. Automobiles §§ 22, 56—**

The mere fact that the operator of a motor vehicle involuntarily goes to sleep while operating his automobile does not, nothing else appearing, constitute culpable negligence, it being necessary for this conclusion that the operator have premonitory symptoms of sleep, and, notwithstanding awareness of the likelihood of falling asleep, continued to operate the vehicle under circumstances evincing a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others upon the highway, proximately resulting in injury or death.

APPEAL by defendant from *Rousseau, J.*, and a jury, at June Term, 1955, of WILKES.

Criminal prosecution tried upon two bills of indictment. One bill charges the defendant in separate counts with (1) reckless driving in violation of G.S. 20-140, and (2) speeding in violation of G.S. 20-141. The other bill charges the defendant with the felonious slaying of one Jesse Wyatt (G.S. 15-144). A general plea of not guilty was entered.

The evidence on which the State relies tends to show that the defendant, former State Highway patrolman, went off duty and left the Highway Patrol office in North Wilkesboro sometime before 4:00 a.m. on the morning of 8 November, 1954. He was requested by a civilian friend, Hayden Church (who had been with the defendant earlier that night on a speed watch), to drive him to his home, which was located about 7 miles west of North Wilkesboro. He agreed to do so. Jesse Wyatt, the deceased, went along for the ride. The defendant was driving his

patrol car. Church was sitting in the middle and Wyatt on the outside of the front seat. At a point on U. S. Highway No. 421 about five miles west of North Wilkesboro at a roadside store and service station known as Sunshine Market, the car ran off the right side of the highway into the yard in front of the Sunshine Market. There, the patrol car collided with a Buick automobile which was parked side of the gasoline pumps. In the collision both cars were badly damaged and Jesse Wyatt was killed. One of the gasoline pumps was overturned, and the parked Buick was knocked about 47 feet toward the building. The patrol car came to rest about 17 feet beyond the point of impact. Tire marks behind the patrol car were traced from the point of impact back through the dirt driveway leading into the service station for 59 feet, and on back an additional 100 feet along the dirt shoulder of the highway. Farther east, at a curve about 600 feet from the Sunshine Market, tire marks were found on the shoulders of the highway where the defendant said he ran off the pavement first on his right and then, after cutting back, over on the left side. The witness Gaither, whose home is about 100 feet from where the collision occurred, testified that on the morning in question he was awakened by a loud noise that sounded like tires "screaming on the road," followed by the crash. Other evidence offered by the State tends to show that the patrol car driven by the defendant was traveling at a high rate of speed. A written statement signed by the defendant several days later in the hospital states that he was driving the "patrol car not over sixty-five (65) miles per hour immediately prior to the collision."

However, the defendant testified at the trial that he was not driving over 50 or 55 miles per hour. He further testified that after running off the highway, first on the right side and then on the left, at the curve 600 feet east of where the collision occurred, he does not remember anything—"I don't know what happened from then on . . . The only explanation that I have as to what happened from that time to the collision is that I had been working sixteen and a half hours without sleeping, except for supper, and . . . I think I must have fallen off to sleep, dozed, or just fallen off to sleep at that curve."

The record discloses that at the conclusion of all the evidence, the defendant moved "for judgment as of nonsuit as to both charges, that of reckless driving and that of manslaughter. Motion allowed on the charge of reckless driving. Motion denied on the charge of manslaughter, . . ." The record contains no further reference to the charge of speeding. However, the case was submitted to the jury only on the charge of involuntary manslaughter. As to this, the jury returned a verdict of guilty. From judgment imposing a prison sentence of fifteen months, the defendant appeals.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*W. H. McElwee, Kyle Hayes, and Robert Burns for the defendant, appellant.*

JOHNSON, J. The trial court's election not to submit to the jury the charge of speeding will be treated as the equivalent of a verdict of not guilty on that count. See *S. v. Sorrell,* 98 N.C. 738, 4 S.E. 630; *S. v. Murphy,* 235 N.C. 503, 70 S.E. 2d 498.

The defendant insists that since the State's case on the charge of manslaughter rested entirely upon evidence of speeding and reckless driving as the ingredients of culpable negligence causing the death of Jesse Wyatt, the elimination at the nonsuit level of these specific charges removed from the case the elements of culpable negligence necessary to support a conviction of involuntary manslaughter, and that the court erred in refusing to allow the motion for nonsuit on the homicide count. The contention is without merit, and the assignment of error relating thereto is overruled on authority of the decision in *S. v. Midgett,* 214 N.C. 107, 198 S.E. 613. The decision in *S. v. Rawlings,* 191 N.C. 265, 131 S.E. 632, cited and relied on by the defendant, is distinguishable. The evidence on which the State relies was sufficient to carry the case to the jury on the homicide count. The motion for judgment as of nonsuit was properly overruled.

However, we are constrained to the view that the defendant is entitled to a new trial for error in the charge.

The court in charging the jury said: ". . . but if you find, gentlemen, that . . . he was operating it (his automobile) carelessly and heedlessly in a wilful or wanton disregard of the rights and safety of others, and you find it was accompanied with such carelessness, or probably consequences of a dangerous nature when tested by the rules of reasonable prevision amounting to a thoughtless indifference to consequences or a heedless indifference to the rights and safety of others upon the highways, and if you find those facts, gentlemen, and all of them beyond a reasonable doubt, it would be your duty to return a verdict of guilty."

The foregoing formula is incomplete and erroneous, in that it does not contain the element of proximate cause as an essential ingredient of culpable negligence justifying conviction of involuntary manslaughter. Here, the court was instructing the jury on reckless driving (G.S. 20-140) as a possible element of culpable negligence. It may be conceded that the state of facts included in the formula used by the court was sufficient to justify a finding that the defendant was guilty of reckless driving. But in order to justify a conviction of involuntary

manslaughter based on the facts contained in the court's formula given to the jury, constituting reckless driving, it was necessary that the jury go further and find beyond a reasonable doubt that such reckless driving was the proximate cause of the wreck and resultant death of the deceased Jesse Wyatt. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456. The challenged instruction did not require the jury to find this essential element of proximate cause. The instruction given by the court authorized the jury to convict of manslaughter upon a mere finding beyond a reasonable doubt of the facts embraced in the court's formula, constituting reckless driving, without any finding whatsoever in respect to the causal connection between such reckless driving and the death of Wyatt. This failure to instruct as to causal connection may not be treated as harmless error, particularly so in view of (1) the defendant's testimony that he fell asleep at the wheel while driving not more than 50 or 55 miles per hour, and (2) the failure of the court to instruct the jury on the law governing criminal liability for death or injury caused by the operator of a motor vehicle falling asleep at the wheel. As to this, the mere fact that the operator of a motor vehicle involuntarily goes to sleep while operating his automobile does not, nothing else appearing, constitute culpable negligence. In determining the question of culpable negligence, the focal point of inquiry is whether the operator, because of drowsiness, previous tiring activities, or other premonitory symptoms of sleep, became aware of the likelihood of falling asleep, but nevertheless continued to operate the vehicle under circumstances evincing a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others upon the highway, proximately resulting in injury or death. See *S. v. Cope, supra; People v. Robinson,* 253 Mich. 507, 235 N.W. 236; *Johnson v. State,* 148 Fla. 510, 4 So. 2d 671. See also *Baird v. Baird,* 223 N.C. 730, 28 S.E. 2d 225; Annotation: 28 A.L.R. 2d 12, 72.

New trial.

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WILLIAM O. CAUGHRON v. GLENN WALKER, BILLY RAY WALKER AND W. R. WALKER, GUARDIAN AD LITEM FOR BILLY RAY WALKER.

(Filed 23 November, 1955.)

**1. Automobiles § 17—**

The operator of a motor vehicle along a dominant highway approaching an intersecting servient highway is under no duty to anticipate that the operator of a motor vehicle approaching along the servient highway will fail to stop as required by statute, and, in the absence of anything which

gives, or in the exercise of due care should give, notice to the contrary, the driver on the dominant highway is entitled to assume and to act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will act in obedience to the statute and stop before entering the intersection.

**2. Same—**

A motorist traveling along the dominant highway approaching an intersection with a servient highway does not have the absolute right of way in the sense he is not bound to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances in driving at a speed no greater than is reasonable and prudent under existing conditions, in keeping his vehicle under control, in keeping a reasonably careful lookout, and in taking such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered.

**3. Automobiles § 41g—**

Evidence of negligence of defendant's driver in entering an intersection with dominant highway without stopping as required by statute, *is held* sufficient to be submitted to the jury on the issue of negligence proximately causing the collision with plaintiff's car which was being driven along the dominant highway.

**4. Automobiles § 42g—**

Evidence *held* not to disclose contributory negligence as a matter of law on part of the driver of plaintiff's car, traveling along the dominant highway, in colliding with defendant's vehicle which entered the intersection from a servient highway without stopping.

**5. Negligence § 19c—**

Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the plaintiff's evidence.

**6. Automobiles § 54f—**

The admission of defendant that he owned the truck involved in the collision suffices to take the case to the jury against him under the doctrine of *respondeat superior*. G.S. 20-71.1.

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

APPEAL by plaintiff from *Armstrong, J.*, at March Term, 1955, of RANDOLPH.

*Ottway Burton for plaintiff, appellant.*
*No counsel contra.*

JOHNSON, J. This is a civil action in tort brought by the plaintiff to recover damages for injury to his automobile, allegedly caused by the

negligence of the defendants. The trial court allowed the defendants' motion for judgment as of nonsuit at the close of the plaintiff's evidence. The appeal challenges the correctness of this ruling and brings into focus the facts disclosed by the evidence, which are summarized as follows:

The wreck occurred about 6:30 a.m. on the morning of 10 July, 1953, on the Flint Hill Road at the junction of the Hoover Hill Road, in Randolph County. The Flint Hill Road runs north and south. It is joined on the west side, but not crossed, by the Hoover Hill Road, which runs southwest for some distance south of the junction and converges into the Flint Hill Road at an angle of about 45 degrees. The two roads thus form a "V" on the south side of the junction. A stop sign facing southwest on the Hoover Hill Road just south of the junction made the Flint Hill Road the dominant, through highway, and the Hoover Hill Road the servient highway. Two vehicles were involved in the wreck, a GMC truck and a Mercury automobile. The Mercury belonged to the plaintiff. His son was driving it northwardly along the Flint Hill Road toward the junction. The truck, admittedly owned by the defendant Glenn Walker, was being driven by his alleged agent, Billy Ray Walker, along the Hoover Hill Road in a northeasterly direction approaching the junction.

As the two vehicles approached the junction, the plaintiff's Mercury was on the favored highway as designated by the stop sign. Notwithstanding this, the driver of the truck, approaching from the left on the servient road, did not come to a complete stop. Instead, he drove on into the intersection and made a left turn to go north along the Flint Hill Road, directly in front of the plaintiff's oncoming Mercury. Whereupon the driver of the Mercury made a sharp turn to the right in order to avoid colliding with the rear of the truck. In doing so he ran off the highway on the right side and overturned about 100 feet north of the junction, causing substantial damage to the Mercury.

Patrolman J. B. Barrett, who arrived immediately after the wreck, testified in part: "Billy Ray Walker (driver of the truck) stated to me that he pulled out of the Hoover Hill Road and didn't stop; that he was running between five and ten miles per hour. . . . there is a slight curve on the Flint Hill Road and also about a 20 degree hill crest, between the roads, a garage, grocery store and filling station combined, a large building owned by Carl Hill. As to the vision a motorist has going the way Mr. Walker was going north to the Flint Hill from the stop sign, I would say the vision is approximately 300 feet south." CROSS EXAMINATION: "Billy told me that he didn't come to a dead stop; he did tell me that he slowed down at the stop sign so he could see down the road as far as he could see. He told me the Mercury wasn't in sight at the

time he pulled out into the intersection. . . . I found skids leading up to the Mercury. I found sixty steps of skids, one side, left front and left rear wheels. . . . I estimate that I found approximately 180 feet of skids. . . . The 180 feet of skid was not all on the pavement, went off the pavement, I haven't got the number of feet. I didn't find any skids at any point on the right front or right rear wheels. . . . The Mercury was damaged on the top and left side."

Steve Caughron, operator of the plaintiff's Mercury, testified in part: "I was going north. I saw the truck and I could have stopped but I knew the stop sign was there and I thought he was going to stop. He slowed up and I kept going, and when he got there he was a little ahead anyway, he came out and the front end of the car barely missed the back of the truck, and I turned off and it turned over, . . . He did not stop before entering the Flint Hill Road. I was going fifty or fifty-five. Yes, sir, the back end of the truck came out and almost hit me. I would have gone around the truck but couldn't; had to go off to keep from getting hit. As the back end of the truck came out, I had to leave the road to keep from hitting the back of the truck. The shoulders wasn't wide enough to run on, because my car jumped off; the left front wheel dropped in a hole and twisted the car and it came up and went down on its top. . . ." CROSS EXAMINATION: "As to how far down was I when I first saw the truck, . . . I probably saw him 100 yards. Billy was 150 or 200 feet from the intersection. . . . I do not know how far I was from the intersection when he reached the stop sign. . . . I was not 300 feet down the road when he was at the stop sign. I wouldn't know about 250. I could have been. . . . I didn't put on the brakes as soon as I saw him. If I had I could have stopped. . . . As to why didn't I stop, because he had the stop sign. . . . I didn't slow down until I seen he wasn't going to stop."

The plaintiff, William O. Caughron, testified: "I got to the scene around 8 o'clock. . . . My son and I measured the skid marks. I measured the rubber tracks where the brakes had gradually took hold, 96 feet, with a steel tape."

It is established by our decisions that where a highway is designated as a main traveled or dominant highway by the erection of stop signs at the entrances thereto from intersecting servient highways, as prescribed by G.S. 20-158 (a), the operator of a motor vehicle traveling upon such main traveled or dominant highway and approaching an intersecting servient highway is under no duty to anticipate that the operator of a motor vehicle approaching on an intersecting servient highway will fail to stop as required by the statute, and, in the absence of anything which gives, or in the exercise of due care should give, notice to the contrary, the driver on the dominant highway is entitled to as-

sume and to act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will act in obedience to the statute and stop before entering the dominant highway. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17; *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919.

"However, the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered." *Blalock v. Hart*, 239 N.C. 475, 479, 80 S.E. 2d 373, *377*. See also *Johnson v. Bell*, 234 N.C. 522, 67 S.E. 2d 658.

Our examination of the evidence leaves the impression it is sufficient to justify, though not necessarily to impel, the inference that the damage to the plaintiff's automobile was proximately caused by the negligence of the defendant truck driver in entering the intersection from a servient highway in front of the plaintiff's oncoming car without complying with statutory requirements. We conclude also that while the evidence may justify the inference that the plaintiff's driver was contributorily negligent, nevertheless we think it sufficient to support the opposite inference. This makes it a case for the jury as against the defendant Billy Ray Walker, driver of the truck. Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the plaintiff's evidence. *Fowler v. Atlantic Co.*, 234 N.C. 542, 67 S.E. 2d 496.

Ownership of the truck is admitted by the defendant Glenn Walker in his answer. This suffices, by virtue of G.S. 20-71.1, to carry the case to the jury against him under the doctrine of *respondeat superior*. *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767.

Since the question raised by the plaintiff's remaining assignment of error may not arise on retrial, we refrain from discussing it.

The judgment below is

Reversed.

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

C. M. WOOD v. MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY.

(Filed 23 November, 1955.)

**1. Insurance § 54—**

Testimony of facts tending to show that the damage to the insured house under construction resulted from wind, and testimony *contra* tending to show that the damage resulted from pressure of rain water against the foundation wall, requires the overruling of defendant's motion to nonsuit in an action on a windstorm policy, the credibility of the conflicting testimony being for the jury.

**2. Same: Evidence § 49—**

In an action on a windstorm policy, witnesses may testify as to conditions they saw at the time they visited the scene, as facts within their knowledge, upon which the conclusion as to whether the damage was caused by wind or rain may be drawn by the jury, but it is error to permit the witnesses to give their opinions that the damage was caused by wind, since this allows them to decide the ultimate issue and thus invade the prerogative of the jury.

APPEAL by defendant from *Crissman, J.*, June Term, 1955, FORSYTH. New trial.

Civil action on a windstorm damage rider attached to a fire insurance policy on a house under construction.

At the time complained of, the plaintiff was erecting a dwelling house on premises referred to in the complaint. The defendant issued to plaintiff its standard fire insurance policy on said building which contained a provision as follows: "In consideration of $6.00 premium, and subject to provisions and stipulations (hereinafter referred to as 'provisions') herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail . . ."

On 15 October 1954 the construction of the house covered by the policy had proceeded so that the framework of the first floor was completed. The ceiling joists were in place, and some of the rafters were cut and lying on top of the ceiling joists. There were no walls or floors above the ground level. The house was resting on a concrete footing and had a foundation built partly below ground level of concrete blocks and bricks. On that day Hurricane Hazel passed in the vicinity of the house, bringing heavy rains and winds. The concrete block walls broke, the framework sagged, and the building suffered certain other damages, all of which plaintiff alleges were caused directly by the windstorm.

On the other hand, the defendant contended that the damages sustained by plaintiff were the result of rain water.

Plaintiff was permitted to testify that in his opinion the damages to the building under construction were the result of the wind. Likewise, the court permitted three witnesses who visited the scene after the occurrence and observed the conditions then existing to testify, over the objection of the defendant, that in their opinion the wind caused the damage.

There was evidence that a strong wind was blowing in that area at the time complained of, and plaintiff testified as follows:

"When I got to the building, the wind was so severe it was rocking the building up and down on the foundation, and there was approximately four to six foot of the foundation done kicked out from under it. I was there, I suppose, something like five to eight minutes, and the wind was just rocking the building on the foundation, and it was just buckling in from all the back side and northeast end. The building then had started slipping on the foundation, what was still standing, and throwing all the pressure to the south wall, and the timbers was just rocking every which way, and it was raining then so bad and the wind was so stiff that I left, for I was afraid to stay out there in it. . . . The wind was so terrific it was just rocking the timbers on the foundation, and this wall was giving, first one way and then another, towards the basement, and then the timbers were working it back out as it come up on the other side. . . . the wind would raise the building some 6 to 8, 10 inches off of the foundation on the south side, throwing it on the east side—I mean, off of the west side onto the east side, and on the east side was where the foundation had broken up first at; and that afternoon, when I made the pictures, the building had moved on the foundation something like 2 to 4 inches. . . . When I saw the wind raise the building 6 to 10 inches high, at that time it was raining hard and the wind was terrific. There was no water running in the building at that time. . . . I say that when I got there that morning the wind was rocking it on the foundation from 6 to 10 inches, with each puff of wind that was coming; in other words, the framework would rise 6 inches to 10 inches above the foundation with each puff of wind. I say the wind picked up that open framework construction, and that I saw the wind lift it as much as ten inches above that foundation. . . . The wind was rocking that empty frame of the house from the west to the east, from 6 to 10 inches off of the west wall, west foundation. I saw the timbers on that west wall rise in the air as much as 6 to 10 inches. . . . The wind was rocking it back and forth on the foundation."

The wind was coming from the west. The cement foundation wall caved in on the east side and the building, according to the pictures offered in evidence, sank down on that side. The framework did not topple over and the loose ceiling joists did not blow off.

Issues were submitted to and answered by the jury in favor of the plaintiff. There was judgment on the verdict and defendant appealed.

*Deal, Hutchins & Minor for defendant appellant.*
*Buford T. Henderson for plaintiff appellee.*

BARNHILL, C. J. While defendant offered evidence, and there were facts and circumstances tending to show, that the pressure of the rain water against the east foundation wall caused the damage, we cannot say that plaintiff's testimony, if accepted by the jury, is insufficient to support a verdict for the plaintiff. The credibility of the testimony was for the jury. Hence, there was no error in the order of the court overruling the motion to dismiss as in case of nonsuit.

The admission of the opinion of lay witnesses who visited the scene after the hurricane had passed must be held for error. It was permissible for them to describe to the jury the conditions as they found them at the time they visited the scene, but it was improper to permit them to make deductive conclusions from what they saw and observed. These conclusions, in the form of opinions, relate to the ultimate fact to be determined by the jury. To allow them to state what in their opinion caused the damage amounting to nothing more than permitting them to decide the issue which was submitted to the jury, and they were thus permitted to invade the prerogative of the jury.

Opinion evidence is inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them, and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. Stansbury, Evidence, 232, sec. 124. A witness will not be allowed to give his opinion on the very question for the jury to decide. Stansbury, Evidence, 236, sec. 126.

"The witness must speak of facts within his knowledge. He cannot, under the guise of an opinion, give his deductive conclusion from what he saw and knew." *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828. See also *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818; *S. v. Roberson*, 240 N.C. 745, 83 S.E. 2d 798; *S. v. Becker*, 241 N.C. 321, 85 S.E. 2d 327; Anno. 23 A.L.R. 2d 136.

*LaBris v. Western Nat. Ins. Co.*, 59 S.E. 2d 236 (W. Va.), is a case almost on all fours. There as here opinion evidence was admitted. In discussing the case the Court said in part: "At best the opinion testimony of these non-expert witnesses is highly conjectural, involves the ultimate issue in the case, and tends to invade the province of the jury." What was there said is applicable here.

As to the instructions of the court on what constitutes direct damage by windstorm, see *Miller v. Insurance Assoc.*, 198 N.C. 572, 152 S.E. 684.

For the reasons stated there must be a
New trial.

STATE v. GEORGE ROBBINS.

(Filed 23 November, 1955.)

**1. Automobiles §§ 67, 72—**

Defendant was under the influence of intoxicating liquor or drugs. The evidence was conflicting as to whether defendant was merely sitting in his parked car, which had been driven by another, when it rolled back and struck the car parked behind it, or whether defendant backed the car. *Held:* The conflicting evidence as to whether defendant was driving takes the case to the jury in a prosecution under G.S. 20-138.

**2. Criminal Law § 52a (1)—**

The evidence must be considered in the light most favorable to the State upon demurrer to the evidence. G.S. 15-173.

**3. Criminal Law § 53f—**

Where the court gives the contentions of the State and then states that it does not know what defendant contends, and that it seemed there had been a misapprehension in the argument of the cause both by the State and the defendant, the instruction must be held prejudicial as contravening G.S. 1-180.

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

APPEAL by defendant from *Armstrong, J.*, at April Term, 1955, of RANDOLPH.

Criminal prosecution on warrant of a justice of the peace upon affidavit charging "that at and in said County (Randolph) on or about the 18th day of May, 1954, George Robbins did unlawfully and wilfully . . . operate a motor vehicle over and upon a public highway while under the influence of intoxicating liquor, beer, wine or narcotic drugs."

The record on this appeal discloses that defendant's recognizance in the sum of $200 for appearance in Recorder's Court, and his recognizance in the sum of $700 for his appearance in Superior Court appear in the original transcript. And the Clerk of Superior Court certifies the record from the Recorder's Court showing that defendant was found guilty, and that from judgment pronounced he appealed.

The record on this appeal discloses that in Superior Court, defendant, through his counsel, entered a plea of not guilty, and the charge of the court indicates that he was put upon trial on the charge of "operating

a motor vehicle on one of the public highways of the State, . . . while under the influence of some intoxicant."

Upon the trial in Superior Court the State offered evidence tending to show that around 8 o'clock on night of 18 May, 1954, defendant was alone sitting behind the wheel in his car parked on east side of Fayetteville Street in Asheboro, N. C., with motor running; that his car was about a car and a half ahead of Mrs. Swanson's car, which was parked at the curb on South Fayetteville Street across from Fox Drug Store; that the car ahead backed to her car, and the bumpers locked; that defendant was intoxicated; and that he stated to a police officer, Bulla, that he "was driving but he wasn't drinking."

Defendant offered evidence tending to show this narrative: Defendant was at Causey's Service Station around 1 or 1:30. He drove his car up there and went to sleep in the car. Causey thought "he was under the influence of something," and drove him across the street to Brittain's apartments, back of the house at the cabins. Defendant was sitting on the right-hand side of the car. Later "close to dark, 5:30 or 6 o'clock," Bill Sledge, then 13 years of age, saw defendant at Brittain's Tourist Camp. He was sitting in his car. He asked Bill to take him home.

Bill testified: "I didn't know whether he was drunk or what. I was trying to get him to come back to life. I stayed on a dirt road. Then I drove to South Fayetteville Street, across from Fox Drug Store. I had been in the drug store . . . I saw Mr. Bulla . . . I got scared and left. I left the car running when I parked it across the street from Fox Drug Store . . . George Robbins had not driven from the time I saw him at Brittain's place until I got out and went in the drug store . . . When the car backed into Mrs. Swanson I was in the drug store. I do not know whether he was trying to drive off or not."

And defendant testified: ". . . on this date . . . I . . . took a sleeping pill. I went to sleep in my car at Causey's Filling Station. That was before dark. I woke up . . . I wanted something for my head. I was not driving my automobile. Billy Sledge was driving. The next thing I knew the car went to rolling back and it rolled into Mrs. Swanson's car . . . I jerked the emergency brake just before it hit. I could not say how long the car had been parked there. I kindly woke up. I thought I was close to the filling station . . . I hadn't drove that car a bit . . . When Mr. Bulla arrested me I said 'Just wait, somebody else was driving, I wasn't driving.' I was in such a shape I don't know what I said."

The jury returned for its verdict that "The defendant is guilty as to driving intoxicated"; and that thereupon the court adjudged that defendant be confined in common jail of Randolph County for the term of

6 months and assigned to work the roads under the direction of the State Highway and Public Works Commission. And the court directed that he be given a medical examination, etc.

To judgment so pronounced, defendant excepted, and appeals to Supreme Court, and assigns error.

*Attorney-General Rodman, Assistant Attorney-General Bruton, and Harvey W. Marcus, Member of Staff, for the State.*

*Deane F. Bell and Archie L. Smith for defendant, appellant.*

WINBORNE, J. The statute, G.S. 20-138, under which defendant stands indicted, declares "it shall be unlawful and punishable . . . for . . . any person who is under the influence of intoxicating liquor or narcotic drugs, to *drive* any vehicle upon the highways within this State."

Now, on this appeal, appellant, the defendant, challenges the correctness of the judgment from which he appeals on assignments of error based upon exceptions duly taken (1) to the refusal of the trial court to grant his motions, aptly made, for judgment as of nonsuit, and (2) to portions of the charge.

As to the first, considering the provisions of the statute, and taking the evidence offered upon the trial in Superior Court, in the light most favorable to the State, as is done in passing upon demurrer to the evidence, G.S. 15-173, this Court is constrained to hold that the evidence presents a case to be considered by the jury under proper instructions of the court.

As to the charge, appellant takes exception to several portions of the charge as given, particularly a section nearly a page in length, in which the trial judge, in referring to defendant's contentions, stated, among other things, "I don't know what he contends . . . it seems there has been a misapprehension in the argument of this cause both by the State and the defendant, . . . and, to be frank, I am at a loss to know what to tell you the contentions of the defendant are."

The record shows that the court had stated contentions of the State. And it is manifest that the section of the charge just referred to contravenes the provisions of G.S. 1-180, for which defendant is entitled to a new trial. Hence other matters to which exceptions are taken need not be expressly treated.

For error pointed out, let there be a

New trial.

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

STATE v. RICHARD WADE ISOM, JR.

(Filed 23 November, 1955.)

**1. Automobiles § 72—**

Evidence that defendant was found about two blocks from the scene of a wreck, leaning against his car, which had been damaged, that defendant was highly intoxicated and all his companions had been drinking, and testimony that defendant stated that he had been driving, *is held* sufficient, considered in the light most favorable to the State, to be submitted to the jury in a prosecution for driving while under the influence of intoxicating liquor.

**2. Criminal Law § 33—**

Ordinarily, the confession of an accused is not rendered inadmissible by the fact that he was intoxicated when it was made, but the extent of his intoxication is relevant, and the weight, if any, to be given his statement under the circumstances is exclusively for the determination of the jury.

**3. Criminal Law § 53d—**

The evidence disclosed that defendant was intoxicated at the time of making a confession of facts tending to incriminate him. The record disclosed that the jury requested additional instructions as to whether it had the power to convict on the statement of a drunk man, to which the court stated that the defendant would have to be crazy or insane not to remember what he had said from one day to the next. *Held:* The jury was entitled to an instruction as to their duty to determine the weight to be given the incriminating statement, and the instruction was not responsive to the jury's inquiry and was highly prejudicial.

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

APPEAL by defendant from *Armstrong, J.*, 6 April Term, 1955, of RANDOLPH.

Criminal prosecution upon bill of indictment charging operation of a motor vehicle upon the public highway while under the influence of intoxicating liquor.

The State's evidence tended to show:

An automobile wreck occurred on East Salisbury Street, Asheboro, on 14 August, 1954, at about 12:30 a.m. When the officers arrived at the scene, defendant was not there.

The officers found defendant about two blocks from the scene of the wreck. He was leaning against his 1950 Plymouth car. The car was sitting on the edge of a dirt road, the back wheels some three feet from the paved highway. The front of the Plymouth was knocked in against the wheels and the wheels would not turn. Three or four "other fellows" were with defendant. All had been drinking.

Two officers testified that defendant stated that he had been driving the car.

One officer testified: "The defendant was very drunk." "He lay down a while." "He was not passed out but he was in a pretty drunken condition, obviously he was very clogged up." "I don't know whether he knew what I was referring to."

Another officer testified: "He (defendant) was very much intoxicated. He would have to hold to something in order to move." "I do not know whether he knew what he was talking about or not."

Another officer, who saw defendant some twenty minutes later, testified: "He was intoxicated, and talking slow and incoherently. I think he had judgment enough to know what he was talking about." "I do not know whether he realized what place he was talking about."

Apart from the statement attributed to defendant, there was no testimony that the defendant was driving the car at the scene of the wreck or elsewhere.

The court overruled defendant's motion for nonsuit and submitted the case to the jury on the State's evidence. Defendant offered no evidence.

The jury returned three different times for further instructions. On one such occasion, so the record shows, the following occurred:

"That on coming into the courtroom for further instructions the jury asked the Court if it had the power to convict on the statement of drunk man and the Court then informed the jury that the defendant would have to be crazy or insane not to remember what he said from one day to the next."

The quoted instruction is the subject of exceptive assignment of error #7.

The record does not disclose either the jury's inquiry or the court's instructions in response thereto on the other two occasions. It appears that on all three occasions the court reporter was not present and no exact record of what occurred was made.

The jury returned a verdict of guilty. Judgment was pronounced thereon. Defendant excepted and appealed, assigning errors.

*Attorney-General Rodman, Assistant Attorney-General Bruton, and F. Kent Burns, Member of Staff, for the State.*

*Seawell & Wilson for defendant, appellant.*

BOBBITT, J. The evidence, considered in the light most favorable to the State, was sufficient to survive defendant's motion for nonsuit. Hence, assignment of error directed to the court's ruling in this respect cannot be sustained.

Assignment of error #7 must be sustained, and a new trial granted, notwithstanding it seems improbable that the record reflects correctly

the instructions given by the presiding judge. But, as shown in the record, the instruction was not responsive to the jury's inquiry and was highly prejudicial. Too, the jury's inquiry remained unanswered.

The obvious purpose of the cross-examination was to emphasize rather than to minimize the extent of defendant's intoxication. The inference is permissible that defendant did not testify because, on account of extreme intoxication, he had no recollection of any conversation with the officers. In short, the defense seems to have been based on the contention that no weight should be given a statement attributed to defendant made under the circumstances disclosed. The testimony, quoted above, afforded a factual basis for such contention.

Ordinarily, intoxication of an accused person does not render inadmissible his confession of facts tending to incriminate him. But the extent of his intoxication when the confession was made is relevant; and the weight, if any, to be given a confession under the circumstances disclosed is exclusively for determination by the jury. 20 Am. Jur., Evidence sec. 525; 22 C.J.S., Criminal Law sec. 828; Annotation: 74 A.L.R. 1102 *et seq.*, and supplemental decisions. See, *S. v. Bryan,* 74 N.C. 351. It would seem that the jury was entitled to an instruction consonant with this generally accepted rule.

New trial.

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

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J. K. STEWART, ADA S. PHELPS, ELLEN S. TYNER, MARY S. CHANNEL, LLOYD STEWART, CLARENCE STEWART, CHALMERS STEWART, W. M. STEWART, JR., EDWIN BUIE STEWART, JOHNNIE R. STEWART, HEIRS AT LAW OF W. M. STEWART, v. DANNIE WITHERS JAGGERS AND HUSBAND, A. E. JAGGERS.

(Filed 23 November, 1955.)

**1. Adverse Possession § 19—**

Evidence tending to show that plaintiffs entered into possession of the *locus in quo* under recorded deeds purporting to convey title by definite and visible lines and boundaries, and had remained in possession continuously and adversely for more than seven years, together with evidence tending to fit the descriptions in the deeds to the lands claimed, *is held* sufficient to require the submission of the issue to the jury.

**2. Appeal and Error § 29—**

Where appellants fail to point out wherein the rulings excepted to were in any material respect prejudicial, their assignments of error cannot be sustained.

**3. Trial § 5½—**

Where plaintiffs rely upon adverse possession under color of title, they are under necessity of introducing written instruments purporting to convey title to the lands claimed by definite lines and boundaries, and to this extent must rely upon the record to show color of title, and therefore a stipulation in the record that plaintiffs rely upon the record title does not require nonsuit for failure of proof of good record title.

**4. Trial § 29—**

Where plaintiffs' evidence is sufficient to make out their case and is not controverted by any evidence to the contrary, the court may give a peremptory instruction that if the jury believes all the evidence and finds by the greater weight of the evidence the facts to be as the evidence tends to show, to answer the issue in the affirmative.

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

APPEAL by defendants from *Morris, J.*, February Term, 1955, of HARNETT.

This was an action to recover damages for the alleged cutting and removal of timber from the lands of the plaintiffs. The defendants denied plaintiffs' title.

The plaintiffs alleged and offered evidence tending to show that they entered into possession of two adjoining tracts of land, as to one in 1926 and as to the other in 1935, under recorded deeds purporting to convey title thereto by definite and visible lines and boundaries, and that they have remained in possession continuously and adversely to the present time. Plaintiff also offered evidence tending to identify the lines and boundaries set out in their deeds, and to fit the descriptions in the deeds to the lands.

The defendants in their answer denied plaintiffs' title but admitted "that the plaintiffs are now and have been for a number of years in the wrongful possession of said lands."

The defendants offered no evidence.

Issues were submitted to the jury and answered as follows:

1. Are the plaintiffs the owners of and entitled to the possession of the property described in the complaint? Answer: Yes.

2. Did the defendants wrongfully cut and remove timber from said property? Answer: Yes.

3. What amount, if any, are plaintiffs entitled to recover of defendants for the wrongful cutting and removing of said timber? Answer: $30.

From judgment on the verdict the defendants appealed, assigning errors.

*Neill McK. Ross, Salmon & Hooper By: Neill McK. Salmon for plaintiff appellees.*

*Pittman & Staton By: William W. Staton,*

*Taylor, Spence & Taylor By: James R. Spence for defendants, appellants.*

DEVIN, J. The defendants assign error in the ruling of the trial judge denying their motion for judgment of nonsuit, but an examination of the record indicates that the evidence offered by plaintiffs was sufficient to require its submission to the jury, and that the motion was properly denied.

The defendants excepted to the ruling of the court in several instances in the admission of testimony and also excepted to the refusal to strike out other evidence, but they do not point out wherein in any material respect the rulings complained of were prejudicial. These assignments are without merit.

The defendants call attention to the parenthetical notation, entered in the record during the examination of a witness as to the plaintiffs' possession, that "at this point it is stipulated that plaintiffs rely upon the record title to establish their title." The defendants contend that plaintiffs should be held bound by this stipulation to proof of record title only in order to prevail, and that in the absence of evidence of title by this method the defendants' motion for nonsuit should have been allowed. But we do not so interpret the effect of the quoted statement noted in the record during the trial.

The plaintiffs in their pleadings alleged their title solely by adverse possession within known and visible boundaries under color of title for 20 years and 7 years, and all their testimony was devoted to proof of title by that method. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142; *Norman v. Williams*, 241 N.C. 732, 86 S.E. 2d 593; G.S. 1-38. In order to establish title by adverse possession under color it was necessary for the plaintiffs to offer in evidence written instruments purporting to convey title describing the lands claimed by definable lines and boundaries, to fit the description to the land, and to show adverse possession of some portion of the land for the statutory period. *Wallin v. Rice*, 232 N.C. 371, 61 S.E. 2d 82. For this purpose and to this extent plaintiffs would have to rely upon the record to show color of title.

Defendants noted exception to the following portion of the court's charge to the jury: "If you believe all of the evidence and find the facts to be as the evidence and all of it tends to show by its greater weight, your answer to the first issue would be yes; otherwise it would be no." Since the record discloses that the plaintiffs' evidence, tending to make out a case of adverse possession for more than 7 years under

color of the deeds offered, was not controverted by any evidence to the contrary, we think the peremptory instruction on the first issue was fully justified.

In the trial we find

No error.

HIGGINS, J., 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 *Higgins, J.,* who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

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RICHARD I. LEONARD v. FLETCHER BENFIELD, TRADING AND DOING BUSINESS AS RANDOLPH ELECTRIC MOTOR COMPANY.

(Filed 23 November, 1955.)

**1. Master and Servant § 9—**

Evidence that plaintiff was employed as manager for defendant's business in a certain town at a stipulated salary per week, that the work-week contemplated was 44 hours, and that it was agreed that plaintiff should have additional compensation for overtime, together with evidence that plaintiff had worked overtime, *is held* sufficient to overrule nonsuit in plaintiff's action to recover compensation for such overtime.

**2. Same—**

The amount of additional compensation for overtime work, if any, in the absence of specific agreement, is the reasonable worth of the services rendered.

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

APPEAL by plaintiff from *Armstrong, J.,* March Term, 1955, of RANDOLPH.

This was an action to recover for services rendered pursuant to contract.

Plaintiff alleged that defendant entered into contract to employ him in the electric motor repair business at a salary of $100 per week of 44 hours and that the contract provided for additional compensation to plaintiff for work in excess of 44 hours per week.

Plaintiff testified, in substance, that such was the agreement, and that pursuant thereto he performed the work for which he was employed for a period of 13 months and that during that period he worked over-

time a total of 694 hours; that he was paid his regular salary but defendant has refused to pay him anything for the overtime claimed.

Plaintiff further testified that he had previously worked for defendant in same business in Lexington, North Carolina, on a weekly basis of 44 hours; that defendant employed him as manager in the place being opened by defendant in Asheboro at $100 per week based on the same number of hours per week; that it was agreed between them if any overtime had to be put in defendant would compensate him for it, and further that defendant would give him an interest in the business if plaintiff worked overtime hours necessary to the successful operation of the business; that plaintiff worked faithfully, and the business was profitable; that defendant knew plaintiff was working overtime and accepted the benefit of his extra-hour labor. Plaintiff offered in evidence the time book he kept showing his hours of work. He claimed he was entitled to compensation for the 694 hours overtime, reasonably, at same rate per hour as agreed for regular time.

The defendant offered no evidence.

At the close of plaintiff's evidence, motion for judgment of nonsuit was allowed. From judgment dismissing his action, plaintiff appealed.

*Ottway Burton for plaintiff, appellant.*

*R. E. Bencini, Jr., and Hal H. Walker for defendant, appellee.*

DEVIN, J. We think the plaintiff has offered evidence sufficient to carry the case to the jury and that there was error in allowing the motion for judgment of nonsuit.

While the plaintiff testified he was employed as manager of defendant's business in Asheboro at a salary of $100 per week, he alleged and offered evidence tending to show that the work-week contemplated 44 hours and that it was agreed that for overtime plainitff should have additional compensation. The amount of such additional compensation, if any, in the absence of specific agreement, would be the reasonable worth of the services rendered. *Turner v. Furniture Co.*, 217 N.C. 695, 9 S.E. 2d 379; *Ray v. Robinson*, 216 N.C. 430, 5 S.E. 2d 127; *Sawyer v. Cox*, 215 N.C. 241, 1 S.E. 2d 562.

Consequent upon the allowance of defendant's motion for judgment of nonsuit at close of plaintiff's testimony the defendant offered no evidence. On another hearing other facts may appear, but on this record plaintiff was entitled to have his case submitted to the jury.

Reversed.

HIGGINS, J., 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 *Higgins, J.*, who was absent on account of his physical condition. It is now adopted by the Court and ordered filed.

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SEABORNE HOLMES v. BANNIE SANDERS AND MARTHA SANDERS.

(Filed 23 November, 1955.)

**Infants § 22—**

In a special proceeding by the father to obtain custody of his child as against the child's maternal grandparents, judgment of the court awarding the custody of the child to its grandparents upon findings, supported by evidence, that it is to the best interests of the child that its custody remain with its grandparents, will not be disturbed.

APPEAL by plaintiff from *Williams, J.*, Resident of Fourth Judicial District, at Chambers in Sanford, N. C.

Special proceeding instituted by petitioner, Seaborne Holmes, citizen of the State of Georgia, and resident of District of Columbia, pursuant to provisions of G.S. 50-13 for the custody of his minor child, Ransome Solomon Holmes, born 1 September, 1953, to petitioner and his wife, Fidelia Sanders Holmes, now deceased, residing with respondents, Bannie Sanders and Martha Sanders, his maternal grandparents, in their home in Johnston County, North Carolina, heard upon affidavits, and oral argument of counsel, for the respective parties. Upon facts found by the Judge, among others pertinent to inquiry, that it is to the best interest of the child, Ransome Solomon Holmes, that he remain in the custody of his grandparents, the respondents, naming them, it is ordered by the court that they "shall have and continue to have the custody of the" child "until further orders of this court . . ."

Petitioner excepted thereto, and appeals therefrom to Supreme Court, and assigns error.

*Canaday & Canaday for plaintiff, appellant.*

*Wellons & Wellons for defendants, appellees.*

PER CURIAM. Upon the facts found by the court, supported by sufficient competent evidence, the judgment from which appeal is taken is accordant with the well settled principle in North Carolina that in matters pertaining to their custody, the welfare of children is "the polar star by which the discretion of the courts is to be guided," *In re Lewis,* 88 N.C. 31; *Finley v. Sapp,* 238 N.C. 114, 76 S.E. 350, and cases cited.

See also *Atkinson v. Downing*, 175 N.C. 244, 95 S.E. 487, where custody of a child awarded to a grandparent was not disturbed on appeal.

Affirmed.

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STATE v. CALVIN SPENCER SMITH.

(Filed 23 November, 1955.)

**Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, the decision of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Rudisill, J.*, at February-March Criminal Term, 1955, of CALDWELL.

Criminal prosecution upon a warrant issued out of Recorder's Court of Caldwell County, on affidavit charging that defendant did on 3 July, 1954, operate a motor vehicle upon the public highways of the State of North Carolina after operator's license being revoked, heard on original warrant in Superior Court on appeal thereto by defendant from judgment of Judge of said Recorder's Court dated 21 January, 1955.

Plea: Not guilty.

Verdict: Guilty as charged in said warrant.

Judgment: Pronounced.

Defendant excepts thereto and appeals therefrom to the Supreme Court, and assigns error.

*Attorney-General Rodman and Assistant Attorney-General Behrends, Jr., for the State.*

*Fate J. Beal and Marshall E. Cline for Defendant Appellant.*

PER CURIAM. The Court being evenly divided in opinion as to whether error prejudicial to defendant is shown in the record on this appeal, *Higgins, J.*, not sitting, the judgment of the Superior Court is affirmed without becoming a precedent. *Cole v. R. R.*, 211 N.C. 591, 191 S.E. 353; *Allen v. Ins. Co.*, 211 N.C. 736, 190 S.E. 735, and cases cited. See also *Johnston v. Paper Co.*, 214 N.C. 828, 199 S.E. 20; *Toxey v. Meggs*, 216 N.C. 798, 4 S.E. 2d 513; *Howard v. Coach Co.*, 216 N.C. 799, 4 S.E. 2d 616; *Whitehurst v. Anderson*, 228 N.C. 787, 44 S.E. 2d 358; *S. v. Brown*, 242 N.C. 602, 89 S.E. 2d 157; *Refrigerator Co. v. Davenport*, 242 N.C. 603, 89 S.E. 2d 153; *Railway v. Railway, ante*, 110, and numerous others.

Affirmed.

J. A. PERRY AND WIFE, EULA D. PERRY, v. ALBERT DOUB, TRUSTEE, L. A. DOUB, TRUSTEE, AND CAREY N. ROBERTSON.

(Filed 23 November, 1955.)

**Appeal and Error § 2—**

An appeal from an order allowing a referee a certain sum from the trust fund, to be taxed as a part of the costs in such manner as the court should decide upon the determination of the action, is premature, since costs incident to a reference are taxable in the discretion of the court, and there is no final determination of who should pay the sum.

APPEAL by defendant C. N. Robertson from *Williams, J.*, March Term, 1955, WAKE.

Civil action for an accounting, heard on motion for additional funds for referee.

More than $7,000 is deposited in trust awaiting the outcome of this cause which was referred in February 1954. On 21 March 1955, Williams, J., ordered that the trustee of said fund pay the referee $300 "to cover expenses in regards to this reference; and that the said $300.00 now being paid to the Referee by the said Albert Doub, Trustee, be taxed as a part of the cost of this action at the termination of this action in such a manner as the court shall then decide."

Defendant Robertson excepted and appealed.

*Vaughan S. Winborne, John A. Robertson, and Samuel Pretlow Winborne for plaintiff appellees.*

*Mordecai, Mills & Parker for defendant appellant.*

PER CURIAM. The costs incident to a reference, including the referee's fee, are taxable in the discretion of the court. *Lightner v. Boone*, 222 N.C. 421, 23 S.E. 2d 313; *Cody v. England*, 221 N.C. 40, 19 S.E. 2d 10; *Williams v. Johnson*, 230 N.C. 338, 53 S.E. 2d 277. The court did not undertake to tax the costs. They are hereafter to be taxed. The appellant is not hurt by the order. Instead of directing that the required fund be paid out of the trust fund, the court had the power and authority to require each party to deposit out of his own pocket a ratable portion of the costs of the reference. It follows that the appellant's appeal is premature and must be dismissed.

Appeal dismissed.

## STATE v. ALFRED BARNES.

(Filed 23 November, 1955.)

**1. Criminal Law § 53p—**

The charge of the court as to the duty of the jury to make a diligent effort to arrive at a verdict *held* proper.

**2. Criminal Law § 54f—**

The spontaneous statement of one of the jurors when the jury returned to the courtroom that the jury stood ten for conviction and two for acquittal *held* innocuous.

APPEAL by defendant from *Gwyn, J.*, April Term, 1955, RICHMOND. No error.

Criminal prosecution in which the bill of indictment is laid under G.S. 14-33 (b) (3).

The defendant, a male person over eighteen years of age, was convicted of an assault upon his wife. There was judgment on the verdict, and defendant appealed.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Joe M. Cox for defendant appellant.*

PER CURIAM. This case is essentially a controversy as to the facts. The jury, having heard the sharply conflicting testimony, resolved the issue against the defendant. His assignments of error fail to point out prejudicial error in the trial which would justify a new trial. The charge of the court as to the duty of the jury to make a diligent effort to arrive at a verdict was well within the bounds of the decisions of this Court. *S. v. Pugh,* 183 N.C. 800, 111 S.E. 849; *S. v. Brodie,* 190 N.C. 554, 130 S.E. 205; *S. v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552. The spontaneous statement of one of the jurors when the jury returned to the courtroom that the jury stood ten for conviction and two for acquittal was innocuous. In the trial below we find

No error.

VIRGINIA N. NOWELL v. J. WALTER NEAL AND ALFRED T. HAMILTON.

(Filed 23 November, 1955.)

APPEAL by plaintiff from *Huskins, Special J.*, May Term, 1955, of WAKE.

Civil action for damages on account of personal injuries, alleged to have been caused by the negligence of defendants, physicians and surgeons, in advising, and in the performance of, an operation, and in failure to render proper post-operation care.

During the progress of the trial, judgment of voluntary nonsuit was entered as to defendant Hamilton.

The court overruled motions for judgment of involuntary nonsuit as to defendant Neal. The first issue submitted to the jury was: "1. Was the plaintiff injured by the negligence of the defendant, Dr. J. Walter Neal, as alleged in the Complaint?" The jury answered this issue "No," and therefore did not consider the issue relating to damages.

Judgment in favor of defendant Neal was entered in accordance with the jury's verdict. Plaintiff excepted and appealed, the principal assignments of error relating to rulings as to the admission and exclusion of evidence and to the court's instructions to the jury.

*Vaughan S. Winborne, John A. Robertson, and Samuel Pretlow Winborne for plaintiff, appellant.*

*Smith, Leach, Anderson & Dorsett for defendant, appellee.*

PER CURIAM. After a protracted trial, involving the consideration of voluminous testimony, the jury resolved the controversial (first) issue in favor of defendant Neal. Careful consideration of plaintiff's assignments of error, brought forward and argued in the brief filed in her behalf, discloses 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.

HARRY R. ROTH v. AUGUSTA H. LUCK.

(Filed 23 November, 1955.)

APPEAL by defendant from *Crissman, J.*, July Term, 1955, of RANDOLPH.

This is a civil action instituted by the plaintiff to recover the sum of $347.63 in commissions alleged to be due from the defendant. It is alleged that the defendant agreed to pay to plaintiff four per cent commission on all merchandise sold for and on her behalf, and that pursuant to the agreement the plaintiff sold $8,690.86 worth of merchandise on which the commission has not been paid.

The jury returned a verdict for the amount claimed. From the judgment entered on the verdict, the defendant appeals, assigning error.

*Ottway Burton for appellee.*

*H. Wade Yates for appellant.*

PER CURIAM. We think the plaintiff's evidence was sufficient to carry the case to the jury. Consequently, the defendant's exceptions to the ruling of the court below on the defendant's motion for judgment as of nonsuit, are overruled. The additional exceptions present no error sufficiently prejudicial to justify a disturbance of the verdict below.

No error.

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

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STATE v. LEON TUCKER.

(Filed 23 November, 1955.)

APPEAL by defendant from *Armstrong, J.*, and a jury, at September Term, 1955, of RANDOLPH.

Criminal prosecution tried on appeal from County Recorder's Court upon a warrant charging the defendant with the unlawful sale of tax-paid whiskey.

From a verdict of guilty and judgment imposing penal servitude, the defendant appeals.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Ottway Burton for the defendant, appellant.*

PER CURIAM. This case involves no new question or feature requiring extended discussion. We have examined the record and find no substantial merit in any of the exceptions brought forward. Neither

reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

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

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STATE v. JAMES R. KELLY.

(Filed 30 November, 1955.)

**1. Criminal Law § 52a (1)—**

In passing upon a motion for judgment of nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable inference which may fairly be drawn from the evidence.

**2. Criminal Law § 52a (2)—**

If there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the court's duty to submit the case to the jury.

**3. Criminal Law § 8b—**

When two or more persons aid or abet each other in the commission of a crime, all being present, all are principals and equally guilty, without regard to any previous confederation or design.

**4. Same—**

While mere presence, even with the intention of abetting the commission of a crime, does not constitute aiding and abetting; if the person who is present communicates in any way to the perpetrator of the crime his intention of assisting, if necessary, or does some act to render aid or commands, advises, instigates or encourages the perpetrator of the crime, he is guilty as an aider or abettor.

**5. Conspiracy § 3—**

As a general rule, if two or more persons combine or conspire to commit a crime, each is liable *criminaliter* for everything done by his confederates in the execution of the common design, as one of its probable and natural consequences, even though what was done was not intended as a part of the original design or common plan.

**6. Homicide § 25—Evidence of defendant's guilt of murder in the second degree held sufficient for jury.**

The evidence tended to show that defendant and another were companions in immorality, that both were with the wife of deceased the night before and the night of his murder, that both had malice against deceased, and both had guns in the car, that defendant had stated about a week

before the murder that if "he didn't stop following him, he was going to fix him to stop," that on the night of the homicide defendant and his companion knew that deceased was following them, that defendant was driving, that his companion told him to stop the car and he would "fix" deceased, that defendant stopped the car in a manner so as to block the highway, and that his companion thereupon went to deceased's car, pointed a shotgun at deceased's chest and fired the fatal shot. *Held:* The evidence raises the reasonable inference that defendant and his companion were acting according to their prior concerted plan and design, and further that defendant aided his companion in the commission of the homicide, irrespective of any prior plan or design, and therefore, was sufficient to take the case to the jury on the charge of murder in the second degree.

APPEAL by defendant from *Paul, Special J.*, May-June Mixed Term 1955 of WAYNE.

Criminal prosecution on a bill of indictment charging murder in the first degree of Robert Robinson.

In a separate bill of indictment Joyce Hobbs was charged with the first degree murder of the same person.

Joyce Hobbs and the defendant pleaded Not Guilty, and the two cases were consolidated for trial. During the presentation of testimony by the State the defendant Hobbs entered a plea of guilty of murder in the second degree. The jury convicted the defendant Kelly of murder in the second degree.

From a judgment of imprisonment the defendant Kelly appeals, assigning error.

*William B. Rodman, Jr., Attorney General, and Claude L. Love, Assistant Attorney General, for the State.*

*John S. Peacock and Edmundson & Edmundson for Defendant, Appellant.*

PARKER, J. The defendant offered no evidence. The only assignment of error, except formal ones, is to the failure of the court to sustain the motion for judgment of nonsuit.

Robert Robinson, 27 years old, was a soldier stationed at Fort Bragg. He had been married about 4 years to Brookie Overton. They lived at Mt. Olive in the home of her mother and minor brothers.

After Robert Robinson's murder the defendant Kelly told John B. Edwards, a member of the State Bureau of Investigation assisting the sheriff in the investigation of the killing, that he had had sexual intercourse with Brookie Overton before her marriage, and had continued such relationship with her since her marriage to Robinson, spending nights with her in hotels and motels in Wilson and Goldsboro.

Since Brookie Overton's marriage, Kelly, in spite of the protests of her mother, continued to come to her home, in the absence of her husband, to take her off with him. About a month before Robinson's death Kelly came to the home for Brookie Overton, and when her mother said he shouldn't be going with Brookie, and shouldn't come to her home, and her brother asked him to leave, he offered to fight her brother.

Joyce Hobbs, who pleaded guilty to the charge of murdering Robert Robinson, and the defendant Kelly, were associates in taking women out in cars, and the irresistible inference from the evidence is that their purpose was immorality. About a week before Robinson's murder Adolphus Wall saw Joyce Hobbs and Kelly at his taxi stand in Mt. Olive. Wall saw two guns in the automobile Kelly was driving. In response to his question why they had the guns, one of them, he could not remember which, replied: "We have got them to kill damned men with."

Elizabeth Rivenbark, a sister of Brookie Robinson, saw Kelly come to her mother's house twice, and ask for Brookie Robinson. On one occasion she saw Kelly there shake his fist at Robinson. She testified: "Hobbs and Kelly had been toting guns around in the car for I had seen them there."

About a week before Robinson was killed, Florence Worrell heard Kelly say: "If he didn't stop following him, he was going to fix him to stop."

The night before Robinson's murder Joyce Hobbs, driving an automobile, passed a filling station where Robinson was, and said to Robinson: "Come on you S. O. B. we are going after Brookie." Kelly was not in the car. Robinson and his brother-in-law got in a car, and followed. Down the road Hobbs stopped, reached in the back of the car, got out a gun, pointed it at Robinson, and said: "Come on mother, we are ready for you." Kelly told Edwards, the S. B. I. Agent, that this same night Hobbs carried him and Brookie Robinson out in the country from Mt. Olive behind a church, and that Hobbs returned and picked them up. Hobbs left them there to go to town to pick up a girl.

On the night of the murder, and just before it occurred, Hobbs, Kelly and Brookie Robinson came in an automobile to Mrs. Betty Wilson's yard. Brookie Robinson got out to stay a few minutes. Kelly said to Hobbs: "You better get up, if you are going to keep that date with that girl in town." They left in the car. After Robinson's murder Kelly returned, picked up Brookie Robinson, and carried her to Mt. Olive.

About 7:00 or 7:30 p.m. on 5 October 1954, Bobbie Overton, a 20-year-old brother of Brookie Robinson, and William Starnes got in Robert Robinson's car. Robinson drove around a block in the Town of Mt. Olive three times, saw Joyce Hobbs' car, and started following it. Kelly

was driving the Hobbs' car, and in it were Joyce Hobbs and Eunice and Hazel Rivenbark. Kelly drove across the railroad track, came down the other side of the street, circled the block twice, and parked in front of Glenn Martin's Drug Store. The girls got out, went in the drug store, came back, and got in the car. Kelly drove off, and Robinson followed. Kelly stopped at a filling station for gas, and Robinson stopped across the street. Kelly drove off on the Goldsboro road, Robinson following. About a quarter of a mile down the road Kelly turned off on a side road, went about 100 feet, and stopped. Robinson stopped his car 25 or 30 feet behind. Starnes testified the hard surfaced part of the road was blocked by the Hobbs car, when its door opened for Hobbs to get out. Bobbie Overton testified: "I do mean to insinuate that the road was blocked." The road had narrow shoulders. Joyce Hobbs with a shotgun jumped out of his car, and ran back to the Robinson car. Robinson was under the steering wheel. Hobbs stuck the shotgun in the window of Robinson's car, saying: "G— d— it, you have been following me far enough." Robinson threw his arms up, and said: "Don't point that gun at me." The gun was pointed at Robinson's chest. Hobbs fired. The load of shot went into his left lung, his heart, and broke three ribs. Robinson died about five minutes after he was shot. Hobbs, after firing the gun, unbreached it, blew it out, and carried it back to his car.

Immediately after the murder Kelly told Lt. H. P. Davis, a police officer in Mt. Olive: "Hobbs had shot Robinson . . . While he was driving Hobbs told him to stop the car, and he would fix the S. O. B., and stop him from following him, referring to Robinson. . . When he stopped the car, Hobbs got the gun, jumped out, and ran back to the Robinson car, that he heard the gun shoot."

In passing upon a motion for judgment of nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable inference which may fairly be drawn from the evidence. *S. v. Ritter*, 239 N.C. 89, 79 S.E. 2d 164. If there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the court's duty to submit the case to the jury. *S. v. Davenport*, 227 N.C. 475, 493, 42 S.E. 2d 686; *S. v. Rogers*, 227 N.C. 67, 40 S.E. 2d 472.

It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Spencer*, 239 N.C. 604, 80 S.E. 2d 670; *S. v. Gosnell*, 208 N.C. 401, 181 S.E. 323; *S. v. Donnell*, 202 N.C.

782, 164 S.E. 352; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Jarrell,* 141 N.C. 722, 53 S.E. 127.

"A person aids when, being present at the time and place, he does some act to render aid to the actual perpetration of the crime, though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or who either commands, advises, instigates or encourages another to commit a crime." *S. v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358. See *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272; *S. v. Hart, supra.*

Mere presence, even with the intention of assisting, cannot be said to be aiding and abetting, unless the intention to assist, if necessary, was in some way communicated to the actual perpetrator of the crime. *S. v. Ham,* 238 N.C. 94, 76 S.E. 2d 346; *S. v. Holland, supra; S. v. Johnson, supra.*

The general rule seems to be that if two or more persons combine or conspire to commit a crime, each is liable *criminaliter* for everything done by his confederates in the execution of the common design, as one of its probable and natural consequences, even though what was done was not intended as a part of the original design or common plan. *S. v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482; *S. v. Williams,* 216 N.C. 446, 5 S.E. 2d 314; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737.

"Everyone who does enter into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N.C. 565.

There is evidence tending to show that Hobbs and Kelly were companions in immorality, and that both were with Robinson's wife the night before his murder, and the night of his murder. There is evidence tending to show that both had malice against Robinson, that they had two guns in the car they used, and that one of them, with both present, said to Adolphus Wall, a week before Robinson's death, "we have got them" (the guns) "to kill damned men with," and that Kelly about a week before the murder said: "If he didn't stop following him, he was going to fix him to stop." It seems to be a fair inference from this evidence that they had the guns in the car to kill Robinson, or any man, who interfered with their immorality: that such was their common design and plan.

The evidence, and the reasonable inference to be drawn therefrom, tends further to show that on the night of the homicide both Hobbs and Kelly knew that Robinson was following them, and that when Hobbs told Kelly "to stop the car and he would fix the S. O. B.," that Kelly stopped the car to permit Hobbs to kill Robinson according to their

prior concerted plan and design, and further, that such stopping of the car by Kelly under all the facts was aiding and abetting Hobbs in the homicide, irrespective of any prior plan or design. The evidence tends to show that the defendants acted in concert, and it is not material which fired the gun inflicting the mortal wound.

There is no doubt that Hobbs was guilty of murder in the second degree in the killing of Robinson. *S. v. Williams,* 235 N.C. 752, 71 S.E. 2d 138; *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393. In fact, there is strong evidence that he is guilty of first degree murder.

The words, "when lust hath conceived, it bringeth forth sin: and sin, when it is finished, bringeth forth death" (James, Ch. 1, v. 15), picture the tragedy here.

At the close of the State's evidence the solicitor for the State announced that the State would ask for a verdict of guilty of murder in the second degree. The demurrer to the evidence was properly overruled, because the evidence in the case, considered in the light most favorable to the State, is sufficient to carry the case to the jury on the charge of murder in the second degree.

No error.

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STATE v. WILLIAM JACKSON RITCHIE.

(Filed 30 November, 1955.)

**1. Intoxicating Liquor § 2—**

In counties not electing to operate county liquor stores, the Turlington Act, as modified by the Alcoholic Beverage Control Act, is applicable.

**2. Same—**

In a county not electing to operate county liquor stores, the provisions of G.S. 18-11, as modified by G.S. 18-49 and G.S. 18-58, render the possession of more than one gallon of tax-paid liquor, even though in the home of a resident, *prima facie* evidence that such liquor is kept for the purpose of sale in a prosecution under a warrant or indictment charging that offense.

**3. Same—**

In a county not electing to operate county liquor stores, a person may lawfully have or keep in his private dwelling, while same is occupied and used by him as his dwelling only, an unlimited quantity of tax-paid liquor for the personal consumption of himself and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein.

**4. Intoxicating Liquor § 9a: Criminal Law § 56—**

A count in a warrant charging defendant, a resident of a county which had not elected to operate county liquor stores, with possession of intoxicating liquor, without allegation that the taxes imposed by law had not

been paid, charges no offense apart from the counts charging unlawful transportation and possession for the purpose of sale, and therefore judgment on such count will be arrested.

**5. Intoxicating Liquor § 9d—**

In this prosecution of a resident of a county which had not elected to operate county liquor stores, the evidence *is held* sufficient to sustain conviction of defendant of possession of tax-paid liquor for the purpose of sale.

**6. Criminal Law § 62f—**

A court may suspend execution of its judgment upon prescribed conditions only with defendant's consent, express or implied, and where defendant appeals immediately following entry of suspended judgment, the cause must be remanded for proper judgment.

APPEAL by defendant from *Armstrong, J.*, at April Term, 1955, of CABARRUS.

Criminal prosecution on a warrant issued out of Recorder's Court of Cabarrus County upon an affidavit charging that "at and in the said County of Cabarrus, on or about the 26th day of March, 1955, W. J. Ritchie, alias Jack Ritchie, did unlawfully, wilfully, and feloniously have on hand and possess intoxicating liquor, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State and the said ..... did unlawfully and wilfully have and keep in his possession certain intoxicating liquors for the purpose of sale, barter or exchange on said date, contrary to the form and statute in such case made and provided and against the peace and dignity of the State, and the said ..... did unlawfully and wilfully transport, export and import intoxicating liquors, on said date, contrary to the form of statute in such case made and provided and against the peace and dignity of the State."

The defendant was tried and convicted in said Recorder's Court on all three counts. He appealed to Superior Court where he pleaded "Not guilty."

Upon trial in Superior Court the State offered testimony of two police officers tending to show: That about 8:45 a.m. on Saturday, 26 March, 1955, they went to residence of defendant, armed with a search warrant; that defendant was seen to throw from his back steps a pint of whisky; that one of the officers picked it up, and went into the house, and asked defendant if he had any more whisky, and defendant stated that he had seven full pints in his trunk, and had drunk the contents of a pint that morning so he would not have more than eight pints. At the time, he had eight pints and some in the other bottle. Defendant was intoxicated. And defendant said to one of the officers that "it seems like" the officers "are picking" on him, that the officers "didn't search his wife—that she sells liquor too."

The jury returned a verdict of guilty as charged in the first two counts of the warrant,—motion for nonsuit as to third count being allowed.

The judgment of the court is: On first count, that defendant be confined in common jail of Cabarrus County for a period of six months and be assigned to do labor on the public highways of the State as provided by law.

On second count, that defendant be confined in the common jail of Cabarrus County for a period of eighteen months and be assigned to do labor on the public highways of the State as provided by law, this sentence to commence after the expiration of the sentence on the first count.

And the record shows that "By consent of the defendant, in open court, this prison sentence is suspended for a period of five years" on conditions stated. Then as part of the appeal entries it is declared: "Judgment pronounced as appears in the record."

"To pronouncement of said judgment defendant excepts in open court and gives notice of appeal," and appeals "to Supreme Court" and assigns error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Robert L. Warren for defendant, appellant.*

WINBORNE, J. What is said by this Court in *S. v. Brady,* 236 N.C. 295, 72 S.E. 2d 675, is pertinent to case in hand. Paraphrasing the factual situation there stated, it may be said here: Cabarrus County has not elected to operate county liquor stores under the Alcoholic Beverage Control Act of 1937. In consequence, this case is controlled by the Turlington Act of 1923, as modified by the provisions of the Alcoholic Beverage Control Act applicable to counties not engaged in operating county liquor stores, citing cases.

Upon similar premises in the *Brady case* this Court had this to say: "These propositions are established law in counties which do not operate county liquor stores under the Alcoholic Beverage Control Act of 1937:

"1. Under the relevant section of the Turlington Act, *i.e.,* G.S. 18-11, as modified by applicable provisions of the Alcoholic Beverage Control Act, *i.e.,* G.S. 18-49 and G.S. 18-58, the possession by the accused, even within his private dwelling, of more than one gallon of intoxicating liquor upon which the taxes imposed by law have been paid constituted *prima facie* evidence that such liquor is kept for the purpose of being sold where the accused is charged with the commission of that offense by the indictment or warrant (citing cases).

"2. Under the relevant section of the Turlington Act, *i.e.*, G.S. 18-11, as modified by the applicable provisions of the Alcoholic Beverage Control Act, a person may lawfully have or keep in his private dwelling, while the same is occupied and used by him as his dwelling only, an unlimited quantity of intoxicating liquor upon which the taxes imposed by law have been paid for use only for the personal consumption of himself and of his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein" (citing cases).

Bearing in mind these principles, it is noted that in the instant case the trial court has considered and treated the warrant as containing three separate counts, and the record discloses that all of the evidence adduced by the State upon the trial in Superior Court relates to the same intoxicating liquor, on which the taxes have been paid, which defendant possessed in his residence. It is charged that the defendant possessed the liquor unlawfully, that he possessed it for the purpose of sale, and that he transported it unlawfully. But the trial judge allowed the motion of defendant for judgment as of nonsuit as to the third count charging unlawful transportation of intoxicating liquor. It follows that defendant was not guilty of having obtained the liquor unlawfully. Therefore, as in the *Brady case*, the jury could have drawn only one of these opposing inferences from the evidence: That defendant possessed the liquor for the personal consumption of himself and family and guests, as defined in the statute, or that he had it for the purpose of sale. And in the light of these inferences, the first count in the warrant, without the aid of the second constitutes no criminal offense. In other words, it appears that defendant is properly charged only with the offense of unlawful possession of tax-paid liquor for the purpose of sale. This is the offense charged in the second count. And this Court is of opinion and holds in respect to the second count the evidence is sufficient to take the case to the jury and to support the verdict of guilty.

Therefore, for the error appearing upon the face of the record, the verdict of guilty under the first count must be, and it is set aside and the judgment rendered thereon is arrested and stricken.

As to the judgment on the second count: A court may suspend the execution of its judgment upon prescribed conditions only with defendant's consent, express or implied. While here it is recited in the judgment that "By consent of the defendant in open court . . ." the judgment is suspended on conditions stated, the record shows clearly that there was neither express nor implied consent for the appeal entries recite that "To the pronouncement of said judgment defendant excepts in open court and gives notice of appeal to the Supreme Court. Further notice waived. The defendant is allowed statutory time within which to make up and serve case on appeal . . ."

Patently appeal was taken immediately following entry of judgment. Therefore the judgment on the verdict upon the second count is stricken out and the cause remanded for proper judgment. *S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203, and cases cited. See also *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774; *S. v. Harvey,* 242 N.C. 111, 86 S.E. 2d 793, and *S. v. Ingram, post,* 190.

For reason stated: On first count—Judgment is arrested;

On second count—Judgment is stricken and cause remanded for proper judgment.

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MRS. ARTHUR FREEDMAN AND THE UTICA MUTUAL INSURANCE COMPANY v. WILLIAM SADLER.

(Filed 30 November, 1955.)

**Automobiles § 41g—Evidence of negligence in entering intersection with dominant highway held sufficient to be submitted to the jury.**

Plaintiff was traveling along a dominant highway which was divided into two traffic lanes by grass plots 20 feet wide between the two lanes. Defendant, traveling on the servient highway, approached the intersection from plaintiff's left. Plaintiff's evidence was to the effect that as she approached the intersection a car traveling north on the servient highway had stopped between the grass islands to permit her to pass, that she therefore continued into the intersection, and was hit by defendant's car, also traveling north, when it was driven around the left of the stationary car into the intersection. *Held:* The evidence was sufficient to carry the case to the jury on the issue of defendant's actionable negligence.

APPEAL by plaintiff from *Phillips, J.,* at 4 April, 1955, Civil Term of GUILFORD (Greensboro Division).

Civil action in tort to recover for personal injuries and property damage resulting from a collision of automobiles at the intersection of two streets.

The plaintiff's evidence discloses that the collision occurred around 2:30 p.m. on 7 April, 1953, at the intersection of West Market Street and Chapman Street, in a residential district of the City of Greensboro. West Market Street runs east and west; Chapman, north and south. West Market Street is divided into two traffic lanes, each about 20 feet wide, with a grass plaza some 20 feet in width lying between the two lanes. Chapman Street is about 25 feet wide. Stop signs facing on Chapman Street on each side of the intersection make West Market Street the dominant, through street and Chapman the servient one.

The plaintiff was driving her Plymouth station wagon westwardly on West Market Street in the traffic lane on the north side of the grass

plaza; the defendant, operating his Dodge sedan, was going northwardly on Chapman Street. Therefore, as the two vehicles approached the intersection the Plymouth driven by the plaintiff was on the favored street as designated by the stop signs (G.S. 20-158).

As the plaintiff approached the intersection, driving at a speed of about 25 or 30 miles per hour, she observed on her left an automobile headed north on Chapman Street. This automobile was stopped midway the intersection, opposite the grass plaza which separated her traffic lane from the lane on her left, apparently waiting for the plaintiff to pass. As she proceeded into the intersection in front of the stopped car, the defendant suddenly drove around from the left side of the stopped vehicle and proceeded on into the north or westbound traffic lane of West Market Street and collided with the left side of the plaintiff's automobile. In the collision the plaintiff suffered personal injuries and both vehicles were damaged.

The plaintiff testified in part as follows: ". . . as I approached the Chapman Street intersection, . . . I saw a black, rather old car parked right there at the intersection in between the grass islands which run down the center of Market Street. The person driving this black car was stopped, waiting for me. I went ahead because Market Street has the right of way. I did not see Mr. Sadler's car until it hit me, and it knocked my car out of control . . . The car which was stopped out in the intersection was headed north. Mr. Sadler (the defendant) came around the left side of the car, also headed north, and hit me in the north lane of traffic on Market Street." BY THE COURT: "I never did see Mr. Sadler's car until I got out of my car after the collision. There was a car belonging to a student from Guilford College who had his car stopped in between the grass islands headed north. I presume he (Mr. Sadler) must have come around the boy's car and hit me." CROSS EXAMINATION: "I presume that Mr. Sadler had gotten about three-fourths of the way across Market Street because that's where he hit me."

Policeman Velton Mooney, who investigated the collision, testified in part: "Mr. Sadler stated to me that he had stopped for the stop sign on South Chapman Street and started into the intersection. There was a car ahead of him which was in the middle of the intersection. Mr. Sadler pulled to the west side of this car which had stopped. Mr. Sadler proceeded across the street, and he stated he didn't see the Freedman (plaintiff) car until it was there in front of him. Mr. Sadler estimated his speed as he proceeded across the intersection at approximately 10 miles per hour." CROSS EXAMINATION: "Sadler said that there was a car in between the grass islands and that he had pulled up alongside of it. . . . All I remember was that the car was here in the

center of the intersection and Sadler stated that he pulled over to the left side of it. . . . I don't know how far you can see with a clear view to the east toward the downtown part of Greensboro. West Market Street is straight along this area for several blocks. . . . I don't know whether there is anything to prevent a car coming down West Market Street from seeing a car already in the intersection. Mr. Sadler stated he was there and started across and didn't see the Freedman car until he hit it. I don't remember whether he told me this other car was blocking him and almost ran into him."

The defendant's evidence is omitted herefrom as not being pertinent to decision.

At the close of all the evidence the defendant moved for judgment as of nonsuit. The motion was allowed, and from judgment based on such ruling, the plaintiff appeals.

*Smith, Moore, Smith & Pope, Bynum M. Hunter, and Falk, Carruthers & Roth for plaintiff, appellant.*

*Robert A. Merritt for defendant, appellee.*

JOHNSON, J. Our examination of the plaintiff's evidence leaves the impression it was sufficient to carry the case to the jury on the issue of actionable negligence. Decision here is controlled by the principles explained in these decisions: *Caughron v. Walker, ante,* 153; *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373; *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17; *Johnson v. Bell,* 234 N.C. 522, 67 S.E. 2d 658.

Since the case goes back for retrial, we refrain from further discussion of the evidence and the applicable principles of law.

The judgment below is

Reversed.

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R. FRAZIER PEMBERTON AND MRS. MARGUERITE PEMBERTON HARRELSON, GUARDIANS OF W. S. PEMBERTON, v. J. L. LEWIS, TRADING AS LEWIS FUNERAL HOME, AND RICHARD GORDON.

(Filed 30 November, 1955.)

**1. Judgments § 33a—**

A judgment of nonsuit is not *res judicata* as to a second action unless it is made to appear that the second action is between the same parties, on the same cause of action, and upon substantially the same evidence.

**2. Judgments § 35—**

A motion for dismissal on the ground that a judgment of nonsuit in a prior action between the parties constituted *res judicata,* is premature

when made prior to the introduction of evidence, since only by a consideration of the evidence in both actions may the court determine whether or not the evidence in both trials is substantially the same, and certainly such motion is properly denied when the court finds that the allegations in the complaints in the two actions are not substantially identical.

**3. Appeal and Error § 2—**

An appeal from the denial of a motion to dismiss on the ground that a judgment of nonsuit entered in a prior action between the parties constituted *res judicata*, is premature when the motion is made prior to the introduction of evidence, and the appeal will be dismissed.

APPEAL by defendants from *Phillips, J.*, April Term, 1955, of GUILFORD (Greensboro Division).

The plaintiffs instituted an action in the Superior Court of Guilford County on 31 May, 1950, against these defendants for the recovery of damages for the alleged actionable negligence of the defendants arising out of an incident alleged to have occurred on 27 October, 1949.

The plaintiffs recovered a judgment against the defendants and upon appeal to this Court the judgment was reversed in an opinion filed on 5 March, 1952, and reported in 235 N.C. 188, 69 S.E. 2d 512, and on 10 April, 1952, a judgment as of nonsuit was duly entered in the Superior Court upon the opinion and judgment of the Supreme Court.

The plaintiffs thereafter instituted the present action against the defendants on 9 July, 1952, for the recovery of damages for the alleged actionable negligence of the defendants arising out of the same incident alleged to have occurred on 27 October, 1949.

The defendants moved in the court below for a dismissal of this action on the ground that the judgment in the former action was *res judicata* of all matters growing out of the aforesaid incident. When the above motion was heard it was agreed by counsel that the trial judge should have before him the judgment roll of the action instituted on 31 May, 1950, by the same plaintiffs and against the same defendants, the record upon appeal to the Supreme Court at the Fall Term, 1951, including the briefs filed in the Supreme Court by the respective parties.

The court below found as a fact that the present action was instituted by the same plaintiffs against the same defendants to recover damages for the alleged negligence of the defendants arising out of the incident alleged to have occurred on 27 October, 1949, but that the allegations of the complaint in this action are substantially different in material aspects from the allegations of the complaint in the action instituted on 31 May, 1950. Hence, the motion to dismiss the action was denied and judgment entered accordingly.

The defendants appeal, assigning error.

*Frazier & Frazier for appellees.*
*Armistead W. Sapp for appellants.*

DENNY, J. It seems to be settled in this jurisdiction that a judgment of nonsuit is not *res judicata* as to a second action unless it is made to appear that the second action is between the same parties, on the same cause of action, and upon substantially the same evidence. *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Batson v. Laundry,* 206 N.C. 371, 174 S.E. 90; *Hampton v. Spinning Co.,* 198 N.C. 235, 151 S.E. 266.

Ordinarily, a motion to dismiss an action on the plea of *res judicata* will not be allowed on the pleadings alone. *Craver v. Spaugh, supra; Buchanan v. Oglesby,* 207 N.C. 149, 176 S.E. 281; *Dix-Downing v. White,* 206 N.C. 567, 174 S.E. 451; *Batson v. Laundry, supra; Hampton v. Spinning Co., supra.*

Moreover, the court below found as a fact that the allegations in the complaint in the present action are substantially different in material aspects from the allegations of the complaint in the former action. Furthermore, the evidence to be considered on such motion may not be limited to the evidence that was adduced in the former trial, but contemplates a consideration of all the evidence adduced in support of the allegations of the respective complaints. It is only by a consideration of all such evidence that the court may determine whether or not the evidence in both trials was substantially the same. Therefore, we think the motion interposed below was prematurely made. *Buchanan v. Oglesby, supra.* Likewise, we hold that this appeal is premature and should be dismissed.

Appeal dismissed.

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STATE v. SYLVIA LEE INGRAM.

(Filed 30 November, 1955.)

**1. Intoxicating Liquor § 9d—**

Evidence in this case that officers, under authority of a search warrant, found a quantity of tax-paid liquor in defendant's possession in her home, and that defendant possessed it for the purpose of sale, *held* sufficient to take the case to the jury.

**2. Criminal Law § 62f—**

Defendant's appeal from a judgment imposing a suspended sentence negates defendant's consent thereto, express or implied, and the cause must be remanded for proper judgment.

APPEAL by defendant from *McKeithen, Special J.,* 13 June, 1955, of GUILFORD.

Criminal prosecution for unlawful possession of tax-paid whiskey for the purpose of sale.

Defendant was first tried and convicted in the municipal-county court. Upon appeal to and trial in the Superior Court, the jury returned a verdict of guilty as charged in the warrant.

The judgment pronounced imposed a sentence of imprisonment, which was *suspended* on *specified conditions.* Thereupon, defendant excepted and appealed, assigning errors.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*Elreta Melton Alexander for defendant, appellant.*

PER CURIAM. The State's evidence tends to show that officers, under authority of a search warrant, found a quantity of tax-paid whiskey in defendant's possession, in her home; and there was plenary evidence that she had it for the purpose of sale. The ruling that the evidence was sufficient for submission to the jury was correct. Moreover, defendant's assignments of error challenging the rulings of the court in admitting certain of the testimony offered by the State are without merit. The trial and verdict are upheld.

However, since defendant promptly excepted thereto and appealed therefrom, the conditional judgment pronounced was not based on defendant's consent, express or implied. Hence, for the reasons stated by *Winborne, J.,* in *S. v. Ritchie, ante,* 182, the judgment is stricken out and the cause is remanded for the pronouncement of a new judgment.

Error and remanded.

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E. J. COX AND WIFE, EVA C. COX, v. C. WORTH SHAW.

(Filed 30 November, 1955.)

**1. Reference § 11—**

Upon the hearing upon exceptions to the report of a referee, the court has authority to affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of the referee.

**2. Same: Appeal and Error § 2—**

Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature. G.S. 1-277.

**3. Reference § 11: Courts § 5: Judgments § 33f—**

Where defendant, upon the filing of the report of the referee, moves for a new survey prior to the filing of exceptions, the reference is not before the court upon the hearing of the motion, and the denial of the motion does not preclude another Superior Court judge from vacating the report and ordering a new survey upon the hearing upon the exceptions.

APPEAL by plaintiffs from *Stevens, J.*, May Term, 1955, BLADEN. Appeal dismissed.

Civil action to try title to land.

The cause was referred and a survey ordered. The referee filed his report. Defendant moved for a new survey. The motion was denied and leave was granted to file exceptions. Thereafter exceptions were filed, and the cause came on to be heard in the court below. The court vacated the reference, ordered a new survey and such additional hearing as might be necessary upon the new survey. Plaintiffs excepted and appealed.

*H. H. Clark for plaintiff appellants.*

*Ellis E. Page and Varser, McIntyre & Henry for defendant appellee.*

PER CURIAM. When the cause came on to be heard on exceptions filed, the court had authority to affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of the referee. *Quevedo v. Deans*, 234 N.C. 618, 68 S.E. 2d 275; *Keith v. Silvia*, 233 N.C. 328, 64 S.E. 2d 178; G.S. 1-194, 195. The order vacating the report of the referee and ordering a new survey was purely interlocutory. It affected no substantial right of the parties. G.S. 1-277. Appeal therefrom was fragmentary and premature. *Whitehurst v. Hinton*, 222 N.C. 85, 21 S.E. 2d 874.

We may note that the motion for a new survey made before the court below is quite different from the motion made before exceptions were filed. At the time Carr, J., signed his order, the reference was not before him for consideration. *Keith v. Silvia, supra.*

Appeal dismissed.

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION v. MUNICIPAL CORPORATIONS OF SCOTLAND NECK, HERTFORD, ENFIELD, EDENTON, ELIZABETH CITY, WINDSOR, BELHAVEN, AND ROBERSONVILLE.

(Filed 14 December, 1955.)

**1. Electricity § 3—**

Where a power company sells electric energy in several states, it is desirable that its schedules of rates be uniform within the entire territory served by it so long as such rates will not give an excessive return on the investment of the utility in any particular jurisdiction or be unjustifiably high in any jurisdiction served by it.

**2. Same—**

A municipality retailing electric energy in its proprietary capacity for a profit utilized for public purposes is not a nonprofit-making corporation in the same sense as an electric membership corporation, nor does it operate under the same conditions, since an REA cooperative must construct and maintain lines through sparsely settled rural areas, and therefore, such differences justify a lower rate schedule for REA cooperatives in conformity with public policy. G.S. 117-10.

**3. Same—**

A party may not attack a rate schedule for a certain classification of consumers of electric energy on the ground of discrimination in that energy sold under such schedule would be at a loss which would have to be made up by other customers of the power company, when such party does not seek the cancellation or increase of such rate, but seeks to obtain electric energy under the identical rate it contends is discriminatory.

**4. Same—**

The difference in the respective peak loads of municipal and industrial consumers of electric energy is sufficient to justify placing them in different classifications for rate-making purposes.

**5. Same—**

While there must be no unreasonable discrimination in the schedule of rates charged for the same kind and degree of service, any matter which presents a substantial difference between customers, such as quantity used, time of use, or manner of service, may be proper ground for classification for rate-making purposes.

**6. Utilities Commission § 3—**

In determining fair rates to be charged by a power company, evidence of rates charged by another company in the same territory is properly excluded when there is no evidence of relative cost conditions.

**7. Electricity § 3—**

A purchaser of electric energy has no vested right in a schedule approved by the Utilities Commission, and whether a utility will be permitted to withdraw an existing schedule of rates is a matter for determination of the Commission in accordance with law.

**8. Same—**

Where the Utilities Commission finds, upon supporting evidence, that a power company is entitled to increase in rates, it is incumbent upon the Commission to approve schedules that in its opinion will be fair and equitable as between the established classifications of customers to be served, and in so doing, it may withdraw a schedule based upon contracts having no fuel clause, and require all customers coming within the same classification to pay rates fluctuating with the cost of fuel so that the rate will be uniform for all within the same classification.

**9. Utilities Commission § 3—Informal conference held without notice was not a formal hearing and appellants were not prejudiced by order based thereon.**

Pursuant to an inquiry during the hearing as to whether a municipality selling electricity at retail would be entitled to purchase electric energy under the commercial rate if it acquired a customer within its territory entitled to the commercial rate, a private conference between the Commission and the power company was held, and as a result thereof, the Commission approved a rider authorizing the commercial rate in such case to a municipal customer for any energy sold by it to such commercial user. Upon objection by municipalities, the power company offered to withdraw the rider, and counsel for the protesting municipalities refused the offer. *Held:* While the informal conference without notice to counsel for the municipalities was unfortunate, it does not invalidate the order of the Commission, since the conference was not a formal hearing within the meaning of G.S. 62-23, and the municipalities were not prejudiced thereby.

**10. Same—**

An order of the Utilities Commission giving municipalities the option to purchase electricity for industrial customers at a lower rate, but expressly providing that the municipalities should be free to contract with such industrial customers with respect to the price they would be required to pay the municipalities for the electric energy purchased by them, does not violate G.S. 62-30 (3).

**11. Same—**

In a hearing before the Utilities Commission to fix rates for electric energy, reports made by municipal customers to the Utilities Commission pursuant to G.S. 62-98, are properly received in evidence as exhibits and made part of the record as authorized by G.S. 62-18, such evidence being competent on the question of whether the proposed schedules are fair and equitable to the municipal customers, though not relevant on the question of the power company's right to a general increase in rates.

**12. Utilities Commission § 5—**

G.S. 62-26.10 and 62-123 make the rates fixed by the Utilities Commission not only *prima facie* evidence of their validity, but also that they are just and reasonable.

APPEAL by protestants from *Carr, J.*, November Term, 1954, of EDGECOMBE.

This proceeding originated upon the written application of Virginia Electric and Power Company, hereinafter called Vepco or company, for a general increase in electric rates in North Carolina, which application was filed on 27 October, 1953, with the North Carolina Utilities Commission, hereinafter referred to as the Commission.

The appellants are the protesting municipal corporations of Scotland Neck, Hertford, Enfield, Edenton, Elizabeth City, Windsor, Belhaven and Robersonville, hereinafter referred to as appellants or protestants.

The application for an increase in rates as originally filed on 27 October, 1953, sought increases in rates estimated by Vepco to produce approximately $297,000 of additional annual revenues from the company's North Carolina operation. Prior to the beginning of the hearing before the Commission on 24 February, 1954, Vepco made modifications in its application for increased rates in North Carolina so that the application as modified sought increases in rates estimated to produce $235,000 of additional annual revenues from its North Carolina operation instead of the $297,000 originally requested.

This cause was heard before his Honor Leo Carr, Judge Presiding, at the November Term, 1954, of the Superior Court of Edgecombe County, North Carolina, upon the appeal of the eight protestants from the final order of the Commission dated 1 June, 1954, and the Commission's order dated 8 July, 1954, denying the petition for a rehearing filed by said protestants. By agreement of counsel for the respective parties it was stipulated that judgment in this cause might be signed and entered by Judge Carr out of the district and out of the term.

On 16 March, 1955, Judge Carr signed a judgment affirming the final order of the Commission, and its order denying petition to rehear, and directing the clerk to tax the costs jointly against the eight appellants. From this judgment the protestants appeal, assigning error.

*Lassiter, Leager & Walker for appellants.*

*Joyner & Howison, Hunton, Williams, Gay, Moore & Powell, and John W. Riely and T. Justin Moore, Jr., for Vepco, appellee.*

DENNY, J. This appeal presents the following questions for determination:

1. Was the action of the Commission erroneous when it refused to establish rates for sales to municipalities for resale identical with rates for sales to rural electric cooperatives, although conditions of the sales differed and no sales to cooperatives were in fact being made?
2. Was the action of the Commission erroneous when it refused to require service to a municipality for resale (with relatively low

load factor and relatively high peak loads at the time of the company's system peak load) at a rate designed for service exclusively to industrial customers (with relatively high load factor, and, in general, no relatively high peak loads)?

3. Was the action of the Commission erroneous when it refused to accept evidence of the rates of other utilities where no evidence of relative cost conditions was offered?
4. Was the action of the Commission erroneous in permitting the company to withdraw special schedules providing rates for sales to municipalities for resale when the company proposed and the Commission permitted the continuance of sales to such municipalities at general rates open to any customer?
5. When, at the request of the Commission, representatives of a utility met after the hearing with the Commission, in the absence of representatives of the protestants, to work out the language of a rate schedule rider favorable to protestants, may the protestants whose rights were not in fact prejudiced and who refused to acquiesce in the withdrawal of the rider successfully assert that the order approving that schedule be reversed?
6. Does "Rider G" purport to fix the rate at which the protestants would be required to sell electricity to industrial corporations in violation of G.S. 62-30 (3)?
7. Did the Commission err in receiving evidence as to the profits of the protesting municipal corporations from the resale of electricity purchased from Vepco?

The appellants have taken no exception to those parts of the order of the Commission or of the judgment of the Superior Court in which it is found or concluded that (a) the total revenues to be derived under the proposed new rates as approved by the Commission are not excessive, and (b) that the permitted rate of return allowed by the Commission is not excessive. Therefore, the entire controversy on this appeal with respect to rates is based on the contention of the appellants that the schedules of rates made applicable to the protesting municipalities are unreasonable, excessive and unlawfully discriminatory as between them and the schedule in effect for REA Cooperatives and the new schedule of rates for large industrial users purchasing a minimum of 5,000 kw monthly.

Consequently, it will be unnecessary for us to incorporate in our opinion the evidence bearing on the necessity for the requested increase in order that Vepco may earn a fair and just return on its investment. The Commission has found as a fact that Vepco is entitled to the increase of $235,000 per year and that such increase will give Vepco an

annual rate of return on its North Carolina properties of only 3.96 per cent, and that such return is "not more than a fair return." Such a finding, upon appeal to the Superior Court, "shall be *prima facie* just and reasonable." G.S. 62-26.10; *Utilities Commission v. Ray,* 236 N.C. 692, 73 S.E. 2d 870; *Utilities Commission v. Coach Co.,* 224 N.C. 390, 30 S.E. 2d 328. Likewise, any rates or charges established by the Commission "shall be deemed just and reasonable." G.S. 62-123; *In re Utilities Co.,* 179 N.C. 151, 101 S.E. 619.

Vepco is a Virginia corporation with its principal office in Richmond. It provides electric service for 19 counties in North Carolina; 67 in Virginia, and five in West Virginia. The company serves more than 600,000 electric customers in an area of approximately 32,000 square miles. The company began its service in North Carolina in 1926 when it purchased the Roanoke Rapids Power Company at Roanoke Rapids, and the Roanoke River Development Company at Weldon. At the end of 1926 it had only 1,718 customers in this State. By September 1953 it had slightly over 36,000 customers in North Carolina, not including the customers in the towns which purchased current wholesale from the company.

The company offered evidence tending to show that the value of its system was fixed at $14,500,000 by the Virginia Commission in 1921, and that its net investment as of 30 September, 1953, had increased to approximately $324,790,000; and that $26,313,000, or eight per cent thereof, represented the net investment allocated to North Carolina, and about two per cent represented the net investment allocated to West Virginia, leaving approximately ninety per cent allocated to the State of Virginia.

Prior to the filing of its request for the increase of rates in North Carolina, the company had in effect in North Carolina 23 schedules and nine riders. Certain of these schedules were obsolete, no energy being sold under them, while others contained no fuel clause, that is, no provision resulting in automatic increase or decrease in rates as the cost of fuel rises or falls. On the other hand, schedules under which the larger users purchased electric current contained fuel clauses. Hence, the customers purchasing electricity under these latter schedules, by reason of the increase in the price of coal, had already had the cost of current increased substantially before the present application for an increase was filed. Those customers, under schedules that contained no fuel clause, have been obtaining current at rates approved by the Commission when the cost of coal was approximately $4.00 per ton, or less than one-half the current price.

The effect of a fuel clause may be demonstrated by a comparison of the rates at which the towns of Edenton and Scotland Neck have been

purchasing electric current under the old schedules. Edenton has had a contract under Schedule 9, which had a fuel clause, and had to pay an average cost per kwh of 1.13c for the test period; while Scotland Neck had a contract under Schedule 18, which had no fuel clause, and was obtaining its electricity at an average cost of 1.03c per kwh. As a result of this disparity, Edenton, which had a much better load factor and a higher electric energy consumption, was paying more for its electricity per kwh than Scotland Neck. Likewise, Elizabeth City, according to the evidence, had a fuel clause in its contract and while it used approximately five times the amount of electricity Scotland Neck used, and had a higher load factor, paid an average of 1.05c per kwh. Six of the eight protestants had been obtaining electricity under schedules without a fuel clause. Elizabeth City and Edenton have been obtaining their electricity under schedules containing fuel clauses. Therefore, it is apparent that the six protesting municipalities which have been receiving electricity under schedules not containing a fuel clause have been paying rates which were discriminatory in their favor against towns served under a schedule with the fuel clause.

There is evidence that from 1926 to the date the present application for an increase was filed, there had been no increase in Vepco rates in North Carolina except by virtue of the effect of the "fuel clause" which was permitted due to the increased cost of coal. This clause was made applicable to certain large users. Vepco in its application to the Commission requested the Commission to authorize it to cancel certain schedules and riders in effect in North Carolina and to substitute uniform rate schedules identical with those filed with the State Corporation Commission of Virginia and with the Public Service Commission of West Virginia, in order that the rates under the respective schedules might be uniform over the entire Vepco system. Certainly, such uniformity is desirable so long as such rates will not give an excessive return on the investment of the utility in any particular jurisdiction in which it serves, or be unjustifiably high in any jurisdiction served. *Smith v. Ames*, 169 U.S. 466, 42 L. Ed. 819.

The Commission allowed Vepco to continue in effect the following existing rate schedules and service agreements: (a) Schedule No. 12, 409-NC and 409-A-NC; (b) Municipal Electric Service Agreement; and (c) County Electric Service Agreement, and to withdraw all other schedules in effect in North Carolina and to place in effect the following schedules and riders: (a) Residential, No. 1; (b) Small Commercial, Nos. 4 and 5; (c) Large Commercial and Industrial, Nos. 4, 5, 8, 9, 10 and 11; (d) Miscellaneous, Nos. 17, 20 and 24; and (e) Riders D, F and G.

The test period used in the hearing before the Commission was based on the twelve months ending 30 September, 1953. According to Vepco's testimony, the rate of return for its entire system during the test period was only 5.22 per cent and in North Carolina only three per cent. That the requested $4,800,000 of additional gross revenue for the system as a whole would, after deduction of Federal income taxes and State and local taxes, increase the net earnings only $2,201,000, which would give a return of 5.87 per cent, a rate deemed fair both to the company and its customers by the State Corporation Commission of Virginia. The order of the Virginia Commission allowing the requested increase was upheld by the Supreme Court of Appeals of Virginia in the case of *Bd. of Supervisors v. Virginia Electric & Power Co.*, 196 Va. 1102, 87 S.E. 2d 139.

According to the evidence, under the schedules that remain in effect in North Carolina, together with the new ones approved by the Commission, Vepco's annual gross income in North Carolina will be increased by $235,000, and its net income, after deduction of taxes, will be increased by $98,000.

On 30 September, 1953, Vepco had 31,259 residential customers in North Carolina. Under the new schedules now in effect, pursuant to the order of the Commission entered on 1 June, 1954, 8,409 of these customers will have their bills reduced and 22,850 will have increases. Vepco had 5,156 commercial and industrial customers in North Carolina on 30 September, 1953. In the small commercial group numbering approximately 5,000 customers, 2,500 will receive a decrease and 2,262 will receive increases, and others in this group will not be affected by the change.

The $235,000 additional revenue to be derived annually from Vepco's North Carolina operation will be obtained under the following schedules: Residential, No. 1, $145,000; Small Commercial, Nos. 4 and 5, $15,000; Large Commercial and Industrial, Nos. 4, 5, 8, 9, 10 and 11, $66,000; and Miscellaneous, Nos. 17, 20 and 24, $9,000.

We shall consider the questions posed on this appeal in the order stated:

I.

The protestants contend they are entitled to rates comparable to those available to the Electric Membership Corporations under Schedule No. 12, 409-NC and 409-A-NC, since they, like the cooperatives, buy electricity wholesale for the purpose of resale. They also contend that they are nonprofit public corporations which devote the net revenue derived from the sale and distribution of electric energy to the use and benefit of the citizens of the respective municipalities.

It must be conceded that the protesting municipalities are buying and selling electric energy in their proprietary capacities and that the profits derived therefrom are being used for the benefit of the citizens of the respective municipalities. However, we do not concede that such proprietary operations constitute public nonprofit corporations comparable to the Electric Membership Corporations.

The General Assembly of North Carolina, in 1935, created an agency to be known as the North Carolina Rural Electrification Authority. The purpose of the legislation is set forth in Chapters 288 and 291 of the Public Laws of 1935. These chapters, as amended, are now codified in Chapter 117 of our General Statutes as 117-1 through 117-28. G.S. 117-3 denies REA the right to fix rates or service charges, but gives to the Utilities Commission of North Carolina the power to fix the rates or service charges, or to order the extension of lines by the power companies. Also, G.S. 117-10, pointing out the manner in which Electric Membership Corporations may be organized, reads as follows: "Any number of natural persons not less than three may, by executing, filing and recording a certificate as hereinafter provided, form a corporation not organized for pecuniary profit (but) for the purpose of promoting and encouraging the fullest possible use of electric energy in the rural section of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management of the business of such corporations."

No limitation of the power to fix rates or to limit the margin of profit has been imposed on municipalities engaged in the distribution of electric energy in this State.

The North Carolina legislation with respect to Electric Membership Corporations, was enacted to implement the Act of Congress creating the Rural Electrification Administration, USCA, Title 7, sections 901-15.

According to the order of the Commission, the schedule under which the REA Cooperatives may be served, fixed a rate of 7½ mills which was approved many years ago at the request of the Federal Government for the purpose of developing rural sections of North Carolina by extending to such areas the benefits and advantages of electricity. The Commission said, among other things, in its order, "The municipalities in their protest seemed to feel that this low rate which the Company is charging the REA Cooperatives resulted in a higher rate which the municipalities were asked to pay. We are quite certain that this position of the municipalities is not well taken for the reason that if the Company had to construct the various transmission lines and extend electric service to the various sections of their territory which are now served by the REA Cooperatives, that the over-all operating expenses of the Company would be greatly increased and the other customers

would have to pay more to compensate for the loss sustained in serving the same rural customers direct. We therefore find as a fact that the protesting municipalities are not entitled to the REA rates. Furthermore, this discussion is rather academic at this time for the reason that while said schedule applicable to REA Cooperatives is still extant, yet the Company does not serve one single cooperative in North Carolina. All of the cooperatives in North Carolina, in the area served by the Company, are now served from the Kerr Dam under a contract with the Federal Government, and the Company only receives a 'wheeling' fee from transmitting said current from the Kerr Dam to the several cooperatives."

Moreover, these protestants contend that the schedule under which the REA Cooperatives might be served, if they should cancel their present contract with the Federal Government under which they now obtain their electric energy from the Kerr Dam, is discriminatory and that any energy sold under such schedule would be at a loss, and such loss would have to be made up by Vepco's other customers. Yet, they do not request that the rate fixed by this schedule be canceled or increased. On the contrary, while they condemn the schedule on one hand as being discriminatory and unlawful, at the same time they seek to obtain thereunder the identical rate they contend is discriminatory. Their position is untenable. Therefore, the conclusion of the Commission that these protestants are not entitled to the REA rate will be upheld.

The Virginia State Corporation Commission held in *Re Old Dominion Electric Cooperatives,* 86 P.U.R. (N.S.) 129 (Va. S.C.C. 1950), that "A utility may properly charge different rates to different classes of consumers and it is proper to put electric cooperatives in a class by themselves. They are nonprofit membership corporations organized under the Electrical Cooperative Act which was passed by the general assembly for the purpose of encouraging the distribution of the blessings of electrical energy as widely as possible among the people of Virginia. The public policy of the State is to help the cooperatives to succeed, and granting them the lowest possible rate for power is not only permissible but a necessary means to that end. No public utility earns the same rate of return on every class of service that it renders." This principle has been recognized and followed by utilities commissions in a number of states. *Wisconsin State Rural Electrification Coordination Committee v. Wisconsin Gas & Electric Co.,* 17 P.U.R. (N.S.) 31 (1936); *Re Wholesale Rates for Power to Rural Cooperatives,* 19 P.U.R. (N.S.) 22 (Ky. P.S.C. 1927); *Highlands Utilities Co. v. Western Colorado Power Co.,* 48 P.U.R. (N.S.) 180 (Colo. P.U.C. 1943); *Re Oklahoma Gas & Electric Co.,* 57 P.U.R. (N.S.) 159 (Okla. C.C. 1944). In a recent deci-

sion, the Illinois Commerce Commission, in acting upon an application of the City of Salem, Illinois, which decision was rendered 17 July, 1955, and reported in C.C.H. Utilities Law Reporter, section 16831, said: "Municipalities are not in the same class with rural electrification cooperatives. It is entirely appropriate for a public utility to classify municipally-owned public utilities in a class separate and distinct from rural electrification cooperatives for the purpose of determining rates and classes of customers to whom service is rendered."

The conditions under which REA Cooperatives must operate, the necessity for constructing and maintaining miles and miles of lines through sparsely settled rural areas, and the consequent line losses, are sufficient to justify serving municipalities engaged in selling electric energy for profit under a different schedule from the one applicable to the REA Cooperatives which are created and operated on a nonprofit basis pursuant to the established public policy of the State and Federal Government.

II.

Under the new schedules the protestants must obtain their electric energy for resale under Schedules Nos. 9 or 10; Schedule No. 9 being applicable to any customer contracting for 100 kw or more; Schedule No. 10, which is applicable to any customer contracting for 1,000 kw or more; while Schedule No. 11 is applicable to any industrial customer contracting for 5,000 kw or more.

The protestants take the position that Schedule No. 11 authorizes rates to industrial customers that are discriminatory. Schedule No. 11 is a new schedule in North Carolina, but a similar schedule has been in effect in Virginia for a number of years. Therefore, it is necessary to consider the use characteristics and load factors as well as the amount of electricity purchased under these respective schedules in order to determine whether or not there is a justifiable basis for the establishment of the different rate schedules.

During the test period, Belhaven had a load factor of 40.28 per cent; Robersonville of 42.28 per cent; Hertford of 45.11 per cent; Scotland Neck of 47.22 per cent; Enfield of 47.52 per cent; Edenton of 51.73 per cent, and Elizabeth City of 57.13 per cent. This information is not available as to Windsor. Elizabeth City has a daily demand of some 6,000 kw; therefore, it is the only one of the protestants whose daily demand is sufficient to comply with the demand required in Schedule No. 11. However, the use characteristics and load factors of Elizabeth City are substantially the same as in other towns. The Halifax Paper Corporation is the only industry in North Carolina in the area served by Vepco which can qualify under Schedule No. 11. During the test

period, Halifax Paper Corporation had a load factor of 82.8 per cent and consumed almost as much electric energy as the combined consumption of the eight protesting municipalities. Halifax Paper Corporation paid, during the test period, for electricity, $655,485.81, and the combined total paid by the eight towns for the same period for electricity was $683,741.43; whereas Halifax Paper Corporation received all of its electric energy at its plant, the eight towns are scattered over an area of more than one hundred square miles.

It is common knowledge that a residential consumer uses on the average about the same amount of electricity each day, but the consumption is not constant throughout the day. The peak period of a residential consumer usually comes at the time when meals are being prepared and during the early hours of the night. But, the utility furnishing energy to its customers must invest sufficient money in its plant and equipment to meet the peak demands of its customers, and when the load falls below the peak, the utility obtains payment only for the percentage of the peak load actually consumed.

We think the evidence with respect to the load factor as between the protesting municipalities and the industrial user, is sufficient to justify placing them in different classifications. We said in *Utilities Commission v. Mead,* 238 N.C. 451, 78 S.E. 2d 290, "There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service. *Horner v. Electric Co.,* 153 N.C. 535, 69 S.E. 607; *Postal Tel.-Cable Co. v. Associated Press,* 228 N.Y. 370"; *Salisbury & S. R. Co. v. Southern Power Co.,* 179 N.C. 18, 101 S.E. 593; *Hilton Lumber Co. v. A. C. L. R. R.,* 141 N.C. 171, 53 S.E. 823; G.S. 62-70.

It is said in *Brown v. Penn. Public Utilities Comm.,* 153 Pa. Super. 58, 31 A. 2d 435, "The charging of different rates for service rendered under varying conditions and circumstances is not unlawful." It is likewise said in *Ford v. Rio Grande Valley Gas Co.,* 141 Tex. Rep. 525, 174 S.W. 2d 379, "Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material . . . factor. *American Aniline Products v. Lockhaven,* 288 Pa. 420, 135 A. 726, 50 A.L.R. 121. Quantity used is an important one."

III.

The protestants contend that the Commission committed error when it refused to admit evidence of the rates charged by the Carolina Power and Light Company in eastern North Carolina when no evidence of relative cost conditions was offered.

The same question came before the Supreme Court of Appeals of Virginia when it considered the very rates at issue in this case. The Virginia Court said: The appellant ". . . charges . . . that the authorized rates are higher than those charged by the Potomac Electric Power Company for electric energy in the same area . . ." The Court then disposed of the charge in the following language: "No evidence was presented showing the cost conditions under which the Potomac Electric Power Company operates. Therefore, no proper comparison may here be made with its rates." *Bd. of Supervisors v. Virginia Electric & Power Co., supra.* The ruling of the Virginia Court is in accord with the decision of the Supreme Court of the United States in the case of *Smith v. Ames, supra.* The protestants' exceptions to the exclusion of the proffered testimony are overruled.

IV.

The protestants assign as error the action of the Commission in permitting Vepco to withdraw Schedule No. 18 which was filed in 1936 and which had been in effect until the order in the present proceeding was signed. This is the schedule under which most of the protestants had been purchasing electric energy and which contained no fuel clause. These protestants have no vested right in a schedule approved by the Commission. Whether a utility will be permitted to withdraw an existing schedule of rates is a matter for the determination of the Commission. Once the Commission determined and held that Vepco was entitled to the increase requested, it was then incumbent upon the Commission to approve schedules that in its opinion would be fair and equitable as between the established classifications of customers to be served. It clearly appears from the evidence in the hearing before the Commission that it would be unfair and an unwarranted discrimination to require Vepco to continue to serve some of these protesting municipalities under the old Schedule No. 18, which contained no fuel clause, and to require the other municipalities to acquire their electric needs under a schedule that is based on the present-day cost of generating electricity. This assignment of error is overruled.

V.

This assignment of error is directed to the action of the Commission in approving Rider G and including such approval in its order, when such rider was approved by the Commission after the formal hearing and without notice to counsel for the protesting municipalities.

It appears that during the hearing, one or more members of the Commission inquired of one of Vepco's witnesses as to how a municipality

could furnish energy to an industrial user should the municipality acquire one that was entitled to purchase electricity under Schedule No. 11. The witness said that he would have to confer with the officials of the company. Thereafter, on 6 March, 1954, a member of Vepco's counsel wrote the Chairman of the Commission and suggested that the question raised in the hearing as to the possibility of a municipality being able to purchase from the company for resale to a large industrial customer, which, if it purchased it from the company, would be entitled to receive service under the proposed Schedule No. 11, might be disposed of by including in the order of the Commission a provision like the following: "Provided, however, that if any customer which, if it purchased energy from the Company, would be entitled to service under Schedule No. 11 as hereby approved hereafter desires to purchase energy from any municipality to which the Company sells energy at wholesale for resale, the Company shall file with the Commission a new rate schedule which will provide that the Company will sell to such municipality, at a delivery point to be designated by the municipality, the energy which it resells to each such customer pursuant to rates not in excess of the rates at the time in effect under the Company's Schedule No. 11."

The Commission, after receipt of the above letter, requested a conference with representatives of Vepco. This conference, according to the record, was held on 9 March, 1954, and related only to the single question as to whether Schedule No. 11 would be made available to any municipality which might obtain a large industry that would be eligible for service under the schedule. As a result of the conference, Rider G was approved and included in the order of the Commission. This rider provides that if any industrial customer locates within any municipality purchasing power from Vepco for resale, and if such customer would be entitled to receive service from Vepco under its rate Schedule No. 11, the company will construct all necessary facilities (up to the delivery point selected by the municipality) to serve such customer, including transforming substations if needed. In addition thereto, it is provided that Vepco will meter the municipality separately for its purchases for normal resale purposes, and under Schedule No. 11 or its equivalent, for resale to its industrial customers. The rider further provides that the municipality will be free to serve such customers under any rate it may desire to put into effect.

The statute with respect to hearings before the Commission, G.S. 62-23, reads as follows: "All hearings before the Commission or its examiners shall be public, and shall be conducted in accordance with such general rules and regulations as the Commission may prescribe. A full and complete record shall be kept of all proceedings had before

the Commission or its examiners, on any formal hearing, and all testimony shall be taken by a reporter appointed by the Commission. . . ."

At the informal conference about which the protestants now complain, it is not contended that the testimony of any witness was taken. No record of what was said in the conference was made.

The protestants devote a substantial part of their brief in an attempt to show that the order of the Commission should be reversed on account of this conference. Numerous cases are cited; however, in our opinion all of them are distinguishable and not controlling on the facts disclosed on the present record. It is not contended that the rates in any of the proposed schedules were changed in any respect as a result of this conference.

We concede that it was unfortunate that counsel for the protestants were not notified of the requested conference and its purpose, thereby giving them an opportunity to be present if they so desired. Unquestionably, this was an unintentional oversight. Even so, we do not construe the evidence as to what took place at the conference to constitute a formal hearing within the meaning of G.S. 62-23, or that what was done invalidates the order of the Commission with respect thereto. In the case of *Louisville N. R. Co. v. Sloss-Sheffield Co.*, 269 U.S. 217, 70 L. Ed. 242, the identical question now before us was considered. *Justice Brandeis*, speaking for the Court, said: "The Commission, like a court, may, upon its own motion or upon request, correct any order still under its control without notice to a party who cannot possibly suffer by the modification made."

At the time of the consideration of the protestants' petition to rehear this matter, counsel for the protestants vigorously condemned the Commission for what it had done and insisted that the rights of the protestants had been prejudiced thereby. Whereupon, Vepco offered to withdraw Rider G, and counsel for the protesting municipalities refused the offer. The Chairman of the Commission then inquired of counsel for the protestants as to whether he would rather have the rider left in the order or taken out, and counsel replied: "I don't think it matters—I think it is a matter the Commission has the privilege of putting in and we don't think it will benefit us, but we are not going to say whether we want it in or not."

In our opinion, no prejudicial error has been shown under this assignment of error. Any municipality served under Vepco's Schedules Nos. 9 or 10, if it gets a large industrial user which is eligible to purchase electricity under Schedule No. 11, may buy the electric energy for such industry or it may let the industry be served direct by Vepco. Furthermore, under Rider G, if the municipality elects to purchase the power it will be free to make its own contract with the industrial user as to

what price it will pay the municipality for such power. No municipality will be bound to take any current under Rider G. It is purely an optional arrangement, worked out and adopted as a result of inquiries made by one or more members of the Commission during the hearing, and is clearly intended to be a concession to the protestants.

It is regrettable that a controversy of this character should have arisen in this important proceeding. However, when counsel for the protestants refused to consent to the withdrawal of the rider complained of when counsel for Vepco consented that it might be withdrawn, and further refused to tell the Commission whether the protestants wanted the rider left in or taken out of the order, the protestants have no ground for complaint because it was retained.

VI.

The protestants insist that Rider G purports to fix the rate at which the municipality would be required to sell electricity to an industrial customer, in violation of G.S. 62-30 (3). The rider contains no such provision, but, on the contrary, expressly states that the municipality shall be free to contract with respect to the price it will require its industrial customer to pay when the electric energy is purchased pursuant to the terms of the rider.

VII.

It is contended that the Commission was in error when it received evidence as to profits realized by the protesting municipal corporations from the resale of electricity purchased from Vepco.

We think this evidence has been made competent by statute. G.S. 62-18 reads in pertinent part as follows: "All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be made a part of the record in the case by definite reference thereto at the hearing." G.S. 62-98 provides, "Every municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity, or purchasing same for distribution and resale, . . . shall make an annual report to the Commission, verified by the oath of the general manager or superintendent thereof, on the same blanks as now provided for reports of privately owned utilities, giving the same information as required of such utilities."

The evidence offered by Vepco with respect to the profits of several of the protesting municipalities, realized from the resale of electricity purchased from Vepco, consisted of copies of the annual reports of these municipalities filed with the Commission pursuant to the requirements

of G.S. 62-98. They were offered in evidence as exhibits and made a part of the record as authorized by G.S. 62-18.

It is true this evidence could have no bearing on whether or not Vepco should have the increase it requested. But, on the question as to whether the proposed schedules were fair and equitable as between groups or classifications to be served under such schedules, we think these reports were properly admitted. For example, Exhibit No. 48 in the hearing before the Commission is the annual report of the Town of Edenton filed with the Commission for the year ending 30 June, 1952. This report shows that Edenton for that year purchased from Vepco 6,478,000 kwh for $71,760.67. According to this report, the Town of Edenton used 470,776 kwh for lighting its streets and other municipal purposes, and resold the remainder of the electricity to its customers for a gross amount of $173,512.52. The operating and distributing costs are not given in the report. Exhibit No. 53 is the annual report of Elizabeth City for the year ending 30 June, 1952, and shows that the City purchased from Vepco 28,267,200 kwh for $305,912.97; it used for municipal purposes 1,433,250 kwh and resold the remainder to its customers for the gross amount of $621,529.00. After deducting operating expenses and paying $18,294.00 on long-term indebtedness, it had a net profit of $192,502.75. Likewise, Exhibit No. 57 is the annual report of the Town of Hertford for the year ending 30 June, 1952, and shows that the Town purchased 2,630,400 kwh from Vepco for $28,409.80. It used for municipal purposes 255,250 kwh and resold the remainder to its customers for $77,305.81. After deducting operating expenses and paying $3,408.59 interest on long-term indebtedness and $5,000.00 on debt retirement, the Town had a net profit of $20,466.52.

It appears from the evidence that under Schedules Nos. 9 and 10, now in effect, Elizabeth City will receive a small reduction in its rates amounting to $1,258.50 per year, while the other seven protesting municipalities will have a total increase of $23,482.00 per year. It is apparent from the evidence that this increase is largely due to the fact that all of these protesting municipalities except Edenton, which will have an increase of only $700.00 per year, have been purchasing their electric energy from Vepco under Schedule No. 18, filed in 1936, which had no fuel clause. Under Schedule No. 11, Halifax Paper Corporation will get a decrease of approximately $42,000.00 annually. However, that corporation, like Elizabeth City, had been purchasing electric energy from Vepco under a contract that contained a fuel clause.

The statutes, G.S. 62-26.10 and 62-123, make the rates fixed by the Commission not only *prima facie* evidence of their validity, but that they are just and reasonable, *Utilities Commission v. Ray, supra; Utilities Commission v. Coach Co., supra,* and we think the pertinent

findings by the Commission are supported by competent, material and substantial evidence. Therefore, it is our conclusion and we hold that the evidence discloses a substantial difference in the condition of the groups to be served under the respective schedules approved by the Commission. We further hold that no discrimination has been shown to exist as between the groups served under the respective classifications that would justify this Court in reversing the court below.

The judgment of the court below is

Affirmed.

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LUCY SMITH v. E. D. BUIE.

(Filed 14 December, 1955.)

**1. Negligence § 19c—**

Nonsuit on the ground of contributory negligence at the close of plaintiff's evidence is proper only when plaintiff's own evidence, taken in the light most favorable to her, establishes this defense so clearly that no other reasonable inference or conclusion can be drawn therefrom.

**2. Automobiles § 17—**

In the absence of anything which gives, or in the exercise of due care should give, notice to the contrary, a motorist traveling along a dominant highway may assume, and act upon the assumption, even to the last moment, that the operator of a vehicle along the servient highway will stop before entering the intersection with the dominant highway.

**3. Same: Automobiles § 42g—Evidence held not to show contributory negligence as a matter of law on part of plaintiff in failing to see that motorist along servient highway would not stop.**

Plaintiff testified that she saw defendant's vehicle approaching along the servient highway, traveling at a speed of 30 to 35 miles per hour, when defendant's car was approximately a half block away and farther from the intersection than plaintiff's car, and that plaintiff did not thereafter watch for defendant's car or see it until after she had entered the intersection. The evidence further tended to show that defendant could have stopped his vehicle, and there was no evidence as to what extent plaintiff could have seen defendant's car as it proceeded toward the intersection or that defendant continued into the intersection at the same speed. *Held:* The evidence does not compel the conclusion that plaintiff saw, or by the exercise of reasonable care should have seen, that defendant was not going to stop at a time when plaintiff's position was such that she could have avoided the collision, and therefore nonsuit on the ground of contributory negligence is error.

**4. Automobiles § 17: Municipal Corporations § 25b—**

Testimony to the effect that at an intersection within a municipality, one street was a through street and the other a cross street on which a stop sign

was erected, nothing else appearing, is sufficient to warrant a finding that the municipal authorities had caused the stop sign to be placed on the cross street as authorized by statute. G.S. 20-158 (a).

DENNY, J., dissents.

PARKER, J., dissenting.

APPEAL by plaintiff from *Sharp, Special Judge,* March, 1955, Civil Term of HOKE.

Civil action to recover damages to person and property growing out of a collision that occurred 1 December, 1953, about noon, within the intersection of Magnolia and Edinborough Streets in Raeford, North Carolina, between a Ford car, operated by plaintiff, and a Buick car, owned and operated by defendant.

The appeal is from a judgment of involuntary nonsuit, entered at the close of plaintiff's evidence.

Magnolia Street runs north-south. Edinborough Street runs east-west. Plaintiff was driving north on Magnolia Street. Defendant was driving west on Edinborough Street.

Plaintiff offered evidence tending to show the following:

1. Magnolia Street was a *through* street. Edinborough Street was a *cross* street. There was a stop sign at the intersection. It was on Edinborough Street, to the right of a driver going west thereon towards the intersection.

2. The portion of Edinborough Street east of Magnolia Street was wider than the portion thereof west of Magnolia Street. A person driving west on Edinborough Street had to bear *to the left* to cross said intersection and enter the portion of Edinborough Street to the west of Magnolia Street.

3. In traveling north on Magnolia Street, plaintiff stopped some 225 feet south of said intersection, at a railroad crossing. She then proceeded north, at a speed of approximately 20 miles per hour. Approximately half way between the place where she had stopped and said intersection, she observed defendant's car. She estimated its speed at 30 to 35 miles per hour. Defendant's car was then farther from said intersection than plaintiff's car, defendant's car being approximately "half the length of the block" from said intersection.

4. Plaintiff did not notice or watch for defendant's car as it proceeded towards the intersection. She drove on into said intersection, assuming defendant would stop in obedience to the stop sign. Plaintiff testified: "After I had entered the intersection I observed the car was not stopping at the stop sign, and the next thing I knew I was struck from the right side of my car" by defendant's car.

5. Defendant entered said intersection without stopping. In response to an inquiry by an investigating officer, defendant stated that "He saw her—that he had time to stop and could have stopped, and he had his mind on something so strong that he wasn't thinking what he was doing."

6. The left front of defendant's car was damaged. The right front of plaintiff's car was damaged.

Evidence as to the extent of personal injuries and property damages, irrelevant on this appeal, is omitted.

Upon appeal, plaintiff assigns as error the entry of judgment of involuntary nonsuit.

*H. D. Harrison, Jr., for plaintiff, appellant.*

*Nance & Barrington for defendant, appellee.*

BOBBITT, J. Does plaintiff's evidence, taken in the light most favorable to her, so clearly establish contributory negligence that no other reasonable inference or conclusion can be drawn therefrom? See *Horton v. Peterson,* 238 N.C. 446, 78 S.E. 2d 181. In his brief, defendant poses this question as determinative.

The relative rights and duties of motorists approaching an intersection, one on a dominant street or highway and the other on a servient street or highway, are fully explained by *Barnhill, C. J., Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683. In that case, upon which defendant places chief reliance, it was held that the issue as to whether the driver on the dominant street was contributorily negligent, was properly submitted for jury determination. There the driver on the dominant street testified that he did not look either to the right or to the left as he approached the intersection. Even so, he was chargeable with notice of what he would have seen had he exercised due care to keep a proper lookout. There was evidence that the driver on the servient street "was going unusually fast . . . was going too fast to stop . . . The speed was from 50 to 60 m.p.h." On the other hand, there was evidence that the car on the servient street was traveling at a speed of only 25 to 30 miles per hour. Upon this conflicting evidence, whether the driver on the dominant street was put on notice that the driver on the servient street would not yield the right of way was held an issue for jury determination.

"It is established by our decisions that where a highway is designated as a main traveled or dominant highway by the erection of stop signs at the entrances thereto from intersecting servient highways, as prescribed by G.S. 20-158 (a), the operator of a motor vehicle traveling upon such main traveled or dominant highway and approaching an

intersecting servient highway is under no duty to anticipate that the operator of a motor vehicle approaching on an intersecting servient highway will fail to stop as required by the statute, and, in the absence of anything which gives, or in the exercise of due care should give, notice to the contrary, the driver on the dominant highway is entitled to assume and to act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will act in obedience to the statute and stop before entering the dominant highway. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17; *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919." *Johnson, J.*, in *Caughron v. Walker, ante*, 153, 90 S.E. 2d 305.

Here plaintiff observed defendant's car on Edinborough Street, going west, at a speed of 30 to 35 miles per hour. It was then approximately "half the length of the block" from the intersection. She did not observe it again until she entered the intersection. She then observed that defendant's car was not stopping at the stop sign.

To what extent, if any, plaintiff could have seen defendant's car as it proceeded from its position when plaintiff first observed it towards the intersection does not appear. Nor does it appear that defendant continued at the same speed as he approached the stop sign and intersection.

There is no evidence that defendant could not have stopped in obedience to the stop sign. Indeed, defendant's own statement is to the effect that he could have done so. If this is accepted, it can hardly be said that plaintiff was put on notice that defendant would not stop when by his own statement he could have done so. The evidence of plaintiff, upon which defendant places great stress, is simply to the effect that plaintiff did not watch for or notice defendant's car from the time she first observed it until she saw it overrunning the stop sign and entering the intersection.

Mindful that the burden of proof as to contributory negligence is on defendant, the evidence here, in our opinion, does not compel the conclusion that plaintiff saw, or by the exercise of reasonable care should have seen, that defendant was not going to stop at the stop sign at a time when her position was such that she could have avoided the collision.

Defendant contends that under G.S. 20-155 (a) he had the right of way, since he approached the intersection from plaintiff's right. The basis of this contention is that there is neither allegation nor proof of an ordinance of the Town of Raeford relating to the erection of a stop sign against traffic going west on Edinborough Street.

Under G.S. 20-169, local authorities, *by ordinance*, may provide for the regulation of traffic within a municipality by means of automatic

signal control devices. Before legal rights may be predicated thereon, such an ordinance must be alleged and established by proper evidence. *Stewart v. Cab Co.*, 225 N.C. 654, 36 S.E. 2d 256; *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25. The State statute, G.S. 20-158 (c), relates to such devices when installed outside of the corporate limits of a municipality.

Here we are dealing with a *stop sign*, not an automatic signal control device. The State statute applicable to *stop signs*, G.S. 20-158 (a), provides, in part, that "local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, . . ." Such action by the local authorities makes applicable the provisions of this State statute.

Where two streets of a municipality intersect, testimony identifying one as the through street and the other as the cross street, on which there is a stop sign to the right of a driver thereon approaching the intersection, connotes that the streets have been so designated and the sign erected by action of the municipal authorities. Nothing else appearing, the evidence here was sufficient to warrant a finding that the municipal authorities had designated Magnolia Street as a through street and had caused the stop sign to be placed on Edinborough Street at its entrance to Magnolia Street. See *Anderson v. Office Supplies*, 234 N.C. 142, 66 S.E. 2d 677; *Johnson v. Bell*, 234 N.C. 522, 67 S.E. 2d 658.

Admittedly, plaintiff's son, Eugene P. Smith, is the owner of the Ford car plaintiff was driving. Any cause of action to recover on account of damage thereto vests in him, not in plaintiff. Yet Eugene P. Smith is not a party to this action.

Under the evidence presented, we reach the conclusion that the issues of negligence and of contributory negligence were for jury determination. Hence, the judgment of involuntary nonsuit is

Reversed.

DENNY, J., dissents.

PARKER, J., dissenting: The plaintiff alleged in her complaint that, as she approached the intersection of Edinborough and Magnolia Streets, she "observed defendant's vehicle travelling west on Edinborough Street at a high rate of speed." On direct examination she testified that, when she first saw defendant's car, it was going at a rapid rate of speed; that she expected it to stop at the stop sign; that when she entered the intersection she saw it was not stopping at the stop sign.

On cross-examination she testified that, when she saw defendant's car coming at a high rate of speed, the car was a city block or less from the intersection, and she would say it was going 30 to 35 miles an hour: that she was closer to the intersection than the defendant was.

This is a part of plaintiff's testimony on cross-examination:

"Q You saw him coming at a high rate of speed?

A Yes, sir.

Q What did you do when you saw a car approaching the same intersection at a high rate of speed?

A I naturally expected the car to stop and, knowing there was a stop sign, I didn't see any sense in keeping on looking. I continued on my way. I did slow down but I did not stop. My speed was within 15 to 20 miles."

This is another part of plaintiff's testimony on cross-examination:

"The car I saw coming was going at a rapid rate of speed.

Q By rapid do you mean around 35 to 40 miles an hour?

A It was rapid; I don't know. There was a stop sign and I expected him to stop.

Q Answer my question! Would you say it was going as fast as 35 to 40 miles per hour?

A I would say 30 to 35.

Q As you went on towards the intersection you kept watching it?

A I noticed the car; but I thought he was stopping, and knowing the stop signs were there, I didn't see any sense of keeping on watching the car.

Q You mean, after having seen the car approaching at a high rate of speed, you didn't see any sense in looking to see if it stopped or not?

A What good would it have done?

Q Is that what you said, you didn't see any sense in noticing that car any more, that is right; that is what you said, isn't it?

A Do I have to answer that question right on?

COURT: Just answer counsel's questions.

Q That is what you said, isn't it?

A That is right.

Q And you drove on into that intersection knowing that it was an intersection, didn't you?

A It was a cross street.

Q And you drove on in there knowing there was a car approaching from your right at a rapid rate of speed, didn't you; that is right isn't it?

A Yes.

Q And you and that car got into that intersection about the same time, didn't you?

A We met there."

There is plenary evidence tending to show that the defendant is guilty of actionable negligence.

However, the plaintiff, who was the motorist on the dominant highway, had actual knowledge that the defendant, who was the motorist on the servient highway, was approaching this intersection a city block or less away at a speed of 30 to 35 miles an hour. Such knowledge on her part, in my opinion, was sufficient to put a person of ordinary prudence on notice that the defendant was either unaware of her presence, or did not intend to, or could not stop in time to yield the right of way to the plaintiff on the dominant highway. Under such circumstances plaintiff had no right to assume that the defendant would stop at the stop sign, and yield her the right-of-way. *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919; *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707.

Yet, the plaintiff with such actual knowledge of the defendant's speed within a city block or less of the intersection gave this testimony as to her actions: "I noticed the car; but I thought he was stopping, and knowing the stop signs were there, I didn't see any sense of keeping on watching the car." When the plaintiff saw the defendant's car, she was far enough away from the intersection at her speed to stop. In my opinion, the plaintiff's evidence establishes contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom, and the defendant is entitled to have his judgment of nonsuit sustained. *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239.

*Marshburn v. Patterson, supra,* is distinguishable. In that case Marshburn, without looking to the right or to the left, drove into the intersection. He did not see the Eddleman vehicle prior to the collision. The Court said: "Thus the evidence is conflicting as to the condition existing at the time, *particularly in respect to whether the operator of the Marshburn automobile was put on notice that Patterson would not yield the right-of-way.* Hence, it was a question for the jury." (Italics mine.) Patterson was driving the Eddleman automobile.

The plaintiff has proved herself out of court. She knowingly "took a chance and lost." *Stamey v. R. R.,* 208 N.C. 668, 182 S.E. 130.

I vote to affirm.

STATE v. C. W. JACKSON.

(Filed 14 December, 1955.)

**1. Bills and Notes § 37—**

If at the time of delivering a cheque to the payee the maker knows that he has neither funds nor credit to pay the cheque upon presentation, the fact that the payee agrees that the cheque would not be presented for collection, would not constitute a defense, since the offense defined by G.S. 14-107 relates to nuisance resulting to trade and commerce from worthless cheques and not to losses occasioned to payees.

**2. Same—**

The giving of a worthless cheque in contravention of G.S. 14-107 is a crime regardless of the consent of anyone.

**3. Criminal Law § 6a—**

Where the offense is a crime regardless of the consent of anyone, the defense of entrapment must be predicated upon acts of officers or agents of the government or state in inciting, directly or indirectly, the commission of the offense, and it is not entrapment when a person who is not connected with the government or state induces defendant to commit the crime.

**4. Criminal Law § 56: Indictment and Warrant § 11—**

Objection that the warrant charged the offense disjunctively and alternately must be raised by motion to quash before entering a general plea, and it cannot be asserted by motion in arrest of judgment.

**5. Bills and Notes § 38: Indictment and Warrant § 11—**

A warrant charging that defendant, trading under a trade name, did, on a specified date, unlawfully and willfully issue a cheque knowing at the time that the named defendant, or the named defendant trading under the designated trade name, or the designated firm, did not have sufficient funds or credit to pay the cheque upon presentation, is sufficient and is not objectionable on the ground that the offense was charged disjunctively or alternately. G.S. 14-107.

APPEAL by defendant from *Phillips, J.*, June Mixed Term 1955 of DAVIDSON.

Criminal prosecution on a warrant for making, uttering, issuing and delivering a worthless cheque heard, on appeal from a judgment imposed on a conviction in the Recorder's Court of Thomasville, upon a plea of Not Guilty at the May Mixed Term 1955 of Davidson County Superior Court by Whitmire, Special Judge, and a jury.

The warrant charged the defendant, trading as Chair City Motors, on or about 6 April 1954, with unlawfully and wilfully making, uttering, issuing and delivering to General Finance Company a cheque in the sum of $8,260.00 drawn on the First National Bank of Thomasville, North Carolina, he knowing at the time of the making, issuing and

delivering such cheque that he, C. W. Jackson, or C. W. Jackson, trading as Chair City Motors, or Chair City Motors, did not have sufficient funds in, or credit with such bank, to pay the same upon presentation.

The warrant in this case was issued upon the affidavit of the complainant George L. Huntley, President of General Finance Company.

C. W. Jackson owned, and operated an automobile business under the trade name of Chair City Motors. General Finance Company handled one floor plan for the defendant: that is a plan where a finance company handles paper for automobile dealers.

On 6 April 1954 the defendant owed General Finance Company $8,260.00 on 11 automobiles. General Finance Company had chattel mortgages on and titles to these automobiles as security for this account. On that day the defendant came into the office of the Finance Company, and gave to it his cheque in the sum of $8,260.00, drawn on the First National Bank of Thomasville, North Carolina, in full payment of his account. The cheque was dated 6 April 1954, and was signed Chair City Motors, and just beneath Chair City Motors, C. W. Jackson. Upon receipt of the cheque General Finance Company gave the defendant the chattel mortgages and titles, marking them paid.

On 7 April 1954, defendant's cheque for $8,260.00 was presented to the First National Bank of Thomasville, North Carolina, for payment, and the bank did not pay the cheque, for the reason that the defendant and Chair City Motors had neither sufficient funds in, or credit with, said bank to pay the cheque when it was presented.

The defendant offered evidence tending to show that George L. Huntley, President of General Finance Company, by persuasion, trickery and fraud induced him to make, utter and deliver this cheque for $8,260.00, Huntley knowing at the time that he had neither funds in, or credit with, the bank on which it was drawn, to pay it on presentation, and the defendant contends that Huntley's purpose was to prosecute him for giving a worthless cheque. The defendant further offered evidence tending to show that Huntley told him if he gave the cheque, it would not be put in for collection, and that he, Huntley, would take care of it.

The State's evidence tended to show that Huntley did not induce the defendant by persuasion, trickery or fraud to make, utter and deliver the cheque to the Finance Company, did not tell the defendant that the cheque would not be put in for collection, and did not say he would take care of it.

Jury Verdict: Guilty as charged.

After rendition of the verdict the defendant moved that prayer for judgment be continued until the June Mixed Term 1955 of Davidson County Superior Court. The motion was allowed.

At the June Mixed Term 1955 of Court Phillips, J., imposed sentence of imprisonment.

From the judgment imposed the defendant appeals, assigning error.

*William B. Rodman, Jr., Attorney General, T. W. Bruton, Assistant Attorney General, and Harvey W. Marcus, Member of Staff, for the State.*

*C. T. Kennedy and W. H. Steed for Defendant, Appellant.*

PARKER, J. The defendant assigns as error the refusal of the Court to give his prayer for instructions No. 2 to the effect that, if the jury was satisfied from the evidence that the defendant delivered the cheque to the General Finance Company under an agreement with Huntley, its President, that the cheque would not be presented for collection, that this would not be a placing of the cheque in circulation, and the jury should return a verdict of Not Guilty.

The defendant testified: "I didn't have any reserve at the First National Bank. I didn't do any business there." According to the defendant's testimony he wrote the $8,260.00 cheque, delivered it to General Finance Company and knew at the time of making and delivery of this cheque that he had neither funds on deposit in, or credit with, the First National Bank of Thomasville, North Carolina, to pay this cheque when presented there for payment. The State's evidence tended to show that on 6 April 1954 the defendant had on deposit in the First National Bank of Thomasville, North Carolina, the sum of $48.99, and on 7 April 1954 the sum of $328.99. Such being the case, if he had an understanding with Huntley, as he contends, this would not entitle him to a verdict of Not Guilty. *S. v. Levy,* 220 N.C. 812, 18 S.E. 2d 355, is directly in point against the defendant's contention.

The nuisance to trade and commerce of worthless cheques, condemned by G.S. 14-107, is "the giving of a worthless check, and its consequent disturbance of business integrity." *S. v. White,* 230 N.C. 513, 53 S.E. 2d 436.

The defendant contends that he was entrapped by George L. Huntley, President of General Finance Company, into making, uttering, issuing and delivering this $8,260.00 cheque to General Finance Company, and assigns as error the refusal of the Court to give to the jury his prayer for special instructions that the acts and language of Huntley constituted entrapment, and was a complete defense.

The making, uttering, issuing and delivering of a worthless cheque is a crime regardless of the consent of any one. This is not a case where the criminality of the act is affected by a question of consent, as for instance, larceny (*S. v. Adams,* 115 N.C. 775, 20 S.E. 722), or an

assault on the person (*S. v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191; *S. v. Nelson,* 232 N.C. 602, 61 S.E. 2d 626). See Annos.: 18 A.L.R. 146; 66 A.L.R. 473; 86 A.L.R. 263.

We are squarely faced with this question for decision: Is the defense of entrapment available to the defendant in a worthless cheque prosecution for the reason that the defendant allegedly was induced to make, utter, issue and deliver this cheque by a third person unconnected with the State?

This Court said in *S. v. Love,* 229 N.C. 99, 101, 47 S.E. 2d 712: "Our own Court has not found it exigent in any cited case we can find to give a formal definition of the defense" (entrapment) "as presented here." In this case the Court quotes this excerpt from *Sorrells v. U. S.,* 287 U.S. 435, 77 L. Ed. 413, 86 A.L.R. 249: "Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." This excerpt is not taken from the opinion of the Court by *Hughes, C. J.,* but from a separate opinion by *Roberts, J.,* concurred in by *Brandeis* and *Stone, JJ.* In the *Love case* our Court further says: "The Federal conception of entrapment is not necessarily binding upon us, for the question is much broader than the cited application in the *Sorrells case,* from which the appellants quote." We have examined the appellants' brief, and they have not quoted from the *Sorrells case* the part this Court quoted, nor does it bear any relation to it.

It seems to be the Federal rule that entrapment exists only when the government agents induce and originate the criminal intent of a defendant. *Sorrells v. U. S., supra; U. S. v. Lidenfield,* 142 F. 2d 829 (cases cited); *U. S. v. Sherman* (1952), 200 F. 2d 880.

In *U. S. v. Sherman, supra,* the Court, after stating that the U. S. Supreme Court has not said anything since then to qualify what it said in *Sorrells v. U. S., supra,* states: "In *Sorrells v. U. S., supra,* all the Court agreed as to the meaning of inducement: it was that someone employed for the purpose by the prosecution had induced the accused to commit the offense charged, which he would not have otherwise committed."

In *Polski v. U. S.,* 33 F. 2d 686, the Court said: "The very heart of the doctrine of entrapment is that the government itself has brought about the crime."

The Supreme Court of Appeals of Virginia has approved the definition of entrapment as given in *Sorrells v. U. S., supra,* in *Ossen v. Com.,* 187 Va. 902, 48 S.E. 2d 204; *Falden v. Com.,* 167 Va. 549, 189 S.E. 329, which definition was set forth in our case of *S. v. Love, supra,* and is quoted before in this opinion.

In *S. v. Del Bianco*, 96 N.H. 436, 78 A. 2d 519, the Court said: "If officers of the law induce an innocent person to instigate a crime which he would not otherwise commit, this is entrapment and may constitute a defense to the crime charged. *Sorrells v. U. S.*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413."

In *People v. Finkelstin* (Cal. App.), 220 P. 2d 934, 940, it is said: "Entrapment exists only where the official has conceived and planned the crime for one who would not have done it but for the allurement, deception or persuasion of the officer." To the same effect, *People v. Nordeste* (Cal. App.), 270 P. 2d 530.

Where the offense charged is a crime regardless of the consent of any one, it seems that an essential element of entrapment is that the acts charged as crimes were incited directly or indirectly by officers or agents of the government or state: that it is not entrapment that one has been induced by some other than a person acting for the government or state to commit a crime. That is certainly the rule in the Federal Courts. In addition to the State cases, cited above, we cite the following cases in support: *People v. Carlton*, 83 Cal. App. 2d 475, 189 P. 2d 299; *Lee v. State* (Crim. Court of Oklahoma), 92 P. 2d 621; *Peery v. State* (Tex. Cr. R.), 134 S.W. 2d 283; *S. v. Berry*, 200 Wash. 495, 93 P. 2d 782, 792; Black's Law Dictionary, 4th Ed., Definition of Entrapment. See also Words and Phrases, Per. Ed., Vol. 14A, Entrapment, where a long list of cases of like import is given, and *S. v. Love, supra.*

It would be unconscionable and contrary to public policy and good morals to punish a man for the commission of an offense of which he would not have been guilty, in thought or deed, and would not have committed, if he had not been entrapped into committing the crime by officers or agents of the state or government, which is prosecuting him. On the other hand, to hold that entrapment is a defense under such circumstances when the inducement comes from a third party unconnected with the State, would gravely imperil the proper enforcement of the criminal law. For instance, if two defendants committed burglary, and one could satisfy the jury, that he was entrapped into committing the crime by his codefendant, he would go scot free.

In the case at bar the State was the prosecutor. Huntley had no connection with the State. The record is devoid of any evidence tending to establish entrapment of the defendant.

The defendant assigns as error the overruling of his motion for arrest of judgment made at the May Term after the return of the verdict of guilty, and the overruling of a similar motion renewed at the June Term. The defendant's contention, as stated in his brief, is that he was charged disjunctively and alternately in the warrant in such a manner as to leave uncertain what is relied on as an accusation against him.

The defendant's motion for arrest of judgment on the ground specified by him comes too late. To raise the question for decision the defendant should have made a motion to quash before entering a general plea. *S. v. Puckett,* 211 N.C. 66, 189 S.E. 183; *S. v. Wilson,* 121 N.C. 650, 28 S.E. 416. In *S. v. Jones,* 242 N.C. 563, 89 S.E. 2d 129, we considered a bill of indictment allegedly in the alternative on a motion to quash, made before a general plea was entered.

There is no merit to this assignment of error, if a motion to quash had been timely entered. Chair City Motors was merely the defendant's trade name. The warrant charges the offense almost in the exact words of G.S. 14-107. In a prosecution under this statute the State must prove that the maker of the cheque had neither sufficient funds on deposit in, nor credit with, the bank on which the cheque was drawn to pay it on presentation. *S. v. Edwards,* 190 N.C. 322, 130 S.E. 10.

There is no variance between allegation and proof here, as the defendant contends.

We have discussed all the assignments of error brought forward and discussed in defendant's brief. All the assignments of error are overruled.

In the trial below we find

No error.

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JOHN TEEMAN DENNIS v. THE CITY OF ALBEMARLE, RAY SNUGGS, AND D. A. HOLBROOK, CONTRACTOR.

(Filed 14 December, 1955.)

**1. Appeal and Error § 51b—**

Only the decisions of our Supreme Court, as applied to the facts of specific cases, are to be regarded as authoritative in this jurisdiction.

**2. Negligence § 11—**

Whether inattention to a known danger, when caused by the momentary and involuntary diversion of plaintiff's attention, constitutes contributory negligence as a matter of law, is to be determined upon the circumstances of each particular case.

**3. Negligence § 19c—**

While diverting circumstances, in general or standing alone, will not ordinarily preclude nonsuit for plaintiff's failure to see and avoid a known danger, when, under all of the circumstances and conditions, diverse inferences may be drawn as to whether a reasonably prudent man, under similar circumstances, would have been advertent to the danger in time to have avoided the injury, the issue of contributory negligence is for the jury.

*Presley v. Allen & Co.*, 234 N.C. 181, and other cases, decided under the general rule, distinguished.

**4. Same—**

Nonsuit on the ground of contributory negligence is proper when, and only when, the undisputed evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.

ON rehearing.

The essential facts are stated in the original opinion, 242 N.C. 263, 87 S.E. 2d 561.

*C. M. Llewellyn, M. B. Sherrin, and Ann Llewellyn Green for plaintiff, appellee.*

*R. L. Smith & Son and Henry C. Doby, Jr., for defendant City of Albemarle, appellant.*

BOBBITT, J. In the original opinion, it is stated:

"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, in petition to rehear, insists that the fact that the momentary diversion of his attention was an involuntary response to the workman's call to him from the church steeple is irrelevant as a circumstance in his favor in determining what an ordinarily prudent person would have done under the same or similar circumstances; and that the original opinion is predicated upon general principles of law in conflict with our decisions.

The original opinion was not intended to overrule by implication the authority of earlier decisions of this Court. Nor do we think such intention can be reasonably inferred. Even so, since defendant apprehends that such was its effect, the petition to rehear was allowed solely

for the purpose of considering those North Carolina decisions cited by defendant as in conflict with our decision in this case.

In the outset, it should be noted that this Court did not predicate its decision on a single circumstance. As quoted above, decision was predicated on all circumstances taken together.

Moreover, the quotation from 65 C.J.S., Negligence sec. 120, patently a general statement, fully recognizes that "Regard must be had to the exigencies of the situation, and the circumstances of the particular occasion." Only the decisions of this Court, as applied to the facts of specific cases, are to be regarded as authoritative in this jurisdiction. Thus, the authority of the decision in this case is simply that under the facts here disclosed, the momentary and involuntary diversion of plaintiff's attention was properly considered by the jury, in conjunction with all other circumstances, in resolving the issue of plaintiff's alleged contributory negligence. It was not held, as defendant suggests, that diverting circumstances in general or standing alone are sufficient to negative contributory negligence. The nature of such diverting circumstances must be considered in relation to the entire circumstances of each particular case.

Judgment of involuntary nonsuit on the ground of contributory negligence should be granted when, and only when, the undisputed evidence, taken in the light most favorable to plaintiff, establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. This rule, repeatedly restated, is clear. Its application, at times, is difficult. Complete reconciliation of all the decided cases would tax the ingenuity of the most discriminating analyst.

Defendant cites *Cook v. Winston-Salem*, 241 N.C. 422, 85 S.E. 2d 696; *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589; *Welling v. Charlotte*, 241 N.C. 312, 85 S.E. 2d 379; *Waldrup v. Carver*, 240 N.C. 649, 83 S.E. 2d 663; *Price v. Monroe*, 234 N.C. 666, 68 S.E. 2d 283; *Gordon v. Sprott*, 231 N.C. 472, 57 S.E. 2d 785; *Deaton v. Elon College*, 226 N.C. 433, 38 S.E. 2d 561; *Benton v. Building Co.*, 223 N.C. 809, 28 S.E. 2d 491; *Morrison v. Cannon Mills Co.*, 223 N.C. 387, 26 S.E. 2d 857; *Houston v. Monroe*, 213 N.C. 788, 197 S.E. 571; *King v. Mills Co.*, 210 N.C. 204, 185 S.E. 647; *Scott v. Telegraph Co.*, 198 N.C. 795, 153 S.E. 413. Under the factual situations presented in each of these cases, wholly different from that here presented, this Court held that the undisputed evidence established contributory negligence as a matter of law. *Alford v. Washington*, 238 N.C. 694, 78 S.E. 2d 915, also cited, seems wholly irrelevant. Defendant cites another group of cases, to wit: *Dowdy v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Ingram v. Smoky Mountain Stages*, 225 N.C. 444, 35 S.E. 2d 337; *Sherlin v. R. R.*, 214

N.C. 222, 198 S.E. 640; *Redmon v. R. R.*, 195 N.C. 764, 143 S.E. 829. In each of these, this Court held that the undisputed evidence established contributory negligence as a matter of law; and further, in relation to the main question involved, that the evidence was insufficient to warrant submission of the issue of last clear chance. We have been unable to discover in any of these cases, nor has our attention been directed to, any feature relating to whether momentary and involuntary diversion of plaintiff's attention, on account of being personally accosted by a third party or otherwise, was of significance as a circumstance for consideration on the issue of contributory negligence.

We shall undertake to analyze briefly those cases *discussed* in defendant's petition to rehear and in brief on rehearing, to wit: *Presley v. Allen & Co.*, 234 N.C. 181, 66 S.E. 2d 789; *Lee v. R. R.*, 180 N.C. 413, 105 S.E. 15; *Rimmer v. R. R.*, 208 N.C. 198, 179 S.E. 753; *Pope v. R. R.*, 195 N.C. 67, 141 S.E. 350; *Eller v. R. R.*, 200 N.C. 527, 157 S.E. 800.

In *Presley v. Allen & Co., supra*, plaintiff was driving west on Main Street in Canton. The street was 40 to 50 feet wide. Some four feet north of the south curb, defendant construction company had dug a ditch for the purpose of laying underground telephone cables. Dirt and clay formed an embankment 18 to 24 inches high on the north side of the ditch. The portion of Main Street north of this ditch, some 30 to 35 feet in width, was left open for traffic. It had been raining all that day until shortly before plaintiff's mishap. Clay was scattered over the portion of the street then used for travel. The street was wet and slippery. Plaintiff had driven over this portion of Main Street earlier that day. He was fully aware of all existing conditions. In driving west on this occasion, plaintiff's car skidded; and the left front wheel went into the ditch.

The decision establishes that there was no evidence of actionable negligence on the part of defendant; but this Court said that, if negligence were conceded, plaintiff's contributory negligence would bar recovery because it was clear from the record "that the traveled portion of the street, parallel to and on the north side of the ditch, was amply wide for him, in the exercise of due care, to have remained out of slipping distance of the ditch."

The evidence disclosed that plaintiff stopped at a red light signal at the intersection of Main Street and Adams Street. A policeman, stationed at the intersection, motioned to plaintiff to proceed. Evidently, defendant regards this as an analogous diverting circumstance. The mishap occurred west of the intersection. The policeman's motion to plaintiff was treated as nothing more than a signal to plaintiff that he was granted leave to traverse the intersection.

The remaining four cases discussed by defendant are railroad crossing cases. In each, this Court held that the undisputed evidence established contributory negligence as a matter of law.

At a railroad crossing, where the view of the track is unobstructed, a pedestrian or motorist who goes upon the track, without first looking to ascertain that he can do so in safety, and is struck by a train, is barred by his contributory negligence from recovery against the railroad company. *Davidson v. R. R.*, 171 N.C. 634, 88 S.E. 759. This is the basis of decision in each of the railroad crossing cases cited in the preceding paragraph and in many others.

In *Lee v. R. R., supra,* plaintiff was struck by a train when attempting to walk across the track. He testified: "I could not see it for the smoke." The smoke was from another train that had just passed.

In *Rimmer v. R. R., supra,* the statement of facts includes the following: "It was misty or drizzling rain. Plaintiff's intestate, on foot, approached the crossing from the west. She had on a cloak, the top part of it being held over her head as a protection from the rain. 'Without being properly attentive to her safety, due to and on account of her attention being centered and directed to the traffic on and upon the said highway,' as alleged in the complaint, plaintiff's intestate walked or ran upon the tracks, in front of the approaching train, and was killed."

In *Pope v. R. R., supra,* plaintiff, without looking, walked upon the track directly in front of an approaching train.

In *Eller v. R. R., supra,* plaintiff drove his car upon the track directly in front of the approaching train.

These decisions hold: (1) In the *Lee case,* plaintiff's failure to ascertain that he could walk upon the track in safety was not excused because his ability to see was temporarily and totally obscured by the smoke; (2) In the *Rimmer case,* the failure of plaintiff's intestate to look was not excused because she had a cloak over her head to protect her from the rain or because her attention was concentrated on traffic on the highway; (3) In the *Pope case,* nothing appears that could reasonably be considered a diverting circumstance; (4) In the *Eller case,* plaintiff's failure to look was not excused because his attention was concentrated on persons and traffic on and near the crossing.

Implicit in these decisions is the settled rule, recently restated, that "where a railroad track crosses a public highway, though a traveler and the railroad have equal rights to cross, the traveler must yield the right of way to the railroad company in the ordinary course of its business." *Gray v. R. R.*, 243 N.C. 107, 89 S.E. 2d 807.

True, in the *Pope* and *Eller cases* there are general statements to the effect that, if the traveler does not look when his view is unobstructed and the approaching train is in plain view, his failure to look cannot

be excused by diverting circumstances other than such as may have been caused by the railroad company. Unquestionably, in the absence of unusual conditions, this is true. Certainly, this general rule was applicable to the cases cited. We do not now suggest that a person who enters upon a railroad crossing without looking to see what obviously can be seen will be excused simply because his attention is diverted or distracted by traffic or other conditions at such crossing not caused by the railroad company.

The facts of this case are clearly distinguishable from the railroad crossing cases. Here plaintiff was traveling on a public highway. True, he knew that defendant had constructed an overhead wire. It was a small wire. While he knew its general location, he did not know its height. It was not in plain view. Rather, it was difficult to see the portion thereof that crossed the highway. He looked, but did not see it. Whether, in the exercise of due care, he would have seen it if his attention had not been momentarily and involuntarily diverted by the workman's call from the church steeple, is a question on which diverse inferences may be drawn from the evidence. The fact that Greene saw the wire, sliding over the top of the main load of hay, and ducked, just in the nick of time, is a circumstance for consideration, but not conclusive as to whether plaintiff exercised due care to keep a proper lookout.

Under the circumstances the question here is not whether one who fails to look when he is under duty to do so is excused by a diverting circumstance. Rather, it is a question as to whether a person who is keeping a proper lookout is charged with contributory negligence as a matter of law because he is momentarily and involuntarily diverted. Indeed, it does not appear that plaintiff could have seen the wire at any time before he turned back and resumed looking straight ahead.

As stated by the presiding judge, defendant contended, bearing upon the contributory negligence issue, "that he (plaintiff) permitted himself to be diverted, his attention to be diverted, and was talking to someone else, . . ." In our view, the cause, character and duration of such diversion were properly regarded as circumstances for consideration by the jury, relevant upon the issue as to whether plaintiff, under the entire circumstances, exercised due care for his own safety.

On the sole question for which the rehearing was ordered, we do not find the decision in this case to be in conflict with the North Carolina decisions cited by defendant in petition to rehear and in brief on rehearing. Other aspects of the case are not now before us. Nor does the scope of rehearing extend to consideration of cases of other jurisdictions, either those cited in the original opinion or others cited in brief on rehearing. On this point, however, we would say that it was not intended, nor do we think it can reasonably be inferred, that the cases

from other jurisdictions referred to in the original opinion, are to be regarded as authoritative here in respect to the factual situations therein considered.

Accordingly, the petition to rehear is dismissed.

Petition dismissed.

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JOHNSON COTTON COMPANY, INC., v. O. T. HOBGOOD, LEVI E. MADDOX AND C. N. CASTLEBERRY, TRADING AS CENTRAL WAREHOUSES.

(Filed 14 December, 1955.)

**1. Registration § 2—**

The proper indexing and cross-indexing of instruments required to be registered is an essential part of their registration.

**2. Same—**

If the index and cross-index of an instrument contain matter sufficient to put a careful and prudent examiner upon inquiry, the record constitutes notice as to all matters which would have been discovered by a reasonable inquiry.

**3. Same: Chattel Mortgages and Conditional Sales § 9—**

The index and cross-index of the chattel mortgage in suit each referred to an erroneous page and book. Within two days the cross-index was corrected to show the proper page and book. *Held:* After the correction, a careful examiner, who failed to find the instrument from the direct index would examine the cross-index, which would have pointed out the instrument, and therefore, the registration was notice subsequent to the date of the correction of the cross-index.

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

APPEAL by plaintiff from *Morris, J.*, June Term, 1955, of HARNETT.

This is an action to recover from the defendants the sum of $981.44 alleged to be due the plaintiff by reason of the facts stipulated by the parties. The facts, summarily stated, are these:

1. That the plaintiff is a North Carolina corporation with its principal office in the town of Dunn in Harnett County, North Carolina.

2. That the defendants were on 1 September, 1952, and are now partners trading as Central Warehouses, operating Central Warehouses Nos. 1 and 2 in Lee County, North Carolina, for the sale of leaf tobacco at auction.

3. That on 15 May, 1952, Jim Goins, then a resident of Moore County, North Carolina, and residing upon the farm of one R. E. Bennett in Moore County as a tenant for the year 1952, executed and delivered to the plaintiff a note and chattel mortgage in the amount of

$1,025.00 for the purpose of securing a pre-existing indebtedness of $500.00 to the plaintiff, evidenced by a note dated 13 November, 1951, and a further pre-existing indebtedness of $400.00, evidenced by a note dated 27 December, 1951, and for advances to be made to the said Goins by plaintiff for the purpose of enabling the said Goins to make a crop for the year 1952.

4. That in the execution of said chattel mortgage the said Jim Goins conveyed a lien to the plaintiff upon one-half interest in all crops of every description grown by Jim Goins during the year 1952 upon the lands of R. E. Bennett in Moore County, North Carolina, which crops included tobacco sold in the Fall of 1952 as set out in paragraph six of the complaint, said tobacco being sold by the defendant for a total sum of $2,351.21.

5. That the said chattel mortgage was duly executed, acknowledged and probated and presented to the Register of Deeds of Moore County, North Carolina, on 23 May, 1952, for recordation.

6. That the chattel mortgage was thereafter, on 29 May, 1952, transcribed upon the records of the office of the Register of Deeds of Moore County, in Chattel Mortgage Book 115, page 70 thereof. On the grantor side of the index, the respective parties were correctly entered, but the index as to book and page was entered as being in Book 102, page 493, which book contains no such numbered page. Likewise, on the grantee side of the index, called the cross-index, the respective parties were accurately and properly entered, but the reference as to where the instrument was recorded was also given as Book 102, page 493. That the cross-index was corrected in May 1952 and the correct reference as to where the instrument was registered was inserted, to wit: Book 115, page 70. The direct, or grantor index, was not corrected until 26 November, 1954, and after the institution of this action.

The court found facts in accord with the stipulation and also that all the tobacco in controversy in this action was grown upon the lands referred to in the chattel mortgage and was sold at Central Warehouses Nos. 1 and 2, operated by the defendants, between 4 September and 30 October, 1952.

Upon the facts found, the court held as a matter of law that the chattel mortgage was not recorded as required by law at the time of the purchase of any of the tobacco, by the defendants herein, and that said instrument did not constitute any notice to the defendants of plaintiff's rights, if any, in said instrument. Accordingly, judgment was entered denying the plaintiff the relief sought. Plaintiff appeals, assigning error.

*I. R. Williams for appellant.*

*D. B. Teague for appellees.*

DENNY, J. This appeal presents for determination whether the indexing and cross-indexing of the chattel mortgage, in the manner set forth above, constituted a sufficient compliance with G.S. 161-22 to give notice of plaintiff's lien on the tobacco crop in controversy.

It is now established law in this jurisdiction that the proper indexing and cross-indexing of instruments required to be registered is an essential part of their registration. *Dorman v. Goodman,* 213 N.C. 406, 196 S.E. 352; *Story v. Slade,* 199 N.C. 596, 155 S.E. 256; *Heaton v. Heaton,* 196 N.C. 475, 146 S.E. 146; *Whitehurst v. Garrett,* 196 N.C. 154, 144 S.E. 835; *Clement v. Harrison,* 193 N.C. 825, 138 S.E. 308; *Wilkinson v. Wallace,* 192 N.C. 156, 134 S.E. 401; *Hooper v. Power Co.,* 180 N.C. 651, 105 S.E. 327; *Manufacturing Co. v. Hester,* 177 N.C. 609, 98 S.E. 721; *Fowle v. Ham,* 176 N.C. 12, 96 S.E. 639; *Ely v. Norman,* 175 N.C. 294, 95 S.E. 543. The last cited case overruled *Davis v. Whitaker,* 114 N.C. 279, 19 S.E. 699, 41 Am. St. Rep. 793, in which it was held that the filing of a deed for registration was in itself constructive notice and that failure to index it did not impair its efficacy.

This Court has held in a number of cases that where the name of one of the grantors in an instrument requiring registration was not listed in the index, the registration was not notice as to the interest of the omitted party. *Dorman v. Goodman, supra; Woodley v. Gregory,* 205 N.C. 280, 171 S.E. 65; *Watkins v. Simonds,* 202 N.C. 746, 164 S.E. 363; *Heaton v. Heaton, supra; Wilkinson v. Wallace, supra; Fowle v. Ham, supra.*

However, in the case of *Tocci v. Nowfall,* 220 N.C. 550, 18 S.E. 2d 225, a large number of lots were conveyed to a real estate corporation as trustee, to be conveyed by it as trustee to the purchasers of the lots. The corporate trustee conveyed one of the lots in its own name to T. A. Ratcliff and wife without disclosing that it held title thereto as trustee. Later, it conveyed the same lot in its capacity as trustee to Mrs. J. Nowfall. The Court held that the holders of the first deed obtained a good title. *Stacy, C. J.,* dissented and *Barnhill* and *Winborne, JJ.,* concurred in the dissent.

On the other hand, it has been held that where a man and wife executed a conveyance and the instrument is duly recorded and properly indexed and cross-indexed under the name of the husband, followed by the words "and wife" or *"et ux,"* the registration is good. *Bank v. Cox,* 204 N.C. 335, 168 S.E. 213; *Insurance Co. v. Forbes,* 203 N.C. 252, 165 S.E. 699; *West v. Jackson,* 198 N.C. 693, 153 S.E. 257. *Cf. Henry v. Sanders,* 212 N.C. 239, 193 S.E. 15.

In the present action it is stipulated that the chattel mortgage in controversy was filed for registration on 23 May, 1952, and, thereafter, on 29 May, 1952, was duly transcribed upon the records in the office of

the Register of Deeds of Moore County in Chattel Mortgage Book 115, page 70 thereof, and an erroneous book and page given opposite the name of the grantor in the direct index and opposite the name of the grantee in the cross-index. However, it is also stipulated that in May 1952 the cross-index was corrected. This means that within two days of the time the chattel mortgage was transcribed on the records it was cross-indexed in accordance with the requirements of the statute, G.S. 161-22.

*Brogden, J.*, speaking for this Court in *West v. Jackson, supra,* in construing C.S. 3561, now G.S. 161-22, said: "The construction of this statute produces two divergent theories. Upon one hand it is asserted that as indexing and cross-indexing is an essential part of registration and essential thereto and since such indexing is statutory, the statute should be complied with to the exact letter. Upon the other hand, it is insisted that the underlying philosophy of all registration is to give notice, and that hence the ultimate purpose and pervading object of the statute is to produce and supply such notice. Therefore, if the indexing and cross-indexing upon a given state of facts is insufficient to supply the necessary notice, then such indexing ought to fail as against subsequent purchasers or encumbrancers. Nevertheless, it is a universally accepted principle that 'constructive notice from the possession of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all the inquiry would have disclosed.' *Wynn v. Grant,* 166 N.C. 39, 81 S.E. 949; *Bridgers v. Trust Co., ante,* 494. This principle of law received the sanction of this Court in *Ely v. Norman,* 175 N.C. 294, 95 S.E. 543. In that case the Court quoted with apparent approval from the Supreme Court of Iowa to the effect 'that an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found.' . . . It must be conceded that the indexing and cross-indexing of the deed of trust in the case at bar is not a strict compliance with the statute, and the registers of deeds through the State should doubtless set out on the index and cross-index the name of the wife. There are perhaps hundreds of deeds of trust in the State indexed and cross-indexed in the same manner employed in the present case, and we are not inclined to strike down these instruments as a matter of law, particularly when there was sufficient information upon the index and cross-index to create the duty of making inquiry." *Whitehurst v. Garrett, supra; Insurance Co. v.*

*Forbes, supra; Bank v. Cox, supra; Insurance Co. v. Dial,* 209 N.C. 339, 183 S.E. 609.

In light of our decisions, we hold that the indexing was sufficient to put a careful and prudent examiner upon inquiry. Moreover, from and after 1 June, 1952, the instrument was cross-indexed properly and accurately as required by statute. We cannot conceive of a careful examiner failing to examine the cross-index when he found the instrument was not recorded in the book and on the page referred to in the direct index. Hence, the judgment of the court below is reversed and the cause remanded for further proceedings in accord with this opinion.

Reversed and remanded.

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

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STATE v. FOY McHONE.

(Filed 14 December, 1955.)

**1. Indictment and Warrant § 6½: Public Officers § 4b—**

A justice of the peace who is also an officer on the police force of a municipality may lawfully, in his capacity as a justice of the peace, take the oath of another police officer to an affidavit on which a criminal warrant is to be issued, and then, as a justice of the peace, lawfully issue a warrant thereon, addressed to the chief of police or any other lawful officer of the town or county, returnable for trial before the judge of the recorder's court of the town. Justices of the peace come within the express exception to the proscription of double office holding. Constitution of North Carolina, Art. XIV, sec. 7. G.S. 15-18, 19, 20 and 24.

**2. Indictment and Warrant § 15—**

The trial court has the discretionary power to allow a warrant to be amended by substituting the words "illegally transporting taxpaid liquor," for the words "transporting illegal taxpaid liquor," since the amendment does not change the nature of the offense intended to be charged. G.S. 7-149 (12).

**3. Intoxicating Liquor § 9d—**

The evidence considered in the light most favorable to the State *is held* sufficient to sustain defendant's conviction of illegal transportation of taxpaid liquor.

APPEAL by defendant from *Sharp, Special J.,* at October 1955 Special Term, of SURRY.

Criminal prosecution upon a warrant issued by Joe L. Simmons, J.P., on affidavit of T. J. Hale returnable before R. S. Westmoreland, Re-

corder, charging that on 5 March, 1955, Foy McHone did unlawfully and wilfully violate the North Carolina prohibition law by possessing for the purpose of sale a quantity of illegal taxpaid liquor and violate the North Carolina prohibition law by (illegally) transporting illegal taxpaid liquor . . . contrary to the form of the statute, etc., the latter over objection and exception by defendant was amended to read "illegally transporting taxpaid liquor." The warrant was addressed "To the Chief of Police or any other lawful officer of Mt. Airy and Surry County," and was served by M. W. Boone, C. P., per T. J. Hale."

Defendant was tried in Recorder's Court and found guilty, and from judgment pronounced by the Recorder's Court defendant appealed to Superior Court, and the case was therein tried *de novo* upon the original warrant as above set forth.

The record shows that upon the call of the case for trial the defendant in apt time entered a plea in abatement to the warrant on the ground that the Justice of the Peace who issued it also is an officer of the Police Force of Mt. Airy, in violation of the Constitution of North Carolina, and the Federal Constitution. The plea was denied. Defendant excepted. Likewise motion to quash the warrant was denied, and defendant excepted.

The case was submitted to the jury upon evidence adduced by the State tending to show that an officer saw defendant transporting in his car more than eight pints, somewhere in the neighborhood of 12 or 14 pints of liquor.

Verdict: Not guilty on the first count charging illegal possession of taxpaid liquor. Guilty on the count of illegal transportation of taxpaid liquor.

Judgment: Imprisonment for a period of 12 months "the sentence to begin at the expiration of sentences in cases Nos. 118 and 119 at the April Term."

To the pronouncement of the judgment defendant excepted, and appeals to Supreme Court, and assigns error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Frank Freeman and J. N. Freeman for defendant, appellant.*

WINBORNE, J. In connection with appellant's assignment of error based upon exception to denial of his plea in abatement, it is appropriate to review pertinent prescribed procedure.

I. In the orderly course of such procedure a justice of the peace is named among those who are given power to issue process for the apprehension of persons charged with any criminal offense. G.S. 15-18.

And it is provided by statute that "Whenever complaint is made to any such magistrate that a criminal offense has been committed within this State, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him." G.S. 15-19.

The statute also provides "that if it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand . . . reciting the accusation and commanding the officer to whom it is directed forthwith to take the person accused of having committed the offense, and bring him before a magistrate to be dealt with according to law. The justice of the peace shall direct his warrant to the sheriff or other lawful officer in his county." G.S. 15-20.

It is further provided by statute, G.S. 15-24, as rewritten by 1953 Session Laws of North Carolina, Chapter 141, Sec. 1, that "persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county, provided, however, that a magistrate may make such warrant returnable before any other magistrate or any court inferior to the Superior Court having jurisdiction within the same county, and the warrant by virtue of which the arrest shall have been made, with a proper return endorsed thereon and signed by the officer or person making the arrest shall be delivered to such magistrate or to the court within the same county as may be directed in the warrant."

Testing the procedure followed in the present case by the prescribed procedure as outlined above, it is seen that though the justice of the peace who took the oath of the complainant and who issued the warrant charging the offense described in the affidavit, was an officer of the police force of Mt. Airy, there is nothing in the record to show that he did anything in respect to the issuance of the warrant here in question in any other capacity than as a justice of the peace. Indeed, it does not appear that he acted in the capacity of police officer.

Therefore, this is substantially the question presented by defendant under his assignment of error based on exception to denial of his plea in abatement: In this State, may a justice of the peace, who is also an officer on the police force of a town, lawfully as justice of the peace, take the oath of another police officer to an affidavit on which a criminal warrant is to be issued, and then as a justice of the peace lawfully issue a warrant thereon, addressed to the chief of police or any other lawful officer of the town or county, returnable for trial before the judge of the recorder's court of the town, who tries the case? The answer is "Yes."

The Constitution of North Carolina, Sec. 7, Article XIV, forbidding double office holding expressly provides that nothing therein contained "shall extend to officers of the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes."

And this Court in the case of *Barnhill v. Thompson* (1898), 122 N.C. 493, 29 S.E. 720, pertinently stated: "At common law there was no limit to the right of a citizen to hold several offices, except incompatibility of the duties of the several offices, and much learning was invoked in England and in this country on the question of 'incompatibility.' We are relieved, however, from much labor on that subject by our Constitution, Article XIV, Section 7." Then after quoting the language of this section of the Constitution, the Court concluded by saying: "This provision is plain and leaves no room for construction, whenever the two places under consideration are found to be public offices."

Moreover, the case of *S. v. Lord* (1907), 145 N.C. 479, 59 S.E. 656, involving a matter of costs to the recorder for the city of Charlotte is worthy of note. The facts as stated there are these: "One Earnhardt, a duly qualified justice of the peace, who also acts as desk sergeant at police headquarters in said city, issued a warrant for defendant and made it returnable before W. M. Smith, the appellant, who is recorder and *ex officio* justice of the peace. Upon the hearing, Smith bound the defendant over to the Superior Court. It is contended that the act of Earnhardt, justice of the peace, was illegal; that the hearing before Smith was void, and that therefore the latter's costs cannot be taxed. His Honor so held," but the Supreme Court did not concur. *Brown, J.*, speaking for the Court had this to say: "Section 3162 of the Revisal (now G.S. 15-24, *supra*), provides that persons arrested under any warrant issued for any offense, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant, etc. The clause 'where no provision is otherwise made' clearly implies that the magistrate who issued the warrant had the authority to make the warrant returnable before himself or before some officer having like jurisdiction, to conduct the preliminary hearing." And the Court concluded: "Having been appointed a justice of the peace by the General Assembly, and having duly qualified as such, the incumbent of the recorder's office is invested with the complete jurisdiction of a justice of the peace, as defined by our Constitution, in addition to that which he exercises as recorder by virtue of the city charter. There is nothing in our fundamental law which forbids the appellant to hold the office of recorder and justice of the peace at one and the same time. Article XIV, Section 7, Constitution." And the Court adds, "We will, of course, presume that when the appellant had the warrant returnable before him he acted in

his capacity as a justice of the peace, and bound the defendant over to the Superior Court. We, therefore, think that the lawful fees prescribed by law for a justice of the peace should have been taxed against the defendant."

Thus in the light of the factual situation in hand, this Court deems the action of the justice of the peace to be permissible under the proviso of Sec. 7 of Article XIV of the Constitution of North Carolina. And it does not appear that such action is violative of any provision of either the State, or the Federal Constitution.

II. For like reason defendant's motion in arrest of judgment was properly overruled.

III. The exception to the ruling of the court in allowing the warrant to be amended as indicated above runs counter to G.S. 7-149, Rule 12, and decisions of this Court. In *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609, the Court in opinion by *Denny, J.,* declared: " 'Under our practice, our courts have the authority to amend warrants defective in form and even in substance; provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant. G.S. 7-149—Rule 12.' " See also *S. v. Johnson,* 188 N.C. 591, 125 S.E. 183; *S. v. Carpenter,* 231 N.C. 229, 56 S.E. 2d 713.

IV. Furthermore, taking the evidence offered upon the trial in Superior Court in the light most favorable to the State, as is done in consideration of motions for judgment as of nonsuit in criminal prosecutions, the Court is of opinion and holds that it is sufficient to take the case to the jury, and to support the verdict rendered. Hence the exceptions in this respect are untenable.

V. Other assignments of error relate to matters which under the setting fail to show error for which a new trial should be ordered.

For reasons stated, in the judgment from which appeal is taken, we find

No error.

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STATE v. FOY McHONE.

(Filed 14 December, 1955.)

**1. Criminal Law § 17e—**

A plea in abatement in a criminal prosecution comes too late when made after plea of not guilty.

**2. Indictment and Warrant § 6½—**

A justice of the peace who is also an officer on the police force of a municipality may lawfully, in his capacity as justice of the peace, take an affidavit and issue a warrant thereon, and plea in abatement and motion

in arrest of judgment on the ground that a police officer may not also hold the office of a justice of the peace, are properly denied.

**3. Gambling § 9—**

Evidence in this case *held* sufficient to sustain conviction of defendant of unlawfully, willfully and knowingly allowing a game of chance, in which money was bet, to be played on his premises, and of unlawfully operating a gaming table at which games of chance were played. G.S. 14-293, G.S. 14-295.

APPEAL by defendant from *Johnston, J.*, at April 1955 Term, of SURRY.

Criminal prosecution upon two warrants, numbered in Recorder's Court 55-112 and 55-114, and numbered 118 and 119 in Superior Court, issued by M. F. Patterson, J. P., on affidavits of Lincoln Puckett returnable before R. S. Westmoreland, Recorder, (1) charging in No. 55-112 the offense of unlawfully, wilfully and knowingly allowing a game of chance, to wit, poker, to be played, in which money was bet, on his premises known as Little Haven Grocery, located on U. S. Highway 103, in violation of G.S. 14-293, and (2) charging in No. 55-114 the offense of unlawfully operating a gaming table, to wit, a poker table, at which games of chance were played in violation of G.S. 14-295. The record shows that the warrants were addressed: "To the Chief of Police or any other lawful officer of Mount Airy and Surry County," and that they were executed by one "Neal Thompson."

Upon trial in Recorder's Court defendant was found guilty. The cases were consolidated, and from judgment pronounced defendant appealed to Superior Court.

Addendum to the record shows

(1) That these consolidated cases came on for trial in Superior Court upon appeal from verdict and judgment of the Recorder's Court of Mt. Airy Township and were tried *de novo* upon the original warrants, and

(2) "Upon the call of the cases for trial, upon the warrants as set out above, the defendant entered a plea of not guilty and following such plea lodged a plea in abatement as to both warrants upon the ground that M. F. Patterson who holds himself out as being a justice of the peace, and who took the affidavits and issued the warrants, was not qualified in that he holds no valid commission to act as justice of the peace, the defendant taking the position that M. F. Patterson, who was a law enforcement officer, being a sergeant on the Police Force of the town of Mt. Airy at the time he took the affidavits and issued such warrants and had been such law enforcement officer for some time next preceding his purported commission from the Governor of North Carolina, dated March 19, 1953, . . . the defendant contending that the commission is not a valid commission at all in that M. F. Patterson was

not eligible to act as a justice of the peace, he being a sergeant on the Police Force of the town of Mt. Airy, N. C., and acting as such enforcement officer at the time." The court denied the plea in abatement. Defendant excepts.

Upon motion of Solicitor that the two cases (numbered in Superior Court as 118 and 119) be consolidated for the purpose of trial, there being no objection on the part of defendant, the court so ordered.

The case was submitted to the jury upon evidence adduced by the State upon each of the charges with which defendant stands indicted.

Verdict: Guilty of charges in both of the warrants.

Motion of defendant to set aside the verdict was denied, and defendant excepts.

Defendant moved in arrest of judgment. The motion was denied. Defendant excepts.

The cases were consolidated for judgment.

Judgment: That defendant be confined in common jail of Surry County for a term of 12 months and assigned to work under the supervision of the State Highway and Public Works Commission.

Defendant excepted thereto, and appeals to Supreme Court and assigns error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Frank Freeman and J. N. Freeman for defendant, appellant.*

WINBORNE, J. Upon consideration thereof the various assignments of error based upon exceptions appearing in the record and the case on appeal are found to be without merit.

1. As to the exception to denial of defendant's plea in abatement: The record discloses that the plea was not made in apt time. Decisions of this Court hold that a plea in abatement of a defendant in a criminal prosecution comes too late when made after his plea of not guilty,—and cannot be considered. See *S. v. Hooker* 186 N.C. 761, 120 S.E. 449, citing *S. v. Oliver,* 186 N.C. 329, 119 S.E. 370. See also *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642.

If, however, the plea had been timely, it is appropriate to say that decision here would have been controlled by that in *S. v. McHone, ante,* 231.

2. Exception to denial of defendant's motion in arrest of judgment is controlled by the decision in *S. v. McHone, ante,* 231.

3. Taking the evidence adduced upon the trial in Superior Court in the light most favorable to the State, this Court is of opinion and holds that it is sufficient to take the case to the jury, and to support the ver-

dict rendered in each case. Hence the motions of defendant for judgment as of nonsuit were properly overruled.

4. Other assignments of error require no express consideration.

Therefore in the judgment from which appeal is taken, we find

No error.

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STATE v. ROBERT LEE WALL.

(Filed 14 December, 1955.)

**1. Automobiles § 59—**

The evidence in this case, taken in the light most favorable to the State, *is held* sufficient to take the case to the jury on the charge of manslaughter.

**2. Automobiles § 60—**

The charge of the court in this prosecution for manslaughter *is held* prejudicial in failing to delineate between actionable negligence in the law of torts and culpable negligence in the law of crimes.

**3. Automobiles § 76—**

Where the evidence discloses that defendant's vehicle was totally disabled in the collision, defendant cannot be convicted of violating G.S. 20-166 (a), and nonsuit on such charge should be granted.

**4. Same—**

Where the evidence discloses that the persons, other than defendant, riding in the cars involved in the collision were either killed or knocked unconscious, defendant cannot be convicted of failing to give his name, address, operator's license number and the registration number of his vehicle to such persons, since the law does not require the doing of a vain thing. G.S. 20-166 (c).

**5. Same—**

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to take the case to the jury on the issue of defendant's guilt of failing to render assistance to persons injured in a collision in which his car was involved, under the existing circumstances.

**6. Same—**

In a prosecution of defendant for failing to render assistance to persons injured in a collision in which defendant's car was involved, testimony tending to establish that persons were injured in the collision is competent, but testimony of doctors describing in minute detail the injuries each of the injured persons sustained as appeared when examined in the hospital, the treatment administered, and the condition of each at the time of the trial, is irrelevant and prejudicial.

**7. Criminal Law § 29a: Evidence § 24—**

While relevant evidence will not be excluded simply because it may tend to prejudice the jury or excite its sympathy, if the only effect of the evi-

dence is to excite prejudice or sympathy, its admission may be ground for a new trial.

**8. Automobiles § 76—**

A defendant may not be convicted of failing to give assistance to a person injured in a collision when the evidence discloses that such person was instantly killed in the collision.

APPEAL by defendant from *Williams, J.*, at March 1955 Criminal Term, of WAKE.

Criminal prosecution upon two bills of indictment:

I. Charging in No. 626 that, on 15 January, 1955, at and in the County of Wake, with force and arms Robert Lee Wall (1) unlawfully, wilfully and feloniously did kill and slay one Jerry Devon Thomas, against the form of the statute, etc., and (2) he, being the driver of a motor vehicle involved in an accident resulting in death to Jerry Devon Thomas and injuries to William Poole, Johnny Purdy and Kenneth Easley (a) did then and there unlawfully, wilfully and feloniously fail to stop the said vehicle at the scene of the accident, and (b) did then and there unlawfully, wilfully and feloniously fail to give his name, address, operator's and chauffeur's license number and the registration number of his vehicle to the person so struck and the driver and occupants of such vehicle collided with, and (c) did fail to render reasonable assistance to the said Jerry Devon Thomas, William Poole and Kenneth Easley, it being apparent that such assistance was necessary against the form of the statute, etc.

II. Charging in No. 627 that, on 15 January, 1955, at and in the County of Wake, with force and arms, Robert Lee Wall (1) unlawfully, wilfully and feloniously did kill and slay one Felix Frazier against the form of the statute, etc., and (2) he, being the driver of a motor vehicle involved in an accident, resulting in death to Felix Frazier, did then and there fail to give his name, address, operator's and chauffeur's license number and the registration number of his vehicle to the person so struck and the driver and occupants of such vehicle collided with, and did fail to render reasonable assistance to the said Felix Frazier it being apparent that such assistance was necessary against the form of the statute, etc.

Plea: Not Guilty.

The cases were consolidated for purpose of trial under circumstances detailed. Defendant excepted.

Verdict: In No. 626—(1) Guilty of manslaughter. (2) Guilty of leaving scene of accident without rendering aid, etc.

In No. 627—(1) Not guilty of manslaughter. (2) Guilty of leaving scene of accident without rendering aid, etc.

Judgment: (1) On manslaughter charge, ten years in State's Prison assigned to work the road under the supervision of the State Highway and Public Works Commission.

(2) On charge under the statute (G.S. 20-166, Subsections "a" and "c") in No. 626, confinement in the State's Prison for a period of five years and assigned to work under the order and direction of the State Highway and Public Works Commission, and

(3) On the same count, in case No. 627, confinement in the State's Prison for five years and assigned to work under the order and direction of the State Highway and Public Works Commission; "sentence to run concurrently. The first sentence of these two latter ones to begin at the expiration of the sentence on the manslaughter charge."

To the pronouncement of judgment, defendant excepts and appeals to Supreme Court.

*Attorney-General Rodman and Assistant Attorney-General Giles for the State.*

*Thos. W. Ruffin for defendant, appellant.*

WINBORNE, J. Consideration of the seven assignments of error, based upon one hundred twenty-nine exceptions taken during the course of the trial and to the charge of the court, reveals error for which defendant is entitled to partial relief and a new trial.

As to assignments of error based upon exceptions to denial of motions for judgment as of nonsuit: First—In reference to first count, or manslaughter charge, in No. 626—The Court is of opinion and holds that the evidence offered upon the trial, taken in the light most favorable to the State, is sufficient to take the case to the jury. Hence the motion in respect to this count here considered was properly overruled.

Nevertheless assignments of error based upon exceptions to the refusal of the trial court to give certain requests for instruction in respect to culpable negligence, and in charging, and in failing to charge the jury in respect thereto appear to be valid. See *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868.

Applicable principles of law are found in the *Cope case* where in opinion by *Stacy, C. J.,* the line which separates the principle of actionable negligence in the law of torts, and that of culpable negligence in the law of crimes is delineated, and in accordance therewith previous decisions of this Court are aligned. It is sufficient to refer to what is said there.

As there must be a new trial on the manslaughter charge, this Court refrains from discussion of the evidence.

Second—In reference to the second count in each of the two bills of indictment—It is appropriate to advert to the statute G.S. 20-166 (a) and (c) under which defendant is indicted. This statute provides in subsection (a) that "The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in Sec. 20-182."

And this statute also provides in subsection (c) that "The driver of any vehicle involved in any accident or collision resulting in injury or death to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in Sec. 20-182."

Now, with respect to so much of the offense as charges in each case failure "to stop his automobile at the scene of the accident": Proof of this charge is wholly lacking. Alton Alford, witness for the State, in describing the movement of the automobiles at the scene of the accident testified: "The Oldsmobile being driven by Robert Lee Wall passed me on the right . . . and traveled down the shoulder of the road, struck a mail box, swerved across the road and went on into some pines and stopped . . ."

And State Highway Patrolman Wicker, as witness for the State, testified: "It was perfectly plain and obvious when I got up there to the Oldsmobile of Robert Lee Wall's that as he had told me, it had gone out of control and had run off the road, had hit a mail box and cut off to the left and went up in the bushes, so that it was perfectly apparent to me that that car . . . was disabled; it had to be pulled in . . ."

And with respect to so much of the offense as charges failure "to give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person so struck and the driver and occupants of such vehicle collided with": In this connection in Number 626 the evidence offered on trial below tends to show that the Chevrolet automobile was operated by William Poole, who was accompanied by Johnny Purdy, Jerry Thomas and Kenneth Easley; and that Jerry Thomas was killed, and the other three were severely injured—all three being unconscious when they reached the hospital. And there

is no evidence that at the scene of the accident any of them, driver, or occupants, was in condition to receive the items of information enumerated in the statute. Giving the information would have been a useless gesture. This the law does not contemplate. Thus defendant was guilty of no offense in failing to do a vain thing.

And in this connection in Number 627, the evidence shows that Felix Frazier, operator of the Buick, was alone at the time, and that he was killed. Hence it would have been useless to attempt to give to him information so enumerated. And defendant committed no crime in this respect.

With respect to so much of the offense in Number 626 as charges failure "to render reasonable assistance to the said Jerry Devon Thomas, William Poole and Kenneth Easley, it being apparent that such assistance was necessary": This Court is of opinion and holds that the evidence in this case, when taken in the light most favorable to the State, is sufficient to take the case to the jury as to whether under the circumstances then existing defendant failed to render reasonable assistance to the injured persons, if it were apparent that such assistance was necessary. But in this connection testimony of two doctors describing in minute detail the injuries each of the injured persons sustained as appeared when examined in the hospital, the treatment administered and the physical condition of each at the time of the trial, was irrelevant, and calculated to unduly prejudice defendant and the admission of it in evidence entitles him to a new trial on this phase of the second count.

Relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it. On the other hand, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. Stansbury's North Carolina Evidence, Sec. 80, p. 143; *S. v. Galloway,* 188 N.C. 416, 124 S.E. 745; *S. v. Page,* 215 N.C. 333, 1 S.E. 2d 887. Compare *S. v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

In this connection in Number 627 the evidence discloses, as above stated, that Felix Frazier was killed in the accident. This phase of the statute manifestly pertains to giving assistance to injured persons. Therefore for the reasons hereinabove stated in respect to the several phases of the charge defendant is entitled to an acquittal on the second count. Hence judgment as of nonsuit on the second count in Number 627 will be entered in Superior Court.

Other assignments of error need not be expressly treated. The matters to which they relate may not recur upon another trial.

For reasons stated,—in No. 626

New trial.

In No. 627—second count,
Reversed.

STATE v. CORDELL HULL McPEAK AND LELAND WESLEY CAMPBELL.

(Filed 14 December, 1955.)

1. **Constitutional Law § 40: Searches and Seizures § 1—**

A person may waive his right to be free from unreasonable searches and seizures, and if it clearly appears that he voluntarily consented, or permitted, or expressly invited or agreed to the search, it constitutes such waiver. Constitution of North Carolina, Art. I, sec. 11; 14th Amendment to the Federal Constitution; G.S. 15-27.

2. **Same: Criminal Law § 43—Evidence held to support finding that owner consented to search of car.**

Evidence to the effect that a highway patrolman stopped a car for a routine check, that the patrolman, having his suspicions aroused, stated that he would like to search the car but that the driver-owner did not have to permit the search if he did not want to, that the owner then unlocked the trunk, unzipped a leather case and stated that he did not have anything, and that the officer saw a sledge hammer in the trunk and searched the car, finding burglar's tools and narcotics, *is held* to make out a *prima facie* case that the owner freely and voluntarily consented to the search, and to sustain the court's finding of a waiver, it being incumbent upon the owner if he wished to dispute the fact of waiver to offer some proof controverting the showing made by the State, and the admission in evidence of the implements and narcotics found was without error.

3. **Same—**

Immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed, and therefore a guest or passenger in a car has no ground for objection to the search of the car by peace officers.

APPEAL by defendants from *Johnston, J.*, February Term 1955 of SURRY.

Criminal prosecution upon two separate, identical bills of indictment against each defendant: the first bill of indictment charges the felonious possession, without lawful excuse, of implements of housebreaking, as prohibited by G.S. 14-55; the second bill of indictment charges in four counts the felonious possession and transportation in an automobile of narcotic drugs, as condemned by G.S. 90-88 and G.S. 90-111.2.

The defendants pleaded not guilty. Their cases were consolidated for trial.

This is the story portrayed by the State's evidence: the defendants offered no evidence. Between 8:30 and 9:00 p.m. on 1 February 1955, the defendant McPeak was driving an Oldsmobile car with Florida license tags on a public road near Mount Airy. The defendant Campbell was in the rear seat, and Ray Hemmings was in the front seat with McPeak. State Highway Patrolman J. B. Howell, with two Deputy Sheriffs of Surry County in his car, was on duty patrolling the highway, and stopped the Oldsmobile for a routine check. Howell got out of his car, walked to the Oldsmobile, and asked McPeak for his driving license and registration card. McPeak gave him a Florida license and registration card in the name of James W. Taylor. Howell took the license and registration card, walked to the rear of the Oldsmobile, and checked the license number. McPeak got out of the car. He said it was his car. Howell saw a file in McPeak's coat pocket. He asked McPeak, if he had ever been tried on a narcotics charge. McPeak replied No.

Howell told McPeak he would like to search his car, but "he didn't have to let us search his car if he didn't want to." McPeak said, "Well, there's nothing on the car," walked back to his car, took the switch key out, walked to the rear, and unlocked the trunk. McPeak unzipped a leather case he had in the trunk, fumbled through some articles of clothing in it, and said: "See, I don't have anything." At that time Howell saw a five or six-pound sledge hammer in the trunk of the car.

Howell then searched the Oldsmobile. He found in it 597 Dolophine Hydrochloride Tablets in bottles labeled 5 to 7.5 millograms, 1749 Codeine Sulphate Tablets in bottles labeled ⅛ to 1 grain, 140 Mercodinone Tablets labeled 05 millogram, 78 Morphine Sulphate Tablets labeled ½ grain, 2 bottles containing tablets labeled Dilaudid Hydrochloride, 100 Hypodermic Tablets in tubes of 20 labeled Hyocine, Morphine and Cactus and 6 Dilaudid Hydrochloride suppositories. Dr. Haywood M. Taylor, a bio-chemist and toxicologist at Duke University, testified the Codeine Sulphate Tablets, the Morphine Sulphate Tablets and the Dolophine Hydrochloride Tablets found in the Oldsmobile are narcotic drugs. There is no evidence in the Record, as to whether the other drugs found are narcotics or not. Howell found in the leather case McPeak unzipped a bottle of nitro-glycerine, a bar of soap wrapped in a wet washcloth and some dynamite caps with short fuses attached. He also found in the car a steel bar, two metal socket wrench extensions, a piece of wire with two clamps on it, a screwdriver and aluminum foil.

McPeak told L. E. Williams, an agent of the State Bureau of Investigation, the following: Campbell came to his home in Jacksonville, Florida, about 10 days before, and brought a bottle of nitro-glycerine and dynamite caps and fuse connections. They decided to make a trip,

and see what "they could spot." They left Florida on 31 January, and reached Mount Airy on 1 February. They went to the home of Ray Hemmings. McPeak said he used the socket wrench extension to punch safes, because it could not be called a burglar's tool. He had never done any jobs in North Carolina, because of "the tool statute."

Campbell made the following statement to L. E. Williams: He and McPeak met in Bowling Green, Kentucky, and decided to go off somewhere, and make some money cracking safes. McPeak was the punch man, and he used nitro-glycerine. He bought some fuses and things en route. He extracted the nitro-glycerine from dynamite. En route McPeak bought the sledge hammer and the socket wrench extension.

Verdict as to each defendant: Guilty of possessing burglary tools, and guilty of violating the narcotics law.

Judgment as to each defendant: imprisonment for 15 years on the charge of possession of implements of housebreaking, and imprisonment for five years for violating the narcotics law: the five-year sentence to run concurrently with the 15-year sentence.

Both defendants appeal, assigning error.

*William B. Rodman, Jr., Attorney General, and Harry W. McGalliard, Assistant Attorney General, for the State.*

*Woltz & Woltz, J. N. Freeman and T. M. Faw, Frank Freeman for Defendants, Appellants.*

PARKER, J. The defendants' assignments of error present one question for decision: Were the implements of housebreaking and the narcotic drugs found in McPeak's automobile admitted in evidence in violation of the provisions of G.S. 15-27, Article 1, Section 11, of the State Constitution and the 14th Amendment to the U. S. Constitution?

It is well settled law that a person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such a waiver, only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912 (where many cases are cited); *Zap v. U. S.,* 328 U.S. 624, 90 L. Ed. 1477; *People v. Preston,* 341 Ill. 407, 173 N.E. 383; 77 A.L.R. 631; 47 Am. Jur., Searches and Seizures, Sec. 71; 79 C.J.S., Searches and Seizures, Sec. 62.

"No rule of public policy forbids its waiver." *Manchester Press Club v. State Liquor Com.,* 89 N.H. 442, 200 A. 407, 116 A.L.R. 1093.

The facts in *Sims v. State,* 73 Okl. Cr. 321, 121 P. 2d 317, are quite similar. The first headnote reads: "Where motorist, on request of

highway patrolmen who stopped him for driving contrary to rules of the road, opened turtleback of automobile, disclosing whiskey, there was a 'waiver' by motorist of immunity from unlawful search."

In the case at bar there was no display of force or firearms, no promises, no threats, no coercion of any kind. Howell told McPeak he would like to search his car, but he told him "he didn't have to let us search his car, if he didn't want to." McPeak said, "Well, there's nothing on the car," got his switch key, unlocked the car's trunk, raised the lid, unzipped a leather bag or case (it is called by both names in the evidence) he had in there, fumbled through some articles of clothing in the bag, and said, "See, I don't have anything." At that time the officer saw a five or six-pound sledge hammer lying in the trunk of the car. In the search the officer found in the bag McPeak unzipped a bottle of nitro-glycerine, some dynamite caps with short fuses attached, and a bar of soap wrapped up in a wet washcloth. The State having introduced evidence sufficient, *prima facie,* to show a waiver, if McPeak wished to dispute the fact of waiver, he should have offered some proof controverting the showing made by the State. *Jones v. State,* 33 Okl. Cr. 369, 244 P. 456. He failed to do so. We conclude that the acts and language of McPeak constituted a free and voluntary consent on his part to the search of his automobile by the officer, and a waiver on his part of his immunity from an unlawful search.

The lower court found as a fact that McPeak gave permission to the officer to search his car, that it was a legal search, that the evidence was competent, and overruled the motion "to suppress all evidence obtained through the search." The ruling of the trial judge as to the competency of this evidence, which is supported by competent evidence, will not be disturbed on appeal. *S. v. Moore, supra.*

The Oldsmobile was the property of McPeak and in his possession. Campbell was a passenger therein. The person of Campbell was not searched.

The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures. *Goldstein v. U. S.,* 316 U.S. 114, 86 L. Ed. 1312; *Kelley v. U. S.,* 61 F. 2d 843, 86 A.L.R. 338; *U. S. v. DeVasto,* 52 F. 2d 26, 78 A.L.R. 336; *Steeber v. U. S.,* 198 F. 2d 615, 33 A.L.R. 2d 1425; 79 C.J.S., Searches and Seizures, Sec. 52, where numerous cases are cited from many jurisdictions; 47 Am. Jur., Searches and Seizures, Sec. 11.

The Oldsmobile belonged to McPeak: Campbell was a passenger or guest therein. Campbell's rights were not invaded by the search of McPeak's car, and he had no legal right to object thereto. *Smith v.*

*State,* 198 Miss. 788, 24 So. 2d 85; *Lee v. State* 148 Tex. Cr. 220, 185 S.W. 2d 978; *Anderson v. Commonwealth,* 312 Ky. 768, 229 S.W. 2d 756.

In *Lee v. State, supra,* a state highway patrolman arrested Lee on a highway about 12 miles west of Fort Worth; at the time of Lee's arrest he was riding with a man who was going to Fort Worth; the officer searched the car without a search warrant, and found an automatic pistol under the seat where Lee was riding. This pistol was used to commit the murder with which Lee was charged. It was admitted in evidence. Lee objected to any evidence of the search and the result thereof, because the search was made without a search warrant. The Texas Court said we see no merit in the objection for two reasons: "First, the automobile did not belong to appellant. Consequently his rights were not invaded by the search and he had no legal right to object thereto, (citing authorities). Second, the officer who made the arrest had theretofore been advised that appellant had committed a felony and was fleeing. Hence the officer had a legal right, under article 215, C.C.P., to arrest the appellant without a warrant, and the arrest carried with it the right to search him."

The cases cited by the appellants are distinguishable.

The evidence challenged by the appellants was admissible against both defendants. In the trial below we find

No error.

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MARION S. DOSHER v. HARLOWE G. HUNT AND J. B. HUNT AND SONS, INC.

(Filed 14 December, 1955.)

**1. Automobiles § 14—**

Evidence tending to show that the driver of a car at night failed to see the tail lights of the vehicle he was following on the highway until too late to avoid colliding with the rear of the vehicle, is sufficient to be submitted to the jury on the issue of such driver's negligence.

**2. Automobiles § 49—**

Where there is evidence that a guest in an automobile saw the tail lights of the vehicle traveling along the highway in front of the car, but no evidence of anything which should have put her on notice that the driver of the car had not seen the preceding vehicle, her failure to warn the driver until it was too late for him to avoid colliding with the rear of the vehicle cannot be held contributory negligence on her part as a matter of law.

**3. Automobiles § 50—**

While in proper instances the negligence of the driver of a car will be imputed to the owner who is a passenger in the car in the owner's action

against a third person, the doctrine of imputed negligence has no application in an action by the guest or passenger against the driver.

**4. Same—**

Where the owner is riding in her car which is being driven by another on a common trip at her request, proof by the owner that the driver was in the general employ of a corporation cannot justify recovery by the owner against the corporation for the driver's negligence, since the negligence of the driver, who was under the direction and control of the owner, is imputed to the owner.

**5. Same—**

The doctrine of common or joint enterprise as a defense is applicable only as regards third persons, and not as between the parties to the enterprise.

APPEAL by plaintiff from *Stevens, J.*, February Term, 1955, CUMBERLAND.

Civil action to recover compensation for personal injuries and property damage resulting from an auto collision.

Defendant Hunt and plaintiff (a widow) had been associating with each other for some years prior to 1951. He was secretary of the defendant corporation and also worked for it in taking orders and the like. He lived in Raleigh. She was employed by the Farmers Home Administration, an agency of the Federal Government, with headquarters in Fayetteville. Her title was assistant home management specialist. On 8 November 1951, the Shrine Convention was held in Smithfield. On that day the automobile assigned to Hunt was in the garage. He had theretofore made arrangements with plaintiff for them to be together at the Shrine dance on the night of the convention. On the morning of the 8th, he went to the Carolina Hotel and caught a ride to Smithfield. He carried with him his brief case containing price book and other papers. He does not remember the name of the person with whom he went. After he reached Smithfield he interviewed at least one customer.

On the date of the convention plaintiff was to be in Clinton. Hunt caught a ride with a patrolman to Clinton, went to the hotel, and waited until plaintiff had completed her work. He then drove her car to Smithfield for her. They visited the rooms of friends, had dinner, and went to the dance. Hunt took about three drinks, none later than 7:00 p.m.

Plaintiff had planned to be in Raleigh on the morning of 9 November, and defendant Hunt had to be "on the job" with the defendant corporation on that morning. About 11:45 p.m. on the 8th, they left Smithfield to drive to Raleigh. Either at her request or with her consent

Hunt drove her automobile. After they passed Clayton, defendant drove the automobile into the rear of a vehicle ahead. He, as a witness for plaintiff, testified that he never saw the forward vehicle although he did testify: "I don't recall seeing any vehicle at that time . . . I might have seen the vehicle in front of me just an instant before I hit it, because I cut the car to the left and hit on the left rear of the car with my right front . . . He must have had very good tail lights . . ."

Plaintiff testified that she saw the tail lights of the forward vehicle some distance ahead, that at first she thought the two cars were traveling at about the same speed, but she discovered that her car was gaining on the forward car. She said nothing until they were within about eighty feet of the forward car. She then exclaimed, "Watch out," or made some other similar remark, and Hunt cut the automobile to the left but not sufficiently to avoid the collision. Plaintiff suffered serious personal injuries. She instituted this action against Hunt, the driver of the car of which she was an occupant, and against Hunt's employer, the defendant corporation.

Both defendants plead the sole negligence of Charlie Farrell, operator of the forward vehicle, and the contributory negligence of the plaintiff.

At the conclusion of the evidence for the plaintiff, the court below entered separate judgments of involuntary nonsuit as against the corporation and the individual defendant. Plaintiff excepted to each judgment and appealed.

*Nance & Barrington and Rudolph G. Singleton, Jr., for plaintiff appellant.*

*Oates, Quillin & Russ and Smith, Leach, Anderson & Dorsett for defendant Hunt, appellee.*

*McNeill Smith, Cale Burgess, and Smith, Moore, Smith & Pope for defendant J. B. Hunt & Sons, Inc., appellee.*

BARNHILL, C. J. Plaintiff offered ample evidence of negligence on the part of defendant Hunt to repel the motion to nonsuit as to him. Indeed, his own testimony suffices. Therefore the judgments entered in the court below must be sustained, if at all, either on the theory that plaintiff, the owner of the automobile being driven by the defendant Hunt, was guilty of contributory negligence, or that since she was the owner of and a passenger on the automobile with the present right to control and direct its operation, any negligence on the part of Hunt must be imputed to her under the doctrine of imputed negligence.

We are unable to say that the plaintiff was guilty of contributory negligence as a matter of law. The road was straight, Hunt was not operating the automobile in excess of the maximum speed limit, and the

rear lights of the forward car were visible for some considerable distance ahead. There is nothing in the record to support the conclusion as a matter of law that the plaintiff knew, or by the exercise of ordinary care should have known, that Hunt did not see the forward car and would not, unless cautioned, take any action to avoid a collision therewith. When they were within about eighty feet of the automobile, plaintiff did exclaim, "Watch out," or "Look out," and Hunt cut the automobile to the left, but not sufficiently to avoid a collision. This presents a question for the jury, and not the court, as to the contributory negligence of the plaintiff. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Samuels v. Bowers,* 232 N.C. 149, 61 S.E. 2d 448; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

On this question *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162, is easily distinguishable. There the plaintiff passenger knew that the defendant driver habitually drove in a reckless manner and at a high rate of speed without keeping a proper lookout. There is no such evidence in this record.

"The doctrine of imputed negligence visits upon one person legal responsibility for the negligent conduct of another. It applies, however, only in limited classes of cases. In its application to the law of master and servant it appears in these two rules:

"1. The master is liable *to a third person* for an injury caused by the actionable negligence of his servant acting within the scope of his employment. (Authorities cited.)

"2. The master is barred from recovery *from a negligent third person* by the contributory negligence of his servant acting within the scope of his employment. (Authorities cited.)" (Italics supplied.) *Rollison v. Hicks,* 233 N.C. 99, 63 S.E. 2d 190.

Therefore, the doctrine of imputed negligence has no application in an action by the master against his servant to recover for injuries suffered by the former as a result of the latter's actionable negligence. *Rollison v. Hicks, supra; Darman v. Zilch,* 110 A.L.R. 826; Anno., *ibid.,* p. 831.

". . . it would offend justice and right to impute the negligence of a servant to his master and thus exempt him from the consequences of his own wrongdoing where the negligence proximately causes injury to a master who is without personal fault." *Rollison v. Hicks, supra.*

While there is evidence that the defendant Hunt was in the general employment of the defendant corporation, it cannot be gainsaid that at the very time and place of the accident he was then acting as the agent of the plaintiff in operating her automobile with her consent or at her direction.

The owner-passenger on an automobile has the right to control and direct its operation. So then, when he seeks to recover from a third party damages resulting from a collision of the vehicle with some other automobile or object, the negligence, if any, of the party who is operating the automobile with the owner-passenger's permission or at his request is imputed to the owner-passenger. The driver's negligence is the negligence of the owner and bars recovery against the third party. *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185. Therefore, as to the corporate defendant, the doctrine of imputed negligence does apply.

"Inasmuch as the master undertakes to manage his affairs through his servant, it is just that he be charged in law with the negligent conduct of his servant acting within the scope of his employment where the rights or liabilities of third persons are involved." *Rollison v. Hicks, supra.*

The defendant Hunt may not exculpate himself from the result of his alleged negligence on the plea that he and the plaintiff were engaged in a joint enterprise in the operation of the automobile and that any negligence in its operation by him is imputable in law to his fellow adventurer, the plaintiff, and defeats any recovery in this action.

"The doctrine of joint enterprise whereby the negligence of one member of the enterprise is imputable to others, resting as it does upon the relationship of agency of one for the other, does not apply in actions between members of the joint enterprise and does not, therefore, prevent one member of the enterprise from holding another liable for personal injuries inflicted by the latter's negligence in the prosecution of the enterprise. In other words, the doctrine of common or joint enterprise as a defense is applicable only as regards third persons and not parties to the enterprise. . . ." 38 A.J. 925; *Rollison v. Hicks, supra;* Note, 30 N.C.L. Rev. 179, at p. 182; 65 C.J.S. 799.

*Bass v. Ingold,* 232 N.C. 295, 60 S.E. 2d 114, and *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73, are factually distinguishable. In those cases the defendant was seeking to bring in a third party as a joint tortfeasor under the provisions of G.S. 1-240.

To summarize: (1) There is sufficient evidence in the record to require the submission of an issue of negligence as against defendant Hunt; (2) the record fails to disclose that plaintiff was guilty of contributory negligence as a matter of law; it only presents a question for the jury on that issue; (3) as to plaintiff's suit against defendant Hunt, any negligence on the part of Hunt is not imputable to plaintiff; (4) the doctrine of joint enterprise does not apply as between plaintiff and defendant Hunt; and (5) in plaintiff's suit against the corporate defendant, the negligence of the defendant Hunt is imputable to her and bars any recovery by her from the corporate defendant.

It follows that the judgment of nonsuit entered as against the corporate defendant must be sustained, and the judgment of nonsuit as against the individual defendant must be reversed.

As to corporate defendant: Affirmed.

As to individual defendant: Reversed.

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LEXINGTON INSULATION COMPANY v. DAVIDSON COUNTY, NORTH CAROLINA.

(Filed 14 December, 1955.)

**1. Public Officers § 7½—**

The statutory prohibition against an appointed or elected official making any contract for his own benefit under authority of his office extends to an official of a corporation who makes a contract between the corporation and a municipality or board of which he is a member. G.S. 14-234.

**2. Actions § 3c—**

A court of justice will not hear a person who seeks to reap the benefits of a transaction which is founded on, or arises out of, his own criminal misconduct or which is in direct contravention of public policy of the State.

**3. Public Officers § 7b—**

A public office is a public trust and the courts will not countenance the subversion thereof for private gain, and therefore the courts will not only declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but will also deny recovery on a *quantum meruit* basis.

**4. Counties § 5: Quasi-Contracts § 1—No recovery may be had on quantum meruit where the contract is void as against public policy.**

The chairman of the board of county commissioners was a stockholder and secretary-treasurer of a private corporation. The county manager entered into contracts between the county and the corporation, and the chairman of the board of county commissioners executed voucher in payment thereof, all without the knowledge of the other commissioners. The commissioners thereafter canceled the contract and demanded the return of the contract price. The corporation repaid the amount received and sued to recover the reasonable value of the services rendered and the materials furnished up to the time of cancellation. *Held:* The contracts were not only void, but, being made in direct contravention of G.S. 14-234, no recovery on a *quantum meruit* basis may be had thereunder, and plaintiff's action should have been dismissed as in case of involuntary nonsuit.

APPEAL by defendant from *Burgwyn, Emergency J.*, February Term, 1955, DAVIDSON. Reversed.

Civil action to recover for labor performed and materials furnished.

In 1951 Jay Howard was the County Manager and County Accountant of Davidson County. D. W. McCulloch was Chairman of the Board of County Commissioners. McCulloch also owned one-third of the capital stock of plaintiff corporation and was its secretary-treasurer and bookkeeper. He paid the bills.

On 18 June 1951, Howard entered into two contracts with plaintiff: (1) to insulate the County Home, and (2) to insulate the County Courthouse. The total contract price was $2,777.32. D. W. McCulloch, as Chairman of the County Board of Commissioners, executed a voucher dated 30 June 1951 for the contract price, payable to plaintiff corporation. The County Manager certified that provision for the payment thereof had been made by an appropriation as required by the County Fiscal Control Act. No such appropriation had been made. Apparently the check was deposited 5 July 1951.

On or about 3 August 1951, work was begun in execution of the contracts. Prior to the commencement of the work, no member of the County Board of Commissioners except the Chairman had any knowledge that the contracts had been made or the voucher had been issued.

When one of the members of the Board of County Commissioners discovered that plaintiff was insulating the County Courthouse, he had a meeting of the Board called, and the Commissioners sent for McCulloch and made inquiry as to the work being done. They were then, for the first time, informed of the making of the contracts and the payment of the contract price. The Board authorized demand on plaintiff to cease work and to return the money paid. The plaintiff repaid the amount received, reserving the right (as it alleges) to file claim on the basis of actual cost. In its amended complaint plaintiff admits that the contract was void and seeks to recover the reasonable value of the services rendered and the materials furnished. The defendant demurred to the complaint on the grounds that the complaint failed to state a cause of action and contends that the voluntary return of the funds received by plaintiff constituted a waiver of any claim it had against the defendant. The demurrer was overruled. The cause was submitted to a jury which found that defendant is indebted to plaintiff in the sum of $1,000. Judgment was entered on the verdict, and defendant excepted and appealed.

*Hugh Mitchell and Phillips & Bower for plaintiff appellee.*

*Charles W. Mauze for defendant appellant.*

BARNHILL, C. J. Defendant assigns as error (1) the order of the court overruling its demurrer to the complaint, and (2) the denial of its motions for judgment of nonsuit.

We need discuss only the exception to the refusal of the court below to dismiss as in case of involuntary nonsuit.

In some cases where the contract with the municipality or public agency is void, we have permitted a recovery on a *quantum meruit* or under the doctrine of unjust enrichment. *Realty Company v. Charlotte,* 198 N.C. 564, 152 S.E. 686; *Hawkins v. Dallas,* 229 N.C. 561, 50 S.E. 2d 561; *Manufacturing Co. v. Charlotte,* 242 N.C. 189. In the cited and like cases no moral turpitude or breach of public policy was involved.

When, however, the cause of action is made to rest on a transaction which is in direct contravention of the provisions of G.S. 14-234, quite a different question is presented.

That section of the General Statutes provides that: "If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor." (In addition the Act contains certain provisos which are not pertinent here.)

The General Assembly is the policy-making agency of our Government, and, in adopting this Act, it made the condemnation of the transactions embraced within the terms thereof a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to "feather their own nests" by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like.

The statute simply recognizes that "No man can serve two masters." Matthew 6:24; *Davidson v. Guilford,* 152 N.C. 436, 67 S.E. 918; *Snipes v. Winston,* 126 N.C. 374.

"This law was enacted to enforce a well-recognized and salutary principle, both of the moral law and of public policy, that he who is entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself." *S. v. Williams,* 153 N.C. 595, 68 S.E. 900.

The prohibition of G.S. 14-234 extends to an officer of a corporation who makes a contract between the corporation and a municipality or board of which he is a member. *S. v. Williams, supra.*

Thus it appears that plaintiff acted advisedly in admitting in its amended complaint that the original contracts are void and unenforce-

able. Now then, the question arises as to whether the plaintiff is entitled to recover in an action *indebitatus assumpsit* on a *quantum meruit* basis. That is, will the court imply a promise on the part of the County to pay the reasonable value of the services rendered and materials furnished and enforce the same? The answer is no.

No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of criminal misconduct and which is in direct contravention of the public policy of the State. *Fashion Co. v. Grant,* 165 N.C. 453, 81 S.E. 606; *Marshall v. Dicks,* 175 N.C. 38, 94 S.E. 514; *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336; *Waggoner v. Publishing Co.,* 190 N.C. 829, 130 S.E. 609.

Public office is a public trust, and this Court will not countenance the subversion thereof for private gain. Not only will it declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a *quantum meruit* basis. In entering into such contract a public official acts at his own peril and must suffer the loss incident upon his breach of his public duty. He may look in vain to the courts to aid him in his efforts to recoup his losses, due to the invalidity of the contract, on the grounds the public agency which he serves has been enriched by his misconduct.

In other words, this Court will not recognize or permit any recovery bottomed on the criminal conduct of a public official. To put it simply, the doors of the courts are closed to any individual, or firm in which he is financially interested, who engages in a transaction which comes within the language of the statute. *Snipes v. Winston, supra; Davidson v. Guilford, supra; King v. Guilford,* 152 N.C. 438; *S. v. Williams, supra.* Annos. 84 A.L.R. 969, 110 A.L.R. 164, 154 A.L.R. 375; 12 A.J. 498.

The court below should have sustained the motion to dismiss this action as in case of involuntary nonsuit. Hence the judgment entered in the court below must be

Reversed.

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FRANK W. HARWELL AND WIFE, v. CLIFFORD A. ROHRABACHER.

(Filed 14 December, 1955.)

**1. Ejectment § 4—**

A magistrate has no jurisdiction to try an action in which title to real property is at issue and his jurisdiction of an ejectment action obtains only when there is a contract of rental and the relation of landlord and tenant exists between the plaintiff and the defendant.

**2. Ejectment § 5—**

If the defendant in summary ejectment wishes to assert that title to real property is in controversy and will arise in the trial of the action, he must plead his defense by written answer signed by him or his attorney, G.S. 7-124, and, in the absence of such answer, he cannot draw title into issue.

**3. Vendor and Purchaser § 13—**

Where the purchaser, by and with consent of vendors, cancels his binding contract to purchase the premises and withdraws his deposit of earnest money, he terminates the contract.

**4. Ejectment § 4—**

Where, after the termination of a contract to purchase realty, the purchaser leases the premises from vendors and pays rent to them, and, after the sale of the property to a third person, pays rent to the grantee, the grantee may maintain an action in summary ejectment for possession of the property after due notice to vacate, title to the property not being in issue. It is immaterial whether possession was taken before or after the cancellation of the contract to purchase.

**5. Landlord and Tenant § 3—**

A person who enters into possession of premises as the tenant of another may not deny the title of his landlord.

APPEAL by defendant from *McKeithen, Special J.*, May Term, 1955, GUILFORD. Affirmed.

Civil action in summary ejectment.

On 26 November 1954, H. R. Welker and wife owned the house and lot in controversy which had been listed with C. H. Slater Realty & Mortgage Corporation, hereinafter referred to as realty company, for sale. On that date the defendant made a firm offer for the purchase of the property and delivered his check for $812.50 as earnest money to bind the transaction. The offer was accepted by the Welkers. Under the terms of the agreement thus entered into, the transaction was to be consummated on or before 26 February 1955.

Defendant ascertained that there were two deeds of trust on the property and several other liens. Delay resulted and in the latter part of December, 1954, defendant and an attorney representing the Welkers discussed a rental of the property by the defendant, and the Welkers authorized a rental to the defendant at $100 per month. On 3 January 1955, the defendant went to the realty company and demanded the return of his deposit of $812.50. The deposit was returned to him, and he signed a letter acknowledging receipt of the earnest money deposit and agreeing that "my contract to purchase this property is now null and void." There is some evidence tending to show that the defendant withdrew his deposit and canceled the agreement for the reason he was under the impression the deeds of trust would be foreclosed, and he

might be able to purchase the property at a lower price. Likewise, on 3 January 1955, the defendant sent the attorney for the Welkers a check in the sum of $100 to cover the January rent and entered possession of the property. Later in January the Welkers sold and conveyed the property to the plaintiff Frank W. Harwell, and on 2 February 1955, plaintiff Harwell advised the defendant that he had acquired title, that future rents would be payable to him, and that he was demanding possession of the property on or before 4 April 1955. Defendant paid Harwell rent for the months of February and March.

Upon failure of defendant to vacate the premises at the expiration of his term, plaintiffs instituted this action in summary ejectment before a justice of the peace. Defendant did not file any answer or any other written pleading, but contended that the title to real property was at issue. Judgment was rendered in favor of the plaintiff, and defendant appealed to the Superior Court.

When the cause came on to be heard in the Superior Court, plaintiffs offered their evidence and rested. Defendant moved for nonsuit which was denied. He offered no testimony. He thereupon prayed the court to instruct the jury as follows:

"I charge you that if you find that, at the time the arrangements were made about the rental of the property, there was in existence and in effect a contract for sale and purchase, the relation of Landlord and Tenant would not then be created."

The prayer was denied, but it does not appear that the defendant excepted to the denial thereof.

The court submitted to the jury issues appropriate in a summary ejectment action which were answered in favor of the plaintiff. There was judgment on the verdict and the defendant appealed.

*Jordan & Wright for plaintiff appellees.*

*Wm. E. Comer for defendant appellant.*

BARNHILL, C. J. The defendant challenges the validity of the judgment entered in the court below on jurisdictional grounds. A magistrate has jurisdiction in an ejectment action only when there is a contract of rental and the relation of landlord and tenant exists between the plaintiff and the defendant.

"The jurisdiction of a justice of the peace in civil actions for recovery of possession of real estate is entirely statutory—and is derived from the landlord and tenant act providing for summary ejectment. (Statute cited.) Such jurisdiction may be exercised only in cases where the relationship of landlord and tenant existed within the terms and meaning of the landlord and tenant act, and where the tenant holds over after

expiration of the term. (Authorities cited.)" *Simons v. Lebrun,* 219 N.C. 42, 12 S.E. 2d 644; *Ford v. Moulding Co.,* 231 N.C. 105, 56 S.E. 2d 14; *Howell v. Branson,* 226 N.C. 264, 37 S.E. 2d 687.

While it is true that a justice of the peace has no jurisdiction to try an action in which the title to real property is at issue, if the defendant in a summary ejectment proceeding wishes to assert that the title to real property is in controversy and will arise in the trial of the action, he must plead his defense by written answer signed by him or his attorney. G.S. 7-124. The title to real estate cannot be drawn into controversy by the defendant on a trial in a justice's court except by delivering to the justice an answer in writing that such title will come in question. *Evans v. Williamson,* 79 N.C. 86. And his answer must be supported by evidence. *Jerome v. Setzer,* 175 N.C. 391, 95 S.E. 616.

Furthermore, even if we concede that the defendant has raised the issue, there is no evidence in the record which tends to show that the title to real estate is involved in this action. The defendant voluntarily, by and with the consent of the Welkers, canceled his binding contract to purchase the premises and withdrew his deposit of earnest money. He thereby terminated the contract. He then leased the premises and entered into possession thereof as the lessee of plaintiff's predecessor in title and paid rent thereon for three months. He received due notice to vacate. Hence the peremptory instruction of the court about which the defendant complains is warranted by the record.

The peremptory instruction was warranted for still another reason. The person who enters into the possession of premises as the tenant of another may not deny the title of his landlord.

"It is recognized as the general rule that a tenant is not allowed to controvert the title of his landlord or set up rights adverse to such title without having first surrendered the possession acquired under and by virtue of the agreement between them." *Lawrence v. Eller,* 169 N.C. 211, 85 S.E. 291; *Carnegie v. Perkins,* 191 N.C. 412, 131 S.E. 750, and cases cited.

"In *Perry v. Perry,* 190 N.C. p. 126, *Varser, J.,* speaking to the question says: 'Of course, as stated in *Davis v. Davis,* 83 N.C. 71, if the defendant did enter as tenant of the plaintiffs or became such after entry, then he is estopped to deny the plaintiffs' title (16 R.C.L. 469), or to assert title to himself (16 R.C.L. 657) until he has restored the possession to the plaintiff, but he may contest the issue of tenancy by any competent evidence.' " *Carnegie v. Perkins, supra.*

It is immaterial whether the defendant entered into possession of the premises before or after he procured the cancellation of his contract to purchase. It is uncontradicted that the contract was canceled and defendant remained in possession as tenant. *Carnegie v. Perkins, supra.*

Furthermore, the record is devoid of any evidence which tends to bring the title to the premises in issue in this cause.

The case just cited (*Carnegie v. Perkins*) is almost on all fours, and the identical questions raised in that cause were resolved against the tenant.

The judgment entered in the court below must be

Affirmed.

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MRS. PATSY FISHER JONES AND HUSBAND, S. D. JONES, v. FRANK LEWIS AND WIFE, MRS. FRANK LEWIS.

(Filed 14 December, 1955.)

**1. Husband and Wife § 12d (4)—**

A separation agreement is terminated by the subsequent reconciliation of the parties for every purpose in so far as it remains executory.

**2. Same—**

Where a deed of separation contains a division of property and is executed in all respects in conformity with law, including the private examination of the wife, a subsequent reconciliation of the parties does not revoke or invalidate the agreement in so far as it constitutes a settlement, and the wife is thereafter estopped to claim an interest in realty conveyed by her to her husband in the deed of separation.

APPEAL by petitioners from *Phillips, J.*, April Term, 1955, of GUILFORD (Greensboro Division).

This is a special proceeding brought before the Clerk of the Superior Court of Guilford County for the partition of certain lands lying in the City of Greensboro. The petitioner Mrs. Jones claims an undivided one-half interest in these lands as a tenant in common with the respondent Frank Lewis. The respondents pleaded sole seizin, and the cause was thereafter transferred to the Civil Issue Docket of the Superior Court for trial.

Mr. Lewis and Mrs. Jones were at one time husband and wife and while they were married they acquired the lands in controversy as tenants by the entirety. They thereafter separated and entered into a formal deed of separation on 12 August, 1943. This deed of separation was recorded in the office of the Register of Deeds of Guilford County on 13 August, 1943, in Book 1018, at page 260. A copy of the deed of separation was attached to the answer of the respondents, and the petitioners in their reply admitted the due execution thereof as alleged. The marriage was later dissolved by absolute divorce and both parties are now remarried.

Mrs. Jones, by the deed of separation, conveyed her interest in the two tracts of land in controversy to Mr. Lewis, and the conveyance, incorporated in the deed of separation, not only referred specifically to the two tracts of land, but set forth a full legal description thereof. Mrs. Jones was privately examined concerning her execution of the deed of separation before the Assistant Clerk of the Superior Court of Guilford County, who found as a fact and certified that it was not unreasonable or injurious to her; and the deed of separation was referred to in her private examination as a "contract and deed of separation and conveyance."

The deed of separation incorporated a property settlement, providing in detail for the adjustment of property rights between the parties. Mrs. Jones not only conveyed her interest in the lands in controversy, but she released any interest in the merchandise and fixtures in the store operated on the premises, subject in each instance to debts and encumbrances. Mr. Lewis, on the other hand, conveyed to Mrs. Jones all the household and kitchen furniture and goods located in their home; turned over to her $475.00 (face value) in United States Savings Bonds; and paid her $600.00 in cash. He also agreed in the deed of separation to pay Mrs. Jones an aggregate sum of $7,500.00 over a five-year period, payable in equal monthly installments of $125.00 on the 12th day of each and every month during said period, and no contention has been made that this sum was not thereafter duly paid and accepted in accordance with the deed of separation.

Mrs. Jones alleges by way of reply that she and Mr. Lewis spent a night together in Charlotte several months after the execution of the deed of separation, and she contends that this constituted a reconciliation and that such reconciliation abrogated the separation agreement. Mr. Lewis states in his brief that if it had been necessary for him to testify, he would have denied that this incident took place as alleged, but he insists whether it did or not, a reconciliation would have done no more than abrogate the promissory aspects of the agreement of separation and would not affect the executed provisions of the property settlement between the parties.

The matter was heard by the trial judge who found as a matter of law that Mrs. Jones' execution of the contract and deed of separation and conveyance was "in all respects regular and in conformity with the laws of the State of North Carolina as they existed at the time of her execution thereof"; and the trial judge decreed that by her execution thereof she "is estopped to deny the title of the defendant Frank Lewis to the two tracts of land in controversy in this proceeding, as described in the petition and in the said contract and deed of separation and conveyance."

Judgment on the pleadings was therefore entered for the respondents, and the petitioners appeal, assigning error.

*Peter L. Long and James J. Caldwell for petitioners.*
*Falk, Carruthers & Roth for respondents.*

DENNY, J. It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose in so far as it remains executory. *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327, Ann. Cas. 1913D, 261; *Moore v. Moore,* 185 N.C. 332, 117 S.E. 12; *S. v. Gossett,* 203 N.C. 641, 166 S.E. 754; *Reynolds v. Reynolds,* 210 N.C. 554, 187 S.E. 768; *Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672. Even so, a reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties. An exhaustive collection of the cases on this subject may be found in 35 A.L.R. 2d Anno.: Reconciliation—What Comprises—Effect, page 707 *et seq.* through 753. At page 727 thereof it is said: "Regardless of what the rule may be as to a settlement with executory provisions, an executed property settlement is not affected by a mere reconciliation and resumption of cohabitation." *Simpson v. Weatherman,* 216 Ark. 684, 227 S.W. 2d 148, 18 A.L.R. 2d 755; *Miller v. West Palm Peach Atlantic Nat. Bank,* 142 Fla. 22, 194 So. 230; *Haggerty v. Union Guardian Trust Co.,* 258 Mich. 133, 242 N.W. 211, 85 A.L.R. 417; *In re Estate of Shafer,* 77 Ohio App. 105, 65 N.E. 2d 902.

Schouler, in his treatise on the law of Marriage, Divorce, Separation and Domestic Relations, Sixth Edition, section 1312, page 1561, in discussing the identical question now before this Court, says: "When the contract contains provisions for the wife which might with equal propriety have been made had no separation been contemplated, and others which would have otherwise been idle, the coming together again of the parties and their conduct may be such as to show an intention to avoid the latter and not the former. So where the agreement for separation includes a division of property which might have been made if no separation had taken place the reconciliation does not abrogate this division."

In 17 Am. Jur., Divorce and Separation, section 735, page 552, it is said: "If an agreement between husband and wife providing for their separation goes beyond the terms of a mere separation deed and is in effect a good voluntary settlement by the husband on his wife, a subsequent reconciliation between the parties cannot affect the agreement

so far as it constitutes a settlement. Hence, the settlement must stand notwithstanding the reconciliation," citing *Haggerty v. Union Guardian Trust Co., supra,* and Anno. 40 A.L.R. 1233, and 85 A.L.R. 421.

It is well settled in this State that a conveyance from one spouse to the other of an interest in an estate held by the entireties is valid as an estoppel when the requirements of the law are complied with in the execution thereof. *Capps v. Massey,* 199 N.C. 196, 154 S.E. 52; *Willis v. Willis,* 203 N.C. 517, 166 S.E. 398; *Keel v. Bailey,* 224 N.C. 447, 31 S.E. 2d 362.

We concur in the ruling of the court below to the effect that the conveyance from the petitioner Mrs. Patsy Fisher Jones was in all respects regular, having been executed in conformity with the laws of this State at the time of the execution thereof, and that she is estopped to deny the title of the respondent Frank Lewis to the two tracts of land in controversy in this proceeding.

The judgment of the court below is

Affirmed.

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STATE v. EARL HARE.

(Filed 14 December, 1955.)

**1. Robbery § 1—**

G.S. 14-87 does not change the offense of common-law robbery or divide it into degrees, but merely provides more severe punishment when the offense is committed or attempted with the use or threatened use of firearms or other dangerous means.

**2. Indictment and Warrant § 22—**

While an indictment will support a conviction of a less degree of the crime therein charged, it will not support a conviction for an offense more serious than that charged.

**3. Criminal Law § 11—**

The common-law rule that an attempt to commit a felony is a misdemeanor remains unchanged in this State except where otherwise provided by statute.

**4. Criminal Law § 60b—**

Where defendant is charged with attempted robbery with firearms, his plea of guilty of robbery without firearms is insufficient to support judgment.

**5. Habeas Corpus § 2—**

Where upon *habeas corpus* it appears that petitioner is serving a sentence under a void judgment, petitioner is entitled to his immediate release, without prejudice to the right of the solicitor to prosecute the petitioner on a new bill of indictment, if so advised.

STATE *v.* HARE.

CERTIORARI to review the order of *Sharp, Special Judge,* in *habeas corpus* proceeding, upon petition of Earl Hare.

This cause is here upon a *writ of certiorari* issued by this Court on 29 September, 1955, to review the judgment below dismissing the *writ of habeas corpus* and remanding the petitioner to custody under a former judgment of the Superior Court.

At the October Term, 1947, of the Superior Court of Lee County, North Carolina, two true bills of indictment were returned against Earl Hair (Hare), Joe T. Harris, and Joe C. Cashwell. One of the bills of indictment contained two counts, the first charging conspiracy to commit larceny and the second larceny. The second bill of indictment charged the defendants with attempted robbery with firearms.

The cases were consolidated for trial. Certified copy of the plea and judgment entered in the consolidated cases against the petitioner shows the following: "The defendant Earl Hair (Hare) pleads guilty to conspiracy and robbery without firearms. Let the defendant Earl Hair (Hare) on the charge of conspiracy be confined in the State's Prison for not less than 8 years nor more than 10 years and on the charge of robbery without firearms be confined in the State's Prison for not less than 7 years nor more than 8 years. The sentence of 7 to 8 years to begin at the expiration of the sentence of 8 to 10 years for conspiracy. John J. Burney, Judge Presiding."

The petitioner began serving the 8- to 10-year sentence for conspiracy on 21 October, 1947, and completed that sentence on 6 March, 1953, at which time he began serving the 7- to 8-year sentence for robbery without firearms.

*Attorney-General Rodman, Assistant Attorney-General Love, R. Brookes Peters, General Counsel for the State Highway & Public Works Commission, and Parks H. Icenhour, attorney for Highway Commission, for the State.*

*Clyde A. Douglass, II, for petitioner.*

DENNY, J. The question to be determined is whether the petitioner is entitled to his release since he is being held under a judgment entered upon a plea of guilty of an offense for which he has never been indicted. The indictment with respect to robbery only charged that the defendants, with the threatened use of certain firearms, to-wit: a pistol, attempted to take personal property, etc. Robbery with firearms is not charged.

We have repeatedly held that the purpose and intent of the Legislature in enacting G.S. 14-87 was to provide for more severe punishment for the commission of robbery when such offense is committed or at-

tempted with the "use or threatened use of any firearms or other dangerous weapon, or implement or means," than is provided for common-law robbery. This statute does not attempt to change the offense of common-law robbery or to divide it into degrees. *S. v. Chase,* 231 N.C. 589, 58 S.E. 2d 364; *S. v. Jones,* 227 N.C. 402, 42 S.E. 2d 465; *S. v. Keller,* 214 N.C. 447, 199 S.E. 620.

A defendant may be indicted for robbery with firearms and be acquitted of that specific charge and convicted of the included crime of common-law robbery without firearms, or a lesser degree of the latter crime if the evidence so warrants. *S. v. Bell,* 228 N.C. 659, 46 S.E. 2d 834. However, it does not follow that upon an indictment that only charges an attempt to commit robbery with firearms, a defendant may be convicted of common-law robbery. Under such an indictment, a defendant might be convicted of an attempt to commit robbery without firearms. This Court said in *S. v. Jordan,* 226 N.C. 155, 37 S.E. 2d 111, "It is permissible under our practice to convict a defendant of a less degree of the crime charged, G.S. 15-170, or for which he is being tried, when there is evidence to support the milder verdict, *S. v. Smith,* 201 N.C. 494, 160 S.E. 577, . . ., but it would seem to be without precedent to try a defendant for one offense and to convict him of another and greater offense, even though the conviction be of a higher degree of the same offense for which he is being tried."

"An indictment will not support a conviction for an offense more serious than that charged. Where an indictment or information charges only a misdemeanor, accused may not be convicted of a felony. One charged with simple larceny cannot be convicted of robbery or of larceny from the person, merely because the proof discloses the commission of the greater crime; nor can one charged with petit larceny be convicted of grand larceny, however great the proved value of the stolen property may be. Under an indictment for assault with intent to rob, accused cannot be convicted of robbery." 42 C.J.S., Indictments and Informations, section 300, page 1330.

It is likewise said in 14 Am. Jur., Criminal Law, section 272, page 952, "A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order, the effect of which is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime sufficiently charged in the indictment or information." Cited and approved in *S. v. Robinson,* 224 N.C. 412, 30 S.E. 2d 320.

At common law, an attempt to commit a felony was a misdemeanor. *S. v. Boyden,* 35 N.C. 505; *S. v. Jordan,* 75 N.C. 27; *S. v. Stephens,* 170 N.C. 745, 87 S.E. 131. Our law in this respect remains unchanged.

except where otherwise provided by statute. *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1; *S. v. Surles,* 230 N.C. 272, 52 S.E. 2d 880.

From the facts disclosed on the record before us, we hold that the court was in error in accepting the plea of guilty of common-law robbery without firearms, in the absence of a bill of indictment charging such crime, and, therefore, the plea was insufficient to support the judgment. Hence, the judgment is void and the petitioner is entitled to his discharge.

What we have said herein is without prejudice to the right of the solicitor to prosecute the petitioner on the bill of indictment charging him with an attempt to commit robbery with firearms, if so advised. However, the petitioner having served over two years and eight months under a void judgment, he is ordered released from custody under his present commitment. Therefore, let this opinion be certified forthwith to the Superior Court of Lee County to the end that the petitioner may be released from custody. *S. v. Austin,* 241 N.C. 548, 85 S.E. 2d 924.

Reversed.

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STATE v. JOHN ROBERT BARBOUR.

(Filed 14 December, 1955.)

**1. Criminal Law § 17c—**

A plea of *nolo contendere* is not open to the defendant as a matter of right, but may be accepted by the court as a matter of grace.

**2. Same—**

A plea of *nolo contendere* is equivalent to a plea of guilty for the purpose of entering judgment in the particular case.

**3. Same—**

Upon acceptance of a plea of *nolo contendere* to a valid warrant or indictment, nothing is left for the court but the imposition of judgment, and while the court may hear evidence to aid it in determining the punishment, if such evidence makes it appear that defendant is not guilty, the court should advise him to withdraw his plea, and it is error for the court to find the defendant guilty for part of the offenses charged and not guilty of part.

**4. Criminal Law § 83—**

Where the record discloses that the defendant entered a plea of *nolo contendere* and that the court, without the intervention of a jury, found defendant guilty of part of the offenses charged and not guilty of part, and imposed sentence "on the verdict," the record does not support the judgment, and the judgment must be vacated and the cause remanded for imposition of sentence upon the plea.

STATE *v.* BARBOUR.

APPEAL by defendant from *Huskins, Special Judge,* February Term 1955 of JOHNSTON.

Criminal prosecution upon a warrant, issued by a justice of the peace, and returnable before the Recorder's Court of the county, charging the defendant with assaulting his wife with his fist and a chair, and with attempting to shoot her with a shotgun, while drunk and disorderly.

In the Recorder's Court, the defendant entered a plea of *nolo contendere,* and from the judgment imposed appealed to the Superior Court. In the Superior Court, the defendant also entered a plea of *nolo contendere.* Then the record states, in this case in which the defendant "has pleaded *nolo contendere,* the Court finds the defendant guilty of an assault on a female with his fist and a chair, and not guilty of an assault with a gun." The record further states "the judgment on the verdict is that the defendant be confined in the common jail of the county for a term of two years, and assigned to perform labor under the supervision of the State Highway and Public Works Commission."

Defendant appeals, assigning error.

*William B. Rodman, Jr., Attorney General, and Claude L. Love, Assistant Attorney General, for the State.*

*E. J. Wellons for Defendant, Appellant.*

PARKER, J. This is the defendant's sole assignment of error: the Court erred in imposing a sentence in excess of the punishment permitted by G.S. 14-33.

However, at the threshold of our consideration of this appeal we are confronted with the acts of the Court, upon the defendant's plea of *nolo contendere,* in finding the defendant guilty of a part of the offenses charged, and not guilty of another part, and in imposing judgment "on the verdict."

In this jurisdiction pleas of *nolo contendere* have been accepted for many years. The acceptance by the Court of such a plea, and its entry in the Minutes of the Court, is a matter of grace: it is not a plea open to the defendant as a matter of right. In this jurisdiction, and apparently in all the State and Federal Courts where such a plea is allowed, a plea of *nolo contendere* to a warrant or an indictment, good in form and substance, when accepted by the Court, becomes an implied confession of guilt, and for the purposes of that case only is equivalent to a plea of guilty. *Fox v. Scheidt,* 241 N.C. 31, 84 S.E. 2d 259; *Winesett v. Scheidt,* 239 N.C. 190, 79 S.E. 2d 501; *S. v. McIntyre,* 238 N.C. 305, 77 S.E. 2d 698; *S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *S. v. Thomas,* 236 N.C. 196, 72 S.E. 2d 525; *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473, L.R.A. 1918A 955; *Hudson v. U. S.,* 272 U.S. 451, 71 L. Ed. 347; Anno.

152 A.L.R., p. 273 *et seq.;* 22 C.J.S., Crim. Law, Sec. 425; 14 Am. Jur., Crim. Law, p. 954; *Nolo Contendere:* Its Nature and Implications, 51 Yale Law Journal 1256-7.

"It" (a plea of *nolo contendere*) "authorizes judgment as upon conviction by verdict or plea of guilty." *Winesett v. Scheidt, supra.* This seems to be universally held. *S. v. Burnett, supra.*

When a plea of *nolo contendere* has been accepted by the Court, and as long as it stands, it is not within the province of the Court to adjudge the defendant guilty or not guilty. *S. v. Thomas, supra; Com. v. Rousch,* 113 Pa. Super. 182, 172 A. 484; *Ferguson v. Reinhart,* 125 Pa. Super. 154, 190 A. 153; *S. v. Herlihy,* 102 Me. 310, 66 A. 643; *Crowley v. U. S.,* 113 F. 2d 334, 338; 14 Am. Jur., Crim. Law, p. 954; 22 C.J.S., Crim. Law, p. 660.

In *U. S. v. Norris,* 281 U.S. 619, 74 L. Ed. 1076, it is said: "After the plea" (referring to a plea of *nolo contendere*), "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record."

It is not necessary that the Court should adjudge that the defendant is guilty, for that follows by necessary legal inference, since a plea of *nolo contendere,* when accepted by the Court, becomes an implied confession of guilt for the purposes of that particular case. *S. v. Burnett, supra; Com. v. Ingersoll,* 145 Mass. 381, 14 N.E. 449; *S. v. Herlihy, supra;* Anno. 41 L.R.A. (N.S.) 72.

The judge can hear evidence only to aid him in fixing punishment. *S. v. Thomas, supra; S. v. Burnett, supra; Com. v. Rousch, supra;* 51 Yale Law Journal 1257; 22 C.J.S., Crim. Law, p. 660.

If, after hearing evidence to aid the Court in determining the sentence to be imposed, it appears that the defendant is not guilty, the Court may advise him to withdraw his plea of *nolo contendere,* and stand a jury trial. It would be improper to adjudge the defendant not guilty. The law contemplates a trial of an issue of fact by a jury, and not by a judge alone, and such has been the understandings of all generations of men who have lived under the common law. *Com. v. Rousch, supra; Ferguson v. Reinhart, supra;* 22 C.J.S., Crim. Law, p. 660. See *S. v. Barley,* 240 N.C. 253, 81 S.E. 2d 772.

It was error for the Trial Judge to find the defendant guilty of part of the offenses charged, and not guilty of part of the offenses charged. That leaves the plea of *nolo contendere* standing for the imposition of sentence thereupon.

Yet the Court did not impose sentence upon the plea of *nolo contendere,* but "on the verdict." There was no jury trial. The record does not support the judgment. The judgment below will be vacated, and

the case remanded for imposition of sentence upon the defendant's plea of *nolo contendere*. However, if the defendant contends that he is not guilty of any part, or of all, of the offenses charged in the warrant, the lower court should permit him to withdraw his plea, and carry his case to the jury.

Reversed and remanded.

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MRS. PEARL HANRAHAN v. WALGREEN COMPANY, INC.

(Filed 14 December, 1955.)

**1. Sales § 27—**

Plaintiff's evidence was to the effect that after using a hair rinse purchased from defendant she had weeping dermatitis of her entire scalp and parts of her face and neck, and that a friend, who purchased and used the same brand of rinse, had her scalp become red and inflamed. There was no evidence that the rinse had been adulterated, misbranded or falsely advertised, or that it contained any poisonous substance. *Held:* The evidence leaves in speculation and conjecture whether the plaintiff's condition was due to allergy or to some harmful and poisonous substance in the rinse, and therefore nonsuit was properly entered in her action for breach of implied warranty.

**2. Same—**

It is generally held that the seller is not liable to the purchaser for damages from the use of the product resulting from an allergy or unusual susceptibility peculiar to the purchaser which is wholly unknown to the seller.

**3. Trial § 23a—**

A verdict may not be based upon mere conjecture or guesswork.

APPEAL by plaintiff from *Williams, J.*, February Civil Term 1955 of WAKE.

Action to recover damages for breach of warranty in the sale by defendant to plaintiff of Noreen Super Color Rinse.

In January 1953 plaintiff purchased from the defendant a hair rinse named Noreen Super Color Rinse. She read the directions on the box for its use, and followed these directions the three times she used the preparation to rinse her hair. Each time her scalp became irritated. Prior to its use she had never had any trouble with her scalp or head. After its third use she consulted a doctor, who found that she had weeping dermatitis of her entire scalp, behind her ears, on her face, and somewhat down the posterior part of her neck. Her witness, Dr. Newton G. Pritchett, testified: "I mean by a weeping condition that it was

not an infection but the fluid that oozes from a contact, an acute type of rash." She was treated for this condition in a doctor's office and in a hospital. She incurred doctor's, medical and hospital expenses.

A girl friend of plaintiff rinsed her hair with the rinse plaintiff purchased from the defendant, and her scalp became red and inflamed from its use.

Dr. Pritchett further testified that plaintiff's dermatitis was caused by some chemical contact with the scalp, but that he could not say what that chemical might be: that it is an allergic reaction to a chemical coming in contact with the body surface. Dr. Pritchett made no chemical analysis of this Noreen Super Color Rinse, and does not know its ingredients. After medical treatment plaintiff's dermatitis came under control.

At the close of plaintiff's evidence, the Court sustained the defendant's motion for judgment of nonsuit.

Plaintiff appeals, assigning error.

*R. B. Templeton and W. H. Yarborough for Plaintiff, Appellant.*
*Smith, Leach, Anderson & Dorsett for Defendant, Appellee.*

PARKER, J. Webster's New International Dictionary, 2d Edition, defines cosmetic as "any external application intended to beautify and improve the complexion, skin, or hair." The plaintiff has no evidence to cause the hair rinse she purchased from defendant to be deemed adulterated, as set forth in G.S. 106-136; or to cause it to be deemed misbranded, as set forth in G.S. 106-137; or to cause it to be deemed false advertising, as set forth in G.S. 106-138.

Plaintiff testified that the hair rinse she bought from defendant contained eight capsules, and she used all except three. Although three of these capsules were in her possession, she produced no analysis of them showing they contained any deleterious substance. Her physician testified that her condition was caused by some chemical contact, but he could not say what that chemical contact might be.

It would seem that the cause of plaintiff's dermatitis remains a matter of doubt and conjecture. It may be that she and her girl friend were allergic to the ingredients of this hair rinse. Although there are contrary decisions, it has been generally held—and it seems the sounder view—that in an action by the buyer of a product against the seller for breach of warranty to recover damages for injuries resulting from the use of the product, there is no liability upon the seller, where the buyer was allergic or unusually susceptible to injury from the product, which fact was wholly unknown to the seller and peculiar to the buyer. *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3 A. 2d 650; *Franke's,*

*Inc. v. Bennett,* 201 Ark. 649, 146 S.W. 2d 163; *Stanton v. Sears Roebuck & Co.,* 312 Ill. App. 496, 38 N.E. 2d 801; *Worley v. Proctor & Gamble Mfg. Co.,* (Mo.) 253 S.W. 2d 532; *Longo v. Touraine Stores, Inc.,* 319 Mass. 727, 66 N.E. 2d 792; *Flynn v. Bedell Co.,* 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504; *Barrett v. S. S. Kresge Co.,* 144 Pa. Super. 516, 19 A. 2d 502; *Bennett v. Pilot Products Co.,* (Utah) 235 P. 2d 525, 26 A.L.R. 2d 958; *Griffiths v. Peter Conway Ltd.* (1939) All Eng. 685—C.A.; Anno. 26 A.L.R. 2d 963 *et seq.* See also: *Lippard v. Johnson,* 215 N.C. 384, 1 S.E. 2d 889, as to allergy. Contrary decisions: *Zirpola v. Adam Hat Stores,* 122 N.J.L. 21, 4 A. 2d 73; *Reynolds v. Sun Ray Drug Co.,* 135 N.J.L. 475, 52 A. 2d 666.

It may be that there was a poisonous substance in the hair rinse, but there is no evidence to support such a conjecture.

We cannot resort to a choice of possibilities: that is guesswork, not decision. See *Mills v. Moore,* 219 N.C. 25, 30, 12 S.E. 2d 661.

The plaintiff relies principally upon *Bianchi v. Denholm & McKay Co.,* 302 Mass. 469, 19 N.E. 2d 697, 121 A.L.R. 460. The facts are different from the case here. In that case there was evidence that the face powder contained two aniline dyes, and that these dyes caused plaintiff's dermatitis.

There is no evidence that plaintiff or her girl friend were or were not persons whose skins were only normally sensitive to infection or irritation. We need not inquire in the case at bar, whether or not there is any assumption that a human being is a normal one, and if there is such an assumption, whether it is merely the drawing of a permissible, though not a compulsory inference of fact, or whether or not it rises to the dignity of a presumption, or even to *prima facie* evidence, for there is no evidence here that the hair rinse contained any poisonous or deleterious ingredient to a normal person who used it. See: *Payne v. R. H. White Co.,* 314 Mass. 63, 49 N.E. 2d 425.

We conclude that there is a total absence of proof of any damage to plaintiff proximately resulting from breach of warranty. See: *Mauney v. Luzier's, Inc.,* 215 N.C. 673, 2 S.E. 2d 888; *Lippard v. Johnson, supra.*

The judgment below is

Affirmed.

D. A. BYRD AND WIFE, VERA W. BYRD, v. M. B. THOMPSON, SR., AND WIFE, DELACY THOMPSON.

(Filed 14 December, 1955.)

**1. Partition § 4g (3)—**

Where actual partition has been ordered, whether the tracts as divided by the commissioners are unequal in value or fair and equitable is a question of fact determinable by the Superior Court on appeal, and its order confirming the report will not be disturbed when the judgment is supported by the findings and the findings are supported by the evidence.

**2. Appeal and Error § 6c (2)—**

A sole exception to the signing of the judgment presents only whether the facts found support the judgment.

**3. Partition § 4g (1)—**

Where, in the actual division of land between two tenants in common, there is a difference in the value of the two tracts, the person to whom is allotted the more valuable tract should pay to the other only one-half the difference in the value.

APPEAL by defendants from *Gwyn, J.*, Resident Judge of the 17th Judicial District, heard 24 September, 1955, in Chambers in Reidsville, N. C., from CASWELL.

Partition proceedings relating to a tract of land in Caswell County, containing 131.62 acres, owned in fee simple, each having an undivided one-half interest, by plaintiff D. A. Byrd and by defendant M. B. Thompson, Sr. In their respective pleadings, plaintiffs petitioned that the land be sold but defendants insisted that actual partition be made. In proceedings not relevant to this appeal, the question of fact thus raised was resolved in favor of defendants.

Pursuant to proper orders, the land was surveyed and divided by commissioners into two tracts. The commissioners allotted tract #1, containing 56.15 acres, valued at $2,850.00, to defendants, and allotted tract #2, containing 75.47 acres, valued at $3,000.00, to plaintiffs. To *equalize,* tract #2 was charged with $150.00, to be paid by plaintiffs to defendants.

Defendants excepted to the commissioners' report. Upon hearing, the clerk overruled defendants' exceptions and approved the commissioners' report, finding specific facts as to the character of the land and that the division made by the commissioners was "fair, just and equitable." Defendants excepted to the clerk's order and appealed. Upon appeal, in a hearing before Judge Gwyn, plaintiffs and defendants offered conflicting evidence as to the value of tract #1 and of tract #2.

Judge Gwyn's order, from which this appeal is taken, in part, provides: "After hearing the evidence offered by all parties, after considering the plats, the division made, the locations and values of both tracts, and the report of the Commissioners, the Court finds that the facts as set forth in the order of the Clerk of the Court, dated September 10, 1955, in this cause are true and correct, and is of the opinion that a just, fair and reasonable division of the lands has been made between the plaintiff and the defendant and should be upheld and confirmed." Further provisions of Judge Gwyn's order overrule defendants' exceptions and approve and confirm both the commissioners' report and the clerk's order.

Defendants excepted "to the foregoing order and the signing thereof" and appealed. Defendants' assignments of error are based solely on this exception.

*D. Emerson Scarborough for plaintiffs, appellees.*

*W. D. Barrett for defendants, appellants.*

BOBBITT, J. Defendants' brief contains no argument and cites no authority relating to an error of law. It relates solely to their contention that the division made by the commissioners was unequal, adverse to them.

Whether the division was unequal or fair and equitable, was a question of fact determinable by Judge Gwyn. *McMillan v. McMillan*, 123 N.C. 577, 31 S.E. 729; *Fisher v. Toxaway Co.*, 171 N.C. 547, 88 S.E. 887.

There are no exceptions to the findings of fact. Defendants' sole exceptive assignment of error is to the signing of the judgment. Thus, the only question presented is whether the facts found support the judgment. *Scarboro v. Insurance Co.*, 242 N.C. 444, 88 S.E. 2d 133. But aside from defendants' failure to present for decision the only question they now argue, it appears there was evidence before Judge Gwyn amply sufficient to support his findings; and the findings made fully support the judgment.

The respective values of tract #1 ($2,850.00) and tract #2 ($3,000.00) having been established, in order to *equalize*, the owelty charged against tract #2 should be $75.00 rather than $150.00. This being an obvious error in calculation, the commissioners' report and the orders confirming such report should be modified so as to make this correction. It is so ordered.

Modified and affirmed.

STATE v. CORDELL HULL McPEAK.

(Filed 14 December, 1955.)

1. **Narcotics § 3—**

The forfeiture of a vehicle used in illegal transportation of narcotics can be defeated and the car recovered by the true owner only if he can establish his title and show that the transportation of contraband was without his knowledge or consent. G.S. 90-111.2.

2. **Criminal Law § 42e—**

Where a statement made by defendant is admitted in evidence by agreement of the solicitor and defense counsel, testimony of another statement by defendant at variance therewith is competent for the purpose of contradiction.

3. **Narcotics § 3—**

Where a petitioner testifies that the vehicle used in the transportation of narcotics was owned by her, and introduces in evidence bill of sale and registration card issued in her name for a particular year, but there is evidence that the car was registered in the name of another for the subsequent year, and that the driver, when arrested, had in his possession registration card showing such other as the owner, and testifies that he and such owner are one and the same, the conflicting evidence is for the jury on the issue, the credibility of the witnesses, and the weight to be given their testimony being for its determination.

4. **Criminal Law § 53l—**

Where the court states the respective contentions of the parties fairly and impartially, a party desiring more specific instructions in regard thereto should tender request therefor.

PETITIONER'S appeal from *Johnston, J.*, April 1955 Term Superior Court, SURRY.

Criminal prosecution upon a charge of possessing and transporting narcotic drugs.

Officers arrested Cordell Hull McPeak near Mount Airy in Surry County while he was driving a 1954 Oldsmobile, motor No. V273219, serial No. 548 A 12757, in which were concealed 50 bottles of narcotic drugs. In McPeak's possession was a registration card for the automobile showing Florida registration for 1955 in the name of James Taylor. The officers seized the vehicle.

Mrs. Nancy McPeak, wife of the defendant, filed a petition in the cause, alleging that she is the owner of the vehicle and that it was used in concealing and transporting narcotics without her knowledge or consent. She asked the court to order the car returned to her. The State answered the petition, denying its material allegations. Appropriate issues were submitted to the jury. The issue of ownership was

answered against the petitioner. The court signed a judgment confiscating the vehicle and ordering it sold. The petitioner excepted and appealed.

*Woltz & Woltz, J. N. Freeman, T. M. Faw, and Frank Freeman for petitioner, appellant.*

*William B. Rodman, Jr., Attorney General, Claude L. Love, Assistant Attorney General, Charles M. Neaves, and Charles L. Folger for respondent, appellee.*

HIGGINS, J. The General Assembly of 1953 (Chapter 909, s. 5b), now G.S. 90-111.2, authorized the confiscation of any private vehicle, vessel, or aircraft unlawfully used for the purpose of concealing and transporting narcotic drugs.

In the illegal transportation of narcotics the vehicle offends and is subject to forfeiture. The forfeiture can be defeated and the car recovered by the true owner only if he can establish his title and show the transportation of contraband was without his knowledge or consent. (See G.S. 18-6.)

In this case the petitioner claims the facts in the case did not warrant the jury in finding she was not the owner. She contends the court erred in permitting the witness Monday to testify that the defendant, Cordell Hull McPeak, when asked about James Taylor in whose name the car was registered, made this statement: "I am one and the same. It is my car. I know I have lost a $3,000 car and besides what time I will get." Considered by itself, the statement would be inadmissible. However, by agreement between the solicitor for the State and defense counsel, a statement by McPeak had been offered by the petitioner and admitted in evidence. In the statement McPeak said the car belonged to his wife. The statement made to Monday was admissible in contradiction. *S. v. Patterson,* 24 N.C. 346; *S. v. Wellmon,* 222 N.C. 215, 22 S.E. 2d 437; *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408.

The petitioner testified the Oldsmobile belonged to her; that she purchased it in Atlanta in 1954. In corroboration she introduced in evidence a bill of sale and registration card issued in her name for the year 1954. However, the car was registered for the year 1955 in the name of James Taylor. When arrested, Cordell Hull McPeak had in his possession the Florida registration card showing James Taylor as the owner. The evidence was sufficient to go to the jury and to sustain the verdict. The credibility of the witnesses and the weight to be given their testimony are jury questions. *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356.

Petitioner's exceptions 10, 11 and 13, and assignments of error of the same numbers relate to the charge. Particularly she contends the court did not detail and emphasize her contentions as to having purchased the car in Atlanta and the documents from the motor company offered by her in corroboration of her claim of ownership. The charge appears to present the contentions fairly and impartially. If the petitioner had desired more specific instructions, she should have asked for them in apt time. Objection after verdict comes too late. *Simmons v. Davenport,* 140 N.C. 407, 53 S.E. 225.

The record fails to disclose error in the trial.

No error.

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THELMA McDANIEL, ADMINISTRATRIX OF THE ESTATE OF EUGENIA McDANIEL, DECEASED, v. IMPERIAL LIFE INSURANCE COMPANY.

(Filed 14 December, 1955.)

**1. Insurance § 39—**

Where a policy provides benefits in case of death of insured through external, violent and accidental means which, except in the case of drowning or death from internal injuries revealed by an autopsy, leave a visible contusion or wound upon the exterior of the body, proof of death by heatstroke or sunstroke does not come within the coverage regardless of whether such death be deemed through external, violent or accidental means, since there is no visible contusion or wound upon the exterior of the body.

**2. Insurance § 13a—**

While a policy of insurance must be construed liberally with respect to the persons insured and strictly with respect to the insurance company, yet insurance contracts must be construed according to the meaning of the terms used, and when the words are plain and unambiguous, they must be given their ordinary meaning.

APPEAL by plaintiff from *Hall, S. J.,* May-June Term 1955, DURHAM Superior Court.

Civil action to recover $1,100.00 death benefits under policy of insurance. For a premium of ten cents (10c) per week the defendant issued to William McDaniel its policy No. 260550, insuring him against death by external, violent and accidental means. Eugenia McDaniel, wife, was the named beneficiary. The controversial provision in the policy is here quoted:

"CONDITIONS, EXCEPTIONS AND LIMITATIONS:

"Upon receipt of satisfactory proof to the Company at its Home Office while this Policy was in full force and effect, that the Insured,

during the premium paying period of the Policy, has sustained bodily injury resulting in death within ninety (90) days thereafter through external, violent and accidental means, of which, except in case of drowning or of internal injuries where revealed by an autopsy, there is a visible contusion or wound, on the exterior of the body, death being the direct result thereof, and independent of all other causes, then upon surrender of this policy, the sum stipulated herein becomes payable to the Beneficiary, appearing as such upon the records at the Company's Home Office."

The policy also provided the insurer shall have the right and opportunity to examine the insured and make an autopsy in case of death when it is not forbidden by law.

Eugenia McDaniel died 15 August, 1952. The plaintiff qualified as her personal representative and brought this action in that capacity.

On 25 June, 1952, according to plaintiff's medical testimony, the insured was carried to Lincoln Hospital in an unconscious condition with a temperature of 109 degrees. He died about two hours later. The cause of death was heatstroke. Plaintiff's medical expert testified there was no visible contusion or wound on the body. No autopsy was performed. There was no evidence to the contrary.

At the conclusion of plaintiff's evidence motion for nonsuit was granted and from judgment accordingly, the plaintiff appealed.

*M. Hugh Thompson and F. B. McKissick for plaintiff, appellant.*

*Gantt, Gantt & Markham, By: Samuel F. Gantt, for defendant, appellee.*

HIGGINS, J. Discussed at length in the briefs is the question whether death as a result of heatstroke or sunstroke is a death through external, violent and accidental means. While this Court has never passed on the question, other courts have and their decisions are in conflict. *Landress v. Phoenix Ins. Co.*, 29 U.S. 491; *Rollins v. Ins. Co.*, 109 Tenn. 89; *Bryant v. Casualty Co.*, 107 Texas 582; *O'Connell v. New York Life Ins. Co.*, 220 Wis. 61.

In the view we take of this case, however, it is not necessary to decide whether death as a result of heatstroke or sunstroke is a death "through external, violent, and accidental means." The plaintiff's evidence shows death was not as a result of drowning; that death did not result from internal injuries revealed by an autopsy. The plaintiff's evidence having eliminated drowning and internal injuries revealed by an autopsy, in order to recover, the plaintiff must show "death through external, violent and accidental means of *which . . . there is a visible contusion or wound upon the exterior of the body.*" There was no visible contu-

sion or wound on the exterior of the body. Thus the insured is not brought within the coverage of the policy.

While we adhere to the principle that insurance policies must be construed liberally with respect to the persons insured and strictly with respect to the insurance company, yet insurance contracts will be construed according to the meaning of the terms the parties have used. When the words are plain and unambiguous they will be given their ordinary meaning. *Ins. Co. v. Wilkinson,* 13 Wall (80 U.S. 232); *Roberts v. Ins. Co.,* 212 N.C. 1, 192 S.E. 873; *Kirkley v. Ins. Co.,* 232 N.C. 292, 59 S.E. 2d 629; *Barker v. Ins. Co.,* 241 N.C. 397, 85 S.E. 2d 305; *McDowell Motor Co. v. Underwriters,* 233 N.C. 251, 63 S.E. 2d 538; *Gould v. Atlantic,* 229 N.C. 518, 50 S.E. 2d 295; *Lineberry v. Security Life,* 238 N.C. 264, 77 S.E. 2d 652.

The language of the policy seems to be plain and free from ambiguity. The plaintiff's evidence shows lack of coverage. For that reason the judgment of the Superior Court of Durham County is

Affirmed.

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## STATE v. OTTWAY BURTON.

(Filed 14 December, 1955.)

**1. Indictment and Warrant § 9—**

The indictment must charge the offense with sufficient definiteness to enable defendant to prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense, and to enable the court to know what judgment to pronounce in case of conviction.

**2. Automobiles § 80—**

Indictment for parking in a meter zone without depositing the required amount of money in the parking meter, in violation of ordinance, should identify where the vehicle was parked and identify the ordinance by date of its passage or otherwise.

APPEAL by defendant from *McKeithen, S. J.,* 13 June, 1955 Term Superior Court, GUILFORD.

Criminal prosecution originated by affidavit and warrant before the Municipal-County Court, Guilford County, upon a charge of "parking in a meter zone and space without depositing the required amount of money in the parking meter . . . in violation of City Ordinance, Chapter 7, Article 9." The defendant pleaded not guilty and demanded a jury trial. Whereupon the case was transferred to the Superior Court of Guilford County.

The grand jury returned a bill of indictment charging that the defendant "on 29th day of September, A.D. 1954 . . . unlawfully and wilfully did cause, allow, permit and suffer his motor vehicle to be parked upon a public street in the City of Greensboro in a parking zone and space, between the hours of 8 a.m. and 6 p.m., without depositing the required amount of money in the parking meter in violation of the ordinance of the City of Greensboro . . ."

In the Superior Court the defendant, before pleading, requested a bill of particulars. The request was refused. Whereupon a jury trial was had upon his plea of not guilty to the charges in the bill of indictment. The jury returned a verdict of guilty and from a judgment that the defendant pay a fine of One Dollar and costs, he appealed.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Ottway Burton, the defendant.*

HIGGINS, J. The sufficiency of the bill of indictment confronts us at the outset in this case. The purpose of a bill is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction. In this case the bill fails to identify the place where the vehicle was parked other than upon a public street in the City of Greensboro in a parking zone and space. Inasmuch as there are many streets in Greensboro, it is necessary to identify the street in the bill or warrant in order that the defendant or his attorney can go to the Ordinances of the City and ascertain if parking at the time and place charged constitutes a violation of the ordinance. No reference in the bill is made to the number of the ordinance, date of its passage, or otherwise. The number, article or date of passage of the ordinance, or some other identifying reference should be given.

The case of *S. v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97, is not in conflict with what is said here. In the *Scoggin case* the sufficiency of the warrant to charge a criminal offense was not at issue and, therefore, the full contents of the warrant are not set out in the Court's opinion. However, examination of the original record in that case discloses the warrant charged "that on or about the 25th day of February, 1952, in the City of Raleigh and in Raleigh Township, Wake County, William G. Scoggin, Jr., between the hours of 8 a.m. and 6 p.m. did park and leave standing his motor vehicle in a parking meter placed in a one-hour parking meter zone on Fayetteville Street between Morgan Street and

Cabarrus Street, said space being alongside and next to a parking meter, and did then and there fail and refuse to deposit any coin or money in said parking meter . . . in violation of the Ordinances of the City of Raleigh, being Sections 19, 58, 66, 67 and 68 of Chapter 5 of the 1950 Code of the City of Raleigh, contrary to the statute," etc.

The warrant in the *Scoggin case* serves to emphasize the deficiencies in the indictment in this case. It is insufficient to support the verdict and judgment. The judgment of the Superior Court of Guilford County is

Reversed.

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IN THE MATTER OF H. O. BOYLES, EXECUTOR OF THE ESTATE OF J. O. BOYLES.

(Filed 14 December, 1955.)

**Executors and Administrators § 8—**

Findings by the clerk that the executor had neglected, failed and refused to pay to one of the beneficiaries her share of the personal estate and had arbitrarily commingled the funds of the estate with moneys belonging to the beneficiary from the sale of certain articles of personalty belonging to her, *are held* sufficient to justify his order revoking the letters testamentary issued to the executor, G.S. 28-32, and when such findings are supported by evidence, judgment of the court approving the clerk's order of removal will not be disturbed.

APPEAL by H. O. Boyles from *Gwyn, J.*, at October Term, 1955, of STOKES.

This is a proceeding under G.S. 28-32 for revocation of letters testamentary issued by the Clerk of the Superior Court of Stokes County to H. O. Boyles as executor of the estate of J. O. Boyles, deceased, heard below on verified petition of Mrs. Juddie Boyles and response filed by the executor.

The petitioner is the widow of the testator. She is about eighty years of age. The executor is her son.

By Item 2 of the will the testator devised his landed estate, consisting of a farm of about 110 acres, to the widow for life, with direction that the executor lease the property, collect the rents, and pay over the net proceeds to the widow "as she may need same." By Item 4 of the will the testator directed that his personal estate be sold as soon as practicable after his death and that the net proceeds, after certain specifically designated disbursements, be divided equally among his widow and ten other named legatees. The gross personal estate amounted to the approximate value of $11,000.

The Clerk, after hearing the evidence, found facts, among which are these: (1) ". . . that H. O. Boyles, executor of the estate of J. O. Boyles, on or about June 28, 1955, made a partial distribution of the funds derived from the personal estate of J. O. Boyles, paying each of the children of J. O. Boyles the sum of $800.00, but that H. O. Boyles has neglected, failed, and refused to pay to Juddie Boyles her share of said personal estate as provided for under item four of the will . . ., and still refuses to make such payment although demand has been made on him to do so"; and (2) "that H. O. Boyles has arbitrarily mixed and commingled the funds of said estate with monies belonging to Juddie Boyles, from the sale by him of certain articles of personal property belonging to Juddie Boyles."

Upon the facts found, the Clerk entered an order revoking the letters previously issued. To this order the executor excepted, and appealed therefrom to the Superior Court. There, the presiding Judge, after *de novo* hearing, to which neither side objected and in which both sides participated, found additional facts (omitted herefrom as not being pertinent to decision) and entered judgment approving the Clerk's order, "both as to findings of fact and as to his conclusions." From the judgment so entered, the executor appeals to this Court.

*Buford T. Henderson and Dallas C. Kirby for Executor, appellant.*

*W. Reade Johnson and Leonard H. Van Noppen for petitioner, appellee.*

JOHNSON, J. The statute, G.S. 28-32, authorizes the Clerk of the Superior Court to revoke letters testamentary when "any person to whom they were issued . . . has been guilty of default or misconduct in due execution of his office . . ."

The facts found by the Clerk are sufficient to justify the order of revocation entered by him and approved both as to findings and conclusions by the presiding Judge. See *In re Sams*, 236 N.C. 228, 72 S.E. 2d 421, and cases there cited. Our examination of the record leaves the impression that the crucial findings of fact are supported by the evidence.

The judgment below is

Affirmed.

PRESTON LEE MAYBERRY, EMPLOYEE, v. OAKBORO GRANITE AND MARBLE COMPANY, EMPLOYER, AND PENNSYLVANIA THRESHERMEN AND FARMERS' MUTUAL CASUALTY INSURANCE COMPANY, CARRIER.

(Filed 14 December, 1955.)

**1. Master and Servant § 42b—**

The evidence supported the finding of the Industrial Commission that the employee was exposed to the hazards of silica dust up to the time of the termination of his employment for disability from silicosis. At that time the employer had no compensation insurance, the policy having expired some nineteen days prior thereto. A majority of the Court being of the opinion that the insurance carrier is liable at least *pro rata* in accordance with the number of working days or parts thereof it was on the risk during the last thirty days the employee worked, G.S. 97-57, the cause is remanded for computation of the respective liabilities.

**2. Appeal and Error § 38—**

Where the Supreme Court is in a three-way division of opinion, without a majority for any view, the cause will be disposed of in the manner supported by a majority without becoming a precedent for any of the divergent views.

APPEALS by Oakboro Granite & Marble Company, Employer, and Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Company, Carrier, from *Gwyn, J.*, February Term, 1955, of STANLY.

Proceeding under Workmen's Compensation Act wherein the requisite jurisdictional facts are stipulated.

Claimant was last remuneratively employed 19 February, 1953, on which date he became disabled by the occupational disease of silicosis.

Claimant had been a stonecutter for twenty-six years. In that capacity, he had worked for this employer from 1940 until 19 February, 1953. This compensation carrier had insured the employer's risk since 1947, the term of its last policy being from 31 January, 1952, through 31 January, 1953. Upon expiration of this policy, the employer, unable to obtain compensation coverage on a voluntary basis, endeavored to obtain such insurance under the assigned risk provisions of G.S. 97-103. However, on account of delay in obtaining assigned risk protection, the employer had no compensation insurance from 31 January, 1953, through 19 February, 1953.

The award directed that compensation benefits be paid by "the defendant Pennsylvania Threshermen & Farmers' Mutual Casualty Company, as compensation carrier for the defendant Oakboro Granite & Marble Company."

While admitting claimant was in its employment from 1 February, 1953, through 19 February, 1953, the employer, by its appeal, challenges

findings of fact to the effect that plaintiff was exposed to the inhalation of dust of silica or silicates after 31 January, 1953.

The compensation carrier, by its appeal, challenges the legal conclusion, upon the facts found, that it is obligated to discharge the employer's liability for compensation to claimant. Its contention is that it has no liability for disablement occurring after the expiration of the term of its policy.

Both defendants concede plaintiff is entitled to compensation benefits in the amount provided by the award. The sole question is whether defendant compensation carrier is obligated to discharge the employer's liability therefor or any part thereof.

*T. Burt Mauney for plaintiff, appellee.*

*Carpenter & Webb for defendant Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Company, appellant and appellee.*

*Morton & Williams for defendant Oakboro Granite & Marble Company, appellant.*

PER CURIAM. The particular work in which claimant was engaged from 1 February, 1953, through 19 February, 1953, appears to have involved less hazard than other work in which he had engaged at prior times. Even so, we cannot say that there is insufficient competent evidence to support the challenged findings of fact. Therefore, the assignments of error of defendant employer are overruled.

All members of this Court agree that the employer is liable to the claimant for the full amount of the award.

Must the carrier discharge all or any part of the employer's liability therefor? All members of this Court agree that the determination of this question involves the construction to be placed on G.S. 97-57, which provides:

"Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

"For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as thirty working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious."

From this point, the members of this Court find themselves in a three-way division of opinion.

*Barnhill, C. J.*, and *Denny* and *Parker, JJ.*, are of opinion that, since the last day of claimant's exposure to the inhalation of the dust of silica or silicates was 19 February, 1953, on which date disablement occurred, the liability of the employer was fixed as of that date; and that, since the carrier was not then on the risk, the award must be paid in full by the employer.

*Winborne* and *Higgins, JJ.*, are of opinion that exposure in February, 1953, being less than for thirty working days and less than a calendar month, should be disregarded as non-injurious; and that, since the carrier was on the risk during the period of injurious exposure prior to 1 February, 1953, the award must be paid in full by the carrier.

*Johnson* and *Bobbitt, JJ.*, are of opinion that the last thirty working days, or parts thereof, when claimant was exposed to the inhalation of the dust of silica or silicates, constitute the period of last injurious exposure and the basis of the employer's liability; and that, since the carrier was on the risk during part but not all of this period, the carrier must pay *pro rata* according to the number of working days, or parts thereof, in this period it was on the risk.

The result is that the only proposition on which four of us agree is that the carrier must pay *at least* a *pro rata* part of the award. Accordingly, this must be the basis for disposition of the appeal.

There is evidence in the record, but no findings of fact, that the last thirty working days, or parts thereof, of claimant's exposure, consists of sixteen working days prior to 1 February, 1953, and of fourteen working days after 31 January, 1953.

The award is vacated and the cause remanded to the North Carolina Industrial Commission for further proceedings. In such further proceedings, the Commission will find the facts as to the dates of the last thirty working days, or parts thereof, the claimant was exposed to the inhalation of the dust of silica or silicates. Upon determining the number thereof prior to 1 February, 1953, and the number thereof subsequent to 31 January, 1953, the Commission will fix the portions of the award to be discharged by the employer and the carrier, respectively.

This disposition of this case does not become a precedent for any of the indicated divergent views. Hence, the members of this Court have refrained from setting forth at large the reasons for their respective opinions.

In view of the present conflict of opinions as to the construction of G.S. 97-57, as related to a factual situation such as that here presented, the need for legislative clarification is indicated.

Error and remanded.

LINCOLN ROBERT STEWART, EXECUTOR OF THE ESTATE OF R. K. STEWART, DECEASED, v. NAN W. STEWART.

(Filed 14 December, 1955.)

**Executors and Administrators § 26: Wills § 33e—**

Where the will provides that testator's widow should receive an annuity in a specified sum for life, consonant with an antenuptial agreement between the parties, and that the estate should remain unsettled for this purpose during the widow's lifetime, the executor is not entitled to force the widow to accept a lump sum payment in commutation of the annuity.

APPEAL by petitioner from *Crissman, J.*, at Chambers, GUILFORD.

The petitioner initiated this proceeding before the Clerk Superior Court of Guilford County to require the respondent to accept a lump-sum payment based on her life expectancy according to the mortuary table in lieu of the $2,000 which her antenuptial agreement with R. K. Stewart provided should be paid to her each year during her life. The will of petitioner's testator provided: "My estate must remain open and unsettled in the hands of my said executor, Lincoln Stewart, during the lifetime of my wife above named for the payment of the sums provided for her in the said ante-nuptial agreement." (For further facts, see *Stewart v. Stewart*, 222 N.C. 387, 23 S.E. 2d 306.)

The respondent filed answer to the petition, objecting to the lump-sum payment upon two grounds: (1) That she is from a "long lived" family and in excellent health, with life expectancy much longer than the average; (2) that a lump-sum payment would place her in a much higher tax bracket than the annual payments provided for in the agreement with her husband.

The Clerk (1) denied the relief asked for in the petition, (2) ordered the payments made annually as provided in the agreement and confirmed by the will, and (3) ordered the executor to postpone settlement of the estate until after the death of Nan Stewart.

On appeal the Judge Superior Court ordered the payments made during the life of Nan W. Stewart as provided in the agreement. From the order, petitioner appealed.

*G. H. Jones and Knox Walker for petitioner, appellant.*

*James B. Lovelace for respondent, appellee.*

PER CURIAM. The widow has a right to insist upon the payments as provided for in her antenuptial contract. The will provides the estate must remain open and unsettled until the payments are made as pro-

vided. No reason appears why the contract should not be carried out as written. The judgment of the Superior Court of Guilford County is Affirmed.

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MARGARET SWANN v. W. P. BIGELOW.

(Filed 14 December, 1955.)

**Trial §§ 33, 42: Negligence § 21—**

The jury answered the issues of negligence and contributory negligence in the affirmative and awarded damages. *Held:* The court should have accepted the verdict and rendered judgment thereon, treating the award of damages as surplusage, and when the court erroneously refuses to accept the verdict and sends the jury back for further deliberation, judgment for plaintiff upon the revised verdict will be set aside and a new trial awarded.

APPEAL by defendant from *Fountain, S. J.*, April 1955 Term Superior Court, CASWELL.

Civil action to recover for personal injury and property damage growing out of a collision between automobiles driven by the parties. The following issues arose on the pleadings and were submitted to the jury:

1. Was the plaintiff injured and her automobile damaged by the negligence of the defendant as alleged in the complaint?

2. If so, did the plaintiff by her own negligence contribute to her own injury and damage as alleged in the further answer?

3. (a) What amount, if any, is the plaintiff entitled to recover of the defendant for damages to her automobile?

(b) What amount, if any, is the plaintiff entitled to recover of the defendant for personal injury?

4. Was the defendant injured and his automobile damaged by negligence of the plaintiff as alleged in the further answer?

5. (a) What amount, if any, is the defendant entitled to recover of the plaintiff for damages to his automobile?

(b) What amount, if any, is the defendant entitled to recover of the plaintiff for personal injury?

The jury returned into court having answered issue No. 1, Yes; No. 2, Yes; No. 3 (a) $830.00; (b) $98.00. The presiding judge refused to accept the verdict. He instructed the jury their attempted answers to issues Nos. 2 and 3 were inconsistent and directed them to return to the jury room and reconsider their verdict on those issues. The jury returned into court after changing the answer to the second issue from "Yes" to "No." The verdict as changed was accepted by the court and

judgment based thereon was signed. The defendant excepted and appealed.

*John W. Hardy for plaintiff, appellee.*

*D. E. Scarborough, C. O. Pearson, William A. Marsh, Jr., and E. H. Gadsden for defendant, appellant.*

PER CURIAM. The presiding judge was in error in holding the answers to issues 2 and 3 as first returned by the jury were inconsistent. The court should have accepted the verdict and rendered judgment thereon, treating the answers to issue No. 3 as surplusage. To send the jury back for further consideration and to accept the verdict after the change was error. However, since the verdict as first returned was not accepted by the court there has been no proper verdict rendered in the case and for that reason the judgment entered is set aside. *Butler v. Gantt,* 220 N.C. 711, 18 S.E. 2d 119. The cause is remanded to the Superior Court of Caswell County for a

New trial.

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DOROTHY C. McDOWELL v. JOHN M. McDOWELL.

(Filed 14 December, 1955.)

**1. Divorce and Alimony § 5d—**

The complaint in this action for alimony without divorce *held* verified according to the requirements of G.S. 50-16.

**2. Divorce and Alimony § 5b—**

Allegations to the effect that plaintiff was compelled to leave her husband by reason of his willful failure and refusal to provide her with reasonable support and necessary medical attention and that such willful failure was without fault or provocation on her part, are sufficient to state a cause of action for divorce on the ground of abandonment.

**3. Divorce and Alimony § 5d—**

Where, in an action for alimony without divorce, the complaint states a cause of action for divorce on the ground of abandonment, demurrer is properly overruled, notwithstanding the failure of the complaint to allege specific acts and conduct of the defendant necessary to support a cause of action for divorce on the ground that defendant offered such indignities to plaintiff's person as to render her condition intolerable and life burdensome. G.S. 50-16.

APPEAL by defendant from *Crissman, J.,* July Term 1955 of RANDOLPH.

Action for alimony without divorce, pursuant to G.S. 50-16, heard upon a motion for subsistence *pendente lite* and counsel fees, and upon a demurrer to the complaint on the grounds that the complaint was not verified, that the complaint does not set forth with particularity the indignities that the plaintiff alleges rendered her condition intolerable and life burdensome, and that the complaint does not allege defendant's failure to provide plaintiff with necessary subsistence according to his means and conditions in life.

After a hearing the court overruled the demurrer, and entered an order that the defendant pay the plaintiff $50.00 a week for subsistence *pendente lite,* and pay her counsel a fee of $150.00.

Defendant appeals, assigning error.

*No counsel for plaintiff, appellee.*

*Ottway Burton for defendant, appellant.*

PER CURIAM. The complaint is verified according to the requirements of G.S. 50-16. *Cunningham v. Cunningham,* 234 N.C. 1, 65 S.E. 2d 375.

"If any husband . . . be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board," the wife may institute an action for alimony without divorce. G.S. 50-16; *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909. "If either party abandons his or her family" it is a ground for divorce from bed and board. G.S. 50-7, sub-sec. 1; *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796.

The complaint alleges the existence of a valid marriage between the parties, a compelling of the wife to leave the husband by reason of his wilful failure and refusal to provide her with any support, except $1,147.50 for the past 34 months, that from this sum she has expended $1,001.00 for medical expenses, that she has incurred other medical expenses, which he refuses to pay, that she has been a faithful and dutiful wife, is in extremely poor health, requires money for further hospital and medical expense, and that his wilful failure to provide for her adequate support has been without provocation on her part. These allegations are sufficient to state a cause of action for alimony without divorce upon the ground of abandonment, and the demurrer was properly overruled. G.S. 50-16; *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919; *Dowdy v. Dowdy,* 154 N.C. 556, 70 S.E. 917; *High v. Bailey,* 107 N.C. 70, 12 S.E. 45.

The complaint attempts to allege as another ground for divorce from bed and board that the defendant offered such indignities to the person of his wife as to render her condition intolerable and life burdensome.

Such allegations are fatally defective for failure to allege sufficient specific acts and conduct to meet the requirements of our decisions. *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; *Best v. Best,* 228 N.C. 9, 44 S.E. 2d 214; *Howell v. Howell,* 223 N.C. 62, 25 S.E. 2d 169.

The plaintiff was permitted by the court below to file an amendment to her complaint, but she failed to do so.

The other assignments of error have been examined, and are without merit. The order by the court below is

Affirmed.

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STATE v. THOMAS JEFFERSON CAVINESS.

(Filed 14 December, 1955.)

**1. Automobiles § 63—**

Testimony of a patrolman from his personal observation of the car driven by defendant, that defendant was traveling at a speed of 65 miles per hour, is sufficient to take the case to the jury in a prosecution for speeding.

**2. Criminal Law § 78d (1)—**

Where, in a prosecution for speeding, the defendant makes no objection to evidence offered by the State in regard to a clocking apparatus, but to the contrary develops the subject in greater detail on cross-examination, defendant cannot challenge on appeal the admissibility of such evidence.

APPEAL by defendant from *Hall, Special Judge,* June, 1955, Criminal Term, of DURHAM.

Criminal prosecution on warrant charging, in substance, that defendant on 27 April, 1955, operated an automobile upon the public highway "at a greater rate of speed than allowed by law, 65 miles per hour in a 55 mile zone," etc.

Defendant was first tried and convicted in the recorder's court. Upon appeal to and trial in the Superior Court, the jury returned a verdict of guilty as charged in the warrant. Judgment was that "defendant pay a fine of $5.00 plus the costs of the Court." Defendant excepted and appealed, assigning errors.

*Attorney-General Rodman and Assistant Attorney-General Giles for the State.*

*Blackwell M. Brogden for defendant, appellant.*

PER CURIAM. The only testimony was that of a State Highway Patrolman, a witness for the State. His testimony was that he saw defendant operating an automobile along Highway #501, some three

miles north of Durham; and that, based upon his personal observation, his opinion was that defendant was traveling at a speed of 65 miles per hour. This evidence was sufficient to carry the case to the jury.

The witness testified further that he had stretched two tubes across Highway #501, 132 feet apart; that these tubes were connected to a stop clock held by him; that an automobile passing over the tube first reached would start the clock; that when it passed over the second tube it would stop the clock; that the clock was calibrated to show the time it took to travel the intervening 132 feet; and that this mechanical device was operated by him with reference to the automobile defendant was driving and indicated defendant's speed while traversing the distance of 132 feet to be at the rate of 65 miles per hour.

Defendant now contends that the evidence narrated in the preceding paragraph was incompetent and should have been excluded.

Defendant's counsel and the Attorney-General have filed interesting and helpful briefs bearing upon the preliminary proof required before testimony as to the speed of an automobile as recorded by such a mechanical device may be admitted in evidence. But the question is not presented on this record. Here the witness testified fully, without objection, with reference to the clock apparatus, how it worked and what it indicated on this particular occasion. Defendant cannot now challenge the admissibility of evidence to which he interposed no objection and which was developed in greater detail by defendant's counsel on cross-examination of the State's witness.

Remaining assignments of error have been duly considered. None discloses error of law sufficient to justify the granting of a new trial. Hence, the trial and judgment will be upheld.

No error.

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IRVIN I. GURFEIN, TRADING AS SOUTHERN PLATE & WINDOW GLASS COMPANY, v. ROADWAY EXPRESS, INC.

(Filed 14 December, 1955.)

**Carriers § 11—**

Evidence that merchandise in good condition was delivered to a carrier and that it was delivered by the carrier in damaged condition, makes out a *prima facie* case precluding nonsuit.

APPEAL by plaintiff from *Preyer, J.*, at 29 August, 1955, Term (Civil) of GUILFORD.

Civil action to recover damage to property in transit from Toledo, Ohio, to plaintiff in Greensboro, North Carolina.

Upon the trial in Superior Court plaintiff offered evidence tending to show that defendant, a common carrier of property by motor truck in interstate commerce, accepted from Toledo Plate & Window Glass Company, in Toledo, Ohio, one case of plate glass silvered for mirrors in good condition for transportation by motor truck and trailer to plaintiff in Greensboro, North Carolina, for which defendant issued a straight bill of lading; that after the shipment arrived at plaintiff's place in Greensboro the driver of defendant's truck said "We tore these braces loose and it slipped down in the truck"; that the glass was delivered "in a totally damaged condition"; and that the wholesale value of the glass was $809.96 plus freight.

When plaintiff rested its case, motion of defendant for judgment as of nonsuit was allowed, and to judgment in accordance therewith dismissing the action, and taxing plaintiff with the cost, plaintiff excepted, and appeals therefrom to Supreme Court and assigns error.

*Thomas Turner and J. J. Shields for plaintiff, appellant.*

*Blackwell, Blackwell & Canady for defendant, appellee.*

PER CURIAM. The evidence offered by plaintiff, taken in the light most favorable to it, makes out a *prima facie* case for consideration by the jury. Hence the judgment as of nonsuit entered in the court below is

Reversed.

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## STATE v. DEL ADAMS.

(Filed 14 December, 1955.)

**Homicide § 27i—**

In this prosecution for murder, the charge in regard to the jury's right to recommend life imprisonment *held* erroneous on authority of *S. v. Carter, ante*, 106.

APPEAL by defendant from *Williams, J.*, and a jury, at August Term, 1955, of JOHNSTON.

Criminal prosecution upon a bill of indictment charging the defendant with the murder of one Raymond Hayes.

The jury returned a verdict of guilty of murder in the first degree, without recommendation of life imprisonment, and judgment was pronounced imposing sentence of death by asphyxiation, from which the defendant appeals.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*E. J. Wellons and Grover A. Martin for defendant, appellant.*

PER CURIAM. Precisely the same error was made in the trial of this case as was made in *S. v. Carter, ante,* 106: the trial court did not instruct the jury what the legal effect of a recommendation of life imprisonment would be, as required by statute, G.S. 14-17. For the reasons given in *S. v. Carter,* a new trial is necessary. It is so ordered.

New trial.

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ROSE THOMPSON v. DORIS STADIEM, ABRAHAM STADIEM, JACOB STADIEM, AND C. C. EDWARDS, TRUSTEE.

(Filed 14 December, 1955.)

**Cancellation and Rescission of Instruments § 12—**

Evidence in this action by a blind and poorly educated woman to rescind contract of purchase and sale of real property and to recover damages for fraud, *held* sufficient to be submitted to the jury, and further, there being no evidence that plaintiff made any payments on the mortgage executed by her after she discovered that the house was not properly underpinned and had not passed city inspection as represented, there was no sufficient evidence of ratification to bar recovery.

APPEAL by defendants from *Hall, Special J.,* April Term, 1955, DURHAM.

Civil action to rescind contract of purchase and sale of real property and to recover damages.

The jury answered the issues submitted by the court in favor of the plaintiff. There was judgment on the verdict and defendants appealed.

*Blackwell M. Brogden for plaintiff appellee.*

*J. Grover Lee and Frazier & Frazier for defendant appellants.*

PER CURIAM. After a careful examination of the record we are constrained to hold that the plaintiff offered sufficient evidence to require the submission of issues to a jury. We have here a blind, poorly educated woman who "Brailled" the house in an attempt to ascertain its condition, on the one hand, and an experienced real estate dealer, on the other. There is no evidence that the plaintiff made any payment on the mortgage she executed after she discovered that the house was not properly underpinned and had not passed city inspection as repre-

sented. Hence, there is no sufficient evidence of ratification to bar plaintiff's recovery.

The judgment entered in the court below is

Affirmed.

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HORACE B. PETTY v. CRANSTON PRINT WORKS COMPANY, A CORPORATION.

(Filed 13 January, 1956.)

1. **Negligence § 17—**

In order to recover for actionable negligence plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach.

2. **Master and Servant § 12—**

In an action by the employee of an independent contractor against the contractee to recover for personal injuries, the duty owed by the contractee to the employee arises from and is determined by the relationship subsisting between them.

3. **Master and Servant § 4a—**

Where a subcontractor is employed to make necessary repairs in a heating system, subject to the right of the contractor and the owner to inspect but without the right of supervision during the progress of the work, the subcontractor is an independent contractor, and in regard to the liability of the owner for injury to an employee of the subcontractor, whether the contractor was an agent of the owner or was acting for itself in the discharge of a duty owed the owner, is immaterial.

4. **Master and Servant § 12—**

A contractee who furnishes an independent contractor an instrumentality for the performance of the work gratuitously without contractual obligation or usage requiring the furnishing of such instrumentality, is not under duty to inspect the equipment before or during the period of permissive use, but is under duty only to disclose latent defects of which it has actual knowledge or notice.

5. **Same—**

The liability of the contractee for injury to an employee of the independent contractor in the performance of the work cannot be greater than that of an employer to an employee.

6. **Same—Nonsuit held proper in this action by employee of an independent contractor against contractee to recover for negligent injury.**

Plaintiff, an employee of an independent contractor, was injured when he fell from a movable scaffold in the performance of his work. The allegations and evidence were to the effect that the scaffold was furnished by the contractee, that at each caster of the scaffold was a set screw to lock

the caster and wheel, but that during the progress of the work it was discovered that the set screws were defective, and the contractor's employees obtained from the contractee's storeroom keeper a cap screw in lieu thereof, there being no set screws in stock, that the cap screw repeatedly became stripped in use and was several times replaced by another, and that while the employees of the independent contractor were at work on the top of the scaffold it suddenly rolled, causing plaintiff employee to fall to his injury. It further appeared that the contractor had his own "A" ladders, that the contractee neither constructed the scaffold nor was obligated to provide it, and that its use by the employees of the contractor was merely permissive. *Held:* Nonsuit was proper.

**7. Same—**

Where the evidence discloses that the employees of an independent contractor had actual knowledge of an alleged defect in the scaffold owned by the contractee and used permissively by the employees of the contractor, failure of the contractee to warn of the defect is without significance.

**8. Same—**

Where employees of an independent contractor permissively use the scaffold of the contractee in the performance of their work, notice of a defect therein given the contractee's storeroom keeper or other employee rather than the contractee's employees in charge of the equipment, is not notice to the contractee, nor is notice to the contractor notice to the contractee.

**9. Appeal and Error § 39c—**

Where the evidence admitted tends to establish a particular fact, the exclusion of other evidence offered for the purpose of establishing the same fact, cannot be prejudicial upon review of judgment as of nonsuit.

APPEAL by plaintiff from *Patton, Special J.*, 21 March, 1955, Extra Term, of MECKLENBURG.

Civil action to recover damages for personal injuries, alleged to have been caused by the negligence of defendant. Plaintiff's appeal is from a judgment of involuntary nonsuit.

Plaintiff was injured on Sunday, 2 March, 1952, between 8:30 and 10:00 a.m., when he fell from a rolling stage scaffold. This occurred while plaintiff, Ferguson and Cagle, employees of Industrial Piping Company, were at work on the scaffold platform, undertaking to replace and fasten on a heater suspended from the ceiling a steel plate about 5 by 8 feet in size and weighing about 75 pounds. Plaintiff was a steamfitter's helper. Ferguson was a steam-fitter welder. Cagle, a steamfitter, was foreman on this job.

Piping Company's employees were at work in the manufacturing plant of Cranston Print Works Company, at Fletcher, N. C. The scaffold belonged to Cranston. It was kept in the plant. It had been used and was available for use by regular Cranston employees and by others,

*e.g.*, painters, who came in to do work in the plant, referred to as "transient employees."

Cranston's plant was built in 1948. J. E. Sirrine & Company, under a cost-plus contract, designed the plant and supervised its construction, including the heating system. In the Fall of 1951, the heating system wasn't functioning properly. Of the 30 heating units in the plant, some 15 to 23 of the heaters had frozen and "busted." Gaffney, Cranston's plant engineer, "called on" J. E. Sirrine & Company to remedy the deficiency, which Company made arrangements for the Piping Company, located in Charlotte, to go to the Cranston plant and do the necessary work.

In the latter part of January, 1952, Piping Company sent Cagle, foreman, and a crew of workmen, including plaintiff, to the Cranston plant. The equipment they took, for work on overhead heaters, consisted of "A" ladders. By use thereof, Cagle checked the heaters. The defective heaters were identified.

The ceiling of Cranston's plant was about 21 or 22 feet high at the location of the heater on which Piping Company's employees were working when plaintiff fell. Each heater was housed "in a big box about 8 feet long and about 5 or 6 feet high and maybe 3 or 4 feet deep. There were fans in there, motors, heating coils and controls. They were mounted up in the ceiling of the plant." "Each of these heaters was a separate unit." To gain access to the machinery inside the heater box, it was necessary to remove the steel plate, described above. In replacing it, it was necessary to hold the plate against the heater and adjust its position exactly so as to line up the holes in the plate with those within the heater box so that the plate could be fastened by means of screws. Piping Company's employees were attempting to do this when plaintiff fell.

The scaffold consisted of (1½") metal tubing. As to height, it consisted of three 5-foot sections, one on top of the other(s). All three sections were set up and in use on the occasion plaintiff fell. The area at the top was a space 5 x 7 feet. The scaffold rested on four casters, one at each corner. At each caster was a set screw or wing bolt, with threads up to the head of the screw or bolt, which bolt could be tightened by hand. When tightened, this bolt would lock the caster and wheel. A threaded bolt, in the vernacular of the machinist, is a screw.

Before considering the evidence bearing more directly on the subject of defendant's actionable negligence, we look to the complaint.

Plaintiff alleged, in substance: that "it was necessary for them (Piping Company's employees) to have a scaffold or other elevated appliance to stand on in doing their work"; that Cranston "furnished to the plaintiff's employer a rolling stage scaffold . . . in doing the

work" it "had contracted to do" for Cranston; that Gaffney, Cranston's plant engineer, had the duty of keeping Cranston's equipment, particularly the scaffold, "in good repair and in a safe condition for use and equipped with proper set screws"; that Hill, Cranston's employee, "was charged with the duty of determining whether said scaffold was fit for use in connection with said work, and with the further duty of seeing that it was in good repair and safe for any use to be made thereof"; that the scaffold "was equipped with rollers or wheels and set screws which were supposed to lock the rollers or wheels in place"; and that when plaintiff and his fellow employees were at work thereon, the scaffold "suddenly rolled away from the part of the heating equipment upon which the plaintiff was working while standing on said scaffold, causing plaintiff to fall between the scaffold and the heating equipment to the floor," and to sustain serious and permanent injuries.

Plaintiff's specifications of Cranston's actionable negligence are, in substance: (1) that proper set screws were not used and those used were defective, on account of which the scaffold was not in a safe condition; (2) that such defects were not apparent to plaintiff; and (3) that Cranston failed to exercise due care to discover such hidden defects and to warn plaintiff thereof.

Before trial, judgment of voluntary nonsuit was entered as to Gaffney and Hill, originally defendants herein.

Gaffney, as Cranston's plant engineer, was "in charge of maintenance, construction, and engineering work and in charge of the equipment as well as the building maintenance of the equipment." Hill was in charge of Cranston's "heating system and was foreman of the pipe fitters, heating plant, boiler room." Conner was Cranston's chief mechanic. Philpott had charge of Cranston's storeroom for tools and parts. Hunsinger was employed by Cranston as a steam-fitter's helper.

After Piping Company's employees started work, they located the scaffold. Plaintiff and Cagle went to a lumber pile in the yard on Cranston's premises, got some boards and made a platform for the top of the scaffold. "The boards were of random length . . ." One or more extended some 14 inches beyond the cross-piece of the scaffold. Plaintiff testified: "Before going upon the scaffold, we locked the wheels by tightening the screws that fasten the wheels and got some boards and scotched each wheel up. We then climbed the scaffold and started taking the back off the heater, a cover in the back of the heater."

According to plaintiff: Piping Company's employees used the scaffold 2 or 3 days before he "noticed anything about it moving." Then, when they were in process of taking the back off a heater "the scaffold rolled." They got down, "unloosened all the pins (set screw or wing bolts) in the wheels and took them out . . . discovered that

one pin the wheel had been—the threads on it had been stripped very bad." He took it to Philpott and asked for another pin. Philpott gave him a cap screw to replace the pin. It was different in that it did not have any flanges on it. "By flanges, I mean a wire pin running through the set screws that's in these wheels now (referring to exhibit in court-room) so you could tighten it up with your fingers." "The one we got from the storeroom had to be tightened with a pair of pliers or a wrench." He took the cap screw to Cagle. It did not have the proper thread. Cagle and plaintiff took it back to Philpott, who then gave them a cap screw "with the proper thread." Plaintiff testified: "He said he had some (set screws) ordered and was supposed to be in that week." "He told me it (the cap screw) would hold and would work until the others came in." "We took the cap screw back and used it instead of a set screw." "We tightened it up and it held. The one that we took out of there would spin." Plaintiff testified: "After the screw was stripped it was our practice to check that cap screw some eight or ten times a day." They did this each time they loosened the screws in order to move the scaffold from place to place. The cap screw was tightened with a wrench. After a while, "we discovered that the threads on that cap screw had become stripped, . . . would spin like the original set screw . . ." When they found they couldn't tighten it with a wrench so as to make it hold, "we took it out and carried it to the storeroom and obtained another and put that cap screw in the scaffold." In all, at least three cap screws were so obtained and used. The set screw had more threads on it than the cap screw, threads all the way up to the bolt. Plaintiff's testimony relates to the use of these cap screws in lieu of the set screw on which the threads had been stripped. His testimony does not identify the particular caster or wheel where this worn set screw was discovered.

According to Ferguson: he got to the Cranston plant some two weeks after Cagle and plaintiff had started their work. After he had worked there some 3 to 5 days, "we was up on the scaffold" when "the wheels rolled on it." He then examined the wheels, "found the holes to be defective and the screw hole in the caster was defective and that the bolts they had put in them had also partially lost their threads." "I found the set screws defective in two of the wheels. The sockets in the castings were defective, they were very badly worn. The new screw (*sic*) that were put in there still had some side motion in there. When we put a new screw in it would hold temporarily. . . . I told the storekeeper, Mr. Philpott, that the sockets in these wheels were defective or something similar to that." They didn't have them, so they had to take cap screws instead. A set screw is "case-hardened." "A cap screw is mild steel, ordinarily it's put in permanently to stay in one place. A

set screw is put in to be changed at different times, therefore, it's hard." The two sockets that were worn were on the same side of the scaffold, the left side; and when plaintiff fell they were on the side plaintiff was on. Before plaintiff fell, "Mr. Hunsinger came to us to borrow the scaffold . . . and we told him that we had put them (boards) around there to try to keep the scaffold from moving and, of course, we pointed out the defective caster to Mr. Hunsinger. Then after we discussed the wheels and he took the scaffold and done some minor job, he had it for some time, and he brought it back to us then."

According to Cagle: When they needed parts, "I could borrow it from the parts room." Piping Company was to replace or pay for such parts. No conversation with Philpott is mentioned. When they found the set screw, where the threads were stripped, all set screws were good except the one. Later, they discovered that "the threads in one of the housings was stripped. . . . At that time we decided to replace all the set screws" and put them in. The "cap screws we obtained matched and fit in there properly." This was three or four weeks before plaintiff fell. "We tightened them (the cap screws) with an adjustable wrench."

During this period of five or six weeks before plaintiff's injury, Cranston employees came and got the scaffold at least three times. On one occasion, Gaffney notified Cagle that painters were coming in and would be using the scaffold over the coming week-end but that "he would see that from every week-end there on out" Piping Company's employees "would have the scaffold."

Now, coming to the occasion of plaintiff's fall and injury.

According to plaintiff: He, Cagle and Ferguson were on the scaffold platform. Facing the open end of the heater box, he was at the left, Cagle was in the center and Ferguson was at the right. Plaintiff's right hand was under the steel plate, his left hand gripping the left end thereof. Ferguson's position was exactly reversed. Cagle was giving directions as to lining up the steel plate opposite the holes through which it was to be fastened by screws. The scaffold platform was placed "flush up against the heater." "Without moving one of the cross-pieces in place, we couldn't get close enough to the heater to work on it. We took one of the cross-pieces off the scaffold so as to be able to work on the heater." The heater was a little longer than the scaffold. Cagle asked him to raise his end a little bit. When he did so, "the scaffold started rolling backwards and pitched me forwards down between the heater and the scaffold, causing me to go off head-first." He knew nothing more until he came to in the hospital. Before going upon the scaffold that day, "we checked all the set screws and them cap screws we had in the scaffold to make sure they were tightened, we jarred, I mean shook, the scaffold to make sure it was tight and we also

made sure it was tight by putting a wrench on the cap screws and testing them with our hands, the set screws, and we also scotched the boards up under the wheels a little bit tighter."

According to Ferguson: Under circumstances substantially the same as described by plaintiff, "suddenly the scaffold began to roll away. Mr. Petty's side, . . . began to roll away from the heater." At the time of plaintiff's fall, the scaffold moved about 6 or 8 inches. After plaintiff and Cagle had fallen and he (Ferguson) had moved around, "it kept on moving around about 3½ to 5 feet on that end. My end didn't move any at all hardly, if any."

According to Cagle: "On the occasion of his (plaintiff's) fall . . . I felt some part of the scaffold shift a little bit and throw Mr. Petty off balance and at that moment we both fell through the heater." "Q. But so far as you know, on that occasion the scaffold did not roll? A. Not that I know of."

No examination was then made of the casters, wheels, screws, etc. Cagle continued to work on the scaffold about two weeks after plaintiff was injured. Cagle testified: "It did not at any time during that period roll with me that I remember."

Other evidence, largely unfavorable to plaintiff, need not be recited.

At the close of plaintiff's evidence, the court granted defendant's motion for judgment of involuntary nonsuit. Plaintiff excepted and appealed, assigning as error the rendition of such judgment and the court's exclusion of certain evidence offered by plaintiff.

*G. T. Carswell and Robinson & Jones for plaintiff, appellant.*

*Carpenter & Webb for defendant, appellee.*

BOBBITT, J. The facts disclosed by the evidence impel the conclusion that judgment of involuntary nonsuit was proper.

To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach. *Ramsbottom v. R. R.*, 138 N.C. 38, 41, 50 S.E. 448. Plaintiff's action is in tort. Even so, the duty owed by defendant to plaintiff arises from and is determined by the relationship subsisting between them. *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893.

Plaintiff was not an employee of Cranston. He was an employee of Piping Company; and as such was awarded compensation by the North Carolina Industrial Commission because this accident arose out of and in the course of such employment. Piping Company's compensation carrier paid the award and to that extent is interested in recovery by plaintiff herein.

Whether J. E. Sirrine & Company, in arranging for the Piping Company to make the necessary repairs, was agent for Cranston, as contended by plaintiff, or acting for itself in discharge of a duty it owed Cranston, is immaterial. Piping Company was an independent contractor. In effect, plaintiff so alleged; and, by uncontradicted evidence, it is established. While the final result was subject to inspection both by J. E. Sirrine & Company and by Cranston, neither had any supervision of the Piping Company's work during its progress. *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137.

There is neither allegation nor evidence that Cranston was obligated by contract or otherwise to furnish a scaffold for use by Piping Company or its employees. Further, there is neither allegation nor evidence that Piping Company or its employees had used Cranston's scaffold or had worked for Cranston or in its plant on any prior occasion.

Plaintiff's allegation is that Gaffney, Cranston's mill engineer, and Hill, alleged to have had charge of Cranston's equipment, particularly the scaffold, "had authority to permit the use of said scaffold by plaintiff's employer."

Plaintiff alleged that it was necessary for Piping Company's employees "to have a scaffold or other elevated appliance to stand on in doing their work." For this purpose, they brought "A" ladders; and by means thereof they inspected the heaters. There is no evidence that Piping Company or its employees had prior knowledge that Cranston had a scaffold. They discovered it after arrival at Cranston's plant. Whether a sufficient platform could have been provided by extending planks between the "A" ladders does not appear. There is evidence that a scaffold was necessary to the performance of Piping Company's work. It is plain that a scaffold, especially a movable scaffold, was more convenient and better adapted to the work. It does not appear whether the casters could be removed so that the scaffold would rest on stationary footings rather than on wheels. It is common knowledge that this may be done with scaffolds of this general type. In any event, the use of the casters facilitated the removal of the scaffold from place to place, as Piping Company's work required; and at each caster there was a device for locking the wheel when this was deemed necessary.

The evidence is sufficient to establish that Gaffney and Hill *permitted* Piping Company's employees to use Cranston's scaffold when it was not otherwise in use by Cranston. Absent both allegation and evidence that Cranston was obligated to provide a scaffold for use by Piping Company and its employees, the conclusion reached is that Cranston did nothing more than permit Piping Company and its employees to use the Cranston scaffold if they saw fit to do so.

So far as the evidence discloses, this particular scaffold was standard equipment, which defendant had purchased and had used for two years. The evidence discloses no defect therein except such as related to the casters or screws by which the wheels were locked. There is no evidence that any locking device failed to function properly at any time until after Piping Company's employees had put the scaffold in use for their purposes. Was Cranston's relationship towards plaintiff such that the law imposed upon him the legal duty to exercise reasonable care to inspect the said locking devices on the scaffold during the period the scaffold was in use by Piping Company's employees so as to cast liability upon defendant in the event such an inspection would have disclosed defects therein?

The annotation in 44 A.L.R. 932-1134, under the caption, "Liability of the contractee for injuries sustained by the contractor's servants in the course of the stipulated work," and decisions cited in the supplements, deal exhaustively with decisions in other jurisdictions, including the English cases, relating to a wide variety of factual situations. Cases are cited, including *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387, in support of the proposition that "a contractee who agreed to provide a contractor with a particular instrumentality for the purposes of the stipulated work is ordinarily liable for any injury which a servant of the contractor may sustain, during the progress of the work, by reason of a defect which was known to the principal employer, or which he might have discovered by the exercise of reasonable care, at the time when the instrumentality was turned over to the contractor." 44 A.L.R. 1048 *et seq.* Plaintiff cites *Coughtry v. Globe Woolen Co., supra,* as an authority upon which he now relies. On the other hand, cases are cited in support of the proposition that "An action brought by a contractor's servant to recover for injuries caused by a defect in an instrumentality gratuitously furnished by the contractee for the purposes of the stipulated work is maintainable, or not maintainable, according as the contractee had or had not actual knowledge of the existence of the defect at the time when the transfer of the instrumentality occurred." 44 A.L.R. 1079 *et seq.* The latter statement is in accord with the text in 35 Am. Jur., Master and Servant sec. 162, and in 57 C.J.S., Master and Servant sec. 604.

In *Paderick v. Lumber Co.*, 190 N.C. 308, 130 S.E. 29, the death of plaintiff's intestate, an employee of an independent contractor, was caused by a defective "skidder" or "loader," by means of which logs were placed on railroad cars. It was held that since defendant had agreed to furnish the loader for use by the independent contractor, the liability of defendant to plaintiff's intestate, in respect of defects in the loader, rested upon principles applicable to the relationship of master

and servant. While there was no recovery in *Moore v. Rawls,* 196 N.C. 125, 144 S.E. 552, the basis of decision in the *Paderick case* was noted and the rule was restated.

In *Cathey v. Construction Co.,* 218 N.C. 525, 11 S.E. 2d 571, heard on demurrer to the complaint, there was a general contract for the construction of a residence. The general contractor constructed a scaffold. After its use by the general contractor's employees, a roofing subcontractor and its employees used the scaffold. The scaffold fell, injuring an employee of the subcontractor; and it was alleged (1) that the materials out of which the scaffold was built were of insufficient strength and defective, and (2) that an employee of the general contractor negligently and without warning removed a support from the scaffold. It was further alleged that prior to the letting of the subcontract for the roof, there had been a long course of dealing between the general contractor and the subcontractor involving similar contracts and that "it was understood between said parties, pursuant to the course of dealing between them, that the necessary scaffolds to be used in the installation of the roof on said dwelling would be furnished" by the general contractor.

In holding that the demurrer should have been overruled, this Court referred to the *Paderick case* as authority, taking occasion to point out that the relationship between defendant and plaintiff was not that of master and servant; but that where the general contractor was obligated to provide the equipment necessary for plaintiff's use the law imposed upon him a like duty with plaintiff's employer in respect of providing equipment suitable and safe for the purposes for which it was to be used.

In the excerpt from *Coughtry v. Globe Woolen Co., supra,* and in the excerpt from 27 Am. Jur., Independent Contractors sec. 30, quoted in the opinion in *Cathey v. Construction Co., supra,* as in the *Cathey case,* liability is predicated on two bases: either (1) an express obligation to provide the equipment, or (2) an implied agreement to provide such equipment as a valuable consideration and inducement to facilitate and minimize the cost of performance of the work. In both the *Coughtry* and *Cathey cases,* the defective equipment was a scaffold, allegedly built of insufficient or defective materials or workmanship, built by the defendant for use, in part at least, for the very purpose for which it was being used when plaintiff was injured.

The facts here are readily distinguishable from the cases cited. Here Cranston had a piece of equipment which Piping Company chose to use rather than provide its own equipment of similar type. Cranston interposed no objection. Cranston had neither constructed the equipment nor was it obligated to provide it. Under such circumstance, we hold

that Cranston had no duty to inspect the equipment before and during the period it permitted the use thereof by Piping Company's employees. Cranston's duty, a breach of which would render it liable, was to disclose to Piping Company and its employees such defects in the equipment, if any, of which it had actual knowledge or notice, which might render the use thereof dangerous, which were not apparent to Piping Company and its employees.

Plaintiff directs our attention to Sections 388 and 392 of the Restatement of Torts where in broad terms it is stated that the law imposes upon one who supplies to another a chattel to be used for the supplier's business purposes the duty to exercise due care to discover its dangerous character or condition, if such exists. We do not understand the authors to mean that one who permits an independent contractor or its employees to use a tool, appliance or equipment, solely as a courtesy and accommodation, is liable for failure to exercise due care to make reasonable inspection thereof before and during the period such use is permitted, simply because the ultimate result of the work to be done by the independent contractor is for the supplier's benefit and for which he must pay the independent contractor. Indeed, in explanation of Section 392, the author says: "One who employs another to erect a structure or to do other work and agrees for that purpose to supply the necessary tools and temporary structures, supplies them to the employees of such other for a business purpose. This is so irrespective of whether the structure or work when finished is to be used for business or residential and social purposes. On the other hand, if it is understood that the person who is to do the work is to supply his own instrumentalities, but the person for whom the work is to be done permits his own tools or appliances to be used as a favor to the person doing the work, the tools and appliances are supplied as a gratuity and not for use for the supplier's business purposes." The quoted explanation is not in conflict with the rule held applicable to this case.

Plaintiff cites *Martin v. Food Machinery Corp.*, 223 P. 2d 293, a decision of the District Court of Appeal, Fourth District, of California; *Hilleary v. Bromley*, 146 Ohio St. 212, 64 N.E. 2d 832, a decision of the Supreme Court of Ohio; and *Kalash v. Ladder Co.*, 34 P. 2d 481, a decision of the Supreme Court of California. In these, and in *Coughtry v. Globe Woolen Co., supra,* we find expressions more favorable to plaintiff's view than in any other cases that have come to our attention. But when the facts of each case are considered, it is apparent that decision rested upon a ground not inconsistent with the view taken by this Court.

In *Martin v. Food Machinery Corp., supra,* the plaintiff was injured when a scaffold on which he was working broke, resulting from the use

of defective materials. Defendant-owner was constructing a building. Its employees built the scaffold and used it in their construction work. Plaintiff was an employee of a subcontractor, who was doing the outside lathing and plastering on a cost-plus basis. The evidence disclosed that it was the custom for tradesmen and workmen, when following one another, to use the scaffold already constructed. Whether plaintiff was an invitee, under the facts presented, was held for determination by the jury. It is noted that in the *Martin case,* as in the *Coughtry* and *Cathey cases,* a stationary scaffold, constructed by the defendant, was involved, not a movable piece of equipment such as the scaffold owned by Cranston.

In *Hilleary v. Bromley, supra,* the second paragraph of the "Syllabus by the Court," states the basis of decision as follows: "2. Where a person agrees to place siding on a house and enters into a subcontract with another whereby the latter is to apply the siding and the former to supply ladders to be used in such work, such supplying is a bailment for the mutual benefit of the parties and the bailor is bound to exercise ordinary care in making the ladders safe for their intended purpose or to disclose to the bailee such defects in the ladders as it was the bailor's duty, in the exercise of ordinary care, to discover."

In *Kalash v. Ladder Co., supra,* the action was against the manufacturer of a ladder which collapsed while plaintiff was at work thereon in his employer's business. The principles applicable to a manufacturer of equipment as set forth in the leading case of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440, were applied.

Even where the relationship is that of master and servant, and the duty devolves upon the master to exercise due care to inspect at reasonable intervals, tools, appliances and equipment furnished by him to his servant for the performance of his work (*Womble v. Grocery Co.,* 135 N.C. 474, 47 S.E. 493; *West v. Tanning Co.,* 154 N.C. 44, 69 S.E. 687; *Cotton v. R. R.,* 149 N.C. 227, 62 S.E. 1093), such duty does not apply to a simple tool, such as a hammer, axe, chisel, spade, etc., because "the employee, by using the tool, has had the opportunity to observe defects, and . . . his knowledge is equal or superior to that of the employer." *Mercer v. R. R.,* 154 N.C. 399, 70 S.E. 742. The reason underlying the rule relating to simple tools applies equally when the servant discovers that, unknown to his master, an appliance or equipment has become defective in the course of his use thereof, unless he makes such defect known to his employer so that the defect may be repaired or a new appliance or new equipment furnished or so that the master may instruct the servant to desist from further use of the defective appliance or equipment.

The relationship between Cranston and plaintiff was not that of master and servant. But in no aspect of the case would Cranston's liability to plaintiff be greater than if such were their relationship.

If plaintiff's evidence is accepted, plaintiff, in the course of his use of the scaffold, actually discovered the alleged defective condition of one or more of the casters or screws used therewith. His actual knowledge of the repeated failure of the locking device on one or more of the wheels was based on his personal experience with and use of the scaffold. When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows is without significance. *Perry v. Herrin,* 225 N.C. 601, 35 S.E. 2d 883; *Presley v. Allen & Co.,* 234 N.C. 181, 66 S.E. 2d 789. Here plaintiff alleges that the very defective condition of which he was fully aware was the proximate cause of his injury.

It is apparent that plaintiff's knowledge of the alleged defective condition of the scaffold was superior to that of Cranston. Indeed, Cranston had no knowledge thereof. Evidence of notice to Philpott, the storeroom keeper, and to Hunsinger, the steam-fitter's helper, rather than to Gaffney or Hill, whom plaintiff alleges were in charge of Cranston's equipment, including the scaffold, was not notice to Cranston. Too, the fact that Piping Company, plaintiff's employer, knew of the alleged defective condition, was not chargeable to Cranston.

It is further noted that there is no evidence that the locking device failed or that the scaffold rolled at any time when the equipment was used by persons other than Piping Company's employees, plaintiff and his co-workers.

In *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561, the plaintiff's intestate was an independent contractor. Judgment of nonsuit was affirmed. What is said by *Barnhill, J.* (now *C. J.*), is appropriate here: "The owner is not responsible to an independent contractor for injuries from defects or dangers of which the contractor knew or should have known, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this he is liable for resultant injury.' (Citations omitted.)"

According to plaintiff's testimony, Piping Company's employees, including plaintiff, shortly before plaintiff's injury, removed the brace on the scaffold adjacent to the heater on which they were working. Defendant contends with much force that the removal of this brace, considered with the weight and position of the workmen and the steel plate, so weakened the scaffold and platform that it should be inferred that they became unsteady or shifted, causing plaintiff to lose his balance; and that any further movement of the scaffold was incident to the fall

of plaintiff and of Cagle from the platform. Obviously, there was some movement of the scaffold or platform. Plaintiff and Ferguson testified that it *rolled.* However, it was physically impossible for them to see the casters or wheels from where they were standing on the scaffold, then holding and placing the steel plate against the heater.

Plaintiff's testimony is direct and positive that the bolts were tightened and the wheels locked before plaintiff and his fellow-employees went upon the scaffold on this occasion. After the accident, no inspection was made to determine whether the threads on any cap screw were worn or stripped or whether any wheel was then unlocked. On the contrary, Cagle testified that he continued to use the scaffold, without alteration, for two weeks after the accident, during which time he had no trouble with the locking device. However, since we have reached the conclusion that the judgment of involuntary nonsuit should be affirmed on the basis of the legal principles declared above, we need not decide whether the testimony of plaintiff and Ferguson, considered in relation to the physical facts and undisputed evidence, is sufficient to support the plaintiff's allegation and theory of the case, namely, that the locking device failed and the scaffold *rolled.*

The court excluded a telegram and certain letters. These tend to show that from September, 1951, until Piping Company's employees got on the job in late January of 1952, Sirrine & Company, prodded by Cranston, had been urging Piping Company to go ahead with the work. However, as plaintiff frankly admits in his brief, these letters were offered solely for the purpose of showing that Cranston wanted the work to proceed as rapidly as possible. Admitted evidence tends to establish this fact. For that matter, in the salubrious but chilly air of Fletcher, North Carolina, in mid-winter, Cranston's desire that the deficiencies in its heating system be remedied without delay is obvious. The exclusion of these exhibits does not affect decision as to nonsuit.

It appears that plaintiff received serious personal injuries while in the employment of Piping Company. He was entitled to compensation benefits. He has received the compensation to which he was entitled under the Workmen's Compensation Act. No doubt the amount thereof was inadequate compensation for his injuries. Even so, we find no evidence in this record sufficient to impose liability upon Cranston for the unfortunate accident. Hence, the judgment of involuntary nonsuit is

Affirmed.

STATE v. RICHARD PAUL R. KLUCKHOHN.

(Filed 13 January, 1956.)

**1. Criminal Law § 52a (1)—**

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference that may be drawn therefrom.

**2. Criminal Law § 52a (2)—**

If there is any competent evidence to support the charge contained in the bill of indictment, the case must be submitted to the jury.

**3. Homicide §§ 8a, 25—**

Evidence tending to show that defendant was handling his pistol in his hotel room, and fired same through the window, fatally injuring a person in a parking lot below, is sufficient to be submitted to the jury on the issue of defendant's culpable negligence in a prosecution for manslaughter, notwithstanding testimony that defendant did not know the gun was loaded and did not consciously point it at anyone.

**4. Homicide §§ 8a, 27e—**

Where there is no evidence that defendant intentionally pointed his pistol at anyone, G.S. 14-34 does not apply, and an instruction that the violation of the statute, proximately resulting in injury and death, would constitute manslaughter, must be *held* for error. The State's evidence of a statement by defendant to the effect that he was "dry firing" the pistol does not amount to evidence that defendant intentionally pointed the weapon at deceased, though it is competent upon the question of culpable negligence.

**5. Criminal Law § 53d—**

The failure of the court to state the law applicable to defendant's evidence in explanation of incriminating facts adduced by the State must be *held* for prejudicial error.

**6. Homicide § 27e—**

Where, in a prosecution for manslaughter, defendant relies upon misadventure or accident, an instruction to the effect that where a person does a lawful act in a careful and lawful manner and without any unlawful intent, resulting in death, the homicide is excusable, but that the absence of any of these elements would involve guilt, is erroneous, since a mere negligent departure from the rule given would not necessarily constitute culpable negligence.

**7. Criminal Law §§ 53f, 53k—**

Where the court gives the State's contentions on every phase of the testimony in detail, but gives the defendant's contentions only in brief and general terms, even though defendant had offered voluminous evidence in explanation of incriminating circumstances adduced by the State, the charge must be *held* prejudicial. G.S. 1-180.

BARNHILL, C. J., dissenting.
PARKER, J., concurring in dissent.

APPEAL by defendant from *Williams, J.*, June Term, 1955, of WAKE.

Criminal prosecution tried upon a bill of indictment charging the defendant with the murder of one Miss Bernice Seawell. The bill of indictment charged murder in the first degree; however, when the defendant was arraigned and entered a plea of not guilty, the solicitor for the State announced that he would not seek a conviction of murder in the first degree but would ask for a verdict of guilty of murder in the second degree, or manslaughter, as the evidence might warrant.

At the conclusion of all the evidence, a motion for judgment as of nonsuit was allowed as to the charge of murder in the second degree but overruled as to the charge of manslaughter.

The evidence tends to show that Richard Paul Kluckhohn, aged 21, was employed as a manuscript solicitor and sales representative in the College Department of the publishing firm of Rowe, Peterson and Company of Evanston, Illinois, and for several weeks prior to 13 May, 1955, he had been traveling through the Southern states visiting colleges and universities in connection with his employer's business. On 11 May, 1955, he arrived in Raleigh, North Carolina, and registered at the Sir Walter Hotel and was assigned to Room 214. During the time he was in the hotel, he was principally engaged in familiarizing himself with one of the books of his company which he was selling, and for diversion he was cleaning his camera and his Luger pistol, and reading fiction. He had purchased the Luger pistol only a short time before at Urbana, Illinois, and had never fired it. During the morning of 13 May, 1955, the defendant testified he had worked on the Luger pistol, running several rounds through the gun, had removed the ammunition clip, and had, he thought, unloaded the gun before placing it on the bed nearest the window. The gun was seen in the room on the bureau on 12 May, 1955, and on the bed on 13 May, 1955, by the hotel maid and housekeeper.

The defendant's evidence further tends to show that, after lunch on 13 May, he placed most of his clothing and toilet articles in his bags, and after reading awhile, prepared to leave the hotel to keep an engagement for the weekend with Dr. Joseph A. Kahl in Chapel Hill, North Carolina. Standing between the two beds, he picked up the pistol to take it apart, and as he was bringing the pistol up, he snapped the trigger and it went off. He testified that he was not consciously pointing the gun anywhere; that he thought it was unloaded; that the noise from the report was loud, causing his ears to ring and dazing him. That he dropped the gun on the bed, sat down briefly, then picked up the

gun, disassembled it, cleaned the barrel with a cleaning patch, put the parts of the gun in his bag, gathered his baggage and left the room. That he was afraid the hotel people had heard the noise and he would get in trouble with them. That he did not know where the bullet had gone or that anyone was hurt.

Leaving the room he went to the lobby and to the cashier's window, where he asked for the bill for Room 214. That he did not appear to the cashier to be nervous or upset or in a hurry. When he offered to pay his bill with a check, he was informed that it would be necessary to have it approved by Mr. Morgan, the Assistant Manager. He crossed the lobby to Mr. Morgan's desk, showed Mr. Morgan his identification card with his name and address and that of his employer's on it, and secured Mr. Morgan's approval on his personal check. The Assistant Manager discussed with him the housekeeper's report about the pistol in his room, and talked with him about Luger pistols and ammunition for them. According to Mr. Morgan, he appeared perfectly normal. The defendant went from Mr. Morgan's desk back to the cashier's window, paid his bill with the check, receipting on the back of the check for the cash he had received.

He left the hotel, got his car and drove to Glen Lennox near Chapel Hill, on Highway 54, where he left some clothes to be cleaned to be picked up the following Monday afternoon. He drove around the University campus and to Dr. Kahl's apartment at 36 Hales Road in Glen Lennox.

Shortly after 6:00 p.m., an officer of the Chapel Hill police force called at Dr. Kahl's apartment and asked for the defendant. The officer asked the defendant if he had a pistol and if it had been fired in Raleigh that day, which the defendant acknowledged, and the officer informed the defendant that a lady had been killed. The defendant exclaimed, "Oh, my God!" and put his hands to his face. The officer testified that the defendant then told him that he had taken down the gun and was dry firing when the gun went off, but that he did not know he had killed anybody, and that he did not know the gun was loaded. The defendant and Dr. Kahl testified that the term "dry firing" was never used. The defendant went with the officer, got his bag with the disassembled Luger pistol in it and turned it over to the officer and was taken to the Chapel Hill Police Station to await the arrival of the Raleigh police officers.

Room 214 in the Sir Walter Hotel is on the fourth floor above Salisbury Street and directly above the sidewalk. The Sir Walter Hotel is on the southeast corner of South Salisbury Street and West Davie Street in the City of Raleigh, and McLaurin Parking Lot is on the southwest corner of Salisbury and Davie Streets. A few minutes before 3:00

o'clock in the afternoon on 13 May, 1955, Mr. Harold McLaurin drove the car owned by Mrs. J. H. Patterson from another part of the parking lot east on Davie Street and turned south on Salisbury Street, stopping with the front of the car approximately ten yards south of the intersection. It was raining pretty hard. Mrs. Patterson and her sister, Miss Bernice Seawell, were waiting in the middle of the lot under an umbrella, and when the car came around the corner, they started across the lot towards the car. Mrs. Patterson gave Miss Seawell the umbrella, and Miss Seawell went to get in on the side nearest the sidewalk. Mrs. Patterson went around the front of the car to pay the attendant and get in on the driver's side. Mr. McLaurin heard a report and ran around the car to Miss Seawell, who was staggering. Miss Seawell was standing approximately eight yards south of the intersection. An ambulance and the police were called and arrived within a few minutes. She was taken to the hospital where she was examined by a physician who testified that there was a bullet wound with the point of entrance on her right shoulder and the point of exit on the left side about the eighth rib, and that she died as a result of that wound.

There was evidence offered that the police cars and the ambulance used sirens and that a crowd gathered at the place where the deceased fell. There was also evidence offered that nothing unusual was heard in the hotel. Three police officers testified that after the ambulance left they saw the defendant looking down on the scene from the room identified as No. 214, and identified the defendant in the courtroom. A witness for the defendant testified that, at about the same time referred to by the police officers, he had examined the windows on the western side of the hotel and he had seen no one. There was no evidence that the defendant knew Miss Seawell, the deceased.

The jury returned a verdict of manslaughter, and from the sentence imposed the defendant appeals, assigning error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Manning & Fulton and John L. Sanders for defendant.*

DENNY, J. The record in this case contains approximately 255 pages of evidence adduced in the trial below; the State's evidence consists of 146 pages and that of the defendant 109. Consequently, we have set out herein only such portions thereof as we deem necessary to an understanding of the questions presented for our consideration and determination.

The defendant entered 560 exceptions in the trial below, including those challenging the correctness of the charge. The record contains

36 assignments of error based on numerous exceptions. However, only 32 of these exceptions are discussed in the brief. The remaining ones will be deemed abandoned under Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 562.

The first assignment of error is directed to the failure of the court to sustain the defendant's motion for judgment as of nonsuit as to the charge of manslaughter, and for a directed verdict of not guilty.

It is well settled in this jurisdiction that in passing upon a motion for judgment as of nonsuit in a criminal prosecution, we must consider the evidence in the light most favorable to the State, and if there is any competent evidence to support the charge contained in the bill of indictment, the case is one for the jury. *S. v. Ritter,* 239 N.C. 89, 79 S.E. 2d 164; *S. v. Church,* 231 N.C. 39, 55 S.E. 2d 792; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473. Furthermore, in the consideration of such motion, the State is entitled to the benefit of every reasonable inference that may be drawn from the evidence. *S. v. Ritter, supra; S. v. Gentry, supra.* Applying the rule as laid down in our decisions with respect to such motions, we think the State's evidence in the trial below was sufficient to carry the case to the jury, and we so hold. Therefore, this assignment of error is overruled.

The defendant excepts and assigns as error the following portion of the charge: "The State contends that you should find the defendant guilty of manslaughter for that he violated a statute on the statute books which reads as follows: "If a (any) person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not (loaded), he shall be guilty of an assault, and upon conviction of the same shall be fined, imprisoned, or both, at the discretion of the court. (G.S. 14-34.) I instruct you, gentlemen, that a violation of that statute proximately resulting in injury and death would constitute manslaughter."

The defendant insists that there is no evidence to show that he intentionally pointed his gun at the deceased, and that the evidence as to "dry firing" was not sufficient to show a violation of the above statute. There is no evidence in the record tending to show that the defendant intentionally pointed his gun at the deceased and then fired, unless the evidence with respect to "dry firing" was sufficient to support the State's contention in that respect. The Chapel Hill police officer testified that when he talked with the defendant in the apartment of Dr. Kahl, around 6:00 p.m. on 13 May, 1955, that the defendant said, "I had taken the gun down and was dry firing it." The State offered evidence to the effect that "dry firing" is a term or terminology classifying a certain use of a firearm; that "dry firing" is the aiming of a weapon at any given object and lining up the sights on some object and then squeezing the

trigger. This evidence may be considered on the question of culpable negligence, but in our opinion it is not sufficient to support the State's contention that the defendant intentionally pointed his pistol at the deceased and then pulled the trigger, and we so hold. Even so, the case should be submitted to the jury on proper instructions for its determination as to whether or not the death of the deceased was proximately caused by the culpable negligence of the defendant. *S. v. Limerick,* 146 N.C. 649, 61 S.E. 568; *S. v. Turnage,* 138 N.C. 566, 49 S.E. 913; *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580.

In the case of *S. v. Turnage, supra,* the defendant had been convicted of involuntary manslaughter. The evidence tended to show that John Turnage, the defendant, threw a brickbat at Blaney Turnage who was in a peach tree. Thereafter, the defendant John Turnage, Dan Moore, Sam Moore, James Hunt and Blaney Turnage went into the Turnage back yard. The defendant went around the house and Blaney Turnage, his brother, followed him with an axe. The defendant went in the house and came out with a gun in his hands, with the muzzle in the direction of the deceased and his companions. Dan Moore, a witness for the State, testified that he could not say "how high the gun was up, or whether to the prisoner's shoulder or not; that he heard the gun fire when the prisoner was 12 feet from the deceased." James Hunt was hit and killed by the shot. The defendant testified, "When I got the gun I did not know it was loaded—had no knowledge of it. After shooting, I learned that the gun had been loaded; did not intentionally point the gun at anyone. . . . I got the gun to frolic with Blaney." Evidence was introduced to the effect that ordinarily the gun was not loaded. Among other instructions, the court charged the jury that upon all the evidence in the case, if believed beyond a reasonable doubt, the prisoner was guilty of manslaughter at least. This Court said: "We do not mean to intimate that there was not sufficient evidence to go to the jury, but we think the guilt or innocence of the prisoner should have been submitted to the jury upon all the evidence, with full and appropriate instructions as to what constitutes manslaughter, as the State asks for no other verdict, and presenting to the jury the contentions of the State and prisoner upon the evidence."

Likewise, in *S. v. Limerick, supra,* the evidence was to the effect that two young boys, the best of friends, had a gun and started through a straw field. A witness for the State testified that the prisoner and the deceased were scuffling over the gun. "One of the boys said, 'I will shoot you.' I don't know which it was. The other said, 'No, you won't; I will shoot you.' . . . I turned around and saw the gun fire, and deceased fell. Prisoner had gun when deceased fell." The deceased said

before he died that the shooting was an accident. The trial judge charged the jury that if they believed the evidence they should find the defendant guilty of manslaughter at least; that, taking all the evidence in its most favorable light to the defendant, he would be guilty of manslaughter. The jury returned a verdict of guilty of manslaughter. This Court, in awarding a new trial, said: "Undoubtedly, if the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental . . . But neither of these positions necessarily or as a matter of law arises from the testimony, and the question of the prisoner's guilt or innocence must be left for the jury to determine on the facts as they shall find them. *S. v. Turnage.*"

In *S. v. Trollinger, supra,* the deceased was killed by the discharge of a pistol in the hands of the defendant and under circumstances as follows: A group of persons, seven in number, in which the deceased and the defendant were included, were talking and laughing. A witness for the State testified that he was from five to ten feet behind the group and heard a shot, and heard a person named Trollinger (not the defendant) say: "You shot that boy!" and heard the defendant say, "I never shot the boy." That he caught up with the crowd and found Nash Lane shot. The witness never saw the pistol. The court directed a verdict of guilty of manslaughter. This Court, in giving a new trial, said: "It is not admitted nor has it thus far been established that the prisoner intentionally pointed the pistol towards the deceased, and the testimony as now given in seems to present the prisoner's case on the question whether he was guilty of culpable negligence in the way he was handling the weapon at the time of its discharge. Negligence of a kind not unlikely to cause injury to the deceased or any of the bystanders; and a proper application of the principles announced in *Limerick's case* requires that the issue be submitted to the jury as to defendant's guilt or innocence of the crime of manslaughter. See *S. v. Turnage,* 138 N.C. 566."

The defendant also assigns as error the failure of the court to give the pertinent contentions arising on his evidence with respect to "dry firing," flight, character evidence, and other pertinent matters, and its further failure to declare and explain the law applicable to his contentions as to what occurred, if the jury should find his version of what occurred to be true. *Mallard v. Mallard,* 234 N.C. 654, 68 S.E. 2d 247; *S. v. Sherian,* 234 N.C. 30, 65 S.E. 2d 331; *S. v. Ardrey,* 232 N.C. 721,

62 S.E. 2d 53; *S. v. Herbin,* 232 N.C. 318, 59 S.E. 2d 635; *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921. This assignment of error is well taken and will be upheld.

The defendant likewise assigns as error the following portion of the charge directed to the defendant's plea of misadventure or accident: "The defendant having entered a plea of Not Guilty, contends that the killing was through misadventure or accident and the Court instructs you that where one does a lawful act in a careful and lawful manner and without any unlawful intent, accidentally kills, that is excusable homicide, but these facts must all appear and the absence of any one of these elements will involve guilt. Accident is an event that happens unexpectedly and without fault."

The vice in this instruction is that it leaves the jury free to consider ordinary rather than culpable negligence as sufficient to make unavailing to the defendant the plea of accidental killing. *S. v. Early,* 232 N.C. 717, 62 S.E. 2d 84; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Miller,* 220 N.C. 660, 18 S.E. 2d 143; *S. v. Cope,* 204 N.C. 28, 167 S.E. 456. A mere negligent departure from the conduct referred to in the challenged portion of the charge would not necessarily involve or constitute criminal guilt. A departure to be criminal would have to consist of an intentional, willful, or wanton violation of a statute or ordinance enacted for the protection of human life or limb which resulted in injury or death. Such a violation of a statute would constitute culpable negligence. *S. v. Cope, supra.* "Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Rountree,* 181 N.C. 535, 106 S.E. 669. 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. . . . 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." *S. v. Cope, supra.*

The defendant further assigns as error the failure of the court to give equal stress to the contentions of the State and the defendant as required by G.S. 1-180. We think this assignment of error is also well taken and must be sustained. We have repeatedly held that a trial judge is not required by law to state the contentions of litigants to the jury. *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196; *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *Trust Co. v. Insurance Co.,* 204 N.C. 282, 167 S.E. 854. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the

opposing party. *S. v. Colson, supra.* The equal stress which the statute requires to be given to contentions of the State and the defendant, in a criminal action, does not mean that the statement of contentions of the State and of the defendant must be equal in length. *S. v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668. For instance, in a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. *Brannon v. Ellis, supra.*

In the charge under consideration, the court gave the State's contentions on every phase of the testimony at great length and in detail. On the other hand, the court gave the defendant's contentions in very brief, general terms, as though he had offered no evidence at all. The pertinent contentions arising from the defendant's evidence were not given as required by the provisions of G.S. 1-180 as interpreted and applied in our decisions.

A careful examination of the charge also reveals that nowhere in it did the court instruct the jury that if the State had failed to show beyond a reasonable doubt that the defendant was guilty, it would return a verdict of not guilty, or that, if the jury should fail to find the defendant guilty beyond a reasonable doubt, it would be its duty to return a verdict of not guilty.

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

There are other exceptions appearing on the record worthy of consideration, but since they are not likely to occur on another trial, we will not discuss them now.

New trial.

BARNHILL, C. J., dissenting: When the evidence in this case is boiled down to its essentials, the facts are few, and all point in one direction. Viewing the evidence offered by the defendant himself, the facts are simple and the inferences to be drawn therefrom are impelling and, in my opinion, lead to only one reasonable conclusion.

A pistol is a deadly weapon. It is so dangerous that the General Assembly has made it a crime for a person to point one at another, even "in fun or otherwise." G.S. 14-34. The defendant was carrying one with him on his travels, prompted no doubt by an ill-conceived idea he needed it for protection. He took it out of his baggage, and it was seen once on the bureau in his room and again on his bed. So it is quite apparent he had been handling it.

On the occasion of the homicide he took it in his hand and pulled the trigger without taking care to ascertain whether it was loaded—though

this is a fact he must have known—or giving thought to the direction in which it was pointed. After it was fired, he callously failed to make any effort to determine in what direction the bullet had gone or where it had landed. It might have passed through the door into the hall where some person was passing, or it might have gone through a wall into another room occupied by other guests of the hotel, or it might have—as it did—passed through the window and mortally wounded one of those who were passing along the west sidewalk of Salisbury Street, or landed in the adjoining parking lot where people were passing to and fro. But what did he care! He calmly finished packing, went to the lobby, paid his bill, chatted for a while with one of the officers of the hotel, and departed, concerned only as to whether anyone had heard the pistol fire in his room.

This is the case made out by defendant's own testimony. The State made out, at least *prima facie,* a much stronger case against him. Under the evidence for the State he stood at the window and watched the people gather around the woman he had mortally wounded.

It makes no difference exactly where defendant was standing when he fired the shot. The irrefutable physical evidence discloses that he was so situated that if he pointed the pistol downward at a somewhat acute angle and fired it, the bullet would strike on or near the sidewalk of Salisbury Street or in the automobile parking lot. It was so pointed, and the bullet did strike the deceased who was on the sidewalk, preparing to get into an automobile.

To my mind this testimony, for which defendant vouches, evidences a culpably heedless use of a deadly weapon resulting in the death of deceased which entitled the State to a peremptory instruction, so that any error in the charge was harmless.

"Where one engaged in an unlawful and dangerous act, such as 'fooling with an old gun,' *i.e.,* using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. G.S. 14-34; *S. v. Vines,* 93 N.C. 493; *S. v. Trollinger,* 162 N.C. 618, 77 S.E. 957; *S. v. Limerick,* 146 N.C. 649, 61 S.E. 568." *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564.

I might add that the cause was tried on the theory the State was required to prove that the defendant intentionally pointed the pistol toward the street where people were passing back and forth. Such is not the case. If defendant intentionally pointed the pistol toward the street and then fired it, inflicting a fatal wound on one of the pedestrians, he would be guilty of murder in the second degree. Thus, in some respects, the charge was more favorable to defendant than he had any right to expect. In any event, a person is presumed to intend the

natural consequences of his act. *S. v. Matthews,* 231 N.C. 617, 58 S.E. 2d 625.

Let me add that if the homicide had been accomplished with any instrumentality other than a deadly weapon I would concur in the majority opinion. The facts being what they are, I must vote to affirm.

PARKER, J., concurs in dissent.

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CONVENT OF THE SISTERS OF SAINT JOSEPH OF CHESTNUT HILL, PENNSYLVANIA, v. CITY OF WINSTON-SALEM.

(Filed 13 January, 1956.)

**1. Controversy Without Action § 4: Appeal and Error § 6c (3)—**

Where the parties agree upon a statement of facts on which the case is submitted to the trial court, exception to the failure of the court to find other facts is not well taken.

**2. Appeal and Error § 6c (2)—**

Exception and assignment of error to the judgment and to the entry of the judgment present solely whether the facts found or agreed support the judgment.

**3. Constitutional Law § 6½—**

Ordinarily, the acceptance of benefits under a statute or an ordinance estops a party from attacking the constitutionality of the statute or ordinance.

**4. Same: Municipal Corporations § 37—Plaintiff held estopped to contest validity of zoning ordinance.**

The facts agreed disclosed that the Bishop of the Diocese of the Roman Catholic Church, which owned land subject to the zoning authority of a municipality, applied for and obtained on behalf of the Diocese a use permit under a zoning ordinance, permitting the use of the property for a church school subject to restrictions that no changes be made in the exterior of the buildings, except those that might be required by the applicable building codes, that thereafter the Bishop applied for a modification of the permit, which was refused, that the property was subsequently transferred to the Sisters of a Convent, who then made a like request for modification, which was also refused, and that the Sisters took title to the property with full knowledge of the facts, and further that the Bishop under Canon Law is charged with the function of a general and religious supervisor in the regulation of the activities of church schools in the area. *Held:* The Bishop, by accepting the benefits of the provisions of the zoning ordinance, waived any right to contest the validity of the ordinance, and under the facts, the Sisters were likewise estopped.

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

APPEAL by plaintiff from *Crissman, J.*, at 18 April, 1955, Term of FORSYTH, as No. 748 at Spring Term, 1955, of this Court, carried over to Fall Term, 1955, as No. 380.

Civil action for declaration of rights, status and relationships of plaintiff under the zoning ordinances of the City of Winston-Salem and a special use permit issued under and pursuant to said ordinances to the "Catholic Diocese of North Carolina" for a private school on and in respect to certain property to which reference is hereinafter made.

The record on this appeal discloses that after the pleadings were filed plaintiff and defendant agreed upon certain facts, "upon which, together with such additional facts, if any, which the court may find, the rights, status, and other legal relations of the parties to this action are to be determined": In summary, these are substantially the facts agreed:

"1. Plaintiff, hereinafter referred to as 'the Sisters' is a non-profit, charitable and religious corporation created and existing under and by virtue of the laws of Pennsylvania,"—having been "engaged in such charitable and religious functions in Winston-Salem since 1943."

"2. Defendant, hereinafter referred to as 'the City' is now, and was at all the times hereinafter mentioned, a municipal corporation situated in Forsyth County, and created by and existing under certain Private Acts of the General Assembly of North Carolina and other amendatory acts of said General Assembly."

The property around which the controversy in this action revolves consists of three platted building lots, 1, 2 and 7, Block 1444, Forsyth County Tax Map, totalling about 3.51 acres. The buildings thereon consist of an eleven-room main house and a separate building consisting of a greenhouse, servant apartment and 3-car garage. It is situated in a subdivision originally called "Westview No. 1," which together with Westview Nos. 2 and 3, and the Country Club Estates, covers an area of some 220 acres. From time to time many expensive homes have been erected in these developments. All lots in the named subdivisions were sold subject to certain restrictive covenants, one of which was: "The property shall be used for residential purposes only, and no building other than residences, except garages or outhouses for domestic purposes shall be built on said premises, provided, that this shall not apply to churches and schools." All of the named subdivisions fall within an area zoned as Res. A-1 by the ordinance of the City.

"6. On December 21, 1948, the City enacted the present zoning ordinance, which repealed and replaced the former zoning ordinance of the City, adopted about the year 1930 . . . under the provisions of the enabling Act, adopted by the General Assembly of North Carolina, in

the year 1947, and under Section 116 of the Charter of the City of Winston-Salem adopted March 3, 1927, and reading as follows: 'The ordinances now in force in the city of Winston-Salem, and such as may hereafter be adopted, shall operate and have effect within one mile outside of the corporate limits of the City . . .'

"The zoning ordinance adopted December 21, 1948, by its terms allegedly extended to and included the area lying within the three miles of the corporate limits of the City. At the time of the enactment of said ordinance," the property and premises have involved "was a private homesite and dwelling house belonging to the estate of the late B. F. Huntley, which at the time of said enactment, was located approximately 2,300 feet outside the nearest corporate line of the city of Winston-Salem, which was extended on January 1, 1949, to include the premises. Pertinent portions of said zoning ordinance set forth in Exhibit B attached to and made a part of the findings . . . provide, *inter alia,* that 'public' schools may be located in all residential zones; that 'private' schools are prohibited from all residential zones except on application for, public hearings on, and grant of, a 'Special Use Permit' by the Zoning Board of Adjustment under the provisions of Section 13 of said Zoning Ordinance." The zoning ordinance does not define the words "public" and "private" as used with respect to schools.

"7. The zoning ordinance divides the city into nine (9) zones: four (4) residential and five (5) business, commercial, or industrial . . ."

"8. On December 23, 1948, the Catholic Bishop of Raleigh purchased the premises involved herein for use as a church elementary school. Application was made by said Bishop for a special use permit under the provisions of Sec. 13, Zoning Ordinance of the City of Winston-Salem. Several public hearings were had and numerous parties registered opposition. On February 17, 1949, a Special Use Permit was issued." Certain conditions were attached to said permit. The permit reads:

"This is to certify that The Zoning Board of Adjustment has authorized the granting of a Zoning Permit and the same is hereby granted to the Catholic Diocese of North Carolina, for the use of the following described property and the buildings situated thereon for a Private School Subject To The Following Conditions:

"1. Amending the petition to read as follows: 'Existing buildings to be used for a private, day nonboarding school for white children.'

"2. Legal agreements being executed providing that there will be no structural changes on the exterior of the present buildings, except those required by the State and City Building Codes relating to schools.

"3. That no additional buildings of any kind will be erected on the land in question."

"Description of Property:" Omitted.

And the agreed facts continue:

"The Catholic Bishop of Raleigh, through counsel, accepted said permit with the conditions set out therein. None of said conditions apply to public or other non-public schools located in residential zoned areas."

"9. The premises and existing buildings thereon were used as an elementary school during the period September 1949 through May 1954. The Sisters conducted said school. Enrollment for the school period 1953-54 was 212 pupils. In 1954 a new church elementary school was completed on other premises in the same residential zone and adjoining the parish church. Plans were made to operate a girls high school upon the premises involved here.

"10. . . ." (here the church school presently operated on the premises is described).

"11. The Catholic Bishop of Raleigh made application on July 23, 1954, for changes in the conditions of the Special Use Permit. Said requested changes are set out in the proposed Special Use Permit presented to the Zoning Board of Adjustment" are these:

"This is to certify that the Zoning Board of Adjustment has authorized the granting of a Zoning Permit and the same is hereby granted to the Catholic Diocese of North Carolina, or successors in title, for the use of the following described property and the buildings situated thereon for a private school subject to the following conditions:

"1. The following described property and buildings presently existing thereon or which may come into existence thereon shall be used for a private day nonboarding school for white children.

"2. There shall be no structural changes to the exterior of, or additions to, the present buildings, except those required by the State and City Building Codes relating to schools, and except for those which shall not be detrimental to the exterior appearance of the present buildings.

"3. That no additional buildings of any kind shall be erected on the land in question, except after submission of plans for said additional buildings to, and approval thereof by, the Zoning Board of Adjustment under applicable provisions of Sec. 13 (a) of the Zoning Ordinance of the City of Winston-Salem.

"Description of Property:" Omitted.

The agreed facts continue:

"Procedures required by Section 13 of the Zoning Ordinance were complied with and a public hearing held. A number of persons indicated opposition. The Zoning Board of Adjustment on August 9, 1954, voted unanimously against changing the conditions of the outstanding Special Use Permit.

"12. The Sisters purchased the premises involved here on February 3, 1955. In connection with the continued use of the premises for school purposes, the Sisters determined that it was necessary and desirable to convert the unused garage at the rear of the premises into a classroom. Conversion requires the removal of three double swinging type wooden doors and replacement thereof by a masonry wall with windows and a door; installation of a new floor and equipment. Application for a building permit for such work was made on February 5, 1955. . . . On March 16, 1955," by letter from Superintendent of Inspections to attorney for the Sisters, building permit was refused, for that, in summary, the zoning permit issued on February 17, 1949, contained the provisions hereinabove set forth; that thereafter on August 9, 1954, the Catholic Diocese, the owner of the property at that time, applied for modification of the foregoing provisions, in manner specified, and that after this request was filed and after it was heard by the Zoning Board of Adjustment it was denied. The letter concluded with this statement: "In my opinion to grant a permit at this time upon the application dated February 5, 1955, would violate and would be contrary to the provisions contained in the permit issued by the Board of Adjustment on February 17th, 1949. For this reason, and for the further reason that issuance of a permit on the application dated February 5, 1955, would violate the Zoning Ordinance of the City of Winston-Salem, this application is denied."

And the agreed facts continue: "Said changes and construction will constitute a structural change to the exterior of the building involved and are not required by the State or City Building Codes relative to schools. Neither the existing buildings nor the said changes and construction do or would violate any provision of the zoning ordinance as to yard, area, or height."

"13." (Pertains to the public school system of Winston-Salem.)

"14. (a) Defendant City maintains and contends that the Zoning Ordinance, by its terms, prohibits schools of the nature and class as that operated by plaintiff from being located on, or using, as a matter of right or law, premises located within any area of Winston-Salem zoned for residential purposes.

"(b) Defendant City maintains and contends that the Zoning Ordinance by its terms, makes the location of, or use of, premises within any area of Winston-Salem zoned for residential purposes, by schools of the nature and class as that operated by plaintiff, a matter of permission, which may be granted or withheld under the provisions of Section 13, of said Zoning Ordinance.

"(c) Defendant City maintains and contends that the said Special Use Permit, with conditions attached, as set out in Exhibit C, was

validly issued, and is presently in force and effect, including said conditions.

"(d) Defendant City maintains and contends that the conditions attached to said Special Use Permit validly prohibits structural changes (except those required by the State and City Building Codes relating to schools) to the exterior of buildings presently located on said premises and validly prohibit any additional changes regardless of size, structure, appearance, or area of premises occupied, from being built on said premises.

"(e) Defendant City intends to enforce the provisions of its Zoning Ordinance and the conditions of the Special Use Permit against plaintiff by taking such action as may be necessary."

"15. When the Sisters purchased the premises involved herein on February 3, 1955, from the Catholic Diocese of North Carolina, they had knowledge of all of the conditions contained in the Zoning Permit dated February 17, 1949, issued by the Zoning Officer of the City of Winston-Salem, same being plaintiff's Exhibit C, and the Sisters also had knowledge at that time that the Catholic Bishop, acting for and on behalf of the Catholic Diocese of North Carolina, had assented and agreed to all the conditions contained in said Zoning Permit.

"16. That . . . from time to time over a period of years many expensive homes . . . have been erected in said developments . . . and many of these residences were erected in close proximity to the B. F. Huntley homesite property before it was purchased by the Catholic Bishop of North Carolina.

"17. That numerous property owners, living in close proximity to the property involved in this proceeding, formerly owned by the Estate of the late B. F. Huntley, appeared at the public hearings, conducted by the Zoning Board of Adjustment of the City of Winston-Salem, with respect to the two applications filed by the Catholic Bishop of North Carolina and opposed the granting of the permits applied for, including the permit issued February 17, 1949 . . . At these hearings these property owners contended that the use of the B. F. Huntley Estate property for school purposes would violate the restrictive covenants contained in all the deeds in the Westview Development, and included also in the deeds to the Huntley property, and that same was contrary to the Zoning Ordinance of the City of Winston-Salem, and that the establishment and operation of a school on said premises would injure the property of home owners in said developments and cause a depreciation in the value of their properties.

"18. That the purpose underlying the application for the building permit dated February 5, 1955 and filed by the Sisters with the proper officials of the City of Winston-Salem is to convert the 4-(3) car garage

building, situated upon the premises in question and formerly used by the late B. F. Huntley for the storage of his family automobiles, into additional classroom space and thereby to enlarge the classroom facilities located upon the property in question.

"The Sisters agree that the conversion of the garage will provide additional classroom space, but insist that the primary purpose of such conversion is that the concrete floor of the garage is more suitable for science room purposes.

"This 6th day of February 1955."

"In order to avoid confusion, counsel for both plaintiff and defendant agree that the terms 'Bishop'; 'Catholic Bishop of Raleigh'; 'Catholic Diocese of North Carolina'; 'Catholic Diocese'; 'Catholic Bishop of North Carolina,' and similar terms, as used throughout the record, are synonymous and refer to Vincent S. Waters, Catholic Bishop of the Diocese of Raleigh, North Carolina."

The cause coming on for hearing, and being heard, "upon the agreed statement of facts, as appears of record, and the parties having waived trial by jury and having agreed that the court might hear and pass upon the questions involved on the basis of agreed statement of facts, and the parties having agreed through counsel in open court that the judgment might be signed out of term and out of the district as of the date the case was argued on April 8, 1955, and the court having considered the agreed statement of facts, the briefs of the parties, and the argument of counsel, and, on the basis thereof, the court, being of opinion that the plaintiff is not entitled to any of the relief sought in this case . . . ORDERED, DECREED AND ADJUDGED that the Zoning Permit issued by the Zoning Officer of the City of Winston-Salem to the Catholic Diocese of North Carolina, dated February 17, 1949, together with all the conditions thereof, is valid and binding upon the plaintiff in this action and that the application for Building Permit filed by the plaintiff in this action under date of February 5, 1955, violates the conditions contained in the Zoning Permit dated February 17, 1949, and the same is contrary thereto and the refusal of the Superintendent of Inspections of the City of Winston-Salem to grant to the plaintiff the building permit applied for on February 5, 1955, was proper and is binding upon the plaintiff in this action, and the plaintiff is not entitled to any of the relief sought in this action, and the same is hereby dismissed, and the plaintiff and its surety are taxed with the costs."

The record also discloses that upon being notified of the decisions of the court, plaintiff, through counsel, filed written motion, supported by affidavit, for a rehearing, on the ground, *inter alia*, that the "sole basis for said decision is the assumed fact that the plaintiff and the Catholic

Bishop of Raleigh are one and the same legal entity . . . which is not borne out by the facts before the court . . ."

In support of its motion, signed by its attorneys, plaintiff filed an affidavit of Vincent S. Waters, dated 18 April, 1955, in which it is stated:

"I, Vincent S. Waters, being first duly sworn, deposes and says: I am the Catholic Bishop of the Diocese of Raleigh, State of North Carolina, and as such hold title to all parochial real estate in the Diocese under Section 61-5 of the General Statutes of the State of North Carolina of 1943, as well as under the laws, regulations and discipline of the Catholic Church and its Code of Canon Law. In this capacity, I formerly owned lots 1-2-7, block 1444, Forsyth County, Tax Map of the City of Winston-Salem, North Carolina.

"On February 3, 1955, by Warranty Deed of January 18, 1955, I conveyed this property to the Sisters of St. Joseph of Chestnut Hill, Philadelphia, Pennsylvania. The Sisters are a nonprofit charitable corporation under the laws of Pennsylvania. Since the date of said deed I have no legal interest in the described land and under the laws and regulations and discipline of the Catholic Church this property belongs to the Sisters of St. Joseph of Chestnut Hill, Philadelphia, Pennsylvania, which is a separate and distinct entity from the Diocese of Raleigh, North Carolina.

"My sole connection with the Sisters of St. Joseph of Chestnut Hill insofar as the land described is concerned is that as Bishop of the Diocese of Raleigh, I am charged by the Church and Canon Law with the function of a general and religious supervisor in the regulation of their activities and schools in this area. Such functions do not in any way pertain to the ownership of the above described land.

"Given this 18th day of April 1955.

(s) VINCENT S. WATERS
MOST REVEREND VINCENT S. WATERS,
Bishop of the Diocese of Raleigh, N. C."

The defendant filed answer, also supported by affidavit, in which it denies the allegations of the motion of plaintiff so made as just stated. The motion was overruled and plaintiff excepted. Exception No. 1.

The court made no finding of fact in respect thereto, and there was no specific request that the court do so.

Judgment, as hereinabove set forth, was signed, and "plaintiff again excepts (Exception No. 2) and appeals to the Supreme Court for errors assigned and to be assigned."

*Deal, Hutchins & Minor for plaintiff, appellant.*

*Womble, Carlyle, Sandridge & Rice for defendant, appellee.*

WINBORNE, J. The parties having agreed upon a statement of facts on which the case was submitted to the trial court, exception to the failure of the court to find other facts is not well taken. Hence exception to the judgment, and to the entry of it, assigned as error on this appeal presents for decision this question: Do the facts to which the parties agreed support the judgment? *Culbreth v. Britt,* 231 N.C. 76, 56 S.E. 2d 15, and cases cited. See also *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555; *In re Hall,* 235 N.C. 697, 71 S.E. 2d 140, and cases cited. Also *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759; *Scarboro v. Ins. Co.,* 242 N.C. 444, 88 S.E. 2d 133; *Byrd v. Thompson, ante,* 271. The answer is "Yes."

The acceptance of benefits under a statute generally precludes an attack upon it. See 11 Am. Jur., pp. 765 to 767; *Cameron v. McDonald,* 216 N.C. 712, 6 S.E. 2d 497; *Wall v. Parrott,* 244 U.S. 407, 61 L. Ed. 1229, 37 S. Ct. 609.

In the *Wall case* the U. S. Supreme Court had this to say: "They cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be."

And in 11 Am. Jur., p. 766, the text writer states: "Estoppel to question the constitutionality of laws applies not only to acts of the Legislature, but to ordinances and proceedings of municipal corporations, and may be extended to cases where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as to cases where they are attacked on other grounds."

The writer continues: "Estoppel is most frequently applied in cases involving constitutional law where persons, in some manner, partake of advantages under statutes. The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Certainly such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional. This principle applies also to questioning the rules or actions of state commissions."

Moreover, in *Cameron v. McDonald, supra,* this Court said: "It is the general rule, subject to certain exceptions, that a defendant may waive a constitutional as well as a statutory provision made for his benefit . . . and this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it," citing *S. v. Hartsfield,* 188 N.C. 357, 124 S.E. 629.

In the light of these principles the answer finds support in a recital of the agreed facts in logical order. The B. F. Huntley home site and

dwelling were located within an area zoned as Res. A-1 by the zoning ordinance of the city. The zoning ordinance prohibited private schools from all residential zones, except upon "Special Use Permit" granted by the Zoning Board of Adjustment under the provisions of Section 13 of the ordinance. The Catholic Bishop of Raleigh purchased the Huntley premises for use as a church elementary school. He then applied for a special use permit under the provisions of Section 13 of the zoning ordinance of the city. Procedure there prescribed was followed, and a special use permit was issued upon conditions stated. The Bishop, through counsel, accepted the permit on 17 February, 1949. The premises and existing buildings thereon were used as an elementary church school during the period September 1949 through May 1954. The Sisters conducted the school. In 1954, plans having been made to operate a girls' high school upon the premises, the Bishop made application on 23 July, 1954, for changes in the conditions of the special use permit. Procedure prescribed by Section 13 of the Zoning Ordinance was complied with, and after public hearing, the Zoning Board of Adjustment, on 9 August, 1954, voted unanimously against changing the conditions of the outstanding special use permit. Then on 3 February, 1955, the Sisters purchased the premises with knowledge of all of the conditions contained in the zoning permit, dated 17 February, 1949, and with "knowledge . . . that the Catholic Bishop, acting for and on behalf of the Catholic Diocese of North Carolina, had assented and agreed to all the conditions contained in said zoning permit."

And in connection with the continued use of the premises for school purposes, the Sisters applied for a building permit on 5 February, 1955. On 16 March, 1955, building permit was refused. The changes and construction proposed will constitute a structural change to the exterior of the building involved, and are not required by the State or City Building Codes relative to schools. The Bishop stated in his affidavit that: "My sole connection with the Sisters of St. Joseph of Chestnut Hill insofar as the land described is concerned is that as Bishop of the Diocese of Raleigh, I am charged by the Church and Canon Law with the function of a general and religious supervisor in the regulation of their activities and schools in this area."

In the light of these facts, it seems clear that the Bishop, by accepting the benefits of the provisions of the zoning ordinance waived any right he might have had to contest the validity of the ordinance. And while the Bishop has conveyed the title to the premises to the Sisters in order that private school work be carried on, permission for which was granted in the Special Use Permit of 17 February, 1949, it appears from the affidavit that he, in his official capacity, is charged by the Church and Canon Law with the function of a general and religious supervisor

in the regulation of the activities and schools in the area. It would seem, therefore, that the Bishop has supervisory power over the use to which the premises is to be devoted. And the Sisters took title to the property with full knowledge, and are estopped to challenge the validity of the ordinance under which they are permitted to conduct a private school.

For reasons stated appellant has failed to show error, for which the judgment from which appeal is taken should be disturbed.

Affirmed.

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

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COMMERCIAL CREDIT CORPORATION, A CORPORATION, v. ROBESON MOTORS, INC., WILTON B. BARNES AND KNOX M. BARNES.

(Filed 13 January, 1956.)

**1. 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.

**2. Usury § 9c—**

Considering the allegations and exhibits in the light most favorable to defendants, the counterclaims for usury in this action *held* not demurrable on the ground that the dates and amounts were not alleged with the required definiteness.

**3. Usury § 1: Penalties § 1—**

An action to recover a statutory penalty, including the statutory penalty for usurious interest paid, is *ex contractu*.

**4. Pleadings § 10—**

Where plaintiff's action is on contract and defendants' counterclaim exists at the commencement of the action and is on contract, it is not required that such counterclaim relate to the contract or transaction set forth in the complaint, G.S. 1-137(2) rather than G.S. 1-137(1) being controlling.

**5. Statutes § 5d—**

Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts.

**6. Pleadings § 10: Usury § 9c—**

In plaintiff's action in debt, defendants may set up counterclaims to recover the penalty for usurious interest paid by defendants to plaintiff in connection with separate and independent transactions between them when

the claims for such penalties existed prior to the commencement of plaintiff's action. G.S. 24-2, G.S. 1-137(2).

APPEAL by defendants from *Hubbard, Special J.*, August-September, 1955, Term of ROBESON.

Defendants' appeal is from an order sustaining plaintiff's demurrer to three of the four causes of action separately alleged by defendants *in amendment* to their original "FURTHER ANSWER AND DEFENSE."

Plaintiff's action is to recover a total of $10,812.41 and to foreclose its liens on sixteen described automobiles and trucks. It is alleged that this indebtedness is due by the corporate defendant, as principal obligor, and by the individual defendants, as guarantors, under the terms of described written contract.

Plaintiff's allegations describe the respective liens securing the several items of indebtedness making up the total of $10,812.41. Plaintiff alleged that, through ancillary proceedings in claim and delivery, it has recovered, pursuant to the terms of its undertaking, eleven of the described automobiles and trucks.

After answering, defendants alleged that plaintiff was indebted to the corporate defendant in an amount much in excess of $10,812.41, and prayed that it recover from plaintiff "as set forth in the counter-claim and counter-suit herein described."

The court, granting plaintiff's motion therefor, ordered that defendants "plead their alleged further answer and defense specifically, in detail and not in generalities and not by reference," and that they "separate their several causes of action . . ." Defendants excepted and gave notice of appeal. The appeal was not perfected.

Thereafter, defendants' filed an amendment, in lieu of their original "FURTHER ANSWER AND DEFENSE," in which they alleged separately four causes of action; and this amendment and plaintiff's demurrer thereto are the pleadings directly involved on this appeal.

Underlying defendants' more specific allegations, defendants alleged: that plaintiff, a finance company, had done business with corporate defendant, an automobile dealer, over a period of years; that their transactions consisted of: (1) direct loans by plaintiff to corporate defendants, for purchase of new and used automobiles, secured directly by liens executed by corporate defendant to plaintiff on such automobiles; and (2) loans made by plaintiff to corporate defendant on conditional sales contracts executed by its customers to corporate defendant and assigned by corporate defendant to plaintiff under its guaranty of payment of its customers' obligations. Defendants alleged further that, pending payment of these assigned contracts, plaintiff withheld in a reserve account or trust fund, as further security for corporate

defendant's obligations, a portion of the agreed amount to be advanced or loaned by plaintiff to corporate defendant on the assigned conditional sales contracts, ranging from $20.00 to $100.00 on each such transaction.

First cause of action: Herein defendants alleged that the corporate defendant had paid to plaintiff, as interest on direct loans, a total of $4,504.60; that the interest so required and paid, under their agreements, was in excess of 6% per annum and therefore usurious; and that the corporate defendant is entitled to recover of plaintiff, as penalty for usurious interest so paid, twice the amount thereof, to wit, $9,009.20.

Second cause of action: Herein defendants alleged that the respective amounts of the conditional sales contracts executed by its customers to the corporate defendant and assigned by the corporate defendant to plaintiff included interest charges in excess of 6% per annum and therefore were usurious; that, upon default of its customers, the corporate defendant was required to pay and did pay to plaintiff, as (usurious) interest on such assigned contracts, a total of $15,549.54; and that the corporate defendant is entitled to recover herein, as penalty for usurious interest so paid, twice the amount thereof, to wit, $31,099.08.

Third cause of action: Herein defendants alleged that plaintiff is a fiduciary in respect of said reserve account or trust fund and that the corporate defendant is entitled to an accounting for the $90,000.00 or more withheld by plaintiff as aforesaid for the account of the corporate defendant. Since plaintiff's demurrer to this cause of action *was overruled,* the particulars thereof are omitted.

Further (fourth) cause of action: Herein defendants alleged that plaintiff, while in possession of automobiles and trucks owned by the corporate defendant, (1) by its negligence caused or permitted them to depreciate in value, and (2) arbitrarily disposed thereof to individuals and dealers of their choice at prices much less than the true value thereof. While plaintiff's demurrer to this cause of action was sustained, defendants' exception and assignment of error were not brought forward on this appeal. Hence, further particulars of this cause of action are omitted.

Plaintiff, in writing, in paragraphs 1, 2, 3 and 4, demurred to each of defendants' four separate causes of action, respectively, and as to each the grounds of demurrer assigned were these: ". . . the same constitutes a misjoinder of causes which cannot be properly used by way of counter-claim or set-off in an action such as brought by plaintiff, and fails to state facts sufficient to constitute a valid counter-claim, set-off or defense." The court overruled the demurrer, as set forth in paragraph 3 thereof, relating to the third cause of action in respect of an accounting by plaintiff to the corporate defendant for said trust fund. The court sustained the demurrer as set forth in paragraphs 1, 2 and 4,

relating to the first cause of action, second cause of action and further (fourth) cause of action.

Defendants excepted to and appealed from the foregoing order, in so far as it sustained plaintiff's demurrer to the first cause of action, second cause of action and further (fourth) cause of action, alleged in said amendment to answer. Upon appeal, the errors assigned are: "1. That the court erred . . . in requiring defendants to plead more specifically in their cross-action . . ." "2. That the court erred in sustaining the demurrer . . ."

*McKinnon & McKinnon and Mordecai, Mills & Parker for plaintiff, appellee.*

*Nance & Barrington and Ellis E. Page for defendants, appellants.*

BOBBITT, J. Neither the assignment of error based on exception to the order requiring defendants "to separate their several causes of action and to plead same specifically," nor the assignment of error based on exception to the judgment, in so far as it sustains plaintiff's demurrer to said further (fourth) cause of action, is brought forward in defendants' brief. Hence, these are taken as abandoned by defendants. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563.

The elements of a usurious transaction need not be restated here. Reference is made to *Doster v. English,* 152 N.C. 339, 67 S.E. 754, and to *Bank v. Wysong & Miles Co.,* 177 N.C. 380, 99 S.E. 199.

Plaintiff contends that defendants' first and second causes of action to recover the penalty for usurious interest paid are demurrable for failure to state facts sufficient to constitute causes of action, on the ground that the dates and amounts are not alleged with the required definiteness, citing *Riley v. Sears,* 154 N.C. 509, 70 S.E. 997. Considering the allegations and exhibits in the light most favorable to defendants, we think these causes of action are sufficient to survive plaintiff's demurrer. Incidentally, the ground of demurrer assigned in this connection is simply that defendants' pleading "fails to state facts sufficient to constitute a valid counter-claim, set-off, or defense," without pointing out any particular defect(s) therein. G.S. 1-128; *Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555.

The question, squarely presented and determinative of this appeal, is this: Where a lender brings an action to recover on a note or other evidence of debt, can the borrower, by counterclaim in such action, recover the penalty for usurious interest paid by the borrower to the lender in connection with separate and independent transactions between them? Apparently, the precise question is one of first impression in this jurisdiction.

Two statutes, namely, G.S. 24-2, which prescribes the penalty for usurious interest paid, and G.S. 1-137, which prescribes the causes of action that may be alleged by way of counterclaim, must be considered in answering the question presented.

G.S. 24-2, in pertinent part, provides: ". . . And in case a greater rate of interest (than six per centum per annum) has been paid, the person or his legal representative or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt. In any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it is lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest. . . ."

Of the two sentences quoted from G.S. 24-2, the first is found in Laws of 1876-77, c. 91, while the second had its origin in Public Laws of 1895, c. 69.

G.S. 1-137 provides: "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

G.S. 1-137, in all material respects, contains the same provisions as sec. 244 of the Code of 1883.

Inquiry as to the origins of the quoted provisions of our usury statute, now codified as G.S. 24-2, throws light on the question now before us for decision.

Originally, our usury statutes condemned as *utterly void* "all bonds, contracts, and assurances whatsoever, . . . for the payment of any principal or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken" interest in excess of the legal rate prescribed. Act of 1741, Potter's Revisal of 1819, c. 28; Revised Statutes of 1837, c. 117; Rev. Code of 1854, c. 114; Laws of 1874-75, c. 84. Under these statutes, no action could be maintained on any usurious assurance for the payment of money. *Shober v. Hauser,* 20 N.C. 222; *Norwood v. Marrow,* 20 N.C. 578. (It is noted that the Act of 1866, Laws of 1866, c. 24, repealed c. 114, Rev. Code of 1854. This Act of 1866 appears as c. 114, Battle's

Revisal of 1873. It was in effect from 1866 until the Act of 1874-75 re-enacted substantially the provisions of the earlier statutes.)

Under the Act of 1874-75, a person who loaned money upon such usurious contract lost his right to recover it. If he actually made recovery thereof, he became liable, by way of penalty, for twice the amount of such recovery, in an action brought *by any person* who sued therefor. The earlier statutes (except the Act of 1866) provided that the person who sued for such penalty was entitled only to one-half of the recovery, the other one-half going to the State. It was provided further in the Act of 1874-75 that a violation thereof was a misdemeanor.

The Act of 1876-77 (Laws of 1876-77, c. 91), in express terms, repealed and superseded the Act of 1874-75. It contains this explanatory recital: "Whereas, The supreme court of North Carolina, on the authority of a decision of the supreme court of the United States, has decided that the penalties imposed by the present usury law cannot be enforced against national banks." The decision referred to is *Bank v. Myers,* 74 N.C. 514, January Term, 1876, based on *Bank v. Dearing,* 91 U.S. 29.

The Act of 1876-77, after prescribing the then legal rate of interest, provided:

"Sec. 3. That the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done shall be deemed a forfeiture of the entire interest which the note, or other evidence of debt, carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of interest paid: *Provided,* Such action shall be commenced within two years from the time the usurious transaction occurred."

This was and is in substance, and nearly so in terms, the provision of the federal statute applicable to national banks. Act of June 3, 1864, c. 106, sec. 30; 13 Stat. 108; Rev. Stat., sec. 5198; U.S.C.A., Title 12, sec. 86. Also, this is in substance, and nearly so in terms, an integral part of G.S. 24-2, our present usury statute.

It is noteworthy that the Act of 1876-77 effected these changes: (1) the usurious contract, as to the *principal* of the loan made, *is not void;* (2) the penalty is for twice the amount of *interest* paid; and (3) the right to recover the penalty vests *in the person who paid* such interest, or his legal representative, in an action in the nature of an action of debt.

In *Barnett v. National Bank,* 98 U.S. 555, the Supreme Court of the United States, October Term, 1878, held explicitly that the penalty for usurious interest paid could be recovered only by a separate suit,

"brought specially and exclusively for that purpose," not by way of counterclaim. The authority of *Barnett v. National Bank, supra, as applied to national banks,* was recognized in subsequent North Carolina decisions. *Oldham v. Bank,* 85 N.C. 241; *Bank v. Simpson,* 90 N.C. 467.

Even so, in *Bank v. Ireland,* 122 N.C. 571, 29 S.E. 835, wherein plaintiff was a national bank, it was held that under our usury statute the defendant was entitled to plead the forfeiture of interest and a counterclaim for twice the amount of usurious interest paid. This Court then entertained the view that such defense and counterclaim were permissible by reason of Act of July 12, 1882, c. 290, sec. 4; 22 Stat. 163. This Act of Congress conferred jurisdiction upon the state courts in actions by and against national banks. But in *Bank v. Wysong & Miles Co., supra,* after full review of the later decisions of the Supreme Court of the United States, this Court concluded that, *as applied to national banks,* the federal usury statute controlled; that said Act of 1882 had no bearing upon the matter; and that recovery of the penalty for usurious interest paid, in respect of an action by *a national bank,* could not be had by way of counterclaim but only by separate and independent action for that single purpose.

While recognizing the duty of this Court to follow the decisions of the Supreme Court of the United States in its construction of a federal statute, *Walker, J.,* in *Bank v. Wysong & Miles Co., supra,* says: "We would not ourselves adopt this construction of the act of Congress were it a question before us to be decided irrespective of the ruling of the highest Federal court, as the words by an 'original or independent' action in the nature of an action of debt are not used in the act, nor do we think there is anything there from which they should be implied, but that the Congress merely intended to refer to the nature of the action in which recovery should be had, as being substantially one of debt, without regard to whether it was an independent one, or by way of cross-bill or cross-action or counterclaim. There is no sound reason, in our opinion, why it should be so. It would seem to be more appropriate to try the question by way of counterclaim in the action upon the debt, when the whole matter may be considered and the rights of the respective parties determined upon all the facts, and with greater precision. . . . Our cases holding that unlawful interest paid may be recovered back by way of counterclaim have no application, as they refer to our own statutes, which now expressly give that remedy. *Bank v. Ireland,* 122 N.C. 571."

In *Smith v. Building & Loan Asso.,* 119 N.C. 257, 26 S.E. 40, upon which *Bank v. Ireland, supra,* is based, it was held that, in plaintiff's

action to recover the penalty for usurious interest paid, the defendant was entitled to plead, by way of counterclaim, its right to recover the balance due on the debt. Significantly, *Clark, J.* (later *C. J.*), observed: "The plaintiff's contention that the defendant cannot to his action set up a counterclaim for the debt on which the usury was paid is unfounded. The plaintiff's own claim is 'in the nature of an action of debt' (Code, sec. 3836), and hence any cause of action 'arising on contract and existing at the commencement of the action' was competent as a counterclaim. Code, sec. 244 (2)."

The Act of 1895 introduced into our usury statute the specific provision relating expressly to a counterclaim, now in substance and nearly so in terms, an integral part of G.S. 24-2, our present usury statute. After re-enacting substantially the provisions of the Act of 1876-77, the General Assembly added this proviso: *"Provided further,* that in any action brought in any court of competent jurisdiction to recover upon any such note or other evidence of debt, it shall be lawful for the party against whom the action is brought to plead as a counterclaim the penalty above provided for, to wit, twice the amount of interest paid as aforesaid, and also the forfeiture of the entire interest."

The construction placed upon the federal statute by the Supreme Court of the United States and the divergent view taken by this Court as to the correct interpretation of the federal statute as well as of the Act of 1876-77, impel the conclusion that the purpose and intent of this proviso was not to restrict the right of recovery by way of counterclaim but rather to make it clear that the right of recovery granted by our statute to recover the penalty for usurious interest paid "in an action in the nature of action for debt," could be pleaded as a counterclaim in an action between the parties.

This Court has held that an action to recover a statutory penalty is deemed an action on contract. *S. v. Rumfelt,* 241 N.C. 375, 85 S.E. 2d 398; *Finance Co. v. Holder,* 235 N.C. 96, 68 S.E. 2d 794; *Smoke Mount Industries, Inc., v. Fisher,* 224 N.C. 72, 29 S.E. 2d 128; and cases cited therein.

G.S. 24-2 provides expressly that the statutory penalty for usurious interest paid is recoverable "in an action in the nature of action for debt." It has been held that an action to declare a forfeiture of interest on account of usury, *Perry v. Doub,* 238 N.C. 233, 77 S.E. 2d 711, and an action to recover the statutory penalty for usurious interest paid, *Finance Co. v. Holder, supra,* are deemed actions on contract.

In *Smoke Mount Industries, Inc., v. Fisher,* plaintiff's action was for breach of contract. Defendant pleaded, by way of counterclaim the penalties for overtime work imposed by the Federal Fair Labor Stand-

ards Act. This Court, by *Schenck, J.*, in words apposite to the present case, said:

"The counterclaim set forth in the answer sounds in contract. It is to enforce, or to collect, a penalty and such actions have been universally held by us to be *ex contractu*. 'An action for a penalty given by a statute to any person injured is an action on contract. This has been the settled law. 3 Blackstone's Com., 158, 160, 161.' *Doughty v. R. R.*, 78 N.C. 22; *Katzenstein v. R. R. Co.*, 84 N.C. 688; *Edenton v. Wool*, 65 N.C. 379; *Wilmington v. Davis*, 63 N.C. 582.

"The cause of action originally alleged by the plaintiff being upon contract, the cause of action set forth by the defendant, arising also upon contract, could, under subsection 2 of G.S. 1-137, be properly pleaded as a counterclaim, and for that reason the demurrer to the counterclaim was properly overruled."

True, a counterclaim for usurious interest paid was denied in *Mortgage Corp. v. Wilson*, 205 N.C. 493, 171 S.E. 783, and in *Finance Co. v. Holder, supra*. They are significant only as they illustrate the basis of decision here, for the plaintiff's action in each of these cases was not "an action arising on contract." G.S. 1-137(2). In the *Wilson case*, the action was for possession of real property; and in the *Holder case*, the action was in tort, for conversion of funds.

Where plaintiff's action is on contract, and defendant's counterclaim exists at the commencement of the action and is on contract, it is not required that such counterclaim relate to the contract or transaction set forth in the complaint "as the foundation of the plaintiff's claim or connected with the subject of the action." In such case, G.S. 1-137(2) rather than G.S. 1-137(1) controls. *McClure v. Fulbright*, 196 N.C. 450, 146 S.E. 74.

"Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts." *Barnhill, J.* (now *C. J.*), in *McLean v. Board of Elections*, 222 N.C. 6, 21 S.E. 2d 842. This rule of statutory construction is well established by our decisions.

We perceive no conflict between G.S. 24-2 and G.S. 1-137(2). Construing these statutes *in pari materia*, we conclude that defendants are entitled to plead, by way of counterclaim to plaintiff's action "arising on contract," their alleged causes of action for usurious interest paid.

Consequently, the plaintiff's demurrer to the first and second causes of action alleged as counterclaims in defendants' said *amendment to answer* should have been overruled. The court's ruling in respect thereto is reversed. The order will be so modified. As modified, the order is affirmed.

Since decision is in defendants' favor on the sole question presented by the appeal, the costs in this Court will be taxed against plaintiff-appellee.

Modified and affirmed.

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COMMERCIAL CREDIT CORPORATION, A CORPORATION, v. KNOX M. BARNES AND ROBESON MOTORS, INC., A CORPORATION.

(Filed 13 January, 1956.)

**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.

APPEAL by defendants from *Hubbard, Special J.*, August-September, 1955, Term, of ROBESON.

Defendants' appeal is from an order sustaining plaintiff's demurrer to the causes of action for affirmative relief alleged by defendant *in amendment* to their original further answer, defense and countersuit.

Plaintiff's action is to recover $2,192.49 plus interest. It is alleged that the individual defendant purchased a described automobile from the corporate defendant and executed and delivered to it a conditional sale contract thereon. It is further alleged that the corporate defendant assigned the contract to the plaintiff and guaranteed payment thereof. In addition to recovery of the money judgment, plaintiff seeks to enforce its lien.

Answering, defendants alleged that the automobile was a demonstrator; that the transaction, as understood and agreed, was between the plaintiff and the corporate defendant; and that the individual defendant's participation therein was a mere formality.

As in "Commercial Credit Corporation, a corporation, *v.* Robeson Motors, Inc., Wilton B. Barnes and Knox M. Barnes," this date decided, defendants filed an amendment to answer, in lieu of their said original further answer, defense and countersuit, alleging therein separately four causes of action by the corporate defendant against the plaintiff. These were identified by the same captions and, except as noted below, contained the same allegations as in the other case.

Herein, in their further (fourth) cause of action, defendants alleged that the corporate defendant's plea for affirmative relief against plaintiff, "as set forth in this answer in three causes is the same as set forth in an action pending in the Superior Court of Robeson County and

entitled 'Commercial Credit Corporation, a corporation, *v.* Wilton B. Barnes and Knox M. Barnes and Robeson Motors, Inc., a corporation.' "

Plaintiff, in writing, in paragraphs 1, 2, 3 and 4, demurred separately to each of defendants' four causes of action, and as to each the grounds of demurrer assigned were these: "(a) The same constitutes a misjoinder of causes which cannot be properly used by way of counterclaim or set-off in an action such as brought by plaintiff, and fails to state facts sufficient to constitute a valid counter-claim, set-off, or defense; (b) It appears on the face of the defendants' pleadings that there is another action pending between the same parties for the same causes."

The court ruled, in relation to subsection (a) of the demurrer(s), that plaintiff's demurrer should be sustained as to the first, second and further (fourth) causes of action, but overruled as to the third cause of action.

The court *ruled further* that demurrer to each and all of the four causes of action should be sustained on the ground assigned in subsection (b) of the demurrer; and thereupon the court entered its order sustaining plaintiff's demurrer as to all four causes of action.

Defendants excepted and appealed.

*McKinnon & McKinnon and Mordecai, Mills & Parker for plaintiff, appellee.*

*Nance & Barrington and Ellis E. Page for defendants, appellants.*

BOBBITT, J. In their brief filed in this Court, defendants bring forward and discuss only the separate rulings of the court below wherein, on the grounds set forth in subsection (a), it was held that demurrer to the first and second causes of action should be sustained. No reference whatever is made to the fact that the court sustained plaintiff's demurrer as to all four causes of action on the ground assigned in subsection (b). Hence, their exception and assignment of error in relation thereto are taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563.

Since the demurrer to all alleged causes of action (counterclaims) was sustained on the ground assigned in subsection (b), and this is not challenged on appeal, the order sustaining plaintiff's demurrer on that ground must be and is affirmed.

Whether the trial of this action should be deferred until the trial in the other case or the two cases consolidated for trial are matters for consideration in the Superior Court.

Affirmed.

ESTHER WILLIAMSON, ADMINISTRATRIX OF THE ESTATE OF ZOLLIE WILLIAMSON, DECEASED, v. ROBERT L. CLAY.

(Filed 13 January, 1956.)

**1. Negligence § 1—**

Actionable negligence embraces negligence and proximate cause.

**2. Trials § 22a—**

In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiff or by defendant, must be considered in the light most favorable to plaintiff.

**3. Negligence § 1—**

A person who enters upon an active course of conduct is under positive duty to exercise ordinary care to protect others from harm, and a violation of this duty is negligence.

**4. Negligence §§ 3, 19b (1)—Evidence held for jury on issue of defendant's negligence in failing to anticipate or ascertain that can contained inflammable substance before throwing contents on fire.**

The evidence tended to show that while intestate was using an acetylene torch in repairing an automobile, the upholstery of the car caught fire, that the defendant, proprietor of the shop, upon hearing the call of fire, hurriedly picked up a can having a little liquid in its bottom, filled the can with water, and threw the contents upon the fire, and that an explosion immediately followed, resulting in the fatal burning of intestate. Defendant testified to the effect that he picked up a particular can used exclusively as a container for water, but other evidence raised permissible inferences that there were numerous cans in and about the premises, and that the contents of each can, in the absence of inspection, were known only by the person last using it or by one observing such use. *Held:* The evidence was sufficient to present the question whether defendant should reasonably have anticipated that the liquid he saw in the can might have been gasoline or other inflammable liquid and whether his actions under the circumstances constituted a failure on his part to use the care of a reasonably prudent man under like conditions, defendant's version of the matter not being the only reasonable inference deducible from the evidence.

**5. Trial § 22b—**

Defendant's testimony cannot warrant judgment as of nonsuit when there is other evidence favorable to plaintiff at variance therewith, since it is for the jury to pass upon the credibility of the witnesses and the weight to be given the testimony.

**6. Trial § 31b—**

Even in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. G.S. 1-180.

**7. Negligence § 14½—**

What constitutes due care in a sudden emergency is to be determined in the light of what an ordinarily prudent person would have done under such emergency circumstances.

**8. Negligence § 20—**

**Defendant's evidence tended to show that he was confronted by a fire in the upholstery of a car being repaired, that he picked up a can and filled it with water and threw the contents on the fire, that when he picked up the can it had a little liquid in the bottom which he thought was water, but which turned out to be gasoline or other inflammable liquid. Defendant contended he was confronted by an acute emergency. *Held:* The court should have applied the apposite legal principles to defendant's evidence, and a general instruction on the doctrine of sudden emergency is insufficient.**

APPEAL by defendant from *Hall, Special Judge,* May-June, 1955, Civil Term, of DURHAM.

Action by administratrix to recover damages, (1) for wrongful death of intestate and (2) for personal injuries between injury and death.

The intestate, hereafter called Williamson, received injuries on 4 June, 1952, consisting of burns. He died 17 June, 1952.

Defendant operated a small automobile repair business. He had less than five employees. Hence, the Workmen's Compensation Act is inapplicable.

Williamson had worked for defendant since 1950, not regularly but intermittently for brief periods. He was paid on a commission basis. His last employment began shortly before June 4th.

Defendant's premises consisted of two adjoining rooms, the garage and the body shop. There was a door in the wall that divided these two rooms. Each room had a door or doors opening upon an alley. This alley extended along the west side of the premises. There was no street frontage, the premises being in the interior of the block.

Uncontradicted evidence, offered by defendant, tends to show that about 10 o'clock on the morning of June 4th, defendant put Williamson to work on the job of cutting a panel from over the right rear wheel of a Pontiac car then in the body shop; that defendant, by use of a chisel and hammer, marked out the section Williamson was to cut out; that defendant turned these tools over to Williamson and left the premises; that defendant returned between 12:30 and 1 o'clock, at which time Williamson was going ahead with the work, as marked out by defendant, using the chisel and hammer; that defendant left the premises again, returning about 3 o'clock, at or about the time the fire started; that some 10 or 15 minutes before the fire started, Williamson laid aside the chisel and hammer and began to cut the panel by means of an acetylene torch; that a portion of the upholstery caught on fire from the flame of the torch; that in response to the cry of "Fire," defendant hurriedly picked up a can, filled it with water, pushed Williamson aside and threw the contents on the fire, at which time an explosion occurred; and

that both Williamson and defendant were burned as the result of such explosion.

Plaintiff's evidence as to what happened on the occasion of the explosion consisted solely of statements attributed to defendant.

Esther Williamson, widow and administratrix, testified that defendant told her that "he picked up a can and got some more water and threw it on the little fire, and . . . when he did it exploded . . . it must have had gasoline in it and . . . that was when he messed up."

Plummer Williamson, brother of the deceased, testified that defendant told him that "he ran to the back door, saw a can sitting there by the car and grabbed it, and that he, Clay, dashed it up there on the fire, and that it flamed. . . . that it must have been gas instead of water, . . ." On cross examination, he testified that defendant told him that "when he picked up the can he thought there was water in it, but that it must have been gas; that he came in there and threw whatever the can contained on the fire, and it flamed up . . ."

David Williamson, brother of the deceased, testified that defendant told him that he "came in and saw the blaze, and . . . took the can and threw some water on it, and it must have been gas instead of water . . ."

Esther Williamson, when recalled after completion of defendant's evidence, testified that up until 5 May, 1952, she had assisted Williamson from time to time, when he was working for defendant at nights in the body shop, helping him to sandpaper cars and put paper on the glass in preparation for painting; that at that time a square 5-gallon can with the top cut out was used for water for the sandpaper; that this can had some kind of label on it; that there was a bench in the body shop on and under which there were a lot of different cans containing paint and paint thinner, some full and some empty; and that there were about 50 empty cans of various sizes, varying from one pint to five gallons, "around that garage."

Uncontradicted evidence, offered by defendant, tends to show that sandpaper was soaked in water in order "to cut the surface faster," preparatory to painting a car.

Lane, a witness for defendant, testified in substance that on and prior to June 4th he was employed by defendant as a mechanic; that on June 3rd he saw Williamson at work in the body shop, sanding the fender of a Chevrolet and getting ready to paint it; that Williamson on that occasion took a can which he had been using and which Clay was accustomed to use when sanding, and drew gasoline from the Chevrolet on which he was working by means of a siphon hose into this can; that he had never seen this can used for anything but water; and that this was the can that defendant picked up on June 4th, on the occasion of

the fire. (Lane's testimony gives no explanation as to why Williamson drew the gasoline or as to what use, if any, he made of it.) Lane described the particular can as "a clean, slick can the color of metal, like the kind that oil ordinarily comes in." He testified further: "There were other cans like this about the garage, but the one which Robert Clay used with water was in the back, the others were in the front. I had always seen Robert Clay use that particular can for water."

Lane testified further: "Automobile paint in cans was kept on the shelf on the south side of the body shop." Also: "The can which Robert Clay used was the only one with the top out back in the work shop. I was in and out of the body shop every day, and that was the only can that I had seen in there with the top out." As to the use of gasoline in and about the garage, Lane testified: "We do not use gasoline to wash the parts of automobiles, but rather kerosene. When we do wash parts in gasoline we use something like a foot tub, or a two- or three-gallon bucket, but mostly we use kerosene."

Parrish, a witness for defendant, testified that he went to defendant's premises the morning of June 4th and stayed there until after the fire occurred. His business there, if any, is not disclosed; but he testified that he went "in that place practically every day." He testified in substance that when defendant heard the cry of "Fire," he came from the outside, picked up a bucket in the garage north of the wall which separated the garage on the north from the body shop on the south, drew water from a faucet on the west wall of the garage, went back out side, then into the body shop, and threw the contents of the bucket on the fire. This witness described the container used by defendant as "a round paint bucket, without a handle, brass in color, about a gallon in size, and the paper was torn off, the top had been cut off with a hammer and chisel." He testified further that defendant had had this bucket in the paint room (body shop) for quite a while; that he had never seen any gasoline put in that bucket; that the bucket was used for water in sanding fenders; and that there was no other bucket around.

Brooks, a witness for defendant, testified that he was on defendant's premises, in the telephone booth in the body shop; that when the upholstery caught on fire, Williamson yelled, "Car on fire," then "threw the torch down, cut it off, and about that time Robert Clay came in the door"; that defendant picked up a bucket, sitting between the car and the faucet, filled it with water, pushed Williamson (who was standing near the door of the car, leaning in) aside and threw the contents of the bucket on the fire; and that he (Brooks) chased Williamson around, finally caught him, threw him down and smothered the fire with an overcoat. Brooks described the bucket as "a square bucket about a 4- or 5-gallon size. The top had been cut out, and I had seen the

bucket before." He testified that he knew this was the bucket for water in which to dip sandpaper before using it to smooth the surface of a car.

Defendant testified that he was across the alley, at another garage some 8 feet away, when he heard Williamson yell, "Bob, the car's afire"; that he "went in and looked around and found . . . the water bucket . . . went to the spigot, drew up some water, and came back and threw it on the fire. . . . When (he) threw it on the fire, it exploded"; that when he "rushed back to the right side of the car" he "pushed Zollie out of the way so (he) could get to the fire"; that Williamson was still standing in the door of the car "with the torch in his hand and the torch was burning"; that, when the explosion occurred, the fire got on his (defendant's) arms and some on his head; that he (defendant) "threw the can out of the door and went to fighting the fire, beating it out"; that he looked around and saw Williamson "with the torch in his hand and the fire was running up his hand to his shoulder"; and that Williamson then took out, running around until Brooks finally caught him and put out the fire on Williamson's clothes.

Defendant testified further that when he ran into the body shop "the can was sitting behind the car on the floor"; that, when he picked it up "there was a little fluid in the bottom but not enough to throw on the fire"; that he thought "there was water in the can, but it wasn't enough to put on the fire, so (he) ran and got water from the spigot"; that when he picked up the can he "looked at it and saw sandpaper in the bottom. It appeared wet"; and that the can, when he picked it up, was approximately 20 feet from the spigot.

Defendant testified further that "if water and gasoline are together in a can, the gasoline will come to the top." Also: "Maybe I can tell the difference between gasoline and water by getting right down and looking at it. I can tell the difference by smelling of it. I did not smell the contents of the bucket." He testified further that he kept and mixed paints on a *work bench,* "six feet long, 2½ feet wide, and a little less than 3 feet high," in the body shop.

Defendant described the container used as "a square can, about six by four inches"; that this particular can, originally a paint can, the top of which he had cut out, had been used to soak sandpaper in water for approximately ten years; and that if Williamson had put gasoline in this sanding can, which he picked up on that occasion, he had no knowledge or notice that this had been done or that there was gasoline or other explosive or inflammable liquid in the can instead of water.

The evidence was somewhat in conflict as to the extent of the fire. Plaintiff's evidence tends to show that it was a small fire, only a small portion of the upholstery having been "singed."

Defendant's evidence tended to show that he had established rules: (1) that no gasoline or other inflammable fluid was to be kept in the body shop; and (2) that the acetylene torch was not to be used in the body shop. There was evidence tending to show that the acetylene torch had been used in the body shop from time to time by defendant and by others in his presence, which was contradicted by testimony of defendant.

The evidence was conflicting as to whether Williamson's death on June 17th was proximately caused by the burns he received on June 4th.

The jury answered all issues in favor of plaintiff. The first issue related to defendant's negligence as the proximate cause of Williamson's injury, the third issue related to defendant's negligence as the proximate cause of Williamson's death; and the second issue related to Williamson's contributory negligence. The jury awarded $1,000.00 damages for the injuries suffered between June 4th and June 17th and $5,000.00 damages for the wrongful death.

Judgment in plaintiff's favor for $6,000.00 and costs was signed. Defendant excepted and appealed, assigning as error the denial of his motion for judgment of involuntary nonsuit, the exclusion of evidence and certain features of the charge.

*Hofler & Mount and Claude Bittle for plaintiff, appellee.*

*M. Hugh Thompson and Bryant, Lipton, Strayhorn & Bryant for defendant, appellant.*

BOBBITT, J. While plaintiff alleged that "the defendant was negligent in directing plaintiff's intestate to weld upon an automobile in a a small enclosed shed which had inadequate room or ventilation," and further alleged that defendant was negligent "in his failure to assist the plaintiff's intestate in extinguishing his flaming clothing which resulted from the explosion," the evidence is insufficient to support either of these allegations.

Decision, in relation to judgment of nonsuit, turns upon the sufficiency of the evidence to support these allegations: "That the paint can which the defendant filled with water and threw upon the small blaze on the upholstery of the door post on which the deceased was working contained about two inches of gasoline which the defendant did not remove; . . . that the defendant knew or had reason to know that the paint can which he filled with water and threw the contents upon the blaze as aforesaid was used for the purpose of washing automobile parts in gasoline and that any liquid which it contained would in all probability be gasoline; . . . that the defendant was . . . negligent in his failure to remove the gasoline from the paint can before filling it

with water and throwing it upon the small blaze near the plaintiff's intestate."

Actionable negligence embraces negligence and proximate cause. The elements of each have been clearly defined. *Ramsbottom v. R. R.*, 138 N.C. 38, 41, 50 S.E. 448; *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E. 2d 63. There is no controversy as to these well established rules. The controversy concerns their application to the facts of this case.

In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiff or by defendant, must be considered in the light most favorable to plaintiff. *Singletary v. Nixon*, 239 N.C. 634, 80 S.E. 2d 676. If any part of defendant's evidence is more favorable to plaintiff than that offered by him, plaintiff is entitled to the benefit thereof. *Marshburn v. Patterson*, 241 N.C. 441, 85 S.E. 2d 683.

"The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Ervin, J.*, in *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551; Prosser on Torts, sec. 32(a).

If defendant knew that the can contained any quantity of gasoline, his act in filling the can and throwing the mixture upon the fire would constitute negligence. It is plain from all the evidence that he acted upon the assumption and in the mistaken belief that the liquid in the can when he picked it up was water. The crux of the matter is whether defendant, the proprietor of the garage and body shop premises, should reasonably have anticipated that the liquid he saw in the can was or might have been gasoline or other explosive or inflammable liquid and whether his failure to pour out the liquid that he saw in the can or his failure to inspect it to find out what it was constituted a failure on his part to use due care under all the circumstances.

According to the testimony of plaintiff's witnesses, defendant, in his statements to them shortly after the fire, did not identify any particular can as the one he had grabbed. Esther Williamson's testimony tends to show that up until 5 May, 1952, a square 5-gallon can with the top cut out had been used for water in which to soak sandpaper. She testified also, as set forth above, that there were some 50 empty cans of various sizes around the garage premises.

Defendant's evidence tends to show that the particular can he grabbed was one that he had used in the body shop for ten years for water in which to soak sandpaper. But, while the several defense witnesses were in accord in their testimony that the can grabbed by defendant was one used for water-sandpaper, testimony of these witnesses differs materially, as set forth above, as to the kind, size and location of

the can grabbed or picked up by defendant. Defendant alone refers to seeing sandpaper in the bottom of the can picked up by him.

The testimony of Lane tends to show that gasoline was used for washing automobile parts in the garage. Indeed, it is a matter of common knowledge that in and around a garage and body shop, the use of gasoline and paint thinner is necessary and customary.

The inference is permissible that there were different cans in and about defendant's premises; and that the contents of each can, in the absence of inspection, were known only by the person last using it or by one who observed such use. Of course, the jury could have accepted the defendant's testimony as to the identity of the particular can and its use exclusively as a container in which to soak sandpaper in water; but we do not think the evidence was such that no other reasonable inference or conclusion could be drawn therefrom.

Defendant relies upon *Mills v. Waters,* 235 N.C. 424, 70 S.E. 2d 11, where a judgment of involuntary nonsuit was affirmed. The principles of law declared therein are sound and well established. But the decision is based on facts essentially different and so does not control decision here. It is not contended here that defendant was negligent in attempting to put out the fire, but that he used for this purpose a can containing a liquid without exercising due care to ascertain the contents thereof. To paraphrase: "What it was . . . was gasoline." The evidence tends to show that plaintiff's injuries did not result from the original fire on the upholstery, but were caused by the explosion which resulted from defendant's conduct.

We are constrained to hold that, when considered in the light most favorable to plaintiff, the evidence was sufficient to take the case to the jury as to defendant's alleged actionable negligence.

If it is true, as defendant insists, that the particular can used had been used exclusively for water-sandpaper over a long period of time, and that defendant had no knowledge or reason to believe that gasoline had been placed therein, and that he acted when confronted by a sudden emergency caused by no fault on his part, it may be that defendant was entitled to a peremptory instruction predicated upon such facts. But it is for the jury to pass upon the credibility of the witnesses and the weight to be given the evidence tending to establish such facts. We cannot treat them as established simply because defendant offered evidence to that effect.

As to the extent of the original fire, we know that it involved a portion of the upholstery. It appears that, even after the explosion, defendant was able *to beat it out.* Even so, the fire in the customer's car in the body shop, caused by the conduct of defendant's employee, and defendant's responsibility for injury and damage that might result

from such fire, are circumstances such that defendant was entitled to have explained to the jury that negligence on his part was to be determined in relation to an emergency situation of such extent as the jury found to exist, under the principles declared in *Mills v. Waters, supra.*

Bearing upon the first and third (negligence) issues, the court instructed the jury correctly but generally as to the definitions of negligence and proximate cause. He did not relate the law to variant factual situations having support in the evidence. Thereafter, he instructed the jury as to the second (contributory negligence) issue and as to the fourth and fifth (damages) issues.

After concluding the instructions relating to all the issues, and near the end of the charge, the court instructed the jury as follows: "I further instruct you, gentlemen of the jury, that where a person is confronted with and required to act in sudden emergency, which was not created by his own negligence, that such person is not held to the most wise and highest choice of care, but only to that choice of care which a person of ordinary prudence would have made under similar circumstances."

There are few occasions, if any, when a person is held to the *most wise* and *highest choice* of care. Negligence is the failure to exercise that degree of care that an ordinarily prudent person would exercise under the same or similar circumstances and when charged with like duty. But apart from the instruction itself, no application of the principles of law declared in *Mills v. Waters, supra,* was related to any particular issue; and the court failed to instruct the jury, in substance, that if they found that the defendant on this occasion acted under emergency circumstances, as defendant's evidence tended to show, then what constituted due care was to be determined in the light of what an ordinarily prudent person would have done under such emergency circumstances.

Even in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. G.S. 1-180; *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898, and cases cited. In this case, since defendant relied in large measure upon what he contended were circumstances of acute emergency, the failure to comply with G.S. 1-180 by applying the applicable legal principles to defendant's evidence in regard thereto must be regarded as prejudicial. Hence, defendant's assignment of error relating to this feature of the charge is sustained and a new trial awarded.

This sequence of events is noteworthy: Zollie Williamson was burned on June 4th and died on June 17th; on July 3rd his widow, Esther Williamson, married one Thomas Farrington; on July 9th she qualified as

administratrix under the name of Esther Williamson and under that name brought this action as administratrix. When asked why she qualified as administratrix under the name of Esther Williamson rather than Esther Farrington, she replied: "I signed it that way for the sake of Zollie." Although disinclined to weaken this thread of loyalty to the memory of her late husband, the use of the Williamson rather than the Farrington surname in qualifying as administratrix and in bringing this action, thus obscuring to some extent her then status, is not commended as an example worthy of emulation.

Questions posed by other assignments of error may not arise when the case is tried again.

New trial.

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WALTER A. HARRIS v. ATLANTIC GREYHOUND CORPORATION.

(Filed 13 January, 1956.)

**1. Carriers § 21a—**

While a carrier is not an insurer of the safety of its passengers, and its liability to them for injury must be predicated upon negligence proximately causing the injury, the carrier owes its passengers the highest degree of care for their safety consistent with the practical operation and conduct of its business.

**2. Carriers § 21c—**

The carrier's legal duty to its passenger continues until such time as it affords its passenger an opportunity to alight safely from its conveyance to a place of safety.

**3. Trial § 22a—**

Upon motion to nonsuit, the evidence, whether offered by plaintiff or defendant, must be considered in the light most favorable to plaintiff.

**4. Carriers § 21c—**

Evidence tending to show that the driver of a bus on a rainy night slowed to a stop to permit a passenger to alight at a designated intersection, but that the bus stopped beyond the intersection at or near the edge of a ditch and parapet, that as the passenger stepped from the bus, his foot struck something soft and he was precipitated some ten feet into the ditch to his injury, *is held* sufficient to be submitted to the jury on the issue of the carrier's negligence.

**5. Same—**

Evidence tending to show that plaintiff passenger asked to alight at an intersection with which he was thoroughly familiar, that the bus slowed down and came to a gradual stop, but traveled just beyond the intersection, that plaintiff did not then know it had done so, and, assuming that the bus had stopped at the intersection where he could alight in safety and having received no warning from the bus driver, stepped from the bus into

a place of danger at the edge of a ten-foot ditch, *is held* not to disclose contributory negligence as a matter of law on part of plaintiff.

**6. Same: Trial § 31b—**

The evidence was in sharp conflict whether defendant's bus stopped for a passenger to alight at an intersection constituting a safe place, or just beyond the intersection at or near a ten-foot ditch constituting a place of danger. *Held:* It was the duty of the court to instruct the jury as to the law applicable to the variant factual possibilities presented by the evidence, and a charge defining negligence and contributory negligence in general terms is insufficient.

**7. Trial § 31b—**

It is the duty of the court and not the jury to relate and apply the law to the variant factual situations having support in the evidence. G.S. 1-180.

**8. Damages § 13a—**

The evidence was in conflict as to whether the injuries received by plaintiff in the accident caused or aggravated plaintiff's kidney condition, or whether the kidney condition subsequent to the accident was entirely unconnected with the injuries received therein. *Held:* On the question of damages for the kidney condition, the court should have instructed the jury in regard to the variant factual possibilities presented by the evidence as a substantial feature of the case, and a general instruction only to the effect that plaintiff was entitled to recover all damages which were the immediate and necessary consequences of the injuries, is insufficient.

**9. Same—**

Where the element of future damages figures largely in consideration of the issue, an instruction to the effect that the jury might take into consideration the mortuary tables as to the life expectancy of plaintiff, without reference to the evidence as to plaintiff's health prior and subsequent to the accident and without charging that the mortuary tables should be considered only as evidence together with other evidence as to the health, constitution and habits of plaintiff, is incomplete and erroneous. G.S. 8-46.

APPEAL by defendant from *Crissman, J.*, July 4, 1955, Term, of FORSYTH.

Civil action to recover damages for alleged actionable negligence.

Plaintiff, a barber by trade, worked in Winston-Salem. He lived on Bethabara Road, 500 feet west of Highway #52, sometimes called North Cherry Street Extension, a mile or more beyond the corporate limits of Winston-Salem.

Frequently, he commuted by Greyhound bus. In traveling from Winston-Salem, he got off the bus at or south of the intersection of Highway #52 and Bethabara Road. Generally, Highway #52 runs north-south and Bethabara Road runs east-west. At this intersection, there was no street light or sidewalk. There was no building at the intersection. On the east side of Highway #52, more than 100 feet

south of Bethabara Road, there was a garage, some distance back from Highway #52. Plaintiff, having crossed this intersection daily, was familiar with conditions there.

A culvert extended from the northeast corner of said intersection diagonally and under Highway #52 to the southwest corner. Through this culvert there flowed (southwesterly) a small stream. The culvert was about 10 feet high and about 8 feet wide. Before reaching the culvert, the stream ran through a deep ditch and over a bed of rock. At said northeast corner, there were concrete retaining walls extending from each end of the culvert, supporting the dirt banks of the ditch. On top of the culvert, a few feet east from the east edge of the hard surface of Highway #52, there was a low parapet or wall, the course of which was that of the culvert, with two short prongs, one parallel with Highway #52 and the other parallel with Bethabara Road. The space intervening between the hard surface of Highway #52 and the parapet, and beyond the parapet between the hard surface and the ditch embankment, was the shoulder of Highway #52.

After work on 21 January, 1954, plaintiff went to the bus station, paid his fare and boarded defendant's bus. The destination of the bus was Charleston, West Virginia. Plaintiff's ticket entitled him to transportation from Winston-Salem to Forsyth County Sanatorium, said intersection being an intermediate point. The bus left Winston-Salem at 7:20 p.m., on time, with headlights burning. It was a dark night, "smoky and drizzly."

Plaintiff was seated on the left, next to the window, in the third seat behind the driver. As the bus traveled along Highway #52, approaching said intersection, at a speed of approximately 35 miles per hour, plaintiff undertook to signal the driver that he wanted to get off at the next intersection. He pulled the cord twice, but the buzzer (signal) was out of order. Some 300 feet south of said intersection, a passenger seated beside plaintiff called to the driver that a passenger wanted to get off at the next intersection. Thereupon, the driver turned on the lights inside the bus, gradually slowed down, pulling the bus onto the right shoulder of the road and ultimately coming to a full stop. The door was opened for plaintiff to alight from the bus. He testified that he couldn't see beyond the bus steps, but assumed he was getting off at a safe place in the intersection.

Plaintiff's evidence tends to show that the driver had stopped beyond the intersection; that the place where he attempted to alight from the bus was at or near the north end of the parapet; and that, as he stepped off of the bus, his foot struck something soft and he was precipitated some ten feet onto the rock bed of the stream and knocked unconscious.

Defendant's evidence tends to show that, after the driver received notice of plaintiff's desire to get off the bus, plaintiff instructed him that he wanted to get off at the intersection; that, in accordance with plaintiff's instructions, he stopped at the intersection and plaintiff got off there, some 10 or 12 feet south of the parapet and ditch; and that plaintiff was standing in Bethabara Road, facing the driver, bidding him, "Good night," when the driver closed the door of the bus and gradually drove northward on Highway #52.

Evidence relating to plaintiff's injuries will be referred to in the opinion.

Issues of negligence, contributory negligence and damages, raised by the pleadings, were answered in plaintiff's favor; and upon the verdict the court rendered judgment that plaintiff recover from defendant damages of $35,000.00 and costs.

Defendant excepted and appealed. It assigns as error, *inter alia,* the denial of its motion for judgment of involuntary nonsuit and errors in the court's instructions to the jury.

*Ratcliff, Vaughn, Hudson, Ferrell & Carter and R. M. Stockton, Jr., for plaintiff, appellee.*

*Womble, Carlyle, Sandridge & Rice for defendant, appellant.*

BOBBITT, J. Defendant, a common carrier, was not an insurer of the safety of its passengers. Its liability, if any, was for negligence proximately causing injury to its passengers. *Hollingsworth v. Skelding,* 142 N.C. 246, 55 S.E. 212, expressly disapproving a contrary *dictum* in *Daniel v. R. R.,* 117 N.C. 592, 23 S.E. 327; *White v. Chappell,* 219 N.C. 652, 14 S.E. 2d 843; *Humphries v. Coach Co.,* 228 N.C. 399, 45 S.E. 2d 546; *Jenkins v. Coach Co.,* 231 N.C. 208, 56 S.E. 2d 571.

This Court has quoted with approval Lord Mansfield's definition of the carrier's legal duty to its passengers, *viz.:* "As far as human care and foresight could go, he must provide for their safe conveyance." *Hollingsworth v. Skelding, supra; Perry v. Sykes,* 215 N.C. 39, 200 S.E. 923; *Horton v. Coach Co.,* 216 N.C. 567, 5 S.E. 2d 828; *Smith v. Cab Co.,* 227 N.C. 572, 42 S.E. 2d 657.

The definition adopted by this Court and stated repeatedly is that a carrier owes its passengers "the highest degree of care for their safety so far as is consistent with the practical operation and conduct of its business." *White v. Chappell, supra; Humphries v. Coach Co., supra; Garvey v. Greyhound Corp.,* 228 N.C. 166, 45 S.E. 2d 58; *Jenkins v. Coach Co., supra.*

We perceive no inconsistency in these definitions. Indeed, in *Smith v. Cab Co., Devin, J.,* (later C.J.), said: "The duty owed by common

carriers to passengers being transported by them has been frequently stated by this Court to be to provide for the safe conveyance of their passengers 'as far as human care and foresight' can go, consistent with practical operation of the business." Even so, the definition quoted from *White v. Chappell, supra,* ordinarily would seem quite sufficient as a general definition.

The carrier's legal duty to its passenger continues until such time as it affords its passenger an opportunity to alight safely from its conveyance to a place of safety. *Wood v. Public Corp.*, 174 N.C. 697, 94 S.E. 459; *Loggins v. Utilities Co.*, 181 N.C. 221, 106 S.E. 822; *White v. Chappell, supra.* The passenger is entitled as stated by *Stacy, J.* (later C.J.), in the *Loggins case* to "a safe landing," which refers to the act of the passenger in alighting from the carrier's conveyance, and to "a landing in safety," which refers to the condition in which he finds himself immediately after he has alighted from the carrier's conveyance. Once the passenger has alighted safely from the carrier's conveyance to a place of safety, the relationship of carrier and passenger ends. *Loggins v. Utilities Co., supra; White v. Chappell, supra; Patterson v. Power Co.*, 226 N.C. 22, 36 S.E. 2d 713.

In passing upon defendant's motion for judgment of nonsuit, the evidence, whether offered by plaintiff or by defendant, must be considered in the light most favorable to plaintiff. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683.

When the evidence is so considered, it is clear that it was sufficient for submission to the jury as to defendant's negligence. Defendant's contention is that its motion for judgment of nonsuit should have been granted because, as it contends, "plaintiff was guilty of contributory negligence as a matter of law." Conceding that the evidence was sufficient for submission to the jury as to alleged contributory negligence of plaintiff, we do not think it establishes plaintiff's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *Horton v. Peterson,* 238 N.C. 446, 78 S.E. 2d 181. Hence, we concur in the court's ruling denying defendant's said motion.

In connection with the alleged contributory negligence of plaintiff, the evidence, considered in the light most favorable to him, tends to show these facts: The bus traveled beyond Bethabara Road, but plaintiff did not *then know* that it had done so; and, having received no warning from the bus driver, he stepped from the bus into a place of danger rather than of safety. The bus did not stop abruptly, but slowed down and gradually came to a stop. Plaintiff, according to the testimony of the bus driver, asked that the driver stop at said intersection; and, in getting off, assumed that the bus had stopped at said intersec-

tion, a place where he could alight therefrom in safety. But having reached the conclusion that there must be a new trial, for reasons stated below, we refrain from expanding arguments pro and con bearing upon the issues of fact.

In instructing the jury, the court reviewed what certain of the evidence offered by plaintiff and by defendant, respectively, tended to show, and reviewed the contentions of the respective parties. Definitions of a carrier's duty to its passenger to and including the passenger's alighting safely from the conveyance to a place of safety, quoted from the *Hollingsworth, Loggins, and White cases,* cited above, were given; and in addition the court gave correctly the law as to burden of proof and general definitions of negligence, contributory negligence and proximate cause.

Then, in *charging* the jury as to the negligence issue, the court's instruction was: ". . . the Court charges you that if you find from this evidence, all of this evidence, and by its greater weight, that the defendant was negligent on this occasion, as the Court has defined negligence to you, and that that negligence was the proximate cause of the injuries sustained by the plaintiff, as the Court has defined proximate cause, taking into consideration the duty that the defendant as a carrier owed to the plaintiff as a passenger, as the Court has defined that duty from the decisions of our Court, then it would be your duty to answer this first issue 'Yes.' If you are not so satisfied, then it would be your duty to answer it 'No.' "

And, in *charging* the jury as to the contributory negligence issue, the court's instruction was: "The Court charges you that the burden is on the defendant to satisfy you by the greater weight of the evidence that there was negligence on the part of the plaintiff which contributed to his injuries, in order that it would justify you in answering this second issue 'Yes.' If you are not so satisfied from all of this evidence and by its greater weight, then you'd answer that second issue 'No.' "

Earlier in the charge, the court had instructed the jury as follows: "Now, Members of the Jury, the law provides that the Judge declare or explain to you the law in the case. It, therefore, becomes the duty of the Court, that is, the one speaking to you now, to relate to you the law that is applicable in this case. You will apply the facts to the law in making up your answer to the issues."

G.S. 1-180 provides, in part, that the trial judge, in giving the charge to the petit jury, either in a civil or a criminal action, shall declare and explain the law arising on the evidence given in the case. The court, not the jury, is to *relate and apply* the law to the variant factual situations having support in the evidence. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, and cases cited.

Analysis of the evidence discloses sharp conflict as to where plaintiff alighted from the bus. If plaintiff alighted therefrom safely at the intersection 10 or 12 feet south of the parapet and ditch, and was standing there when the bus drove away, and thereafter, notwithstanding he was thoroughly familiar with the lay of the land at said intersection, for some unexplained reason or none walked or wandered over to the edge of the ditch and fell in, the defendant would not be guilty of negligence proximately causing plaintiff's injuries.

On the other hand, if the bus went beyond the intersection and plaintiff was invited or directed to alight therefrom at or near the edge of the ditch and parapet, then a factual situation calling for an application of other principles of law was presented. In such case, it would be for the jury to say whether the bus driver failed to exercise due care to stop at a place where plaintiff might alight safely from the bus to a place of safety or to warn plaintiff of a danger of which the bus driver was aware, or of which he should have been aware had he exercised due care; and in relation to the contributory negligence issue, it would be for the jury to say whether plaintiff knew, or by the exercise of due care should have known, that the bus had passed the intersection and was in the vicinity of the ditch and parapet when he undertook to alight from the bus and whether in alighting from the bus under such circumstances he failed to exercise due care for his own safety when he could not see where he was stepping.

Careful consideration of the charge fails to disclose that the court gave instructions of law applicable to these variant factual possibilities or approximating the analysis set out above.

Defendant, while it excepted to and assigned as error the court's instruction that it was for the jury to "apply the facts to the law in making up your answers to the issues," it would seem that this position was brought forward in the brief only in relation to two specific features of the charge, both bearing on the issue of damages, referred to below.

Unquestionably, plaintiff's evidence tends to show that he received serious injuries as the direct and proximate result of his fall; and there is ample evidence that the injury to his collar bone is permanent and partially disabling. From 21 January, 1954, to 10 February, 1954, he was in the hospital, for some days in critical condition; and during this time he was treated exclusively for injuries directly and obviously caused by his fall on 21 January, 1954. In the course of examinations then made, pus cells in his urine were detected. Later, on account of the continuance of this kidney condition, Dr. Andrew, who had previously treated plaintiff for kidney trouble, was called in to take charge of this feature of plaintiff's condition. From 31 March, 1954, to 3 April, 1954, plaintiff was in the hospital for a complete study of his urinary tract. It was

found that the left kidney was obstructed. Conservative treatment was given. Plaintiff was in the hospital again from 20 June, 1954, to 25 June, 1954, when a further study was made. No improvement had resulted from the original conservative treatment. Again, conservative treatment failed to bring about any improvement; and on 14 July, 1954, plaintiff returned to the hospital, at which time his left kidney, which was practically destroyed, was removed. Plaintiff was in the hospital from 14 July, 1954, to 27 July, 1954. These three visits to the hospital were solely in connection with plaintiff's kidney trouble.

Dr. Rabil, who treated plaintiff for injuries (other than kidney trouble) resulting from his fall, testified that in his opinion the injury on 21 January, 1954, and plaintiff's bedfast condition during treatment therefor, "aggravated a pre-existing kidney condition." Dr. Andrew, who had treated plaintiff for kidney trouble in 1946 and who made the examinations and performed the operation in 1954, had a different view. Dr. Andrew, plaintiff's urologist and surgeon, was called as a witness by defendant. In his opinion, examinations made in the hospital in January-February, 1954, simply brought to the attention of the doctors then treating him the existence of plaintiff's pre-existing kidney trouble. He testified: "The accident he had on January 21, 1954, did not have anything to do with the destruction of his kidney or with the necessity for the removal of his kidney. The destruction of the kidney was the result of the obstruction. Mr. Harris was born with that condition existing; it was a congenital abnormality. That continued to grow worse through the years, until this finally developed."

Much emphasis was placed upon these visits to the hospital, plaintiff's loss of time, etc., incident to his kidney condition. The record shows that plaintiff displayed his scars resulting from this operation to the jury.

In charging the jury on the third issue, the court made no reference to the sharply conflicting evidence as to whether plaintiff's fall aggravated a pre-existing kidney condition or had nothing whatever to do with it; and no instruction of law was given with reference thereto. True, in the course of general instructions, the court instructed the jury that, if plaintiff was entitled to recover at all, he was entitled to recover for all injuries, "in consequence of the defendant's wrongful or negligent acts," and again such as were "the immediate and necessary consequences of the injury." We are constrained to hold that the disputed issue as to whether plaintiff's kidney condition was caused by his fall on 21 January, 1954, was a substantive feature of the controversy of such importance that it was incumbent upon the court to instruct the jury directly in relation thereto. We think the jury should have been

so instructed even in the absence of a specific request therefor. *Bank v. Phillips, supra,* and cases cited.

Unless the plaintiff's kidney condition and operation were caused or aggravated by the fall on 21 January, 1954, the jury should have disregarded such kidney condition and operation. It was for the jury to say whether plaintiff's pre-existing kidney condition was aggravated by the fall on 21 January, 1954, and if so, to award damages only to the extent they found such pre-existing kidney condition had been aggravated by the fall on 21 January, 1954. It would seem that the court should have instructed the jury specifically bearing upon this important phase of the case.

Plaintiff was out of work from 21 January, 1954, to 27 August, 1954, except for two brief periods, namely, from May 26th to June 19th and from June 26th to July 13th. Plaintiff's hospitalization in connection with his kidney examinations and operation occurred before his final return to work on August 27th.

When he did go back to work in the barber shop in the Robert E. Lee Hotel, where he worked on a commission basis, there is much evidence that, primarily on account of the fractured collar bone, he was permanently injured, suffering a general disability with relation to his occupation of 33%; that he could then work slowly, for short periods and under considerable difficulty; that his condition was such that it would tend to become worse rather than better; that in the future, during his lifetime, he would suffer damages on account of disability, pain and suffering, loss of earnings, etc. The mass of evidence bearing upon the permanency and character of plaintiff's injury shows clearly that future damages figured largely in the consideration of the issue as to damages.

The record shows: "The plaintiff introduced into evidence from the General Statutes of North Carolina, Section 8-46, being the mortuary tables, that portion which reads as follows: 'Completed Age, 57, Expectation, 16.1 years.'"

There was other evidence, some favorable and other unfavorable to plaintiff, bearing upon his health prior to as well as subsequent to his fall on 21 January, 1954.

In arriving at plaintiff's life expectancy, a vital factor incident to the determination of future damages and the present value thereof, the instruction was: ". . . the Court charges you that . . ., if you come to consider this third issue, you may take into consideration the mortuary tables which were introduced as to the life expectancy of the plaintiff in this case, . . ." The court then added: "and that you may take into consideration all of the evidence that has been introduced here as to plaintiff's losses from work, his loss from his earnings, and the expense that he has been put to by hospital, doctor and medical

bills, and his mental suffering, his bodily suffering, that in the past and take into consideration that which he may suffer in the future, as the Court has just related to you." It will be noted that the additional instruction thus quoted, which immediately follows the reference to the mortuary tables, deals solely with other aspects of damages, not with the determination of life expectancy.

The instruction is incomplete and erroneous. G.S. 8-46 expressly provides that the statutory mortuary tables "shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, . . ."

The reference to the mortuary tables is the only reference in the charge, either by way of statement of law or by way of statement of contentions, bearing upon the life expectancy of plaintiff. Failure to instruct the jury that it was for the jury to determine the life expectancy of plaintiff, based upon the evidence as to his health, constitution and habits, in conjunction with which the mortuary tables were also for consideration *as evidence,* was calculated to convey the impression that the mortuary tables constituted the sole guide for the jury and were determinative.

Upon the evidence in this record, the issues of negligence, contributory negligence and damages were for jury consideration. But we are constrained to hold that the error in the instruction relating to the mortuary tables, and the failure of the court to declare and explain the law arising on conflicting evidence relating to crucial and sharply disputed questions of fact, were of such prejudicial effect as to necessitate a new trial. It is so ordered.

New trial.

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PHOEBE G. KENNEDY v. DR. FOUNTAIN PARROTT.

(Filed 13 January, 1956.)

**1. Physicians and Surgeons § 14—**

A surgeon may not be held liable on the basis of negligence for conduct resting upon judgment, opinion or theory when the surgeon possesses the requisite skill and ability and acts according to his best judgment and in a careful and prudent manner.

**2. Evidence § 5—**

Courts may take judicial notice of any fact in the field of any particular science which is either so notoriously true as not to be the subject of reasonable dispute or which is capable of demonstration by resort to readily accessible sources of indisputable accuracy, and judges may inform themselves as to such facts by reference to standard works on the subject.

**3. Trial § 22b—**

While ordinarily defendant's evidence which contradicts that of plaintiff is not to be considered on motion to nonsuit, in an action for malpractice the testimony of defendant's expert witnesses which discloses known and generally accepted facts, corroborated by textbook statements, in regard to the particular disease or ailment in controversy, may be considered.

**4. Trial §§ 22a, 23a—**

While plaintiff's testimony of statements made by defendant, even though denied by defendant, must be taken as true in passing upon defendant's motion to nonsuit, yet when such statements are in direct conflict with scientific fact, they may be lacking in sufficient probative force to require their submission to the jury.

**5. Physicians and Surgeons § 20—Evidence held insufficient to be submitted to the jury in this action for malpractice.**

Plaintiff's evidence was to the effect that during an operation for appendicitis defendant surgeon found enlarged cysts on plaintiff's left ovary and punctured them, and that after the operation plaintiff developed phlebitis in her leg. Plaintiff also offered testimony of statements by defendant and another surgeon for the purpose of showing that while puncturing one of the cysts the surgeon cut a blood vessel, causing the phlebitis. There was no evidence that defendant did not possess the requisite skill and ability or that he failed to exercise the proper care in performing the operation, other than the testimony of the statements, and defendant introduced expert testimony, corroborating textbook statements, in direct conflict with the statements as to the cause of phlebitis. *Held:* Nonsuit was proper.

**6. Physicians and Surgeons § 14—**

The acceptance of a person as a patient by a physician or surgeon does not create a contract in the ordinary sense of that word, but rather a status or relationship, although in any event the agreement imposes on the physician or surgeon the duty, in the treatment of the patient, to apply his skill and ability in a careful and prudent manner.

**7. Physicians and Surgeons § 15½—**

Where a patient consents to a major internal operation, the consent, in the absence of proof to the contrary, will be construed as general in nature, and the surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated in order to remedy any abnormal or diseased condition discovered in the area of the original incision.

**8. Physicians and Surgeons § 20—Evidence held not to show that extension of operation in accordance with surgical procedure was unauthorized.**

Plaintiff's evidence tended to show that she consented to an operation for appendicitis, and that while performing the operation defendant discovered enlarged cysts on plaintiff's left ovary, and punctured them. There was no evidence that defendant exercised bad judgment or that the extended operation was not dictated by sound surgical procedure, but to the

contrary there was expert testimony that the puncture of the cysts was in accordance with sound surgical practice. *Held:* The evidence fails to make out a *prima facie* case of technical assault and battery on the ground that the extended operation was unauthorized.

APPEAL by plaintiff from *Parker (Joseph W.), J.*, May Term, 1955, LENOIR. Affirmed.

Civil action to recover damages for personal injuries resulting from an alleged unauthorized operation performed by the defendant, a surgeon.

The plaintiff consulted the defendant as a surgeon. He diagnosed her ailment as appendicitis and recommended an operation to which she agreed. During the operation the doctor discovered some enlarged cysts on her left ovary, and he punctured them. After the operation the plaintiff developed phlebitis in her leg. She testified that Doctor Parrott told her "that while he was puncturing this cyst in my left ovary that he had cut a blood vessel and caused me to have phlebitis and that those blood clots were what was causing the trouble." She also testified that defendant told Dr. Tyndall, who was called in to examine her for her leg condition, "that while he was operating he punctured some cysts on my ovaries, and while puncturing the cyst on my left ovary he cut a blood vessel which caused me to bleed," to which Dr. Tyndall said, "Fountain, you have played hell."

The defendant recommended that the plaintiff go to Duke Hospital, and there is evidence he promised he would pay the bill. She also saw Dr. I. Ridgeway Trimble at Johns Hopkins, Baltimore. Dr. Trimble operated on her left leg and side "to try to correct the damage that was done."

Plaintiff had to undergo considerable pain and suffering on account of the phlebitis and still has some trouble with it.

At the conclusion of the testimony, the court, on motion of the defendant, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

*Owens & Langley for plaintiff appellant.*

*Marion A. Parrott and John G. Dawson for defendant appellee.*

BARNHILL, C. J. Plaintiff's action as alleged in her complaint is an action for damages for personal injury proximately resulting from the negligence of the defendant in performing an operation on her. The only allegation in the complaint which gives any indication it is an action for damages proximately resulting from an alleged technical assault or trespass upon the person of plaintiff is the allegation that the puncturing of the cysts on her ovary was unauthorized.

Dealing first with the cause of action alleged, it is to be noted that plaintiff made no effort in the court below to prove the defendant did not possess the requisite skill and ability, and she offered no evidence that he failed to exercise due and proper care in performing the operation other than her testimony as to what the defendant said and what Dr. Tyndall said in his presence. She tendered no expert testimony.

In the first place, where the conduct relied on rests upon judgment, opinion, or theory, such as in case of a surgeon performing an operation, the ordinary rules for determining negligence do not prevail. The reason is that when one who possesses the requisite skill and ability acts according to his best judgment and in a careful and prudent manner, he is not chargeable with negligence. *Hunt v. Bradshaw,* 242 N.C. 517, and cases cited; *Jackovach v. Yocom,* 237 N.W. 444, and authorities cited. See also Annos. 26 A.L.R. 1036, 53 A.L.R. 1056, and 139 A.L.R. 1370.

Furthermore, proof of error of judgment and nothing more will not suffice. *Jackovach v. Yocom, supra,* and cases cited. And the defendant testified that the cysts he punctured were slightly less than an inch in diameter, and that he felt "that these cysts were large enough to be potentially dangerous . . ."

A judge or court may take judicial notice of any fact in the field of any particular science which is either so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by resort to readily accessible sources of indisputable accuracy. Judges may inform themselves as to such facts by reference to standard works on the subject. *Hopkins v. Comer,* 240 N.C. 143, 81 S.E. 2d 368, and authorities cited; Stansbury, N. C. Evidence, sec. 11.

In applying this rule we need not enter into any extended discussion as to whether the puncture of the cysts on plaintiff's ovaries proximately caused her phlebitis. Suffice it to say that among physicians, surgeons, and others who make it their business to know the physiology of the human body, it is an accepted fact that (1) phlebitis of the leg is caused by the inflammation of a vein in the leg, and (2) when the inflammation becomes acute, it may cause the formation of blood clots which produce thrombophlebitis.

Phlebitis is at times a postoperative or pregnancy complication. When it develops after an operation, its cause is the combination of the operative procedures, that is, the anesthesia, the shock of the operation, and the confinement to bed which, in combination, cause a slowing of the blood flow and dehydration of the blood, which produces inflammation and the formation of blood clots which further block the flow of blood which causes a swelling of the leg, redness, and tenderness. Lippincott's Quick Reference Book for Medicine and Surgery, 14th ed.,

p. 570; Blumer, The Therapeutics of Internal Diseases, Vol. 3, p. 568; Cecil, Textbook of Medicine, p. 1287.

While on a motion to nonsuit we may not consider the testimony offered by defendant as it tends to contradict the evidence offered by the plaintiff, we may consider the evidence of defendant's expert witnesses for the purpose of ascertaining what are the known and generally accepted facts about phlebitis, as it tends to corroborate the textbook statements in respect thereto. Indeed, in our opinion, the trial judge had the right to call upon experts in the science of medicine to inform him on the subject. *Hunt v. Bradshaw, supra; Hopkins v. Comer, supra.*

The defendant denied he made the statements attributed to him by the plaintiff. Even so, for the purposes of this appeal, we must assume that he did make them. But then, he offered five expert surgeons and physicians who testified that (1) if the defendant made the statements attributed to him, he was in error, and (2) the phlebitis was the result of the operative procedures—the anesthesia, the operation, and the confinement to bed—which caused a slowing of the plaintiff's blood and tended to cause a dehydration thereof which in turn produced the phlebitis and the clotting of the blood.

Thus it appears that if defendant made the statements upon which the plaintiff relies, they are so in conflict with known scientific facts that they are lacking in sufficient probative force to require their submission to a jury. Therefore, if the cause was tried in the court below on the allegation of negligence contained in the complaint, the judgment of nonsuit was well advised.

On the other hand, if her cause of action is for damages for personal injuries proximately resulting from an assault or trespass on her person, as she now asserts, and such operation was neither expressly nor impliedly authorized, she is entitled at least to nominal damages.

The contents of the record and her brief clearly indicate that, whatever the theory of the trial below may have been, she is now seeking to recover on this latter theory.

It is stated in the case on appeal that the puncturing of the cysts constituted an unauthorized operation on her by the defendant. A similar statement is contained in her brief. In addition thereto, the brief contains the following:

"The plaintiff earnestly contends that the trial Court erred in granting the defendant's motion for judgment of nonsuit at the conclusion of all the evidence for that the plaintiff had introduced sufficient evidence to make out a case of assault and battery or trespass to the person by the performance of an unauthorized operation upon her by the defendant. . . ."

Furthermore, her whole argument and citation of authorities are directed to that contention.

While the law of contracts is applied as between a patient and his physician or surgeon, when a person consults a physician or surgeon, seeking treatment for a physical ailment, real or apparent, and the physician or surgeon agrees to accept him as a patient, it does not create a contract in the sense that term is ordinarily used. Usually there is no specification or particularization as to what the physician shall do. The patient selects, and commits himself to the care of, the doctor because he is confident the doctor possesses the requisite skill and ability to treat—and will treat—his physical ailment and restore him to normal good health. The physician, after diagnosing the ailment, prescribes the treatment or the medicine to be administered; but the patient is under no legal obligation to follow the physician's instructions. Thus it is apt and perhaps more exact to say it creates a status or relation rather than a contract. In any event, agreement imposes on the physician or surgeon the duty, in the treatment of the patient, to apply his skill and ability in a careful and prudent manner.

Prior to the advent of the modern hospital and before anesthesia had appeared on the horizon of the medical world, the courts formulated and applied a rule in respect to operations which may now be justly considered unreasonable and unrealistic. During the period when our common law was being formulated and applied, even a major operation was performed in the home of the patient, and the patient ordinarily was conscious, so that the physician could consult him in respect to conditions which required or made advisable an extension of the operation. And even if the shock of the operation rendered the patient unconscious, immediate members of his family were usually available. Hence the courts formulated the rule that any extension of the operation by the physician without the consent of the patient or someone authorized to speak for him constituted a battery or trespass upon the person of the patient for which the physician was liable in damages.

However, now that hospitals are available to most people in need of major surgery; anesthesia is in common use; operations are performed in the operating rooms of such hospitals while the patient is under the influence of an anesthetic; the surgeon is bedecked with operating gown, mask, and gloves; and the attending relatives, if any, are in some other part of the hospital, sometimes many floors away, the law is in a state of flux. More and more courts are beginning to realize that ordinarily a surgeon is employed to remedy conditions without any express limitation on his authority in respect thereto, and that in view of these conditions which make consent impractical, it is unreasonable to hold the physician to the exact operation—particularly when it is internal—that

his preliminary examination indicated was necessary. We know that now complete diagnosis of an internal ailment is not effectuated until after the patient is under the influence of the anesthetic and the incision has been made.

These courts act upon the concept that the philosophy of the law is embodied in the ancient Latin maxim: *Ratio est legis anima; mutata legis ratione mutatur et lex.* Reason is the soul of the law; the reason of the law being changed, the law is also changed.

Some of the courts which realize that in view of modern conditions there should be some modification of the strict common law rule still limit the right of surgeons to extend an operation without the express consent of the patient to cases where an emergency arises calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of someone authorized to speak for him. *Jackovach v. Yocom, supra; King v. Carney,* 204 P. 270, 26 A.L.R. 1032.

Other courts, though adhering to the fetish of consent, express or implied, realize "that the law should encourage self-reliant surgeons to whom patients may safely entrust their bodies, and not men who may be tempted to shirk from duty for fear of a law suit." They recognize that "the law does not insist that a surgeon shall perform every operation according to plans and specifications approved in advance by the patient and carefully tucked away in his office-safe for courtroom purposes." *Barnett v. Bachrach,* 34 A. 2d 626.

This view, to which we subscribe, is fully stated in *Bennan v. Parsonnet,* 83 A. 948, as follows:

"Without stopping to point out the fallaciousness of the premise that a surgical operation can be contracted for or performed according to plans and specifications, it is enough to say that the entire foundation of the supposed analogy is swept away by the surgical employment of anaesthesia, which renders the patient unable to consent at the very time that the rule of the common law required that his consent be obtained; for in those days the patient (such was the horror of it) was a conscious participant in such surgical operations as were then performed, and as his consent could be obtained the rule of the common law was that it must be obtained.

"The surgical employment of anaesthesia has, as a matter of common knowledge, not only eliminated the possibility of obtaining the patient's consent during the operation, but has also had other radical effects of which notice must be taken. Thus it has rendered possible and of everyday occurrence surgical operations of a character and magnitude not dreamed of at the time the common law was in the making, and, as a matter of practical moment, has also advanced the period that marks

the commencement of a surgical operation from the time when the patient's body is actually invaded by the knife to the time when the anaesthetic is administered, or at least when the patient has succumbed to its influence. The employment of anaesthesia has also postponed to this same period of relaxation and unconsciousness the making of that complete and final diagnosis of the patient's condition that at common law was made at a time when he could be both informed and consulted. By these considerations the scope of modern surgical operations has been greatly enlarged, and the legal rule applicable thereto extended beyond the emergencies of actual surgery to other matters more or less vitally affecting the patient's welfare. To meet these changed conditions, the rule of law must, in the interest alike of the patient and the surgeon, be adapted to the changes that have been so wrought, chief among which is the unconscious state of the patient at a time when by the common-law rule his consent must be obtained. To meet this fundamental change in the condition of the patient, it is imperative that the law shall in his interest raise up some one to act for him—in a word, to represent him in those matters affecting his welfare concerning which he cannot act for himself because of a condition that has become an essential part of the operation.

". . . if no one has been so appointed, the law by its constructive power will raise up such a representative without which the welfare and even the life of the patient might be needlessly sacrificed. To meet the requirements of the case, such representative should not only keenly appreciate the nature of the duty that is thus cast upon him, but also be possessed of the knowledge and skill to perform such duty with wisdom and promptness. He should also be one in whom the patient reposes confidence and on whose judgment he would presumably rely. The surgeon whom the patient himself has selected alone fills all of these requirements, and hence upon him the law should cast the responsibilities of this office by the legal implication that the patient intended him to act for him when he made no other selection."

In major internal operations, both the patient and the surgeon know that the exact condition of the patient cannot be finally and definitely diagnosed until after the patient is completely anesthetized and the incision has been made. In such case the consent—in the absence of proof to the contrary—will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated. This rule applies when the patient is at the time incapable of giving consent, and no one with authority to consent

for him is immediately available. *King v. Carney, supra; Baxter v. Snow,* 2 P. 2d 257; *Jackovach v. Yocom, supra.*

In short, where an internal operation is indicated, a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated, and for so doing he is not to be held in damages as for an unauthorized operation.

"Where one has voluntarily submitted himself to a physician or surgeon for diagnosis and treatment of an ailment it, in the absence of evidence to the contrary, will be presumed that what the doctor did was either expressly or by implication authorized to be done." *Baxter v. Snow, supra.*

Unexpected things which arise in the course of an operation and incidental thereto must generally at least be met according to the best judgment and skill of the surgeon. *Higley v. Jeffrey,* 8 P. 2d 96. And ordinarily a surgeon is justified in believing that his patient has assented to such operation as approved surgery demands to relieve the affliction with which he is suffering. *Dicenzo v. Berg,* 16 A. 2d 15.

Here plaintiff submitted her body to the care of the defendant for an appendectomy. When the defendant made the necessary incision he discovered some enlarged follicle cysts on her ovaries. He, as a skilled surgeon, knew that when a cyst on an ovary grows beyond the normal size, it may continue to grow until it is large enough to hold six to eight quarts of liquid and become dangerous by reason of its size. The plaintiff does not say that the defendant exercised bad judgment or that the extended operation was not dictated by sound surgical procedure. She now asserts only that it was unauthorized, and she makes no real showing of resulting injury or damage.

In this connection it is not amiss to note that the expert witnesses testified that the puncture of the cysts was in accord with sound surgical procedure, and that if they had performed the appendectomy they would have also punctured any enlarged cysts found on the ovaries. "That is the accepted practice in the course of general surgery."

What was the surgeon to do when he found abnormal cysts on the ovaries of plaintiff that were potentially dangerous? Was it his duty to leave her unconscious on the operating table, doff his operating habiliments, and go forth to find someone with authority to consent to the extended operation, and then return, go through the process of disinfecting, don again his operating habiliments, and then puncture the cysts; or was he compelled, against his best judgment, to close the incision and then, after plaintiff had fully recovered from the effects of the anesthesia, inform her as to what he had found and advise her that

these cysts might cause her serious trouble in the future? The operation was simple, the incision had been made, the potential danger was evident to a skilled surgeon. Reason and sound common sense dictated that he should do just what he did do. So all the expert witnesses testified.

Therefore, we are constrained to hold that plaintiff's testimony fails to make out a *prima facie* case for a jury on the theory she brings her appeal to this Court. The judgment entered in the court below is

Affirmed.

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TOWN OF BLOWING ROCK v. JAMES B. GREGORIE, CAROLINE GREGORIE, AND LLOYD ROBBINS, CONTRACTOR.

(Filed 13 January, 1956.)

**1. Dedication § 4—**

Where a municipality improves, repairs, or paves a street dedicated to the public by the registration of a plat showing such street, especially when accompanied by a long-continued use of the street by the public, there is an acceptance of the dedication of the street as a public street of the town.

**2. Dedication § 5—**

Purchasers of lots sold by reference to the recorded map of a subdivision acquire vested rights to have all and each of the streets shown on the map kept open.

**3. Dedication § 6—**

Where the dedication of a street has become complete by the acceptance by the town, the right to revoke the dedication is gone except with the consent of the town, acting on behalf of the public, and the consent of those persons having vested rights in the dedication.

**4. Same—**

Where persons purchase lots with reference to a recorded map and thereby acquire an easement to use the streets shown on the plat, the closing of a street shown on the plat by the municipality without their request or consent would deprive them of property rights in violation of Art. I, Sec. 17, of the State Constitution and the 14th Amendment to the Constitution of the United States.

**5. Municipal Corporations § 25b—**

A municipality holds its streets in trust not only for itself and its citizens, but also for the general public.

**6. Statutes § 5c—**

Under our Constitution, the validity of a statute may not be attacked on the ground that its provisions do not correspond with the subject expressed in the title, since, though a title may be called in aid of construction, it

does not control the text. Constitution of North Carolina Art. II, Sec. 21. G.S. 12-1 refers solely to public-local or private acts.

**7. Municipal Corporations § 25b—**

G.S. 153-9 (17) applies to municipalities in closing a public street.

**8. Statutes § 5d—**

Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each.

**9. Municipal Corporations § 25b—**

G.S. 153-9(17) and G.S. 160-200(11) may be harmonized, and therefore must be construed *in pari materia*, so that a municipality may not close a public road or street without giving notice by registered mail to individuals owning property adjoining the road or street, and notice by publication in the newspaper published in the county.

**10. Dedication § 6—**

An accepted dedication of streets in a subdivision cannot be revoked by successors in title to the subdivision quitclaiming all their right therein to an owner of a lot contiguous to the street when the municipality does not lawfully consent to such revocation.

**11. Controversy Without Action § 2: Estoppel § 11a: Limitation of Actions § 15—**

Where the case is submitted to the court upon stipulations and admissions in the pleadings and there is no reference therein to estoppel or the bar of the statute of limitations, the questions of estoppel and of the statute of limitations are not presented.

**12. Controversy Without Action § 2—**

Where the case is submitted to the court upon stipulations and admissions in the pleadings, and the fact appears therein that notice required for the validity of a pertinent resolution or ordinance was not given, the question of validity of the resolution or ordinance is presented to the court in rendering judgment arising as a matter of law on the facts stipulated, and allegation that the resolution or ordinance was *ultra vires* is not necessary.

**13. Same—**

Where the case is submitted to the court upon stipulations and admissions in the pleadings, the facts agreed are in the nature of a special verdict upon which the court is requested to render judgment arising as a matter of law thereon, and the court is not permitted to infer or deduce other facts from those stipulated. Therefore, observations of the court based upon a personal view of the *locus in quo* at the insistence of counsel for both parties, have no place in the judgment and will not be considered on appeal, but do not justify disturbing the judgment when such observations are harmless.

**14. Municipal Corporations § 25b—**

When a street of a municipality is unlawfully obstructed, the municipality may maintain a suit for mandatory injunction to remove the obstruction.

APPEAL by defendants from *Sharp, Special Judge,* June Civil Term 1955, of WATAUGA.

Civil action by the Town of Blowing Rock to restrain the defendants from closing a street in the town known as Valley View Road.

The parties waived a jury trial, and agreed that the judge might hear and decide the case upon the admissions in the pleadings, stipulations made by the parties, and enter judgment.

The development known as Mayview Park Subdivision, which is within the corporate limits of the Town of Blowing Rock, was made in 1919, and the map of this subdivision was recorded in the office of the Register of Deeds for Watauga County in June 1920. This map shows a large number of lots and streets in this subdivision, and it shows Valley View Road as one of the streets.

The parties have been unable to find any minutes among the records of the town showing that the Commissioners of the town formally accepted the dedication of the streets shown on the map above mentioned, but from June 1920 until 4 August 1950, the Town of Blowing Rock continuously kept Valley View Road open as shown on the said map, and periodically made repairs on it. Valley View Road is paved to a point at about the south corner of Lot No. 84 in this development, and beyond that point to the end of the road it is unpaved.

The defendants James B. Gregorie and Caroline Gregorie own Lot No. 81 in this development. Between Lot No. 84 and Lot No. 81 are Lots Nos. 82 and 83. Valley View Road ends just beyond Lot No. 81 in a turn or dead end circle at a cliff known as Lover's Leap, where there is a drop of several hundred feet and a view of Johns River Gorge.

On 1 August 1950, the Commissioners of the Town of Blowing Rock passed a resolution that Valley View Road lying and being between Lots numbered 75, 76 and 81 of the Mayview Park Subdivision be abandoned, and closed as a public road, and the same is hereby released and surrendered to the defendants Gregorie for their own private use and benefit. Lot No. 75 is across this road from Lot No. 81, and Lot No. 76 is beside Lot No. 75 and beyond the dead end of Valley View Road. Wonderland Trail, a street shown on the map, runs by Lots Nos. 75 and 76 on their opposite side from Valley View Road. No notice of the meeting at which the above resolution was passed was published in the only newspaper published in Watauga County.

On 4 August 1950, T. H. Broyhill, and wife, successors in title to the owner and developer of Mayview Park Subdivision, executed a quit-

claim deed to the defendants Gregorie for all right, title and interest they might have to that part of Valley View Road lying and being between Lots Nos. 75, 76 and 81 of the Mayview Park Subdivision.

In 1954 the defendants Gregorie, by the defendant Lloyd Robbins, a contractor, erected two stone pillars in Valley View Road "one at the southwest corner of Lot 81 and the other at the southwest corner of Lot 75," and between the pillars extended a chain.

Plaintiff instituted this action 4 June 1954. On 14 August 1954 the Commissioners of the Town of Blowing Rock, at a special session, passed an ordinance repealing their resolution of 1 August 1950, and ordering that Valley View Road be restored to the use of the public, and be continued as a public street for the use of those owning property along the road, as well as other property owners in the subdivision, and the general public. No notice of this special meeting was published in a newspaper.

The court held as matters of law: (1) The town accepted the dedication of Valley View Road as a public street of the town, and maintained it as such for over thirty years; (2) All the citizens of the town and the owners of lots adjoining the road between Lots Nos. 75, 76 and 81 have an interest in the road, and were entitled to notice that the town proposed to close it; (3) The town failed to comply with G.S. 153-9(17) in that no notice was published; (4) The town had no right to release and surrender a part of Valley View Road to the defendants Gregorie for their private use; (5) The resolution or ordinance passed 1 August 1950 is invalid.

Whereupon the court entered judgment enjoining the defendants from closing or blocking off Valley View Road, and directed the defendants to remove all obstructions from the road.

The defendants appeal, assigning error.

*Wade E. Brown for Plaintiff, Appellee.*
*Louis H. Smith for Defendants, Appellants.*

PARKER, J. This Court said in *Ins. Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13, citing numerous cases in support: "It is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public." See also: *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E. 2d 458.

However, in so far as the general public are concerned, and without reference to the claims and equities of the individual purchasers of lots

with reference to the map of such a development, it is well understood that a dedication is never complete until acceptance. This acceptance may be shown not only by formal action on the part of the authorities having charge of the matter, but, under certain circumstances, by user as of right on the part of the public, or other facts, but unless and until acceptance has been in some way established, it should be properly termed an offer to dedicate on the part of the owner. *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Lee v. Walker,* 234 N.C. 687, 68 S.E. 2d 664; *Irwin v. Charlotte,* 193 N.C. 109, 136 S.E. 368; *Wittson v. Dowling,* 179 N.C. 542, 103 S.E. 18; 26 C.J.S., Dedication, Sec. 34.

The stipulations state that there was a dedication of the streets shown on the recorded map of the Mayview Park subdivision. The stipulations also state that W. L. Alexander was the original owner and developer of the land comprising Mayview Park subdivision, and sold lots therein before he became bankrupt. The stipulations further show that T. H. Broyhill and C. E. Hayworth, and wife, purchased at the bankrupt sale of W. L. Alexander all of his interest and right in this subdivision; that C. E. Hayworth, and wife, sold their interest to Broyhill, and wife; that Broyhill, and wife, conveyed Lot No. 81 in this subdivision by reference to the above mentioned map as Lot No. 81 to Jack Roberts, and wife, and that Mrs. Roberts, a widow, conveyed Lot No. 81 to the defendants Gregorie by a similar reference.

According to the stipulations, the Town of Blowing Rock, from June 1920 until 4 August 1950, kept Valley View Road open as shown on the map, and periodically made repairs. The stipulations further state that Valley View Road is paved to a point at about the south corner of Lot No. 84, and that beyond that point to the end of the road it is unpaved. This user of Valley View Road by the town was of such a character as unequivocally to indicate an intention on the part of the town to accept Valley View Road for the particular purpose to which it was dedicated, because the acceptance of the dedication of a street by a town may be implied from the fact that the town exercised acts of control over it by improving, repairing or paving it, especially when accompanied by a long continued use by the public. *McElroy v. Borough of Ft. Lee,* C.C.A.N.J., 46 F. 2d 777, *certiorari* denied, 283 U.S. 853, 75 L. Ed. 1461; *Menstell v. Johnson,* 125 Or. 150, 262 P. 853, 57 A.L.R. 311, 330 (Headnote 15); 16 Am. Jur., Dedication, Sec. 34; 26 C.J.S., Dedication, pp. 105-106. The lower court decided correctly that the Town of Blowing Rock had accepted the dedication of Valley View Road, as a public street of the town.

Purchasers of lots sold by reference to the recorded map of a subdivision acquire vested rights to have all and each of the streets shown on the map kept open. *Collins v. Asheville Land Co.,* 128 N.C. 563,

39 S.E. 21; *Ins. Co. v. Carolina Beach, supra; Gaither v. Hospital,* 235 N.C. 431, 70 S.E. 2d 680; 16 Am. Jur., Dedication, Sec. 57.

The dedication of Valley View Road as a street in the Town of Blowing Rock, as shown on the map, having become complete by acceptance by the town, as above set forth, the right to revoke the dedication is gone, except with the consent of the Town of Blowing Rock acting on behalf of the public, *McElroy v. Borough of Ft. Lee, supra; Keiter v. Berge,* 219 Minn. 374, 18 N.W. 2d 35, and with the consent of those persons who have vested rights in the dedication, *Rose v. Elizabethtown,* 275 Ill. 167, 114 N.E. 14; 3 Dillon on Mun. Corp. 5th Ed., Sec. 1091.

In *Ins. Co. v. Carolina Beach, supra,* lots in a subdivision were sold with reference to a plat showing the street in question to be 99 feet in width. At the time the charter was granted to the municipality embracing the lands, the only plat recorded was a revised one showing the streets as 80 feet wide. The Court held (as stated in 5th headnote N. C. Reports) "the granting of the charter cannot be construed as having the effect of limiting the width of the street to 80 feet so as to defeat the vested right of purchasers of lots with reference to the original plat to compel the owner to abide by its dedication of the street for the full width as shown by the plat." The Court said: "To have deprived those who purchased lots with reference to the original map, and those claiming under them, of appurtenant rights in and to the streets, for the purpose of vesting such rights in another merely for private use would run counter to provisions of the Constitution of North Carolina, Art. I, Sec. 17, and to the 14th Amendment to the Constitution of the United States. See *Moose v. Carson, supra.* Compare *Sheets v. Walsh,* 217 N.C. 32."

The Resolution of the Commissioners of the Town of Blowing Rock of 1 August 1950, abandoning part of Valley View Road and releasing it to the defendants Gregorie for their own private use and benefit, states certain parts of said street have been used in the past for parking and have been used so as to be a disturbance to adjoining property owners and that the said adjoining property owners have requested the Commissioners of the town to abandon and close a certain part of the road. It does not appear from the stipulations whether there were purchasers of lots in this subdivision by reference to the recorded map, except Jack Roberts, and his wife, and the defendants Gregorie, though the stipulations state that W. L. Alexander, the original owner and creator of this subdivision, sold lots therein before becoming bankrupt. If there were such purchasers, there is no evidence that they requested or consented to the closing of part of Valley View Road, and the action of the governing body of the Town of Blowing Rock in abandoning and permitting part of this road to be closed for the private use and benefit of the

defendants Gregorie, was in violation of their rights under Art. I, Sec. 17, of the State Constitution and under the 14th Amendment to the United States Constitution.

The Town of Blowing Rock holds its streets in trust not only for the municipality and its citizens, but also for the general public. *Swinson v. Realty Co.*, 200 N.C. 276, 156 S.E. 545; *City of Birmingham v. Hood-McPherson Realty Co.*, 233 Ala. 352, 172 So. 114, 108 A.L.R. 1140; 64 C.J.S., Mun. Corp., Sec. 1688.

The Court said in *Butler v. Tobacco Co.*, 152 N.C. 416, 68 S.E. 12: "The town authorities hold the streets in trust for the purposes of public traffic and cannot, in the absence of statutory power, grant to anyone the right to obstruct the street to the inconvenience of the public, even for public purposes, and for private purposes not at all."

G.S. 153-9(17) provides that the governing body of any municipality shall have power to close any street or road or portion thereof. It further provides that individuals owning property adjoining said street or road, who do not join in the request for the closing of said street or road, shall be notified by registered letter of the time and place of the meeting of the governing board at which the closing of said street or road is to be acted on, and it further provides that notice of said meeting shall be published once a week for four weeks in some newspaper published in the county, if there is one.

The stipulations state that no notice of the meeting of the governing body of the Town of Blowing Rock on 1 August 1950, was published in the *Watauga Democrat*, the only newspaper published in the county. The record is silent as to whether any individuals owning property adjoining Valley View Road, who did not request a closing of part of the road, were notified of this meeting of 1 August 1950 by registered letter.

The defendants stressfully contend that the statutory provisions of G.S. 153-9(17) are not binding on municipalities, because the Title or Caption of the Act amending G.S. 153-9(17), enacted by the General Assembly in Chapter 1208, 1949 Session Laws, is entitled "an act to amend section 153-9, subsection 17 of the General Statutes of North Carolina, to provide for the closing of streets lying outside municipalities by the boards of county commissioners," and the provisions in the amendatory act as to municipalities do not correspond with the subject expressed in the title. The defendants cited in support of their argument *S. v. Blease*, 95 S.C. 403, 79 S.E. 247, and 82 C.J.S., Statutes, p. 372. The pertinent part of the decision in *S. v. Blease* was based on Art. 3, Sec. 17 of the South Carolina Constitution, which is, "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." 82 C.J.S., Statutes, pp. 372-373,

quoted in defendants' brief discusses constitutional provisions requiring the subject of a statute to be expressed in its title. These authorities are not in point for the reason that no such constitutional provision appears in the North Carolina Constitution. Art. II, Sec. 21 of the North Carolina Constitution reads: "Style of the Acts. The style of the Acts shall be 'The General Assembly of North Carolina do enact.'" G.S. 12-1 refers to public-local or private acts. Manifestly, these are not applicable to the question here discussed.

At the common law in England the title of an act was no part of the act. *S. v. Welsh*, 10 N.C. 404; *S. v. Woolard*, 119 N.C. 779, 25 S.E. 719; 50 Am. Jur., Statutes, Sec. 159. In this section of Am. Jur., it is said: "Originally, in England, titles were given to statutes by the judges who drew up the statutes from the records of Parliament. In the reign of Henry VI, bills in the form of statutes without titles were introduced." In *S. v. Woolard, supra,* it is said: "Indeed, prior to the eleventh year of Henry VII (1495), titles were very rarely prefixed at all. But now the title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act. Indeed, so far is this true, and so important has the title become, that in many State Constitutions there are now provisions to guard against the title of bills being misleading. *Ratione cessante, cessat ipsa lex.* Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered." This Court said in *In re Chisholm's Will,* 176 N.C. 211, 96 S.E. 1031: "Though the caption of a statute may be called in aid of construction, it cannot control the text when it is clear."

The defendants' contention that G.S. 153-9(17) does not apply to municipalities is untenable.

The defendants further contend that, even if the statutory provisions as to notice set forth in G.S. 153-9(17) apply to municipalities, G.S. 160-200(11) gives power to a municipality to close its streets, and does not provide for the giving of notices, and that in closing a street a municipality has the choice as to whether it will proceed under G.S. 153-9(17) or G.S. 160-200(11).

Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *In re Blalock,* 233 N.C. 493, 64 S.E. 2d 848; 82 C.J.S., Statutes, Sec. 366.

"It may be presumed to have been the intention of the legislature that all its enactments which are not repealed should be given effect." 50 Am. Jur., Statutes, Sec. 362.

The object of all interpretations of statutes is to ascertain the meaning of the legislative intention, and to enforce it, if it does not violate constitutional provisions. It seems to us that there is no difficulty in harmonizing the provisions of G.S. 153-9(17) and G.S. 160-200(11), and that the true legislative intent is that if a municipality wishes to close a street, or a part thereof, the notices required by G.S. 153-9(17) must be given. Such an intent is fair and just, because it affords all interested parties an opportunity to be heard. To adopt the view contended for by defendants would require us to strike down the provisions as to notice set forth in G.S. 153-9(17). The lower court correctly decided that the resolution or ordinance passed by the Commissioners of the Town of Blowing Rock on 1 August 1950, was void, because the notices of such meeting as required by G.S. 153-9(17) were not given.

The quitclaim deed of Broyhill, and wife, could not revoke the accepted dedication by the Town of Blowing Rock of Valley View Road, as shown on the map of the subdivision, because the town has not lawfully consented to a revocation. *Rowe v. Durham, supra; Somersette v. Stanaland,* 202 N.C. 685, 163 S.E. 804; *McElroy v. Borough of Ft. Lee, supra; Keiter v. Berge, supra; Rose v. Elizabethtown, supra.*

The defendants contend that the lower court erred in failing to pass upon their pleas of estoppel and of the statute of limitations. The case was heard upon stipulations and admissions in the pleadings. There is no admission in the pleadings that plaintiff is estopped to maintain this action, or that its action is barred by the statute of limitations. No reference to those pleas occur in the stipulations. The defendants further contend that the plaintiff did not allege that the resolution of 1 August 1950, was *ultra vires,* or illegal, and that no notice of the meeting, as required by G.S. 153-9(17), was given. However, the fact that the required notice was not given is stated in the stipulations.

When a case is tried upon an agreed statement of facts, it "is in the nature of a special verdict, admitting there is no dispute as to the facts and constituting a request by each litigant for a judgment which each contends arises as a matter of law on the facts agreed. . . ." *Sparrow v. Casualty Co., ante,* 60, 89 S.E. 2d 800.

The lower court decided the case, and rendered judgment, upon the stipulations agreed upon by the parties. Questions of failure to make certain allegations in the complaint, of estoppel and of the Statute of Limitations were not presented to the lower court for decision by the agreed stipulations.

The judgment states that "the court, at the request and insistence of counsel for both plaintiff and defendants, went with both counsel upon the premises, viewed the terrain and road in question and made the following observations." The defendants now manfully contend that the court erred in putting its observations in its judgment. Conceding that such observations have no place in the judgment, because "the court is not permitted to infer or deduce further facts from those stipulated" (*Sparrow v. Casualty Co., supra*), such observations were harmless, and have had no effect on our decision.

When a street of a municipality is unlawfully obstructed, the municipality may maintain a suit for mandatory injunction to remove the obstruction. *Adams v. Commissioners of Town of Trappe,* 204 Md. 165, 102 A. 2d 830; 64 C.J.S., Mun. Corp., p. 187. See: *Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889.

The assignments of error of the defendants are overruled. The judgment below is

Affirmed.

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ROXANNA DANIEL RICHTER v. CARL M. HARMON, JR.

(Filed 13 January, 1956.)

**1. Constitutional Law § 28: Divorce § 21—**

The decree of a court of competent jurisdiction awarding the custody of a minor child of the marriage in an action for divorce is binding on our courts under the Full Faith and Credit Clause of the Federal Constitution, and ordinarily only the courts of the state rendering the decree have jurisdiction to amend or modify it.

**2. Same—**

Where decree awarding custody of the minor child of the marriage is entered in a divorce action in another state by a court of competent jurisdiction obtaining jurisdiction of defendant by publication, but subsequent thereto plaintiff moves to another state, and the minor child thereafter visits her father in this State, the courts of the state in which the divorce decree was entered no longer have jurisdiction and can make no modification of its custody decree that would have any extraterritorial effect, and therefore the custody decree may be modified for change of conditions transpiring subsequent to its rendition by the courts of a state acquiring jurisdiction of the child.

**3. Domicile § 3—**

Where the mother of a minor child is awarded its custody in a divorce action, the domicile of the child is that of the mother.

**4. Infants § 21—**

Any action as it relates to the custody of a child is in the nature of an *in rem* proceeding, and the child must be present in the State and within

the jurisdiction of a court of competent jurisdiction before such court may render a valid decree awarding its custody.

**5. Same—**

The courts of the state in which an infant is residing have jurisdiction to determine the right to its custody even though the domicile of the child be elsewhere.

**6. Same: Divorce § 21—Court of state of child's residence may modify custody decree for changed conditions when state rendering decree has lost jurisdiction.**

A decree of divorce was entered by a court of competent jurisdiction having jurisdiction of the parties, awarding the custody of the child of the marriage to its resident mother. Thereafter, the mother moved to another state, and the father of the child, with the consent of the mother, brought the child to his residence in this State. *Held:* The custody decree is entitled to full faith and credit and is conclusive so long as the circumstances attending its rendition remain the same, but has no controlling effect as to facts and conditions arising subsequent to its rendition, and therefore, in a special proceeding instituted in this State by the mother to enforce the custody decree, in which respondent alleges facts transpiring subsequent to the decree, and asserts that petitioner is not a proper and suitable person to have custody of the child, the court has jurisdiction to determine whether or not conditions and circumstances have so changed since the entry of the custody decree as to justify, in the best interest of the child, the awarding of the custody of the child to respondent.

**7. Infants § 22—**

The courts of this State will not hesitate to award the custody of a minor child to a nonresident parent if it is found that it will be for the best interest of the minor child to do so.

APPEAL by respondent from *Carr, J.*, in Chambers at Graham, North Carolina, 4 June, 1955. From ALAMANCE.

This is an action instituted in the Superior Court of Alamance County by the petitioner pursuant to G.S. 50-13 whereby she seeks to enforce a Florida decree, entered in conjunction with a divorce decree, for the custody of Roxanne Adrienne Harmon.

The pertinent findings of the court below are as follows:

1. The petitioner and respondent were married in Nashville, Tennessee, on 22 December, 1945, and moved to the State of Florida to live in September 1947 where they lived together as husband and wife until on or about 2 January, 1953.

2. The petitioner is a native of Florida and the respondent is a native North Carolinian, and the only child born of their marriage was Roxanne Adrienne Harmon, who was born in Florida on 13 April, 1952, while her parents were actually and legally residing in that State.

3. On or about 2 January, 1953, the respondent separated himself from the petitioner and their minor child while living in Gainesville,

Florida, and returned to North Carolina where he obtained employment. He still resides in North Carolina and is employed in the City of Burlington.

4. About 2 February, 1953, the petitioner came to Burlington, North Carolina, and lived with the respondent in the home of his parents. During this time the minor child was living in Florida with petitioner's mother. The petitioner and respondent went to Florida on or about 16 February, 1953, and brought the child to North Carolina. The petitioner and child resided in respondent's home for two days when the petitioner had an argument with the parents of her husband and took the child and returned to Florida where she established her residence at Melbourne. She obtained employment with the United States Government and supported herself and child.

5. The petitioner instituted an action for absolute divorce against the respondent in the Circuit Court of Brevard County, Florida, on 21 August, 1953, in which she prayed for the custody and care of the minor child born of the marriage. The court was one of competent jurisdiction.

6. The petitioner advised the respondent by registered mail of the pendency of the divorce action, and the Clerk of the Circuit Court for Brevard County, Florida, mailed a copy of the Bill of Complaint and Notice to Appear in said action to respondent at 153 E. Holt Street, Burlington, North Carolina, which were received by the respondent. The respondent was not personally served but was lawfully served by publication.

7. The respondent failed to answer or demur to the Bill of Complaint in said divorce action and on 13 October, 1953, a decree was rendered in said action granting an absolute divorce to the petitioner and awarding her the exclusive custody of Roxanne Adrienne Harmon.

8. The respondent has taken no action to have the Florida divorce decree vacated or modified in any respect and the decree has not been modified.

9. The respondent has remarried and is now living in Burlington, North Carolina, with his second wife.

10. In April 1954 petitioner went to Washington, D. C., for the purpose of seeking employment there, and left her child with her mother in Florida. The early part of May 1954, petitioner called the respondent over the telephone and stated to him that she was seeking employment in the Washington and Baltimore area and would be willing for him to have the child visit him in Burlington for a short time while she was getting located either in Washington or Baltimore, and advised him that she would instruct her mother in Florida to let him have the child for a visit. Respondent went to Florida and got the child from her grandmother and brought her to North Carolina the latter part of May

1954, and the child has remained in his home since that time. The petitioner has made formal request for the surrender of the child but the respondent refuses to do so.

11. The petitioner married Charles B. Richter on 4 February, 1955, with whom she now resides in Baltimore, Maryland.

12. Since the rendition of the divorce decree in the Florida court, referred to hereinabove, the petitioner and the minor child in controversy have not been residents of the State of North Carolina, neither have they been domiciled in this State.

From the foregoing findings of fact the court held that the decree of the Florida court should be accorded full faith and credit in this State, pursuant to our Federal Constitution, and entered judgment directing the respondent to surrender Roxanne Adrienne Harmon to petitioner. The respondent appeals, assigning error.

*H. Clay Hemric for petitioner, appellee.*

*Carroll & Pickard for respondent, appellant.*

DENNY, J. If the petitioner were still a citizen and resident of the State of Florida the decree in that State awarding the custody of the minor child, Roxanne Adrienne Harmon, to her would be binding on our courts under the full faith and credit clause of the Constitution of the United States. *Allman v. Register,* 233 N.C. 531, 64 S.E. 2d 861; *Sadler v. Sadler,* 234 N.C. 49, 65 S.E. 2d 345.

In the *Allman case* we said: "It appears that the Virginia Court had jurisdiction over the parties to this proceeding, including the minor children involved, at the time the plaintiff's divorce decree was granted and she was awarded the full care and custody of her children. Therefore, so long as the plaintiff and her children are domiciled in that State, and the decree awarding her the custody of her children remains unmodified, such decree is binding on our courts under the full faith and credit clause of the Constitution of the United States. *In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32; *McMillin v. McMillin,* 114 Col. 247, 158 P. 2d 444, 160 A.L.R. 396; *Cole v. Cole,* 194 Miss. 292, 12 So. 2d 425; *Parsley v. Parsley,* 189 La. 584, 180 So. 417; *Fraley v. Martin* (Tex. Civ. App.), 168 S.W. 2d 536; *Ex Parte Mullins,* 26 Wash. 2d 419, 174 P. 2d 790; 27 C.J.S., Divorce, Sec. 328, p. 1284. And the only forum in which the decree awarding custody of these children to the plaintiff may be amended or modified, is the court in which the decree was entered. *Howland v. Stitzer,* 231 N.C. 528, 58 S.E. 2d 104."

In the instant case, however, the petitioner is no longer a resident of the State of Florida but a citizen and resident of the State of Maryland. The Florida court no longer has jurisdiction of the petitioner, the

respondent, or of the minor child whose custody was awarded to the petitioner herein. Consequently, that court, under the circumstances, could make no modification of its custody decree that would have any extraterritorial effect, *In re Alderman,* 157 N.C. 507, 73 S.E. 126, 39 L.R.A. (N.S.) 988, thereby preventing the courts of another State from making a new disposition of the child on a change of circumstances showing such course essential to the child's best interest. *McMillin v. McMillin,* 114 Col. 247, 158 P. 2d 444, 160 A.L.R. 396; *Milner v. Gatlin* (1924 Tex.), 261 S.W. 1003; *Goldsmith v. Salkey,* 131 Tex. 139, 112 S.W. 2d 165, 116 A.L.R. 1293; *Sanders v. Sanders,* 223 Mo. App. 834, 14 S.W. 2d 458; *Dorman v. Friendly,* 146 Fla. 732, 1 So. 2d 734; 27 C.J.S., Divorce, Section 329, page 1284; 17 Am. Jur., Divorce and Separation, section 688, page 521; Anno. 4 A.L.R. 2d 85. The decree of divorce, however, is valid and the change of domicile did not divest such decree of the right to full faith and credit in a sister State. *In re Biggers,* 228 N.C. 743, 47 S.E. 2d 32; *S. v. Williams,* 224 N.C. 183, 29 S.E. 2d 744; *Williams v. North Carolina,* 317 U.S. 287, 87 L. Ed. 279. Even so, the minor child has a rather unusual status at the present time. Her parents having been divorced, and her custody awarded to the mother, the petitioner, her domicile must be conceded to be that of her mother who is domiciled in the State of Maryland. *Allman v. Register, supra.* However, Roxanne Adrienne Harmon has never been in Maryand. Therefore, the courts of that State do not have and never have had any jurisdiction over her. *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *Sadler v. Sadler, supra; Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798; *Burrowes v. Burrowes,* 210 N.C. 788, 188 S.E. 648. Domicile alone cannot confer jurisdiction over the person. Any action as it relates to the custody of a child is in the nature of an *in rem* proceeding, and the child must be present in the State and within the jurisdiction of a court of competent jurisdiction before such court may render a valid decree awarding its custody. *Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228; *Coble v. Coble, supra; Burrowes v. Burrowes, supra.*

The minor child in controversy in this proceeding has resided in the home of her father in this State since the latter part of May 1954. According to the petition filed herein, she was brought into this jurisdiction with the consent of the petitioner and at her suggestion. It is true, according to the finding of the court below, the petitioner intended that the child should live with the respondent only until such time as she secured employment and got located in the Washington-Baltimore area, at which time it was understood that the child would be returned to her. But the fact that the respondent failed to return the child to the petitioner makes it necessary for us to determine whether the presence of the child in this State since May 1954 is sufficient to give the courts of

the State jurisdiction to determine the question of her custody in light of the allegations in the answer to the petition to the effect that the petitioner is not a fit or suitable person to have the custody of the child.

The petitioner bases her claim to custody solely on the Florida decree and insists that we must give full faith and credit to that decree. For the reasons heretofore stated, we do not concur in that view except as to the circumstances and conditions existing when the decree was entered. On the other hand, the respondent in his answer to the petition alleges that he went to Florida in May 1954 and got the minor child, Roxanne Adrienne Harmon, who had been abandoned and deserted by her mother; that he never, at any time, promised to return the child to the petitioner. He further alleges that by reason of the things set out in his answer that the "petitioner has fully and completely demonstrated the fact that she is incapable and incompetent and that she is not a fit, proper nor suitable person to have the care and custody of the minor child . . ."

In 43 C.J.S., Infants, section 5, page 52, *et seq.*, it is said: "Jurisdiction to control, and determine and regulate the custody of, an infant is in the courts of the state where the infant legally resides, and the courts of another state are without power in the premises, and cannot obtain jurisdiction for such purpose over persons temporarily within the state. However, if the child is actually within the jurisdiction of the court, the court may determine claims as to his custody, although his legal domicile is elsewhere, and regardless of the domicile of its parents . . ."

In the case of *Finlay v. Finlay,* 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937, *Cardozo, J.,* in speaking for the Court, said: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. *Woodworth v. Spring,* 4 Allen, 321, 323; *White v. White,* 77 N.H. 26, 86 Atl. 353; *Hanrahan v. Sears,* 72 N.H. 71, 72, 54 Atl. 702; *Re Hubbard,* 82 N.Y. 90, 93. For this, the residence of the child suffices, though the domicile be elsewhere." *Bragassa v. Bragassa,* 197 Ga. 140, 28 S.E. 2d 133; *People ex rel. Noonan v. Wingate,* 376 Ill. 244, 33 N.E. 2d 467; *Wear v. Wear,* 130 Kan. 205, 285 P. 606, 72 A.L.R. 425; *Sheehy v. Sheehy,* 88 N.H. 223, 186 A. 1, 107 A.L.R. 635; *Wicks v. Cox,* 146 Tex. 498, 208 S.W. 2d 876, 4 A.L.R. 2d 1; Anno. 4 A.L.R. 2d, section 24, page 41; 27 Am. Jur., Infants, section 105, page 827.

We hold that since the minor child had been a resident of North Carolina for almost a year prior to the institution of this proceeding, coupled with the further fact that the petitioner, who had heretofore been given custody of the child by a court of competent jurisdiction in another State, came into this State and invoked the jurisdiction of our courts

and instituted this proceeding, the court in which she instituted the proceeding does have jurisdiction of the child and may consider any change or circumstances that have arisen since the entry of the Florida decree on 13 October, 1953, and to determine what is for the best interest of the child and to award custody accordingly. But, in disposing of the custody of the minor child in controversy, the Florida decree awarding her custody to the petitioner is entitled to full faith and credit as to all matters existing when the decree was entered and which were or might have been adjudicated therein. It is said in 17 Am. Jur., Divorce and Separation, section 688, page 522: ". . . where a decree of divorce fixing the custody of the children of the marriage is rendered in accordance with the laws of another state by a court of competent jurisdiction, such decree will be given full force and effect in other states as long as the circumstances attending the rendition of the decree remain the same. The decree has no controlling effect in another state as to the facts and conditions arising subsequent to its rendition." *In re Cameron's Guardianship,* 66 Cal. App. 2d 884, 153 P. 2d 385; *Freund v. Burns,* 131 Conn. 380, 40 A. 2d 754; *Boone v. Boone,* 132 F. 2d 14; *Drake v. Drake,* 187 Ga. 573, 1 S.E. 2d 573; *Kniepkamp v. Richards,* 192 Ga. 509, 16 S.E. 2d 24; *Callahan v. Callahan,* 296 Ky. 444, 177 S.W. 2d 565; *Cole v. Cole,* 194 Miss. 292, 12 So. 2d 425; *Hachez v. Hachez,* 124 N. J. Eq. 442, 1 A. 2d 845; *In re Jiranek,* 267 App. Div. 607, 47 N.Y.S. 2d 625; *Miller v. Schneider* (1943 Tex. Civ. App.), 170 S.W. 2d 301; *Sheehy v. Sheehy, supra;* Nelson on Divorce and Annulment, 2nd Ed., section 33.66, page 567, *et seq.;* Anno. 72 A.L.R. 442; 116 A.L.R. 1300; 160 A.L.R. 400.

The courts of this State will not hesitate to award the custody of a minor child to a nonresident parent if it is found that it will be for the best interest of the minor child to do so. *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918.

The judgment entered below is set aside and this cause remanded for further hearing to the end that it may be determined whether or not conditions and circumstances have so changed since the entry of the Florida decree that it will be for the best interest of Roxanne Adrienne Harmon to be placed in the custody of the respondent. If no change of condition is found to have occurred, justifying the change of custody, the petitioner will be entitled to an order in accord with the Florida decree.

In view of the conclusion we have reached, the parties to this proceeding may desire to recast their pleadings, and they will be permitted to do so if so advised.

Error and remanded.

A. V. SANDERS, ADMINISTRATOR OF THE ESTATE OF JAMES LEVERNE SANDERS, DECEASED, v. ALFORD CHAVIS.

(Filed 13 January, 1956.)

**1. Judgments § 27a—**

Upon motion to set aside default judgment for surprise and excusable neglect under G.S. 1-220, findings of fact as to conferences between a representative of defendant's insurer and the attorney for plaintiff have no bearing upon defendant's failure to defend the action and will be set aside, since defendant's conduct must be judged by what he did and not what a person not a party to the action did.

**2. Appeal and Error § 40d—**

A finding of fact not germane to the inquiry may be set aside.

**3. Judgments § 27a—**

Averments that defendant's car involved in the accident was covered by an assigned risk policy of insurance and that the insurer had no knowledge of the institution of the action against insured and no opportunity to defend its insured, do not tend to justify defendant's failure to defend the action or his failure to notify his insurer to do so.

**4. Same—**

Where the evidence is sufficient to support the court's finding that plaintiff administrator did nothing to hinder, delay or interfere with the defendant in the defense of the action, and that defendant's failure to defend the action or notify his insurer to do so was inexcusable, the findings support the denial of defendant's motion under G.S. 1-220 to set aside the default judgment, notwithstanding that the court's finding that the evidence of both parties tended to show that plaintiff advised defendant to contact his insurance agent was erroneous in that only plaintiff's evidence tended to support such finding.

**5. Appeal and Error § 40d—**

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal.

**6. Judgments § 27a—**

Upon motion to set aside a default judgment under G.S. 1-220, a finding upon supporting evidence that defendant's failure to defend the action was inexcusable renders the existence of a meritorious defense immaterial.

APPEAL by defendant from *Stevens, J.*, in Chambers at Lumberton, North Carolina, on 20 April, 1955. From HOKE.

Civil action to recover for the alleged wrongful death of James Leverne Sanders. The facts involved in this appeal are set out in the findings of the court below and are as follows:

"1. That on and prior to December 23, 1953, the defendant, Alford Chavis, was the owner of a 1947 Chevrolet 2-door Fleetmaster automobile.

"2. That on or about the 16th day of October, 1953, the Travelers Insurance and Indemnity Company, under the Motor Vehicles Safety and Financial Responsibility Act of 1947 of North Carolina (G.S. 20-224 through 20-279) issued a liability insurance policy upon an automobile owned by the defendant, Alford Chavis, and that said policy covered the automobile above mentioned.

"3. That on the 23rd day of December 1953 the above described automobile, covered by the above named insurance which was in full force and effect at that time, was in an accident, and that in the accident, James Leverne Sanders, the plaintiff's intestate, was an occupant of the said automobile and was killed in the said accident.

"4. That the plaintiff A. V. Sanders is the duly qualified Administrator of the Estate of James Leverne Sanders.

"5. That the attorney for the plaintiff A. V. Sanders, Administrator, had several conferences with an Agent of the Travelers Insurance and Indemnity Company looking toward a settlement of the death claim without the necessity of a court action, and that when it became apparent to both sides that a settlement could not be reached, the attorney for the plaintiff notified the agent of the Travelers Insurance and Indemnity Company that he would file action just as soon as the papers could be prepared, and that action was commenced in Hoke County, North Carolina, the home county of the defendant, Alford Chavis, within less than ten days from the time the attorney notified the agent of the Travelers Insurance and Indemnity Company that he would start action as soon as possible.

"6. That on the 16th day of August 1954 the plaintiff commenced action in the Superior Court of Hoke County, North Carolina, against the defendant, alleging that the defendant's negligence was the sole and proximate cause of the death of the plaintiff's intestate.

"7. That summons was issued by the Superior Court of Hoke County on the 16th day of August, 1954, and was personally served upon the defendant by the Sheriff of Hoke County on the 17th day of August 1954, and that a copy of the summons, together with a copy of the verified complaint, was left with the defendant on the 17th day of August 1954; but that the defendant never notified the insurance company that he had been sued and never turned the suit papers over to the insurance company.

"8. That the defendant, Alford Chavis, went to the plaintiff, A. V. Sanders, when the Sheriff of Hoke County served the suit papers upon him and undertook to discuss the matter with him but there is no evidence before the Court that A. V. Sanders did or said anything to the defendant, Alford Chavis, that would hinder, delay or defeat the said Alford Chavis in his defense of the said action. In fact, all the evi-

dence, both for the defendant, and for the plaintiff, shows that A. V. Sanders told him to contact his insurance agent. And the Court finds as a fact that A. V. Sanders did not hinder, delay, or interfere in any way with the defendant in the defense of said action.

"9. That J. H. Austin is the agent of the Travelers Insurance and Indemnity Company, and that J. H. Austin sold the defendant the insurance policy referred to above.

"10. That J. H. Austin lives in the Town of Raeford, Hoke County, North Carolina, and is well known to the defendant in this case.

"11. That the defendant is a person of Indian descent, and is not an educated man, but that he works regularly and is married and has a family, and is well able to look after, and does look after the ordinary business affairs of life, which includes buying and trading automobiles, and buying insurance upon said automobiles, and having it transfererd from one automobile to another, and that he is well able to, and did understand what the above entitled action meant when the papers were served upon him.

"12. That the defendant did not answer the plaintiff's complaint, or did not demur to said action within the thirty days allotted to him to file answer or other pleadings, by the General Statutes of North Carolina, and no additional time was granted him in which to file pleadings in said matter.

"13. That on the 20th day of September 1954 the plaintiff took judgment by default and inquiry before Honorable J. B. Cameron, Clerk of Superior Court of Hoke County, North Carolina.

"14. That on the 18th day of November 1954 Honorable J. B. Cameron, Clerk of Superior Court of Hoke County, signed an amendment, which was a clarifying amendment to the judgment by default and inquiry entered on the 20th day of September 1954.

"15. That at the November 1954 Term of Superior Court of Hoke County, issues were submitted in the above entitled matter to a jury duly sworn and impaneled to try the issues, and the jury answered the issues in favor of the plaintiff in the amount of $50,000.

"16. That at the November 1954 Term of Superior Court of Hoke County, Judge W. A. Leland McKeithen, Judge holding the courts of said county, signed a judgment in which the plaintiff was given judgment against the defendant in the sum of $50,000.

"17. That the defendant served notice on the plaintiff on the 10th day of March 1955, that he would make a motion before Honorable Henry L. Stevens, Jr., Judge presiding over the courts of the Ninth Judicial District, at Chambers, in the Courthouse in Lumberton, North Carolina, on the 11th day of April 1955, at 2:30 o'clock p.m., to set the judgment aside rendered in the above entitled matter at the November 1954 Term

of Superior Court of Hoke County, on the grounds of mistake, inadvertence, surprise, or excusable neglect, in accordance with G.S. 1-220.

"18. That the plaintiff has answered the defendant's motion, and has denied the material parts of said motion.

"19. That Alford Chavis, in his affidavit, says that he was not driving the automobile at the time of the wreck, but was asleep in the back seat and James Sanders was driving at the time he went to sleep, and since there is no evidence to the contrary, the Court, for the purpose of this hearing, finds that to be a fact.

"20. That both the defendant and the plaintiff have submitted affidavits before the court to substantiate their positions."

Upon the above facts, the court concluded that the neglect on the part of the defendant in failing to defend the action of the plaintiff was inexcusable, but that the defendant has a meritorious defense. Therefore, the court denied the motion to set aside the judgment rendered in Hoke Superior Court at the November Term 1954. From the judgment entered the defendant appeals, assigning error.

*Coble Funderburk for plaintiff, appellee.*
*McLean & Stacy for defendant, appellant.*

DENNY, J. The defendant excepts to the failure of the court below to find certain facts in accord with his prayer therefor, and also excepts to the second, third, fifth, eighth, ninth, tenth and eleventh findings of fact as set out hereinabove. He further excepts to the first conclusion of law, the denial of the motion to set aside the judgment entered at the November Term 1954 of the Superior Court of Hoke County, and to the judgment entered pursuant to the findings of the court and its conclusion of law.

The primary question presented for determination on this appeal is simply this: Is there any competent evidence to support the court's finding that the neglect on the part of the defendant in failing to defend this action was inexcusable?

Certainly some of the findings with respect to insurance coverage on the car involved in the accident on 23 December, 1953, and certain conferences between a representative of the insurance company and the attorney for the plaintiff are not germane to the question before us. This is particularly true with respect to any conferences between an agent of the insurance company and the plaintiff's attorney. The insurance company is not a party to this action. Hence, finding of fact No. 5 will be set aside since it does not have any bearing on the conduct of this defendant with respect to his failure to defend the action. The defendant's conduct must be judged by what he did and not what some-

one, not a party to the action, did. *Earle v. Earle,* 198 N.C. 411, 151 S.E. 884.

The defendant introduced in his behalf an affidavit signed by an assistant claim manager of The Travelers Indemnity Company to the effect that such company, because of the assigned risk, issued its policy of indemnity insurance covering an automobile owned by the defendant, Alford Chavis; that the automobile insured in the name of the defendant by his company was wrecked and that the affiant is advised that James Leverne Sanders was killed as a result of said wreck; that The Travelers Indemnity Company had no knowledge of the institution of this action and no opportunity to defend its insured, Alford Chavis.

Conceding all this to be true, there is nothing in this affidavit that tends to justify the defendant's failure to defend the action or to notify his insurer to do so. Neither do we construe the finding based on this affidavit to be prejudicial to the defendant.

The defendant, in support of his motion, submitted an affidavit in which, among other things, he said: "I took them (the papers) to Mr. A. V. Sanders and asked what the papers were and what to do with them. I cannot read or write. Mr. Sanders looked at the papers and said he did not know what to do with them and that probably my insurance man would be around in a day or two. I did not know the name of the insurance company or the name of the adjuster who had investigated the accident and therefore I did not know how to get in touch with the insurance company . . . I went to Fayetteville, N. C. the first Saturday after getting the papers to try and locate the adjuster but I could not remember the name."

A. V. Sanders submitted an affidavit in which he said: "That he is the Administrator of the Estate of James Leverne Sanders; that on or about the 17th day of August, 1954, after the Sheriff had served the summons and a copy of the summons, together with a copy of the complaint, upon the defendant, the defendant asked the affiant about the papers; that affiant told him that affiant was the one bringing the action, and therefore could not advise him as to what to do, but told the defendant to see his insurance agent who would advise him what to do in the matter; that the defendant, Alford Chavis, never discussed the matter with the affiant further."

A further affidavit by Alford Chavis was introduced in which he said: "That he knows J. H. Austin, agent for the Travelers Indemnity and Insurance Company (The Travelers Indemnity Company); that he purchased the insurance on the 1947 Chevrolet in which he, James Leverne Sanders, and Albert Rufus Sanders were riding at the time of the accident, from J. H. Austin; that J. H. Austin lives in Raeford, North Carolina, and that the affiant also lives in Raeford, North Caro-

lina; that the said J. H. Austin lives within two miles of the affiant, Alford Chavis' home."

Other affidavits were submitted tending to show that Alford Chavis is a man of average intelligence; has worked for the same employer for more than ten years; that he has a wife and one child; that he looks after all the regular business of his home; that he works regularly and has above average business intelligence for a man with little education; that he trades cars himself without asking the approval of anyone and makes good trades; that he buys his own insurance on cars and has sufficient intelligence and business ability to know what "to do with the papers served on him by the Sheriff of Hoke County" and what the action meant.

We concede, as contended by the defendant, that the eighth finding of fact, to the effect that "all the evidence both for the defendant and for the plaintiff shows that A. V. Sanders told him (the defendant) to contact his insurance agent," is not supported by the defendant's evidence. Nevertheless, the plaintiff's evidence was sufficient to support the finding that the plaintiff did tell the defendant to contact his insurance agent. Moreover, we think the evidence contained in the affidavits offered by the plaintiff is sufficient to sustain the finding that the plaintiff did nothing to hinder, delay, or interfere with the defendant in the defense of the action in controversy, and that the pertinent findings bearing on the primary question presented for our determination are supported by competent evidence. Therefore, such findings are binding on review. *Perkins v. Sykes,* 233 N.C. 147, 63 S.E. 2d 133; *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *Carter v. Anderson,* 208 N.C. 529, 181 S.E. 750.

In our opinion, the remaining assignments of error present no error sufficiently prejudicial to the defendant to justify a reversal of the judgment below.

In light of the finding that the defendant's negligence was inexcusable, the fact that he may have a meritorious defense, and the court so found, becomes immaterial. *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d 849; *Pate v. Hospital,* 234 N.C. 637, 68 S.E. 2d 288; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67.

We do not consider what defenses the defendant's insurer may interpose by reason of the failure of Alford Chavis to notify it of the institution of this action against him, by reason of the terms of the policy or pursuant to the provisions of the Motor Vehicle Safety and Responsibility Act (G.S. 20-224 through 20-279). These are matters which cannot be adjudicated in this action. Therefore, any finding in this action with respect to the existence of insurance and the conduct of the

insurer in relation thereto, shall be without prejudice to the rights of such insurer in any other action relating thereto.

The judgment below is

Affirmed.

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ODELL WEAVIL, ADMINISTRATOR OF DENNIS FREEMONT WEAVIL, DECEASED, v. CLYDE W. MYERS AND C. W. MYERS TRADING POST, INC.

(Filed 13 January, 1956.)

**1. Pleadings § 19c—**

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, it will survive a demurrer based on the ground that it does not allege a cause of action, since a complaint cannot be overthrown by a demurrer unless it is totally lacking in sufficiency.

**2. Pleadings § 15—**

Upon demurrer a complaint will be liberally construed with a view to substantial justice between the parties, and its allegations of fact will be taken as true with every reasonable intendment in favor of the pleader, but a demurrer does not admit conclusions or inferences of law.

**3. Automobiles §§ 24, 35—Allegations held sufficient to state cause of action for failure of warning device at end of lumber protruding from truck.**

Allegations to the effect that the lumber loaded upon a truck extended more than four feet beyond the rear of the body of the truck, that defendant failed to display a red flag, reflector or light at the end of the lumber, plainly visible under normal atmospheric conditions at least 200 feet from the rear of the truck, in violation of G.S. 20-117, *held* sufficient to state a cause of action for negligence in this respect in an action for wrongful death resulting when intestate ran into the rear of the protruding lumber at nighttime, since the violation of the statute was negligence and, upon the facts alleged, consequences of an injurious nature might have been expected as a result thereof.

**4. Evidence § 5—**

The courts will take judicial notice of the fact that about 7:00 p.m. on 26 November, 1954, in North Carolina, was within the time between one-half hour after sunset and one-half hour before sunrise.

**5. Negligence § 11—**

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, but suffices for this purpose if it contributes to the injury as a proximate cause, or one of them.

**6. Automobiles § 42d—**

Whether a motorist is guilty of contributory negligence as a matter of law in colliding with a vehicle standing on the traveled portion of a highway must be determined largely upon the facts of each particular case in accordance with the standard of care and prevision of a reasonably prudent man under like circumstances.

**7. Automobiles § 7: Negligence § 9½—**

It is a well settled principle of law that a person is not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law.

**8. Automobiles §§ 10, 35—Allegations held not to show contributory negligence as matter of law in hitting truck stopped on highway.**

Allegations to the effect that defendant's truck was being driven over 45 miles per hour when the front and rear lights went out, that the driver stopped within about 54 feet on or near the center portion of the hard surface, that at the time or just before the driver stopped, he turned on the left-turn signal, that the truck's load of lumber protruded some four feet beyond the body of the truck without light or warning device, and that plaintiff's intestate, following on the highway, collided with the rear of the lumber, *held* not to disclose contributory negligence as a matter of law on the part of intestate.

**9. Parties § 12—**

Where the individual defendant is mentioned only in the captions of the summons and complaint, without any reference to him in the body of the complaint, his name should be stricken.

APPEAL by plaintiff from *Johnston, J.*, July Term 1955 of FORSYTH.

Civil action by administrator to recover damages for wrongful death heard upon a demurrer.

The caption of the case, as it appears in the Record, gives two defendants: Clyde W. Myers and C. W. Myers Trading Post, Inc. Except in the caption, the complaint does not mention the name of Clyde W. Myers. The complaint alleges that the defendant C. W. Myers Trading Post, Inc., is a corporation, refers throughout the complaint to the defendant, and prays judgment alone against C. W. Myers Trading Post, Inc. The demurrer, and the judgment of the court sustaining it, refer to one defendant. The captions on the briefs of appellee and appellant have only the corporate defendant's name. Apparently the demurrer was filed by the corporate defendant alone.

From judgment sustaining the demurrer, the plaintiff appeals, assigning error.

*Deal, Hutchins & Minor for Plaintiff, Appellant.*
*Jordan & Wright for Defendant, Appellee.*

PARKER, J. The material allegations of the complaint are substantially these:

About 7:00 p.m. on 26 November 1954, the defendant C. W. Myers Trading Post, Inc., owned a large Reo Truck with a flat, wooden bed, which it used in hauling lumber, and which at the time was being driven on State Highway 311 about three miles from Winston-Salem, North Carolina, with a large load of rough lumber on it by Zachary Battle, a servant and agent of the corporate defendant, within the scope of his employment, in furtherance of his master's business, and for the purpose for which the corporate defendant owned and maintained the truck. The bed of the truck was four feet, or more, above the highway, and an improvised second-hand bed had been placed upon the chassis and frame of the truck, which was 12 inches, or more, longer than the framework of the truck. The rough lumber on the truck extended ten feet, or more, above the bed of the truck. The lumber was 12 feet, or more, in length with two lengths of the lumber placed end to end on the truck. The load of lumber extended more than four feet beyond the bed or body of the truck. The corporate defendant should have had at the end of this load of lumber in such a position as to be clearly visible at all times from the rear of such load a red flag, red reflector, or red light, or other warning device, plainly visible under normal atmospheric conditions at least two hundred feet from the rear of the truck, and it violated the statute in this respect as set forth in G.S. 20-117.

About three miles from Winston-Salem the truck was being driven at a speed greater than 45 miles an hour, when the front and rear lights of the truck went out. Whereupon the driver, Zachary Battle, without giving any signal that he intended to stop, brought the truck to a sudden and abrupt stop, within a distance of about 54 feet, on or near the center of the paved portion of the highway, when he could have driven the truck off the paved portion of the highway and on the right shoulder, where there was ample space. Simultaneously Zachary Battle turned on his left-turn signals on the truck, indicating a forward movement of the truck to the left, when he had no intention of turning or driving forward. Plaintiff's intestate following in his Ford automobile ran into the rear of the truck, and received injuries resulting in death. Zachary Battle, and his helper, put a reflector, flare and fusee 200 feet in front of the parked truck, but none to the rear of the truck, though they had sufficient time to do so. The defendant, and its agents, knew, or should have known, that the color of the highway, truck and lumber were about the same, and blended together. The defendant should have had reflectors placed on the rear of the lumber, so that the reflectors would disclose the presence of the truck, if its lights were not burning. That

the turning on of the left-turn signal on the truck prevented plaintiff's intestate from passing the truck on the left in safety.

That plaintiff's intestate was prevented from passing on the left side of the truck on account of the left-turn signals thereon, and was forced to turn back and follow in behind the truck, as it was supposed to turn left, but instead of turning left, the truck abruptly stopped making it impossible for him to avoid a collision. The automobile of plaintiff's intestate collided with the lumber protruding beyond the bed of the truck. The lumber penetrated the windshield of the car, and practically decapitated plaintiff's intestate, causing instant death.

The collision, and resulting death of plaintiff's intestate, was caused by no fault, or negligence on his part, but was proximately caused by the negligence of the corporate defendant. Here follow ten specific allegations of negligence based upon the facts narrated above.

The corporate defendant demurred to the complaint on two grounds: one, it appears on the face of the complaint that the defendant, and its agents, were not guilty of actionable negligence, two, that plaintiff's intestate, according to the complaint's allegations, was guilty of contributory negligence as a matter of law.

The judgment states that, the court being of the opinion that the complaint fails to state a cause of action, the demurrer is sustained.

A complaint cannot be overthrown by a demurrer, unless it is totally lacking in sufficiency. *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568; *Cotton Mills v. Mfg. Co.,* 218 N.C. 560, 11 S.E. 2d 550. 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, it will survive a demurrer based on the ground that it does not allege a cause of action. *Workman v. Workman,* 242 N.C. 726, 89 S.E. 2d 390; *Batchelor v. Mitchell,* 238 N.C. 351, 78 S.E. 2d 240; *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547.

Upon this demurrer we take the allegations of fact in the complaint as true: the demurrer does not admit conclusions, or inferences of law. *McKinley v. Hinnant, supra.*

Construing the complaint liberally "with a view to substantial justice between the parties" (G.S. 1-151), and with every reasonable intendment made in favor of the pleader (*Sparrow v. Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365), it is manifest that the complaint alleges a cause of actionable negligence against the corporate defendant sufficient to survive the first ground of assault set forth in the demurrer. The failure of the defendant to display a red light at the end of the lumber, which extended more than four feet beyond the rear of the bed or body of the truck, plainly visible under normal atmospheric conditions at least 200 feet from the rear of the truck, between one-half hour after sunset and

one-half hour before sunrise, as required by G.S. 20-117, was negligence. *Bumgardner v. Allison,* 238 N.C. 621, 78 S.E. 2d 752; *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197. We take judicial notice of the fact that about 7:00 p.m. on 26 November 1954, in North Carolina, was within the time between one-half hour after sunset and one-half hour before sunrise. 31 C.J.S., Evidence, p. 700. Plaintiff's intestate's automobile ran into the rear end of the lumber on the truck, which truck had abruptly stopped on or near the center of the highway and had a left-turn signal on, and the lumber penetrated the windshield of his automobile practically decapitating him and causing instant death. It is a fair and reasonable inference that the corporate defendant in the exercise of due care could have reasonably foreseen that the failure to have the required light at the end of the lumber on its truck, which was being driven on a public highway at night, and which might have some casualty on the road and have to stop, might result in injury or death to some person, or that consequences of an injurious nature might have been expected, and that such failure proximately caused the death of plaintiff's intestate. Without considering the other facts alleged as actionable negligence, these facts alone are sufficient to overcome the first ground of the demurrer.

The final point presented for decision is this: On the face of the complaint, is the contributory negligence of plaintiff's intestate so patent and unquestionable as to bar recovery? *Ramsey v. Furniture Co.,* 209 N.C. 165, 183 S.E. 536.

A plaintiff's negligence to bar recovery need not be the sole proximate cause of injury. It suffices, if it contributes to his injury as a proximate cause, or one of them. *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251.

In one part of the complaint it is alleged that when the front and rear lights of the truck went out, Zachary Battle brought the truck to a stop within a distance of about 54 feet—the complaint alleges the truck was going at a speed greater than 45 miles an hour—upon the right-hand side of the hard surfaced part of the highway, and simultaneously turned on the left-turn signals or left-turn lights on said truck, indicating a left turn of the truck from the highway, and plaintiff's intestate, following in his Ford automobile, ran into the rear of the truck, and was almost instantly killed.

In another part of the complaint it is alleged that Zachary Battle stopped the truck on or near the center of the paved portion of the highway, that there was ample space to turn off on the right shoulder of the highway, and that before the truck stopped Zachary Battle had an assistant to jump out of the cab, and to place flares or fusees about 200 feet in front of the truck, and that no flares or fusees were put 200 feet

to the rear of the truck, though there was ample time to do so; that at the time, or just before he stopped the truck, Zachary Battle turned on his left-turn signals, indicating his intention to make a left turn, and that plaintiff's intestate was caught in a trap, and prevented from passing on the left side of the truck on account of the left-turn signal, and was forced to turn back and follow behind the truck, but the truck instead of turning to the left, as it had indicated, abruptly stopped, making it impossible for plaintiff's intestate to avoid running into the rear end of the truck and being killed.

Whether a motorist colliding with a vehicle standing on the travelled portion of a highway is guilty of contributory negligence, as a matter of law, is a troublesome question. The test of liability for negligence, primary or contributory, is the care and prevision which a reasonably prudent person would employ in the circumstances. The rule is constant: the degree of care which a reasonably prudent man is required to exercise varies with the exigencies of the occasion. No exact formula can be laid down. As *Seawell, J.*, said of a collision of this type in *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637: "Practically every case must 'stand on its own bottom.' "

It is a well settled principle of law that a person is not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person. *Gaskins v. Kelly,* 228 N.C. 697, 47 S.E. 2d 34; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Wilkinson v. R. R.,* 174 N.C. 761, 94 S.E. 521; *Wyatt v. R. R.,* 156 N.C. 307, 72 S.E. 383.

In *Tyson v. Ford, supra,* and in *McClamrock v. Packing Co.,* 238 N.C. 648, 78 S.E. 2d 749, will be found a list of cases of this type in which contributory negligence was held as a matter of law to bar recovery, and a second list in which contributory negligence has been held to be an issue for a jury. We conclude the case at bar comes within the second list.

It may be noted that G.S. 20-141 (e) provides "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered . . . contributory negligence *per se*

in any civil action . . ." There is no allegation in the complaint as to the speed of the car of plaintiff's intestate.

Defendant's truck at night was going over 45 miles an hour, the front and rear lights went out, and the driver stopped it within about 54 feet on or near the center of the paved highway. The driver of the truck at the time he stopped the truck, or just before he stopped it, turned on the left-turn signals of the truck. When Zachary Battle turned on the left-turn signals of the truck before he stopped it, or as he was stopping it, thereby indicating his intention to turn to the left on the highway, it would seem that plaintiff's intestate would be warranted in concluding that the truck in front would continue its indicated course. With no allegation as to the speed of the car of plaintiff's intestate, and no allegation as to how close his car was to the truck, when it began to stop, or how close he was travelling behind it, and with the truck giving a signal that it was going to turn to the left, and in fact abruptly stopping on or near the center of the highway, and when under those circumstances plaintiff's intestate drove his car at night into the rear of the lumber extending more than four feet beyond the bed or body of the truck, which lumber had no red light at the end of the load, it cannot be said that the allegations of the complaint state contributory negligence on the part of the plaintiff with that clearness and singleness of fact and inference which must obtain in order to justify sustaining the demurrer on the second ground stated therein.

The case of *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845, relied on by the defendant, is distinguishable. In that case the Court said: "It is manifest from the evidence that the speed at which plaintiff was driving his automobile was the proximate cause, at least one of the proximate causes of his injury and damages."

The defendant also relies on *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676, where the Court says: "This testimony compels the conclusion that he was either operating his automobile at an excessive rate of speed or was not keeping a proper lookout at the time." That was a nonsuit upon the evidence. In the case at bar the allegations of the complaint compel no such inference.

The other cases cited by the defendant on contributory negligence are distinguishable.

We are frequently confronted with a serious and difficult question as to how far a court will declare certain conduct of a plaintiff contributory negligence as a matter of law, and take away the question from a jury. This case presents such a problem.

The name of Clyde W. Myers appears in the captions of the summons and complaint. No reference is made to him in the body of the com-

plaint. It would seem that his name should be stricken. *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373.

We hold that the lower court was in error in sustaining the demurrer to the complaint, and the judgment below is

Reversed.

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STATE v. JIM LONG.

(Filed 13 January, 1956.)

**1. Arson §§ 1, 5—**

It is an essential element of the common law crime of arson that the burning be done or caused maliciously, and the omission of the indictment to so charge is fatal.

**2. Arson § 1—**

The common law crime of arson is an offense against the security of habitation, rather than the safety of property, and it is essential under the common law that the property be inhabited by some person.

**3. Same—**

The offense of common law arson has not been defined by statute in this State, and therefore the common law definition of the offense is still in force here. G.S. 4-1.

**4. Arson § 5—**

An indictment charging that defendant unlawfully, wilfully and feloniously set fire to and burned the dwelling house of a named person, the dwelling being unoccupied at the time of the burning, charges a complete offense and not an attempt, and a conviction thereunder as charged is a misdemeanor and is not a conviction under G.S. 14-67, which relates to an attempt to burn a dwelling house, and is a felony.

**5. Same—**

An indictment charging that defendant unlawfully, wilfully and feloniously set fire to and burned the dwelling house of a named person, the dwelling being unoccupied at the time of the burning, charges the burning of an "uninhabited house" in violation of G.S. 14-144.

**6. Arson § 1—**

An "uninhabited house" within the purview of G.S. 14-144 is a house fit for human habitation, but which is uninhabited at the time.

**7. Arson § 7—**

Where the evidence discloses that the structure the defendant is charged with burning had theretofore been so badly burned before the occurrence in suit that it was not fit for human habitation, the evidence is insufficient

to be submitted to the jury in a prosecution for burning an uninhabited house in violation of G.S. 14-144.

APPEAL by defendant from *Joseph W. Parker, J.*, May Criminal Term 1955 of CUMBERLAND.

Criminal prosecution on a bill of indictment charging the defendant on 1 September 1954 with unlawfully, wilfully and feloniously setting fire to and burning the dwelling house of Mrs. Dan Wheatley, the same being unoccupied at the time of the burning.

The State's evidence tells this story. On 23 July 1954 a dwelling house in the Town of Hope Mills, the property of Mrs. Dan Wheatley, was greatly damaged by fire. J. D. Snipes, Chief of Police of the Town, was the first witness for the State. On direct examination he was not questioned as to the condition of this house after that fire, and before the fire of 1 September 1954. On cross-examination he testified: "This house was burned July 23, 1954. On July 23, 1954, a little more than a month before, five or six weeks before September 1, this house was damaged considerably beyond living. It was damaged considerably beyond living. The house was so badly burned that it couldn't be lived in." Chief Snipes further testified that no one lived in the house after this fire. On redirect examination he testified that no one was living in the house on 1 September 1954.

Maurice Odom was the second witness for the State. On direct examination he gave no testimony as to the condition of this house after the fire of 23 July 1954 and before the fire of 1 September 1954. On cross-examination he said this house was destroyed by the fire of 23 July 1954, and that no one lived in it after that fire.

W. B. O'Daniels, a member of the State Bureau of Investigation, was the last witness for the State. The fire on 1 September 1954 burned only a spot in the left front of this house before it was extinguished. On direct examination O'Daniels testified that he rode by this house in January 1955, and this was its condition then as he saw it: the cement foundation was apparently in good condition, the back and right side had been damaged by fire, the left corner, the walls and a portion of the roof were still intact, the room on the right front, a part of the living room and a portion of the back off the porch were intact. On cross-examination he gave testimony in substance as follows: the house, except the right front room, could not be occupied. The roof of the right front room was burned and caved in, cold air would come in through the roof, and possibly rain—he thought it would leak. In this room most of the windows were burned or broken out. The front room could not be lived in by a normal person without repairs. A person

down and out could live in this room, if necessary, but it would be like living in a cave.

The evidence for the defendant tended to show these facts: after the fire of 23 July 1954, this house was a total loss to the insurance carrier and incapable of sheltering human beings or of being lived in as a dwelling house. The house "was just gutted and collapsed."

About 8:00 p.m. on 1 September 1954, the defendant Long and Maurice Odom went to the home of Robert (Cooter) Tyson, which is located in close proximity to the burned Wheatley House. The defendant went into the Tyson House, and came out with oil-soaked rags, and said to Odom, "he was going to finish burning that house, this house here that is burnt." Odom replied: "Not with me with you, because I aint never been in no trouble. I don't want to get in no trouble and I am not going to be with you, if you burn it." Odom ran away, and when he turned a corner, he saw the defendant crawling through a hole under the Wheatley House. Some 30 minutes later a fire alarm sounded, and Odom went back to the Wheatley House. Upon arrival he saw a small place on the left front part of the Wheatley House burning. Odom testified that the part of the house he saw burning was about as far from the hole under the house he had seen the defendant crawling through, as he was on the witness stand from the prosecuting officer.

As a result of information he received, J. D. Snipes, Chief of Police of Hope Mills, drove to the Wheatley House, and saw the left-hand corner of the front of the Wheatley House smoking and blazing. He turned in a fire alarm. The fire truck of the town soon arrived, and extinguished the blaze in a few minutes.

Odom told W. B. O'Daniels, a member of the State Bureau of Investigation, what he saw the defendant do at the Wheatley House on 1 September 1954, and what he heard him say. The morning the case was tried in the Superior Court, the defendant said to Odom: "What you say, Rat? I'll get you."

Plea: Not guilty. Verdict: Guilty, as charged.

From judgment of imprisonment the defendant appeals, assigning error.

*William B. Rodman, Attorney General, Claude L. Love, Assistant Attorney-General, and F. Kent Burns, Staff Attorney, for the State.*

*Chas. G. Rose, Jr., for Defendant, Appellant.*

PARKER, J. It is an essential element of the common law crime of arson that the burning was done or caused maliciously. *S. v. Laughlin,* 53 N.C. 455; *S. v. Porter,* 90 N.C. 719; *S. v. McCarter,* 98 N.C. 637, 4 S.E. 553; 4 Am. Jur., Arson, Sec. 2; 6 C.J.S., Arson, Sec. 1; Wharton's

Crim. Law, 12 Ed., Vol. 2, Sections 1051 and 1059; Miller's Crim. Law (Hornbook Series), p. 323; Curtis, The Law of Arson, Sections 1 and 68.

As a general rule an indictment for the common law crime of arson must allege that the burning was done maliciously. The omission to so charge is a fatal defect. *D'Allesandro v. Tippins,* 101 Fla. 1275, 133 So. 332; *Kellenbeck v. State,* 10 Md. 431, 69 Am. Dec. 166; *Commonwealth v. Cooper,* 264 Mass. 378, 162 N.E. 733; *Jesse v. State,* 28 Miss. 100; *Maxwell v. State,* 68 Miss. 339, 8 So. 546; *Reed v. State,* 171 Miss. 65, 156 So. 650; *S. v. Gove,* 34 N.H. 510; *S. v. Mutschler,* 55 N.D. 120, 212 N.W. 832; *S. v. Pedie,* 58 N.D. 27, 224 N.W. 898; *S. v. Murphy,* 134 Oregon 63, 290 Pac. 1096; *Tuller v. State,* 8 Tex. Court of Appeals 501; *People v. Perez,* 35 Puerto Rico 951; 6 C.J.S., Arson, Sec. 18; 4 Am. Jur., Arson, Sec. 31; Wharton's Crim. Law, 12th Ed., Vol. 2, Sec. 1072; Curtis, The Law of Arson, Sec. 169; Bishop's Directions and Forms, Sec. 179. See: *S. v. Anderson,* 228 N.C. 720, 722, 47 S.E. 2d 1, where it is said the common law arson bill charged: "(1) The wilful and malicious burning of the dwelling house of Willie Belle Cratch" *et al.;* and indictment in *S. v. Clark,* 52 N.C. 167, in the original record in the Clerk's Office.

Arson, at common law, is an offense against the security of habitation, rather than the safety of the property. It was intended to protect the habitation of man, and the crime was not committed, unless the house was inhabited by some person. An uninhabited house is not subject to common law arson. We omit any discussion of a temporary absence, or of a man setting fire to his own dwelling house, as not relevant. *S. v. Clark, supra; S. v. Gailor,* 71 N.C. 88; 6 C.J.S., Arson, Sec. 9; Curtis, The Law of Arson, Sections 3 and 13. See: *S. v. Sarvis,* 45 S.C. 668, 24 S.E. 53, 55 Am. St. Rep. 806, 32 L.R.A. 647.

The General Assembly of North Carolina has provided that any person convicted of common law arson shall suffer death, or life imprisonment if the jury so recommend at the time of rendering its verdict. G.S. 14-58. However, the General Assembly has never defined common law arson. Therefore, the common law definition is still in force in this State. G.S. 4-1.

The bill of indictment does not charge the offense of common law arson, because it does not charge that the act was done maliciously, and because by charging that the house at the time of burning was unoccupied, it negatives the fact that the house was inhabited. *S. v. Clark, supra.* See: *Cox v. State,* 87 Fla. 79, 99 So. 126; *Gilbreath v. State,* 15 Ala. App. 588, 74 So. 723.

It is apparent from the Record that the case was tried below on the theory that the bill of indictment charged a violation of G.S. 14-67. The judge so stated in his charge to the jury. The verdict was guilty

as charged, and the judgment imposed by the court was as provided by G.S. 14-67, and not as provided by G.S. 14-58.

The relevant part of G.S. 14-67 is: "If any person shall wilfully attempt to burn any dwelling house, uninhabited house, . . ., the property of another, he shall be guilty of a felony."

The indictment charges that the defendant unlawfully, wilfully and feloniously set fire to and burned the dwelling house of Mrs. Dan Wheatley, the same being unoccupied at the time of the burning—a complete offense, not an attempt to commit this offense.

In G.S., Chapter 14, Criminal Law, Subchapter IV, Offenses against the Habitation and Other Buildings, Article 15, Arson and Other Burnings (G.S. 14-58 through G.S. 14-69, both inclusive), we find no statute condemning the unlawful and wilful burning of an uninhabited house, though G.S. 14-67 makes the wilful attempt to burn an uninhabited house a felony. However, in the same chapter, Subchapter VI, Criminal Trespass, Article 22, Trespasses to Land and Fixtures, we find G.S. 14-144, which is headed, "Injuring houses, churches, fences and walls," and reads in part as follows: "If any person . . . shall unlawfully and wilfully burn, demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article, . . . every person so offending shall be guilty of a misdemeanor."

In our opinion, the bill of indictment properly charges the burning of an "uninhabited house" in violation of G.S. 14-144.

What is the meaning of the words "uninhabited house" as used in that statute?

In *S. v. Clark, supra,* the defendant was properly charged in the bill of indictment with the common law crime of arson. The jury found a special verdict as follows: "That John F. Clark, the prisoner at the bar, is guilty, wilfully and maliciously, of burning the dwelling house in manner and form as charged in the bill of indictment; but that said dwelling house, when burned, was an uninhabited house, though it was built as a dwelling house, and had before that time been inhabited." This Court held that judgment of death could not be pronounced upon the special verdict of the jury, because that verdict found that the house was uninhabited at the time of the burning, but that judgment could be pronounced against the defendant as for a misdemeanor under Sec. 103, Ch. 34, Rev. Code 1854, which is identical in language with the part of G.S. 14-144 quoted above. The Court said: "And we find the Legislature, in Section 103 of the same chapter of the Code, providing that the burning of *'uninhabited houses'* shall be a misdemeanor only. By a reference to this last section it will be perceived, by necessary implication from the context, that the uninhabited house spoken

of is a house that is fitted for habitation but is unoccupied at the time." In *S. v. Lumber Co.,* 153 N.C. 610, 69 S.E. 58, the Court said: "An uninhabited house 'is a house that is fitted for habitation, but is unoccupied at the time.' *S. v. Clark,* 52 N.C. 167."

The State's evidence is uncontradicted that no one lived in this house after the fire of 23 July 1954. *Chief Snipes,* the first witness for the State, testified that the house was so greatly damaged in the fire of 23 July 1954 "that it couldn't be lived in." Maurice Odom, the second witness for the State, testified this house was destroyed by the fire on 23 July 1954. O'Daniels, the State's last witness, testified that only the right front room could be occupied, but that the roof of that room was burned and caved in, cold air would come into that room through the roof, and possibly rain, and that most of the windows of the room were burned or broken out. That this room could not be lived in by a normal person, without repairs. That a person down and out could live in this room, if necessary, but it would be like living in a cave. The State can derive no aid from the defendant's evidence.

In our opinion, and we so hold, the State has offered not a scintilla of evidence that this house after the fire of 23 July 1954 was fitted for habitation.

If it should be contended, which it is not, that the indictment charges a wilful burning of "other house or building not mentioned in such articles" as set forth in G.S. 14-144, the contention would be of no avail, because the State could not avoid a nonsuit on the facts.

In *S. v. Cuthrell,* 235 N.C. 173, 69 S.E. 2d 233, the Court said: "The word 'building' embraces any edifice, structure, or other erection set up by the hand of man, designed to stand more or less permanently, and which is capable of affording shelter for human beings, or usable for some useful purpose. See 4 Am. Jur., Arson, Sec. 16; Curtis, The Law of Arson, Sec. 28, p. 38; 6 C.J.S., Arson, Sec. 6, p. 725; Webster's New International Dictionary, 2d Ed.; Funk & Wagnall's New Standard Dictionary."

The State has offered no evidence that this house after the fire of 23 July 1954 was fit for any useful purpose or habitation.

The defendant assigns as error the action of the lower court in overruling his motion for judgment of nonsuit made at the close of the State's evidence, and renewed at the close of all the evidence. In doing so the lower court committed error.

G.S. 14-144 makes the unlawful and wilful burning of an uninhabited house a misdemeanor. G.S. 14-67 makes the wilful attempt to burn an uninhabited house a felony. It would seem that these two statutes are fit subjects for legislative consideration. If the statute in respect to the burning of an uninhabited house was placed under Ch. 14,

Article 15, Arson and Other Burnings, instead of under Article 22, Trespasses to Land and Fixtures, it would facilitate research, and prevent its being overlooked.

The defendant's motion for judgment of nonsuit will be sustained.

Reversed.

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JOHN V. LOVIN, ADMINISTRATOR OF THE ESTATE OF DONALD CHARLES LOVIN, DECEASED, v. THE TOWN OF HAMLET.

(Filed 13 January, 1956)

**1. Negligence § 4b—**

The attractive nuisance doctrine does not apply to a municipal recreation and amusement park; children are at least impliedly invited to visit such park and make use of its facilities.

**2. Same—**

It is not negligence for a person to maintain an unenclosed pool or pond on his premises.

**3. Same—**

Liability under the doctrine of attractive nuisance is usually predicated upon proof that children were in fact attracted by the instrumentality or condition which caused injury or death, and that children had been attracted to such instrumentality or condition to such an extent and over such a period of time that any person of ordinary prudence would have foreseen that injury or death was likely to result.

**4. Same—Complaint held insufficient to state cause of action for wrongful death upon doctrine of attractive nuisance.**

The allegations were to the effect that defendant municipality maintained a public playground or park and an artificial lake, that the top of the dam of the lake was a part of the park, that the water at the dam was some eight feet deep, and that plaintiff's intestate, a child seven years old, while playing in said park and on said dam, fell into the deep water of the lake and was drowned. There was further allegation that children of tender years frequented the playground and used the swings, slides and wading pools to such an extent that the agents and officials of the municipality knew, or by the exercise of due diligence should have known, that said area was dangerous to such children, and that notwithstanding such knowledge, the municipality failed to provide any type of barrier on the dam to restrain children from getting into the deep water of the lake at the dam. *Held:* Demurrer should have been sustained for want of allegation as to where, how or under what conditions plaintiff's intestate fell into the lake and for want of allegation that children were accustomed to wade in the lake or play in the lake from the banks or dam thereof in such manner and to such extent as to put the agents and officials of the municipality on notice.

**5. Municipal Corporations § 12—**

Governmental function and liability for negligence are diametrically opposed unless liability for negligence is expressly provided by statute. Whether the maintenance of a park and playground is a governmental function of a municipality, *quaere?*

**6. Pleadings § 23—**

Where judgment overruling a demurrer is reversed on appeal, plaintiff may seek leave to amend if he is so advised.

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

APPEAL by defendant from *Gwyn, J.*, June Term, 1955, RICHMOND. Reversed.

Civil action to recover damages for the wrongful death of plaintiff's intestate.

In 1935 the defendant built an earth dam parallel to and about 125 feet northeast of East Hamlet Avenue (U. S. Highway 74) and impounded water sufficient to create a lake of approximately fifty acres in area, located in a densely populated section of defendant municipality. It does not appear whether the dam was built across a natural stream or the water is furnished by the local water works. In 1952 and 1953, the defendant improved the land lying between East Hamlet Avenue and the lake dam by planting trees, sowing grass, constructing a shallow wading pool, and installing swings and slides for the youth of the city as a public playground or park. The playground was so constructed that the land slopes gradually downward from the lake dam to the avenue, and the top of the dam is a part of the playground. There is a spillway in the dam through which the surplus water of the lake flows across the intervening space through a culvert under East Hamlet Avenue, and the water about the spillway is approximately eight feet deep.

After making formal allegation of the foregoing facts, the plaintiff alleges with some elaboration that the construction of said park on said area between the pond and East Hamlet Avenue, the installation of slides, swings, and the wading pool for children, and the maintenance of said area between the dam and the avenue constitutes an attractive nuisance; and that such area was frequented by children living or visiting in the immediate neighborhood of said park. He further alleges that children of tender years visited the playground and used the swings, slides, and wading pool to such an extent that the agents and officials of the defendant town knew, or by the exercise of due diligence should have known that said area was dangerous to such children, and notwithstanding such knowledge, defendant failed to provide "any type of barrier on said dam to restrain the children, which they had attracted

to said playground, from getting into the deep water of said Lake at said dam." Plaintiff then alleges that on 8 July 1954, about 3:00 p.m., plaintiff's intestate, about the age of seven years, accompanied by one Jerry Larne Norton, about five years of age, "was playing in said park and on said dam which is a part of said park, and fell in the deep water of said Lake, was drowned and was found later on in the afternoon in water approximately 8 feet deep, and the death of plaintiff's intestate, as the plaintiff is informed, believes, and hereby alleges, was proximately caused by the negligence of the defendant in the construction, maintenance, and operation of said artificial lake and the children's playground lying adjacent thereto . . .," "that the construction, maintenance and operation of said playground for children and the dam which impounded said artificial Lake, which said dam was a part of said playground, constitutes and on July 8, 1954, did constitute an attractive nuisance for children of tender age, and in the construction, operation, and maintenance of said children's playground lying between a well-traveled street and said artificial Lake, the said defendant, through its agents, servants, employees and officials, was negligent in the following particulars, to-wit:

"That said defendant, through its agents . . . and officials knew, or by the exercise of due diligence should have known, that the construction of an artificial lake . . . in a densely populated residential section, and by a street would be attractive to children, and thereby created a hazard to the life and well-being of said children, and that the existence of said artificial lake in said residential section and adjoining one of the main streets in said Town would obviously be of extreme danger to children of tender years; that the agents . . . and officials of the defendant either knew, or by the exercise of due diligence, should have known that the planting of trees and grass and the installation of slides and swings for children and a wading pool in said area between East Hamlet Avenue and the Hamlet City Lake, which includes the dam of said Lake would attract children of tender age, and that children would frequently visit said area or playground for the purpose of entertainment and amusement and for playing with each other and for the purpose of enjoying the swings, slides and wading pool so negligently installed by the defendant at and on such a dangerous place for children;" that such agents and officials "knew, or by the exercise of due diligence should have known, that after said playground for children as hereinbefore described was established by said Town, that children of tender age would visit or frequent said dangerous area or playground, and that said agents, servants, employees and officials knew, or by the exercise of due diligence should have known that the natural curiosity of children would lead them into the deep water of said Lake at said

dam and thereby cause said children to be drowned;" that said agents and officials "negligently failed to erect any type of barrier on said dam to restrain the children, which they had attracted to said playground, from getting into the deep water of said Lake at said dam;" and "failed to employ any person or persons to stay at said playground and act as a guard or keeper to protect said children of tender age and keep them from getting into the deep water on the edge of said playground;" and "failed to put up any sign of any type whatsoever warning children or their parents of the extreme danger of deep water lying adjacent to said playground for children."

The plaintiff further elaborates on his allegations of negligence in respect to the construction and maintenance of said park and the maintenance of said dam as a part of said playground. He likewise alleges that the alleged negligence of the defendant and its agents and officials was the proximate cause of the death of plaintiff's intestate.

The defendant demurred for that (1) it appears on the face of the complaint that the construction and maintenance of said park was in furtherance of a governmental function, and (2) that the complaint fails to set forth facts sufficient to constitute a cause of action.

The demurrer was overruled and defendant excepted and appealed.

*Pittman & Webb for plaintiff appellee.*

*Z. V. Morgan for defendant appellant.*

BARNHILL, C. J. In considering the complaint to determine whether it states a cause of action, a distinction must be drawn between the construction and maintenance of the park as such and the construction and maintenance of the lake. The attractive nuisance doctrine has no application to the maintenance of the park. It is maintained for the amusement, entertainment, and recreation of children of the defendant town, and such children are at least impliedly invited to visit the park and to make use of the swings, slides, wading pool and playground. Furthermore, there is no allegation that plaintiff's intestate lost his life through the use of any of the instrumentalities constructed and maintained for the entertainment of children.

A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so. *Hedgepath v. Durham,* 223 N.C. 822, 28 S.E. 2d 503; *Barlow v. Gurney,* 224 N.C. 223, 29 S.E. 2d 681, and cases cited; *Fitch v. Selwyn Village,* 234 N.C. 632, 68 S.E. 2d 255; *Stribbling v. Lamm,* 239 N.C. 529, 80 S.E. 2d 270.

The case in which the attractive nuisance doctrine was formulated and applied involved a turntable. *R. R. v. Stout,* 84 U.S. 657, 21 L. Ed. 745. Hence the cases dealing with attractive nuisances have come to

be known as the turntable cases. Ordinarily liability under this doctrine, which was adopted for the protection of infants of tender years, is established by proof that children were in fact attracted by the instrumentality or condition which caused injury or death and that such children had been attracted to such instrumentality or condition to such an extent and over such a period of time that any person of ordinary prudence would have foreseen that injury or death was likely to result. *Barlow v. Gurney, supra.*

When the complaint is considered in the light of the principles enunciated in the turntable cases, it is singularly defective in two respects: (1) There is no allegation as to where, how, or under what conditions plaintiff's intestate fell into the lake. Certainly he did not wade in water eight feet deep. His body must have been drawn to the place where it was located by the suction of the water flowing through the spillway. (2) While the plaintiff alleges with some elaboration that (a) the agents and officials of the defendant knew, or by the exercise of ordinary care should have known, that the natural curiosity of children would lead them into the deep water of said lake at said dam and thereby cause said children to be drowned, and (b) said children would be hurt or drowned by falling into or wading into the deep water of the lake, there is no supporting allegation of fact that children were accustomed to wade in the lake or to play in the lake from the banks thereof or to play along the water's edge in such manner and to such extent as to put the agents and officials of defendant on notice.

As the complaint may merely constitute a defective statement of a good cause of action, we refrain from any further discussion thereof which might tend to chart the course of the trial in the event the plaintiff should elect to amend.

While plaintiff, relying on *Atkins v. Durham,* 210 N.C. 295, 186 S.E. 330, and *White v. Charlotte,* 211 N.C. 186, 189 S.E. 492, conceded that the maintenance of the park was a governmental function, he was apparently inadvertent to our decision in *Purser v. Ledbetter,* 227 N.C. 1, 40 S.E. 2d 702. See also Anno. 142 A.L.R. 1340.

What was said by *Connor, J.,* in *White v. Charlotte, supra,* is *obiter dictum.* Governmental function and liability for negligence are diametrically opposed unless liability for negligence is expressly provided by statute.

It appears, therefore, that we have one case, *Atkins v. Durham, supra,* in which it is held that the maintenance of a park and playground is a governmental function and another case, *Purser v. Ledbetter, supra,* in which it is held that the maintenance of such playground or park is not a governmental function. We need not now determine which decision will be followed. We are content to rest our decision at this time solely

on the deficiency of the allegations contained in the complaint. The question of governmental immunity will be answered when it is squarely presented for decision.

The plaintiff may seek leave to amend if he is so advised. *Teague v. Oil Co.*, 232 N.C. 469, 61 S.E. 2d 345.

The judgment entered in the court below is

Reversed.

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

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T. J. NORTON, ADMINISTRATOR OF THE ESTATE OF JERRY LARNE NORTON, DECEASED v. THE TOWN OF HAMLET.

(Filed 13 January, 1956)

APPEAL by defendant from *Gwyn, J.*, June Term, 1955, RICHMOND. Reversed.

Civil action to recover damages for the wrongful death of plaintiff's intestate.

Defendant demurred to the complaint, the demurrer was overruled, and defendant appealed.

*Pittman & Webb for plaintiff appellee.*

*Z. V. Morgan for defendant appellant.*

PER CURIAM. Plaintiff's intestate is the five-year-old child who accompanied the plaintiff's intestate in *Lovin v. Hamlet, ante,* p. 399, to the park and playground maintained by the defendant municipality. He was likewise drowned, and his body was found in water about eight feet deep. The two are companion cases. What is said in *Lovin v. Hamlet* is controlling here. The judgment entered in the court below is reversed on authority of the opinion in that case.

Reversed.

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

JOHN H. BURTON AND EARL BURTON REPRESENTING THE CITIZENS AND TAXPAYERS OF THE CITY OF REIDSVILLE, AND SUCH OTHER TAXPAYERS AS SHALL ASK TO BE MADE PARTIES TO THIS ACTION (ORIGINAL PARTIES PLAINTIFF); J. W. AMOS, MRS. C. E. WARNER AND CLAUDE S. BURTON (ADDITIONAL PARTIES PLAINTIFF) v. THE CITY OF REIDSVILLE; GEORGE HUNT, JAMES L. THOMPSON, SR., W. B. PIPKIN, CLYDE COBB, AND WILLIAM G. SPRINGS, IN THEIR CAPACITY AS MEMBERS OF THE CITY COUNCIL OF THE CITY OF REIDSVILLE AND ALSO IN THEIR CAPACITY AS INDIVIDUALS.

(Filed 13 January, 1956)

**1. Appeal and Error § 50—**

Where it appears that the lower court dismissed the action as of nonsuit and thereafter entered a conditional judgment on the merits, so that the judgment can properly be neither affirmed nor reversed, the cause will be remanded for a hearing *de novo*.

**2. Trial § 26: Judgments § 17d—**

When the court allows motion to dismiss as in case of nonsuit, it terminates the action, and no suit is thereafter pending in which the court can make a valid order.

**3. Municipal Corporations § 8d—**

The disposition of apartment houses owned by the city and situate on lands of others, rests in the sound discretion of the council of the city.

**4. Constitutional Law § 10a: Administrative Law § 2: Public Officers § 7b—**

Discretionary power vested in administrative agencies or officials connotes the authority to choose between alternative courses of action, and, under the separation of powers, the courts are without authority to act as supervisory agencies to control and direct the exercise of such discretion so long as the agencies or officials act in good faith and in accordance with law, but may, in a proper proceeding, determine only whether such power has been exercised capriciously or arbitrarily or in bad faith or in disregard of law.

**5. Same—**

Where the exercise of discretionary power by a municipality is attacked on the ground that the city officials acted arbitrarily and in bad faith, nonsuit cannot be properly entered, but the court should hear the evidence, find the ultimate facts, and enter an affirmative judgment, the question of abuse of discretion being one of fact for the court.

APPEAL by plaintiffs from *Johnston, J.*, March Term, 1955, ROCKINGHAM.

Civil action instituted by taxpayers to enjoin the City of Reidsville from destroying three low-cost apartment buildings belonging to the City.

This cause was here on a former appeal, *Burton v. Reidsville,* 240 N.C. 577, 83 S.E. 2d 651. The essential facts are there stated. We held on that appeal that the complaint sufficiently pleaded an arbitrary abuse of discretion by the individual defendants, members of the City Council of the corporate defendant.

After our opinion on the former appeal was certified to the court below, the complaint was amended to allege that "The apartments are not a public nuisance and the threatened destruction of the said apartments constitutes an arbitrary or capricious exercise of discretion by the City Council."

When the cause came on for trial, a jury was duly selected and impaneled. At the conclusion of the plaintiffs' evidence in chief, the court, on motion of defendants, granted the defendants' motion for judgment as in case of nonsuit. It thereupon entered a judgment of nonsuit. It then announced that it would rule upon the matter as if a question of fact for the court was presented. The defendants announced that they would offer no evidence. *"The Court further ruled that if the pleadings and evidence present a question of fact for the Court,* then the Court is of the opinion and finds as a fact that the City Council of the City of Reidsville in adopting the resolution of April 13, 1954, with reference to the Thomas Street Apartments did not act arbitrarily and capriciously, and did not abuse the discretion reposed in said City Council." (Italics supplied.) It then entered its decree dismissing the action as of nonsuit, adjudging that defendants had not abused their discretion, and dissolving the restraining order. Plaintiffs excepted and appealed.

*Gwyn & Gwyn for plaintiff appellants.*

*Brown, Scurry & McMichael for defendant appellees.*

BARNHILL, C. J. This proceeding became so entangled in a snarl of procedure in the court below that no course is left open to us except to vacate the judgment entered and remand the cause for hearing in accord with the applicable principles of law.

As the record now stands, we have a judgment dismissing the action and, at the same time, affirmatively adjudicating the rights of the parties "if the pleadings and evidence present a question of fact for the Court." But the court did not decide whether the pleadings and evidence present an issue of fact for a jury or a question of fact for the court. Thus we have a conditional judgment on the merits after the cause had been dismissed for the reason plaintiffs had offered no evidence of sufficient probative force to be submitted to a jury. We cannot either affirm or reverse the judgment without leaving a false impression as to what we have decided.

When the court allowed the motion to dismiss as in case of nonsuit, it thereby terminated the action, and no suit was thereafter pending in which the court could make a valid order.

As we stated in *Bourne v. R. R.*, 224 N.C. 444, 31 S.E. 2d 382:

" 'Nonsuit' is a process of legal mechanics. The case is chopped off. *Corcoran v. Transportation Co.*, 57 S.E. 962. It is a judgment of dismissal. *Anderson v. Distributing Co.*, 55 S.W. 2d 688. It dismisses the action. Cyclopedia Law Dic., 2nd Ed. (Callaghan). Although it does not necessarily decide the merits of the cause of action, it is a final judgment in that it terminates the action itself.

" 'Nonsuit is the name of a judgment given against the plaintiff when he is unable to prove a case . . .' *Cooper v. Crisco*, 201 N.C. 739, 161 S.E. 310. 'A nonsuit is but like the blowing out of a candle, which a man at his own pleasure may light again.' *Hickory v. R. R.*, 138 N.C. 311, 50 S.E. 683 . . .

"It cannot put its adversary out of court and at the same time retain the cause in court. *Morse v. Turner*, 92 S.E. 767 . . ."

The disposition of the apartment houses described in the complaint, situated as they are on the land of others who demand one-half of the rents, rests within the sound discretion of the defendant members of the Council of the City of Reidsville. *In re Housing Authority*, 235 N.C. 463, 70 S.E. 2d 500; *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 22 S.E. 2d 896; *Mullen v. Louisburg*, 225 N.C. 53, 33 S.E. 2d 484; 37 A.J. 741, sec. 117. And discretion in a legal sense means the power of free decision; undirected choice; the authority to choose between alternative courses of action. Webster, New Int. Dic., 2nd Ed.; Callaghan, Cyc. Law Dic., 2nd Ed.

The acts of administrative or executive officers are not to be set at nought by recourse to the courts. Nor are courts charged with the duty or vested with the authority to supervise administrative and executive agencies of our government. However, a court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. *Pue v. Hood, Comr. of Banks, supra.* And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the

official chose the wrong course of action. The right to err is one of the rights—and perhaps one of the weaknesses—of our democratic form of government. In any event, we operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act—and rightly so.

Here there is evidence the individual defendants declined to consider the purchase of the land on which the apartments are located, or a public sale of the land and buildings with an equitable division of the proceeds of sale, or to make any offer of any type to the landowners. The resolution ordering that the buildings be torn down makes no provision for salvaging the lumber and other material. While the buildings are temporary structures, there is evidence that the interiors of the apartments are quite presentable, and the exterior can be made so.

Therefore, we are unwilling to say on this record there is no evidence that the defendants have stubbornly refused to deal with the landowners or to consider any disposition of the buildings other than to tear them down. However, defendants offered no evidence, and there are intimations in the record that there is a pre-existing agreement requiring the destruction of the buildings. When the defendants present their proof, it may become quite apparent that they have acted in good faith after full consideration and in the best interest of the defendant municipality.

It is a question of fact for the court below to decide. After hearing the evidence, it should find at least the ultimate facts and render its judgment on the facts found.

Incidentally, this is not a case for nonsuit. On the evidence offered an affirmative judgment should be entered either for or against the defendants. In arriving at its judgment, the court may, by consent of the parties, consider the evidence in the case agreed and such other testimony as the parties may desire to offer. This will save much time and expense.

The cause is remanded for a hearing *de novo*.

Error and remanded.

J. ALVIN TART AND WIFE, GLADYS PEARL TART, v. MRS. SUE NICHOLS BYRNE, ADMINISTRATRIX, AND WALTER E. NICHOLS, ADMINISTRATOR OF W. E. NICHOLS, DECEASED, AND I. R. WILLIAMS, TRUSTEE.

(Filed 13 January, 1956)

**1. Pleadings § 19b—**

Where there is a misjoinder of parties and causes of action, the action must be dismissed; it is only where several causes of action have been improperly joined that the court will sever the causes and divide the action without dismissal.

**2. Same—Demurrer for misjoinder of parties and causes of action held properly sustained.**

Plaintiffs set out in their complaint a contract under which they were to be paid by *cestui* a specified royalty on each gallon of gasoline sold by them, which payments were to be applied to the indebtedness secured by the deed of trust. The action was instituted against the administrators of the *cestui* and the trustee in the deed of trust, alleging breach of the contract, and seeking an accounting against the administrators and praying that the deed of trust be declared void and the foreclosure thereunder set aside. The complaint also alleged a cause of action against the administrators for fraud and for slander or defamation of plaintiffs' business reputation by intestate, and a cause of action against the administrators for suppressing bids at the judicial sale. *Held:* The trustee is neither a necessary nor proper party to the action for defamation, or fraud, or for the suppression of bidding at the foreclosure sale, nor could these causes be tried along with the other causes alleged, G.S. 1-123, and therefore judgment sustaining demurrer for misjoinder of parties and causes of action, and dismissing the action, was proper. G.S. 1-127(5).

**3. Pleadings § 3a—**

Where plaintiffs declare upon several causes of action, each cause should be separately stated. Rule of Practice in the Supreme Court No. 20 (2).

APPEAL by plaintiffs from *Morris, J.*, June Term, 1955, of HARNETT.

Plaintiffs instituted this action against Mrs. Sue Nichols Byrne and Walter E. Nichols in their capacity as administrators of W. E. Nichols, deceased (W. E. Nichols died in June 1954), and against I. R. Williams as trustee in a deed of trust executed by the plaintiffs to secure certain indebtedness owed by them to W. E. Nichols.

It is alleged in the complaint that on or about 1 September, 1953, the plaintiffs and W. E. Nichols entered into a written contract (not set out in the record) whereby the plaintiffs and W. E. Nichols were to carry out certain business transactions wherein W. E. Nichols was to furnish gasoline products to the plaintiffs and the plaintiffs were to receive certain rebates or premiums on the products sold. That pursuant to the contract, the plaintiffs, on 5 September, 1953, executed a note to W. E. Nichols in the sum of $7,000.00, secured by a deed of

trust, payable $1,000.00 on 15 September, 1954, and a like sum on 15 September of each successive year through 1960; that in furtherance of the agreement, the plaintiffs leased a filling station to W. E. Nichols for the purpose of selling Amoco gas products for Lee-Moore Oil Company of Sanford, North Carolina, of which W. E. Nichols was an official and a stockholder. That according to the terms of the lease agreement, the plaintiffs were to receive two cents a gallon royalty on all gas sold for W. E. Nichols, which sum was to apply on the principal indebtedness secured by the deed of trust; that the said W. E. Nichols willfully failed and refused to comply with his contract and repudiated his obligations thereunder.

The defendant administrators demurred to the complaint on the ground that there is a misjoinder of parties defendant and causes of action. The various causes of action attempted to be set up in the complaint, none of which are separately stated, are pointed out in the demurrer, as follows:

1. A cause of action for breach of contract against the defendant administrators but not against the defendant I. R. Williams, which purported cause of action sounds in contract.

2. A cause of action for an accounting against the defendant administrators but not against the defendant I. R. Williams, which purported cause of action is equitable in its nature.

3. A cause of action against the defendant administrators for slander or defamation of plaintiffs' business reputation by W. E. Nichols, his servants and agents, but not against the defendant I. R. Williams, which purported cause of action sounds in tort.

4. A cause of action for fraud against the defendant administrators but not against the defendant I. R. Williams, which purported cause of action sounds in tort.

5. A cause of action which is denominated a cause of action for negligence in breaching the contract entered into on 1 September, 1953, against the defendant administrators but not against the defendant I. R. Williams.

6. A cause of action for suppressing bids at a judicial sale against the defendant administrators but not against the defendant I. R. Williams, which purported cause of action sounds in tort.

7. A cause of action to have the deed of trust referred to in the complaint declared null and void and to set the same aside against all the defendants, which purported action is equitable in its nature.

8. A cause of action to have the foreclosure proceeding under the power of sale contained in the deed of trust referred to in the complaint, declared null and void and to restrain further proceedings under the

power of sale contained in said deed of trust against all the defendants, which purported cause of action is equitable in its nature.

The court below sustained the demurrer and dismissed the action. The plaintiffs appeal, assigning error.

*E. Reamuel Temple, Jr., for plaintiff appellants.*
*McDermott & Cameron for defendant appellees.*

DENNY, J. It appears from the answer filed by the defendant I. R. Williams, trustee, that J. Alvin Tart and wife, Gladys Pearl Tart, executed a note in the sum of $7,000.00, dated 20 November, 1952, to the First-Citizens Bank and Trust Company, Dunn, North Carolina, and secured it by the execution of a deed of trust on certain lands and personal property to R. P. Holding, trustee. Thereafter, these plaintiffs employed I. R. Williams as their attorney to prepare the deed of trust referred to in the complaint. That the latter deed of trust was given on the identical real and personal property described in the deed of trust to R. P. Holding, trustee. That the First-Citizens Bank and Trust Company was paid the sum of $7,000.00, furnished by W. E. Nichols on 5 September, 1953.

The deed of trust dated 5 September, 1953, to secure the note for $7,000.00 executed by the plaintiffs and delivered to and held by W. E. Nichols, according to the answer of I. R. Williams, trustee, has been foreclosed and the Dunn Production Credit Association of Dunn, North Carolina, became the last and highest bidder in the sum of $8,500.00, which bid has been confirmed by the Clerk of the Superior Court of Harnett County; and the trustee is ready to deliver the deed to the said bidder.

The plaintiffs say in their brief, speaking through counsel, that they have abandoned their prayer seeking to restrain the defendant I. R. Williams, trustee, from foreclosing the property described in the deed of trust. Even so, they have not abandoned their alleged cause of action to have the deed of trust declared null and void and the foreclosure proceeding set aside. I. R. Williams, the trustee in the deed of trust, is a necessary party to such an action. However, the defendant trustee is neither a necessary nor a proper party to the cause of action for alleged defamation of character by W. E. Nichols and his servants and agents. He would likewise not be a necessary or proper party to the purported action for damages allegedly flowing from the suppression of bidding at the foreclosure sale by the servants and agents of the estate of W. E. Nichols, deceased. Moreover, these latter causes of action would not be triable along with the other alleged causes of action set out in the complaint if the action had been instituted against the

defendant administrators alone. *Johnson v. Scarborough,* 242 N.C. 681, 89 S.E. 2d 420; *Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708; *Smith v. Gibbons,* 230 N.C. 600, 54 S.E. 2d 924; *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382.

In *Snotherly v. Jenrette, supra, Devin, J.,* later *Chief Justice,* said: "It has been uniformly held by this Court that separate and distinct causes of action set up by different plaintiffs or against different defendants may not be incorporated in the same pleading, and that such a misjoinder would require dimissal of the action. *Teague v. Oil Co., ante,* 469, 61 S.E. 2d 345; *Foote v. Davis & Co.,* 230 N.C. 422, 53 S.E. 2d 311; *Southern Mills, Inc. v. Yarn Co.,* 223 N.C. 479, 27 S.E. 2d 289; *Wingler v. Miller,* 221 N.C. 137, 19 S.E. 2d 247; *Holland v. Whittington,* 215 N.C. 330, 1 S.E. 2d 813; *Wilkesboro v. Jordan,* 212 N.C. 197, 193 S.E. 155; *Roberts v. Utility Mfg. Co.,* 181 N.C. 204, 106 S.E. 664. But where several causes of action have been improperly united, the cause will not be dismissed and the court will sever the causes and divide the action. G.S. 1-132; *Southern Mills Co. v. Yarn Co.,* 223 N.C. 479 (485), 27 S.E. 2d 289; *Gattis v. Kilgo,* 125 N.C. 133, 34 S.E. 246."

In the instant case, the plaintiffs have attempted to set up separate and distinct causes of action which do not affect all the defendants as contemplated by G.S. 1-123 and G.S. 1-127(5). Moreover, the plaintiffs have failed to state separately their alleged causes of action as required by Rule 20 (2) of the Rules of Practice in the Supreme Court, 221 N.C. 557; *Mills v. Cemetery Park,* 242 N.C. 20, 86 S.E. 2d 893; *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104; *Large v. Gardner,* 238 N.C. 288, 77 S.E. 2d 617; *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

The ruling of the court below sustaining the demurrer and dismissing the action will be upheld.

Affirmed.

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

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ESSIE STONE BAILEY v. GEORGE R. BAILEY.

(Filed 13 January, 1956)

**1. Appeal and Error § 6c (2)—**

**An exception to the judgment entered presents for decision only whether the facts found support the judgment and whether any error of law appears on the face of the record.**

**2. Divorce and Alimony § 12—**

Upon the hearing of a motion for subsistence *pendente lite* in an action for alimony without divorce on the ground of abandonment, there is no material difference between a finding by the court that defendant ordered plaintiff to get her things out of his house and evidence that defendant told plaintiff to move her things out of his house.

**3. Divorce and Alimony § 1b—**

In the wife's action for divorce *a mensa et thoro* on the ground of abandonment under G.S. 50-7(1), as well as in an action for divorce *a mensa et thoro* on the ground that defendant offered such indignities to the person of plaintiff as to render her condition intolerable and life burdensome, G.S. 50-7(4), the conduct of the husband may be so cruel, without the infliction of any physical violence, as to compel the wife to leave him and thus constitute an abandonment of the wife by him.

**4. Same—**

The courts will not attempt to define what is such cruel treatment by a husband as to compel his wife to leave him and constitute an abandonment by the husband of the wife.

**5. Same—**

Allegations to the effect that the husband permitted his grown children by a prior marriage to remain in his home in a drunken condition, and to curse, abuse and harass his wife at all hours of the day and night, and that he told her to get her things out of his house, *are held* sufficient to state a cause of action for divorce *a mensa et thoro* on the ground of abandonment, and, treated as an affidavit upon the hearing for subsistence *pendente lite*, to support the court's finding that the husband abandoned the wife.

**6. Pleadings § 15—**

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, it will survive the challenge of a demurrer based on the ground that it does not allege a cause of action.

**7. Divorce and Alimony § 12—**

Findings to the effect that defendant had abandoned his wife without any fault or provocation on her part and without providing for her any maintenance or support, *held* to support order for subsistence *pendente lite* in the wife's action for alimony without divorce under G.S. 50-16.

**8. Same—**

An order for subsistence *pendente lite* does not affect the ultimate rights of the parties nor require a jury trial.

APPEAL by defendant from *Williams, Resident Judge*, in Chambers in Sanford. CHATHAM.

Action for alimony without divorce, pursuant to G.S. 50-16, heard upon a motion for subsistence *pendente lite* and counsel fees.

After a hearing the court entered an order that the defendant pay the plaintiff $300.00 and $125.00 a month beginning 1 April 1955 for subsistence *pendente lite,* and pay her counsel a fee of $300.00.

Defendant appeals, assigning error.

*Barber & Thompson for Plaintiff, Appellee.*

*John A. Robertson, Stanley L. Seligson, Gavin, Jackson & Gavin for Defendant, Appellant.*

PARKER, J. The defendant assigns as errors the judge's findings of fact numbered 3, 4, 5 and 7, his failure to find the facts as contended by the defendant, and the signing of the order.

This Court said in *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53: "The exception to the judgment entered presents for decision only two questions: (1) Do the facts found support the judgment, and (2) does any error of law appear upon the face of the record?"

At the time of their marriage on 15 November 1947, the plaintiff was a widow with five married children, and the defendant a widower with eight married children, and three minor children living with him.

The judge found these facts material for decision here, which are supported by competent evidence: (1) The existence of a valid marriage between the parties, and a living together as husband and wife, except for a year's separation in 1952-1953, until 21 May 1954. (2) The defendant has offered such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome, in that for several years, and particularly for several months prior to 21 May 1954, he has permitted, encouraged and condoned certain of his grown and married children to remain constantly at the home in which plaintiff and defendant lived, in a drunken condition, and to curse, abuse and harass plaintiff at all hours of the day and night. (3) On 21 May 1954 defendant ordered plaintiff to get her things out of his house, and on the same date he abandoned her, and has failed to provide her with any subsistence and support. (4) The indignities offered to the plaintiff by the defendant, and his abandonment of her, were without any fault or provocation on her part. (5) The plaintiff does not have sufficient means upon which to subsist during the pendency of this action, nor to defray the necessary expenses thereof. (6) The defendant has real property listed on the tax books of Wake County at a valuation of $32,461.00, and a rental income of $800.00 a month. The numbering here is ours.

The judge's findings of fact, except as to the tax valuation of defendant's realty, are based upon allegations of plaintiff's complaint and of her reply to defendant's answer, which were used as affidavits. The

judge found as a fact that on 21 May 1954 the defendant ordered the plaintiff to get her things out of his house. This finding of fact is based upon this allegation in paragraph 10 of plaintiff's complaint: "On May 21, 1954 the defendant stated to the plaintiff that he wanted her to get her things out of his house (certain furnishings that she had there) in that he wanted the room in which same were kept, so that he could have another room for the use of his children"; and upon this allegation in paragraph 16 of plaintiff's reply: "The defendant told the plaintiff to move the furniture out of the house (not to another room, but to get it completely out of the house), in that he wanted the room to use for some of his children while they were in the house." The difference between the finding that the defendant ordered the plaintiff to get her things out of his house, and the evidence that the defendant told plaintiff to move her things out of the house, we do not consider a material difference.

"If any husband . . . be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board," the wife may institute an action for alimony without divorce. G.S. 50-16; *Brooks v. Brooks,* 226 N.C. 280, 37 S.E. 2d 909. "If either party abandons his or her family," it is a ground for divorce from bed and board. G.S. 50-7, sub-sec. 1; *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796.

*Denny, J.,* said for the Court in *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919: "It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This, under our decisions, would constitute abandonment by the husband."

We have held in *Pearce v. Pearce,* 226 N.C. 307, 37 S.E. 2d 904; *Green v. Green,* 131 N.C. 533, 42 S.E. 954; and in *Coble v. Coble,* 55 N.C. 392, that where a divorce *a mensa et thoro* is sought under G.S. 50-7(4) on the ground that the defendant offers such indignities to the person of the plaintiff as to render his or her condition intolerable and life burdensome, allegations of actual physical violence are not required. We think the same principle applies when a divorce *a mensa et thoro* is sought under G.S. 50-7(1) on the ground of abandonment, and that a husband may compel his wife to leave him by cruel treatment without the actual physical infliction of violence upon her person. See: *Ringgold v. Ringgold,* 128 Va. 485, 104 S.E. 836, 12 A.L.R. 1383.

It would be impossible, and also unwise, to attempt to define with accuracy, so as to fit all cases, what is cruel treatment by a husband that compels his wife to leave him. There is a species of cruelty, which cuts deeper than a blow, and that is the weakening of a husband's love

and affection through the disparagement, cursing and abuse of his wife by his grown children by a former marriage, and which, when not resented by him, but permitted or encouraged, are bound to destroy the happiness of the home, and tend to impair the health and self-respect of the wife. The judge here has found as a fact that for a period of several years, and particularly for several months prior to 21 May 1954, the defendant has *permitted, encouraged and condoned* certain of his grown and married children to remain constantly at his home in a drunken condition, and to curse, abuse and harass the plaintiff at all hours of the day and night, and that, on 21 May 1954, he told her to get her things out of his house. The judge concluded that this was such cruel treatment as compelled the wife to leave the husband, and constituted an abandonment of his wife by defendant. We concur. See: *Caddell v. Caddell,* 236 N.C. 686, 690, 73 S.E. 2d 923.

In *Day v. Day,* 84 Iowa 221, 50 N.W. 979, the Court said: "Nor can he protect himself from the legal results which may follow such cruel and inhuman treatment as will justify a divorce to the wife on the ground that his children were the wrong-doers, and that he ought not to be compelled to send them away from their home. The law requires a husband to do all that he reasonably can to protect his wife from insult and abuse, regardless of the source from which it may come. If, as seems to be the case here, he could not or would not control the conduct of his children to the extent of securing to the wife decent treatment at their hands, then he is, if possessed of ample means, bound to provide a home where she can be free from their insult and abuse. *Atkinson v. Atkinson,* 67 Iowa, 364, 25 N.W. Rep. 284. Failing to do so, she is, in a proper case, justified in leaving him, and such leaving will not constitute legal desertion." See also: *Thompson v. Thompson,* 205 Mich. 124, 171 N.W. 347, 3 A.L.R. 990 and Annotation p. 993, *et seq.; Harbin v. Harbin,* 249 Ala. 616, 32 So. 2d 537; *Ringgold v. Ringgold, supra;* 17 Am. Jur., Divorce, Sec. 71.

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, it will survive the challenge of a demurrer based on the ground that it does not allege a cause of action. *Workman v. Workman,* 242 N.C. 726, 89 S.E. 2d 390: *Batchelor v. Mitchell,* 238 N.C. 351, 78 S.E. 2d 240; *Bryant v. Ice Co.,* 233 N.C. 266, 63 S.E. 2d 547.

Construing the plaintiff's pleadings liberally "with a view to substantial justice between the parties" (G.S. 1-151), and with every reasonable intendment made in favor of the pleader *(Sparrow v. Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365), it appears that the plaintiff has alleged a cause of action for divorce from bed and board on the ground

of abandonment. G.S. 50-7(1). The demurrer *ore tenus,* on the ground that the complaint does not allege facts sufficient to state a cause of action, filed by defendant in the Supreme Court, is overruled.

The facts found by the judge are sufficient to support the order on the ground that the defendant abandoned his wife, without any fault or provocation on her part, and without providing for her any maintenance and support. No error appears on the face of the record.

The power of the judge here to enter an order for subsistence *pendente lite* is based, in part at least, on the duty of the husband to support his wife, until and unless she has been deprived of the right to such support by her own act or by force of law. Such an order does not affect the ultimate rights of the parties, nor does an application for such an allowance *pendente lite* require a jury trial. *Peele v. Peele,* 216 N.C. 298, 4 S.E. 2d 616. It may not be amiss to note that the defendant in paragraph 14 of his answer alleges, that he "is not questioning the plaintiff as a faithful and dutiful wife."

The defendant's assignments of error are overruled. The order of the court below is

Affirmed.

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FIRST-CITIZENS BANK & TRUST COMPANY, INC. OF DUNN v. LOUIS E. RAYNOR AND UNITED CO-OPERATIVE CREDIT UNION.

(Filed 13 January, 1956)

**1. Bills and Notes §§ 15, 18—**

In order to constitute the holder of a negotiable instrument payable to order a holder in due course, it is necessary that the instrument be endorsed by the payee or transferrer. G.S. 25-35.

**2. Same—**

Where a bank accepts a cheque indorsed only for deposit to the credit of the payee, the bank's stamp "absence of endorsement guaranteed" cannot change the positive law requiring that a negotiable instrument payable to order must be indorsed to constitute the transferee a holder in due course.

**3. Banks and Banking § 8b: Bills and Notes § 17—**

Where the card signed by a depositor and the deposit slip of a bank both stipulate that the bank acts only as depositor's collecting agent in regard to cheques deposited, and that all items are credited subject to final payment in cash or solvent credits, the bank is a collecting agent only, and title to such cheques does not pass to the bank.

**4. Bills and Notes § 23½—**

The drawer and the payee of a cheque both have a lawful right to stop payment thereon at any time before the instrument is paid or certified or is delivered to a *bona fide* holder for value.

**5. Banks and Banking § 8b—**

Where a bank receives commercial paper as a collecting agent, but permits the holder to draw thereon before collection, the relationship between the parties is not changed, but the depositor continues to be the owner of the paper.

**6. Banks and Banking §§ 7f, 8a: Bills and Notes §§ 17, 23½—**

A husband and wife maintained a joint checking account. A cheque payable to his order was issued to the husband and mailed to him. The wife procured the cheque, indorsed it "for deposit to the account of the within named payee," deposited it in the joint account, and then drew her cheque for the same amount and received payment from the bank. The drawer of the cheque, at the husband's request, stopped payment thereon. *Held:* The bank was not a holder of the cheque in due course and is not entitled to recover thereon against the drawer or payee.

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

APPEAL by plaintiff from *Morris, J.*, February Term 1955 of HARNETT.

Civil action to recover $800.00, with interest.

The plaintiff's evidence tends to show the following facts: On 28 February 1953 the defendant Louis E. Raynor, and wife, who is not a party, opened a joint checking account, payable to either or survivor, in the plaintiff's bank at Dunn. The initial deposit was $75.00. At the same time each one signed a card for the plaintiff in respect to this account, the pertinent part of which reads: "To First-Citizens Bank & Trust Company. You are hereby authorized to recognize the signature below in the payment of funds and the transaction of other business in connection with my account. . . . It is hereby stipulated and agreed that any and all items deposited by the person, . . . whose signature appears below are received by this bank for deposit or collection and in doing this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits." The ledger sheets of the plaintiff show that this account was carried in the names of Mr. or Mrs. Louis E. Raynor. Each one of them made individual deposits in this account, and each one drew cheques upon it.

Louis E. Raynor had funds on deposit with his codefendant United Co-operative Credit Union. On 18 February 1954 this credit union mailed to Louis E. Raynor its cheque, drawn on the Security National Bank of Raleigh, in the sum of $800.00, and payable to the order of Louis E. Raynor. Mrs. Louis E. Raynor received this cheque. On 20 February 1954, she deposited this cheque to their joint checking account. The plaintiff credited the cheque to their account, and gave her a deposit slip, having printed on its face these words: "In receiving items for deposit or collection, this bank acts only as depositor's col-

lecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits." This cheque was not indorsed by Louis E. Raynor. On the back of the cheque Mrs. Louis E. Raynor had written, "for deposit to the account of the within named payee," though she did not sign her name.

When this $800.00 deposit was made, the account showed a balance of $17.35. When Mrs. Raynor had made this deposit, she then and there drew a cheque for $800.00 on their joint account, which the bank paid.

Louis E. Raynor requested the United Co-operative Credit Union to stop payment on this $800.00 cheque, which it did. The Security National Bank returned the cheque to plaintiff with the notation, "Payment Stopped," and the plaintiff received it on 27 February 1954. On the same date plaintiff wrote the Credit Union that it had guaranteed the indorsement (though in fact the cheque was not indorsed), and requesting that it permit payment of the cheque. On 4 March 1954, the defendant Credit Union replied to the letter saying that the cheque was issued to Louis E. Raynor, that he apparently never saw it, that he did not indorse it or receive any of the funds, that he had requested it to stop payment on the cheque, and that it did not feel the stop payment should be lifted.

From judgment of nonsuit entered at the close of plaintiff's case, it appeals, assigning error.

*Young & Taylor for Plaintiff, Appellant.*

*Burgess & Baker for United Co-operative Credit Union, Defendant Appellee.*

*No Counsel for Louis E. Raynor.*

PARKER, J. The $800.00 cheque was the property of the defendant Louis E. Raynor. It was made payable to his order. He did not indorse it. There is no evidence that he ever authorized anyone to indorse it for him. There is no evidence that he knew his wife had procured this cheque, and had deposited it in plaintiff's bank, until after the plaintiff had cashed her $800.00 cheque.

G.S. 25-35 reads: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. . . . if payable to order, it is negotiated by the indorsement of the holder, and completed by delivery."

This Court said in *Mayers v. McRimmon*, 140 N.C. 640, 53 S.E. 447: ". . . to constitute a holder in due course of a negotiable instrument payable to order, it is always required that the same should be endorsed.

Other requirements may, under given conditions, be dispensed with, but endorsement of such an instrument is essential."

The plaintiff stamped on the back of this cheque, "absence of endorsement guaranteed." Such a stamping cannot change the positive law of this State requiring that a negotiable instrument payable to order must be indorsed by the holder to constitute the transferee a holder in due course. The plaintiff is not a holder in due course of this $800.00 cheque.

Printed on the card that Louis E. Raynor, and his wife, signed, when they opened a joint checking account with plaintiff are the words, "it is hereby stipulated and agreed that any and all items deposited by the person. . . . whose signature appears below are received by this Bank for deposit or collection and in so doing this Bank acts only as depositor's collecting agent, . . . All items are credited subject to final payment in cash or solvent credits." Printed on the face of the deposit slip for the $800.00 cheque issued by plaintiff appear similar words.

The Courts are practically unanimous in holding that title to a cheque or other commercial paper that is deposited for the special purpose of collection does not pass to the bank. *Boykin v. Bank of Fayetteville,* 118 N.C. 566, 24 S.E. 357; *Bank v. Bank,* 119 N.C. 307, 25 S.E. 971; Annotations: 11 A.L.R. 1046, 42 A.L.R. 494, 68 A.L.R. 727, 99 A.L.R. 488; 7 Am. Jur., Banks, Sec. 448.

It is said in 7 Am. Jur., Banks, Sec. 449: "Even the fact that a bank receiving commercial paper for collection permits the holder to draw the amount of it before the collection is made does not of necessity change the relationship of the parties to the transaction or prevent the collecting bank, upon dishonor of the paper, from charging it back to the customer. The bank may, as a matter of favor and convenience, permit checks to be drawn against such paper before payment, since the depositor, in the event of nonpayment, is responsible for the sums drawn, not by reason of his indorsement, the paper not having ceased to be his property, but for money paid." See also: Anno 11 A.L.R. 1050.

In *Textile Corp. v. Hood, Comr. of Banks,* 206 N.C. 782, 175 S.E. 151, the deposit slips contained words identical with the words on the deposit slip for the $800.00 cheque here, so far as it is pertinent to the question here. The bank in the *Textile Corp. case* had allowed the depositor to check against uncollected items, but the depositor was solvent, and the bank had always charged returned cheques to the depositor's account. In respect to cheques deposited in the bank by the Textile Corp., and for which on every deposit it received such a deposit slip, the Court said: "We think they" (the cheques) "were held by the bank as agent for the plaintiff. We think under all the facts and circumstances of this

case, that the bank by express contract was an agent for collection, the contract in clear language so states."

In *Worth Co. v. Feed Co.*, 172 N.C. 335, 342, 90 S.E. 295, the Court said: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the indorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the indorsement, the bank is an agent for collection and not a purchaser."

The evidence in this case is susceptible of only one construction, interpretation or conclusion as a matter of law, and that is that the plaintiff received the $800.00 cheque as an agent for collection, and not as a purchaser. *Denton v. Milling Co.*, 205 N.C. 77, 170 S.E. 107.

In *Universal Supply Co. v. Hildreth*, 287 Mass. 538, 192 N.E. 23, 94 A.L.R. 1389, the Court said: "The drawer of a check retains the right to countermand its payment at any time before it is paid or is certified or is delivered to a *bona fide* holder for value." See also: *In re Will of Winborne*, 231 N.C. 463, 57 S.E. 2d 795; 9 C.J.S., Banks and Banking, Sec. 344.

The plaintiff is not a *bona fide* holder for value of the $800.00 cheque. It received it from Louis E. Raynor's wife, without his indorsement, and without his knowledge or consent, and as an agent for collection. The United Co-operative Credit Union had a lawful right to stop payment on this cheque at the request of Louis E. Raynor, without incurring any liability to plaintiff. Louis E. Raynor had a similar right.

Louis E. Raynor has received none of the plaintiff's money by reason of this $800.00 transaction. The plaintiff was not his agent in attempting to collect the cheque. The plaintiff was acting as agent for Mrs. Louis E. Raynor, who had no authority to deposit this cheque. She is the person who has received $800.00 of the plaintiff's money in a transaction about which Louis E. Raynor had no knowledge, and in which he did not participate in any way, and she is the one who is alone responsible to plaintiff for its money paid to her.

The judgment of nonsuit below is

Affirmed.

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

H. M. WATTS, EMPLOYEE, v. W. C. BREWER, T/A BREWER'S LAUNDRY & CLEANERS, EMPLOYER.

(Filed 13 January, 1956)

**1. Master and Servant §53b—**

Where an employee suffers an injury to his eye arising out of and in the course of his employment, resulting in temporary total disability and permanent partial loss of vision of an eye, the employee is entitled to compensation for the healing period, plus compensation for 120 weeks, for that portion of the compensation provided for total loss of an eye (60 per cent), that the partial loss of vision bears to a total loss. G.S. 97-31(2) (t).

**2. Same—**

Claimant received an injury to his eye in the course of his employment. After a healing period of a little more than a month, he returned to his same job at the same wage. *Held:* Notwithstanding that "disability" as used in G.S. 97-31 has the same connotation accorded it in G.S. 97-2 (i), the provision of the former statute that disability caused by the injuries enumerated "shall be deemed to continue" are mandatory, and the Commission is without authority to deny compensation which the statute provides on the ground that the employee is earning as much as he was earning before the injury.

APPEAL by defendant from *Morris, J.*, March Term, 1955, CHATHAM.

Workmen's compensation claim.

On 7 May 1953, the claimant, while engaged in the discharge of his duties as an employee of the defendant, in closing the lid on a washer, received an injury to his right eye. A foreign body flew out of the washer and struck him in the eye. He continued to work until 11 June 1953 on which date he visited a physician and received treatment. On 16 July 1953, he returned to work with the defendant at the same salary he was receiving before his injury. His salary both before and after the accident was $50 per week.

The hearing commissioner found that claimant "was temporarily and totally disabled from June 11, 1953 to July 16, 1953 and is entitled to compensation for this period of time for temporary total disability," and that he has a 16.4% disability in his right eye "which would entitle him to compensation for 19.68 weeks for his permanent partial disability to his right eye." He then concluded as a matter of law that claimant is entitled to compensation at the rate of $30 per week (60% of weekly wages) from 11 June to 16 July 1953 (the healing period) "and for his permanent partial disability, loss of vision of his right eye, he is entitled to compensation at the rate of $30 per week for 19.68 weeks."

An award was entered in accord with the conclusions made except that no limit was placed on the number of weeks the payments for the permanent partial disability to the eye are to be made.

On appeal the full Commission adopted the findings of fact and conclusions of law made by the hearing commissioner and approved the award made. Defendant appealed to the Superior Court.

When the cause came on for hearing in the court below, the judge, without ruling separately on the several exceptions filed by defendant, entered judgment affirming the award. Defendant excepted and appealed.

*T. F. Baldwin for plaintiff appellee.*

*Daniel L. Bell for defendant appellant.*

BARNHILL, C. J. The defendant's exceptions and assignments of error are not directed to the findings of fact made by the Commission. *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467. They do, however, challenge the correctness of the allowance of compensation for partial loss of vision of the eye after the claimant returned to work for the same employer at the same salary, that is, after the healing period. Defendant stressfully contends that the award in this respect is unwarranted and contrary to the express provisions of the Act; that the Act provides compensation for loss of wages; and that after the claimant returned to work he suffered no loss of wages. He insists that disability as used in G.S. 97-31 bears the connotation given it in G.S. 97-2(i), and the disability "shall be deemed" to continue for the period stipulated in G.S. 97-31 only when the injury causes a loss of wages.

The question thus presented has already been decided by this Court. We said in *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865:

"The Workmen's Compensation Act. Ch. 120, P.L., 1929, as amended . . . (now G.S. Chapter 97) provides primarily for four several types of compensation to be paid to employees covered by the Act for injuries arising out of and in the course of their employment. They are:

"1. Compensation for disability, dependent as to amount upon whether the injury produces a permanent total, a permanent partial, a total temporary or a partial temporary incapacity. Sec. 29 and 30.

"2. Compensation in stipulated amounts for loss of some part of the body such as finger or toe, a leg or arm. Sec. 31.

"3. Compensation for death. Sec. 29.

"4. Compensation for bodily disfigurement. Sec. 31."

*Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265, and *Rice v. Panel Co.*, 199 N.C. 154, 154 S.E. 69, are to like effect.

Under the statute, G.S. 97-31, as construed by this Court, plaintiff is entitled to compensation under paragraphs numbered 1 and 2 in the *Branham case, supra.* He was awarded compensation for loss of wages during his disability which was the healing period to which reference is made in G.S. 97-31. But he is also entitled to compensation for his partial loss of vision in his right eye. The Legislature provided a somewhat arbitrary method for ascertaining the amount of this compensation.

G.S. 97-31, which is the applicable statute, provides that: "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period *and in addition the disability shall be deemed to continue for the periods specified,* and shall be in lieu of all other compensation, including disfigurement, to wit: . . . (t) . . . The compensation . . . for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss . . ." (Italics added.)

Under this section a workman who suffers a total loss of an eye is entitled to 60% of his average weekly wages during 120 weeks in addition to the compensation paid during the healing period. (Subsection q). If, however, the injury produces only a partial loss of vision, he is entitled to receive that portion of the compensation provided in subsection (q) that the percentage of loss of vision bears to a total loss.

It is true that "disability," as used in this section has the connotation accorded it in G.S. 97-2(i), but in order to fix the compensation for loss of a finger, toe, leg, or for any other injury included in the schedule which is a part of G.S. 97-31, the Legislature provided further that the disability caused by such injury "shall be deemed to continue for the period specified" in said section. And "shall be deemed," as used in this section, means "shall be held," "shall be adjudged," "shall be determined," "shall be treated as if," "shall be construed." *Douglas v. Edwards,* 298 F. 229; *In re Green's Estate,* 164 N.Y.S. 1063; *Harder v. Irwin,* 285 F. 402; *Bank v. Dodd,* 245 P. 503; Black's Law Dic., 4th ed.; Webster's New Int. Dic., 2nd ed.

The language of G.S. 97-31 is clear, and its provisions are mandatory. *Davis v. Board of Education,* 186 N.C. 227, 119 S.E. 372. The Commission is without authority to deny the compensation for which it provides on the ground the employee is earning as much as he was earning before the injury.

Thus, in case of the loss of an eye the Commission must conclusively presume and adjudge that the disability resulting therefrom continued or will continue for 120 weeks beyond the healing period, G.S. 97-31(q), and in case of a partial loss of vision resulting from a compensable injury it shall award that portion of the compensation provided in sub-

section (q) that the percentage of loss of vision bears to a total loss—here 16.4% of 60% of his weekly wages for a period of 120 weeks. As 60% of his weekly wages amounted to $30, the claimant is entitled to $4.92 per week for a period of 120 weeks.

The Commission awarded additional compensation at the rate of $30 per week for 16.4% of 120 weeks, or 19.68 weeks. The result is the same but the money payment is the compensation, and it is 16.4% of the $30 that is to be paid for the period specified in the statute.

It follows that the award of the Commission as affirmed by the court below must be modified in accord with this opinion. As so modified the judgment entered in the court below is affirmed.

Modified and affirmed.

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GRADY POPE, BY HIS NEXT FRIEND, VERNIE POPE, v. THEODORE R. PATTERSON.

(Filed 13 January, 1956)

**1. Automobiles § 34—**

A motorist is under legal duty 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.

**2. Same—**

A motorist who sees children on or near the highway must exercise care in proportion to their incapacity to foresee, or to appreciate, and to avoid peril, and in some situations, he must anticipate that a child of tender years may attempt to cross in front of an approaching automobile unmindful of danger.

**3. Automobiles § 41m—Evidence held for jury on issue of negligence in striking child on highway.**

The evidence tended to show that a 12-year-old boy was pushing a toy wagon, in which a 4½-year-old boy was riding, diagonally in a southeasterly direction across a paved highway in a rural section, that defendant, traveling in an easterly direction, saw them when he was 400 feet distant, at which time they were on his left of the highway, that defendant slowed down, that when the children were about the middle of the road, the 12-year-old boy looked back, saw defendant's truck, told the younger boy to turn the wagon and go straight across the highway, that the younger boy turned the wagon to the right into defendant's lane of travel, that defendant swerved his truck to the right, but hit the older boy, and stopped the truck on the right shoulder some ten feet from the impact. *Held:* Defendant's motion to nonsuit should have been denied.

**4. Automobiles § 19—**

The evidence tended to show that defendant, traveling in an easterly direction, saw children on the highway when they were some 400 feet distant, that one of the children was pushing a toy wagon, in which the other was sitting, diagonally in a southeasterly direction, that defendant slowed his truck, but struck one of the children when the wagon was suddenly turned right into his lane of travel. *Held:* Defendant cannot avail himself of the doctrine of sudden emergency, since this doctrine is not available to one who by his own negligence has brought about or contributed to the emergency.

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

APPEAL by plaintiff from *Armstrong, J.*, June Term 1955 of CABARRUS.

Action to recover damages for injuries to a 12-year old boy struck by an automobile.

The plaintiff's evidence tends to show these facts:

About 4:30 p.m. on 2 October 1953, a clear day with the sun shining and the pavement dry, Grady Pope, a 12-year old boy, was pushing a homemade toy wagon, in which Larry Wayne Beach, a 4½-year old boy, was riding and guiding the wagon, "at an angle" in an easterly direction across a paved highway in a rural section. The highway at the scene runs east and west, is practically level, and the pavement is 17 feet 11 inches wide. Before pushing the toy wagon upon the highway Grady Pope looked west, and seeing no approaching vehicle, entered the highway from the north side.

From the place where the boys were crossing the highway there is an unobstructed view 400 feet to the west along the highway. The defendant was driving a pick-up truck on this highway going east. He told Patrolman H. B. McKee, who investigated the occurrence, that he first saw the two boys, when he was about 400 feet from them; that one of them was pushing a homemade toy wagon, and one riding in it; and that "they were in the left lane of the road, the same direction he was travelling."

When Grady Pope got to the middle of the road, or a little farther, he looked back, and saw defendant's approaching truck. He does not know how far the truck was from him when he saw it. He told Larry Wayne Beach to turn the wagon, and go straight across the road. As Grady Pope went from the point where he first entered the highway to the point where he first saw the truck, he was trotting. When he saw the truck, he started running. That is all he knows, because he was struck by defendant's truck, and knocked unconscious. He heard no signal or warning of an approaching car. He had three bones broken, and remained in a cast eight weeks.

Two witnesses said they heard a horn just prior to the boy being struck. The defendant in talking to Patrolman McKee made no statement about blowing his horn.

From signs in the road the point of collision was about 15 feet from the north edge of the pavement and near the south edge. Defendant's truck stopped on the shoulder of the highway headed east with the front of it about 10 feet from the apparent point of collision. The toy wagon was near the left rear wheel of the stopped truck. The truck was damaged on the left front fender near the headlight. Short skid marks led up to the truck.

The defendant told Patrolman McKee that when he saw the boys, "he slowed down his truck, and continued on ahead, and just as he got almost even with them, they made a complete right turn from the left side of the road across into the right hand lane right into the path of his vehicle, and he put his brakes on, pulled his truck to the right, as quickly as he could, but was unable to avoid it."

At the close of plaintiff's evidence, the court allowed the defendant's motion for judgment of nonsuit.

Plaintiff appeals, assigning error.

*C. M. Llewellyn, Anne S. Greene, and M. B. Sherron for Plaintiff, Appellant.*

*E. R. Alexander and E. T. Bost, Jr., for Defendant, Appellee.*

PARKER, J. The sole contention of the defendant is that the plaintiff has not offered sufficient evidence of actionable negligence on the part of the defendant to carry the case to the jury.

It has been repeatedly declared by this Court 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. *Pavone v. Merion,* 242 N.C. 594, 89 S.E. 2d 108; *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 have less judgment and capacity to appreciate and avoid danger than adults, and that children are entitled to a care in proportion to their incapacity to foresee, to appreciate and to avoid peril. *Pavone v. Merion, supra; 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.

In *Sparks v. Willis, supra, Devin, J.,* said for the Court: "It has been frequently declared by this Court to be the duty of one driving a motor

vehicle on a public street who sees, or by the exercise of due care should see, a child on the traveled portion of the street or apparently intending to cross, to use proper care with respect to speed and control of his vehicle, the maintenance of vigilant lookout and the giving of timely warning to avoid injury, recognizing the likelihood of the child's running across the street in obedience to childish impulses and without circumspection."

In a particular situation due care may require a motorist to anticipate that a child of tender years, whom he sees on the highway, will attempt to cross in front of an approaching automobile, unmindful of danger. *Hughes v. Thayer, supra; Fox v. Barlow,* 206 N.C. 66 173 S.E. 43.

*Lucas v. Bushko,* 314 Pa. 310, 171 A. 460, was an action against a motorist for striking a nine-year old child riding on a tricycle on a road. The Supreme Court of Pennsylvania said: "Where an automobile driver sees a child in a place of danger, or has reason to apprehend that it might run into a place of danger, and has sufficient time to stop his car if under proper control, it is his duty to exercise such care as would be reasonably necessary to avoid a collision." In that case the defendant's car was travelling west on the highway and stopped within its own length after striking the child. The Supreme Court of Pennsylvania reversed the trial court, and held it was a case for the jury.

When the defendant was 400 feet away, he saw Grady Pope pushing a homemade toy wagon, in which Larry Wayne Beach was riding, across the highway. He saw they were children, and must have known that the boy in the toy wagon was a small child. The toy wagon was being pushed from the north side of the highway diagonally across it in a southeasterly direction. The boys were going in the same direction as the defendant was, and it is a reasonable inference that Grady Pope's back was to the defendant, for he says when he had pushed the wagon to the middle of the road, or a little farther, he looked back. There were no obstructions on the highway, and nothing to interfere with the defendant's vision. These boys were on the highway, where they had a right to be, in plain view, and it was incumbent upon the defendant to have his car under such control as to be prepared for such rash movements as might be expected of these boys. Although the defendant's car stopped in a short distance after striking Grady Pope, and although there is no evidence as to the speed of the defendant's car, yet the fact remains that his car struck and injured this boy whom he had seen in plain view for 400 feet on the road before striking him, and when the boy was almost off the pavement.

It would seem that the defendant cannot avail himself of the doctrine of sudden emergency, for as *Winborne, J.,* said in *Hoke v. Greyhound*

*Corp.*, 227 N.C. 412, 419, 42 S.E. 2d 593: "The principle is not available to one who by his own negligence has brought about or contributed to the emergency."

We feel that it is a question for the jury under proper instructions to say as to whether or not the defendant exercised due care to avoid injuring Grady Pope, whom he saw on the highway.

The judgment of the lower court is

Reversed.

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

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STATE v. WILLIE GARFIELD HOOKER, CHARLIE HOLDEN, AND JOHN EDWARD WILLIAMS.

(Filed 13 January, 1956.)

**1. Criminal Law § 53l: Trial § 32—**

While the court is not required to give requested instructions in the exact language of the request, even though the instruction be correct in itself and supported by evidence, the court must give such instruction at least in substance.

**2. Same: Criminal Law § 53j—**

Where the State relies upon the unsupported evidence of accomplices for a conviction, the refusal of the court to charge in response to a special request that the State's witnesses were accomplices according to their own testimony, and that their testimony was unsupported by any other evidence in the case, must be *held* for prejudicial error.

APPEAL by defendant Willie Garfield Hooker from *Seawell, J.*, at August 1955 Term, of SCOTLAND.

Criminal prosecution upon a bill of indictment containing three counts against defendant and Charlie Holden and John Edward Williams.

The first count charges that on 16 December, 1954, defendant Hooker and said Holden and Williams unlawfully, willfully and feloniously did break and enter the warehouse of Southern Cotton Oil Company with intent to steal, take and carry away merchandise, chattels, money and valuable securities of said company; the second count charges that on same date defendant Hooker and said Holden and Williams did feloniously steal, take and carry away goods, chattels and money of Southern Cotton Oil Company of value of more than a hundred dollars; and the third count charges that defendant Hooker and said Holden and

Williams did on same date feloniously receive and have money of the value of more than one hundred dollars of the Southern Cotton Oil Company well knowing that same had been feloniously stolen, taken and carried away.

The record shows that when the case was called for trial in Superior Court defendants Albert Purcell (not named in the bill above referred to) and John Edward Williams each entered plea to breaking, entering and larceny; that defendant Charlie Holden had not been taken; and that defendant Willie Garfield Hooker entered a plea of not guilty.

And the record also shows that thereupon the case against Willie Garfield Hooker proceeded to trial; that the State first offered evidence tending to show that the offenses described in the bill of indictment had been committed. Then the State introduced as witnesses Albert Purcell and John Edward Williams, who testified to their own participation, and implicating defendant, in the commission of the said offenses.

Their testimony was the only evidence offered tending to connect defendant with the offenses.

On the other hand, defendant, testifying as witness in behalf of himself, denied that he participated therein.

The case as thus presented was given to the jury.

Verdict: Guilty.

Judgment: Confinement in the State Penitentiary for a period of not less than 7 nor more than 10 years.

Defendant excepted thereto, and appeals therefrom to Supreme Court and assigns error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Jennings G. King for defendant Hooker, appellant.*

WINBORNE, J. In apt time defendant, appellant, in writing requested the trial court to give these special instructions:

"1. In North Carolina, a defendant may be convicted upon the unsupported testimony of an accomplice, if the jury is satisfied from such testimony and beyond a reasonable doubt of his guilt; and, in this case, the witnesses Purcell and Williams are which is known in law as accomplices; and their testimony as to the guilt of the defendant is unsupported by any other evidence.

"2. However, the court further instructs you that it is dangerous to convict a defendant upon the unsupported testimony of an accomplice; that it will be dangerous to convict the defendant in this case upon the testimony of Purcell and Williams, although it is your duty to do so if their testimony has satisfied you beyond a reasonable doubt of the

defendant's guilt; and that it is your duty to scrutinize their testimony with caution and with care and in the light of their interest and bias, if any, in the case."

The court refused to give either of these instructions, and to the failure to do so, defendant excepted, and assigns same as error.

While the court is not required to give the instruction in the exact language of the request, if request be made for a specific instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance. *S. v. Booker,* 123 N.C. 713, 31 S.E. 376; *S. v. Henderson,* 206 N.C. 830, 175 S.E. 201; *S. v. Pennell,* 232 N.C. 573, 61 S.E. 2d 593.

Indeed, here the requested instructions find support in decisions of this Court. *S. v. Barber,* 113 N.C. 711, 18 S.E. 515; *S. v. Williams,* 185 N.C. 643, 116 S.E. 570; *S. v. Ashburn,* 187 N.C. 717, 122 S.E. 833.

However, the court did give general instructions in this respect. But defendant contends, and we think rightly so, that the charge as given by the court failed to cover substantially the matters included in the requested instruction in that: The court failed to instruct the jury (1) "that Purcell and Williams were actually accomplices, according to their testimony," and (2) "that their testimony as to defendant's participation in the alleged offense was unsupported by any other evidence in the case."

For error thus pointed out, there must be a

New trial.

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STATE v. ROY McGOWAN.

(Filed 13 January, 1956.)

**1. Indictment and Warrant § 6½—**

A valid warrant of arrest must be based on an examination of the complainant under oath, must identify the person charged, contain directly or by proper reference at least a defective statement of the crime charged, be directed to a lawful officer or to a class of officers commanding the arrest of the accused, and be issued by an officer, lawfully authorized to do so. G.S. 15-18.

**2. Same—**

The issuance of a warrant is a judicial act; the service of a warrant is an executive function.

**3. Same: Criminal Law § 77c—**

The presumption in favor of the validity of acts of public officials which would ordinarily sustain a warrant not introduced in evidence, does not

obtain when the validity of the warrant is challenged in the Superior Court, and testimony and statements in the record disclose that it was not issued by an officer authorized to issue same, without evidence to the contrary.

**4. Indictment and Warrant § 6½—**

An order of arrest signed by a police officer and not by a judicial officer as required by G.S. 15-18, is void.

**5. Arrest and Bail § 3—**

Where police officers attempt an arrest upon an invalid warrant of arrest, the person sought to be arrested has a legal right to resist, and his motion to nonsuit in a prosecution for resisting arrest should be allowed.

APPEAL by defendant from *Hall, S. J.*, May Term 1955, Superior Court of ALAMANCE.

Criminal prosecution upon a warrant charging the defendant with resisting arrest. This charge grew out of an altercation between the defendant and police officers when they sought to arrest him on a charge of disorderly conduct. Also growing out of the arrest was a charge against one of the officers for assaulting the defendant. The three cases were appealed from the Municipal-Recorder's Court to the Superior Court of Alamance County where they were consolidated and tried together before a jury. The officer was convicted of assaulting the defendant. The defendant was acquitted on the charge of disorderly conduct. He was convicted on the charge of resisting arrest. From the judgment pronounced he appealed, assigning errors.

*William B. Rodman, Jr., Attorney General, and Harry W. McGalliard, Asst. Attorney General, for the State.*

*P. W. Glidewell, Sr., and W. R. Dalton, Jr., for defendant, appellant.*

HIGGINS, J. The defendant's principal assignment of error is based on his exceptions to the refusal of the court to grant his motions for judgment as of nonsuit. The resistance charge consisted of language and an effort on the part of the defendant to pull away from the officers as they forced him into the police car following the arrest. While the evidence of resistance was conflicting, it was sufficient to take the case to the jury, *provided* the officers were armed with a warrant sufficient in law to justify them in undertaking the arrest.

A valid warrant of arrest must be based on an examination of the complainant under oath. G.S. 15-19. It must identify the person charged. *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609. It must contain directly or by proper reference at least a defective statement of the crime charged. *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989; *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470. It must be directed to

a lawful officer or to a class of officers commanding the arrest of the accused. C.J.S., Vol. 22, p. 474. It must be issued by an officer thereto lawfully authorized, that is, the Chief Justice or one of the Associate Justices of the Supreme Court, a Judge of the Superior Court, a judge of a criminal court, a presiding officer of an inferior court, a justice of the peace, a mayor of a city or other chief officer of an incorporated town. G.S. 15-18. The issuance of a warrant of arrest is a judicial act. The service of the warrant is an executive function.

In this case neither the State nor the defendant introduced the warrant in evidence. If nothing else appears and if no objection to the validity of the warrant had been raised in the Superior Court, we would be justified in presuming the officers of the law performed their legal duties and that the warrant was legal and valid. *S. v. Honeycutt,* 237 N.C. 595, 75 S.E. 2d 525; *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311; *S. v. Rhodes,* 233 N.C. 453, 64 S.E. 2d 287; *S. v. Wood,* 175 N.C. 809, 95 S.E. 1050; *S. v. Bridgers,* 87 N.C. 562; Stansbury on Evidence, Sec. 235. In this case, however, something else *does* appear and the validity of the warrant *was* challenged in the Superior Court.

The State's witness, Police Sergeant Dupree, testified that he went to headquarters, got the warrant, signed it himself, charging the appellant with disorderly conduct. Another State's witness, J. M. Williams, testified that at the time of the arrest appellant asked Sergeant Dupree who signed the warrant, and Dupree answered: "Signed by me for disorderly conduct and that you are under arrest." The following appears in the record: "The warrant for disorderly conduct under which the defendant was being arrested at the time he was charged to have resisted arrest was not formally introduced in evidence. However, the warrant was before the court to the extent that the fact that the cases were consolidated for trial so placed it. At the time of the defendant's arrest the warrant read: 'Johnny Dupree, being duly sworn, deposes and says that Roy McGowan on or about the 18th day of September 1954, with force and arms at and in the county aforesaid and within the corporate limits of the City of Burlington, N. C., did unlawfully be disorderly by cursing and/or swearing in a public place and/or using language calculated to bring about a breach of the peace against the statute in such case made and provided, and against the peace and dignity of the State and/or in violation of the City Ordinance, Section .....'" There was no conflicting evidence, either as to the contents of the warrant or as to the person who signed it.

Without approving in form or substance the document described as a warrant, it was at most an affidavit of a complaining witness upon which a warrant of arrest might be predicated. The evidence shows it was signed not by one authorized to issue a warrant of arrest, but by a

police officer. The evidence goes no further. In passing on the question presented by the appeal we must take the record as we find it. We cannot supply missing essentials by speculation. Lacking an order of arrest signed by a judicial officer, the police officers were without authority to take the appellant in custody. He had a legal right to resist.

The evidence was insufficient to go to the jury. The court committed error in denying defendant's motion. The judgment of the Superior Court of Alamance County is

Reversed.

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LOREN H. WILLIAMS AND WIFE, LENA REEVES WILLIAMS, v. GEORGE W. STUMPF.

(Filed 13 January, 1956.)

**1. Trial § 49—**

The trial court has the discretionary power to set aside the verdict as being contrary to the weight of the evidence, but it is questionable whether the court should hear evidence outside the trial in order to determine whether the verdict should be set aside, and refuse to permit cross-examination of the witnesses called by the court for this purpose.

**2. Trial § 42—**

A party has a substantial right in a verdict rendered by the jury in his favor.

**3. Appeal and Error § 40b—**

The action of the trial court in setting aside the verdict in its discretion will not be disturbed in the absence of abuse, but the rule contemplates the exercise of a legal and judicial discretion rather than an arbitrary and capricious one.

APPEAL by defendant from *Phillips, J.*, 4 April, 1955, Civil Term, Greensboro Division, GUILFORD Superior Court.

The plaintiffs instituted this action to recover $3,000 in damages alleged to be due by reason of the refusal of the defendant to comply with a contract to purchase a lot in Starmount Forest, Guilford County.

The defendant admitted making an offer to purchase the lot upon certain conditions. As a defense he claimed to have withdrawn the offer before acceptance. As a counterclaim he demanded the return of $500 deposited as earnest money.

A jury trial resulted in a finding the defendant did not enter into the contract to purchase and that he was entitled to recover the $500 advanced. The record discloses that on the morning following the jury verdict, "pursuant to motion by plaintiff to set aside the verdict and for

a new trial, the court called witnesses and put them on the stand as witnesses of the court." The court conducted the examination of Marvin Legare, agent for the Brown Realty Company, with respect to the contract and withdrawal of the offer. At the time the presiding judge concluded the examination of the witness, counsel for defendant requested permission to cross-examine. The request was refused and the defendant excepted. The court stated: "This is an action of the court, nobody else's. I am doing this on the theory as to whether or not I decide in my discretion to set the verdict aside. It is not a part of the record—not a part of the trial. This witness was not on the stand."

The defense counsel tendered a judgment in accordance with the verdict, which the court refused to sign. The defendant excepted.

"The court, in its discretion, exercises its discretion and sets aside the verdict of the jury and orders a new trial."

The defendant excepted and appealed.

*Hoyle & Hoyle for plaintiff, appellees.*

*Brooks, McLendon, Brim & Holderness, By: L. P. McLendon, Jr., for defendant, appellant.*

HIGGINS, J. The question presented is whether the trial judge abused his discretion: (1) By refusing to permit cross-examination of the witness called by the court; and (2) by hearing evidence outside the trial in order to determine whether the verdict should be set aside.

It is a tradition of the law that the right to cross-examine is one of the strongest safeguards against mistake and perjury. It is a matter of regret, therefore, the defendant's counsel was denied the right to cross-examine the witness on whose testimony the court might determine whether it would set the verdict aside. After all, the defendant had a substantial right in the verdict in his favor, *Edwards v. Motor Co.*, 235 N.C. 269, 69 S.E. 2d 550, and it was entirely proper for his counsel to be diligent in his efforts to protect that right.

Although there is no evidence that anything improper took place during the trial, nevertheless the court has power to set aside the verdict as against the greater weight of the evidence. However, it is questionable whether the court should take additional testimony or base its decision only on that which the jury considered.

It is undoubtedly the rule that when a trial court sets aside a verdict in its discretion its action in so doing will not be disturbed in the absence of abuse. The rule contemplates the exercise of a legal, judicial, rather than an arbitrary, capricious discretion. *Pruitt v. Ray*, 230 N.C. 322, 52 S.E. 2d 876; *Francis v. Drug Co.*, 230 N.C. 753, 55 S.E. 2d 499;

*Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257. Examination of this record fails to disclose error of law requiring a reversal. The order of the Superior Court of Guilford County setting aside the verdict is

Affirmed.

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STATE v. EMMA SIMPSON.

(Filed 13 January, 1956.)

**Constitutional Law § 34d—Counsel must be appointed for person accused of capital felony who is unable to employ counsel.**

G.S. 15-4.1, implementing Article I, Sec. 11, of the Constitution of North Carolina, makes it mandatory that the clerk of the Superior Court notify the resident judge or the judge holding the courts of the district, and request immediate appointment of counsel for an accused held in custody on a capital charge, who is unable to employ counsel, and failure of such accused to have counsel appointed for her until after verdict and sentence violates her legal rights under the statute and Constitution and also under the due process clause of the Fourteenth Amendment to the Federal Constitution. The fact that the State, after arraignment and plea, elects not to press the charge for the capital offense does not affect the mandatory provisions of the statute.

APPEAL by defendant from *Stevens, J.,* April, 1955 Term Superior Court, ROBESON.

Criminal prosecution upon an indictment charging Northrup McNair and Emma Simpson with the first degree murder of Danzy Simpson.

Each defendant upon arraignment entered a plea of not guilty. Whereupon the solicitor, in open court, announced: "The State will seek no greater verdict than murder in the second degree." The defendant Northrup McNair was represented by counsel. The appellant was without counsel.

At the conclusion of the State's evidence the court directed a verdict of not guilty as to McNair. This appellant was convicted of murder in the second degree and sentenced to 25 years in the State's Prison. However, immediately after verdict and sentence, the presiding judge appointed counsel who prepared the case on appeal, filed a brief and argued the case in this Court.

*William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.*

*Charles G. McLean for Emma Simpson, defendant appellant.*

HIGGINS, J. The appellant assigns as error the failure of the court to appoint counsel to represent her in the trial. She was indicted for murder in the first degree, the punishment for which may be death. By stipulation it appears: (1) The appellant is a poorly educated colored woman, unfamiliar with court and jury trial procedure; (2) she is a pauper, financially unable to employ counsel; (3) the State was represented at the trial by the solicitor, by the assistant solicitor, and by a member of the bar employed by the private prosecution; (4) the codefendant McNair was represented by two attorneys of his own selection.

The homicide occurred on 15 February 1955. Appellant was arrested the following day. She was indicted at the March Term of Superior Court and tried at the April Term following. She was in custody from the time of the arrest until after the trial. She was unable to employ counsel. The court failed to appoint counsel until after verdict and sentence.

There was no evidence the two defendants were acting in concert at the time of the homicide. The codefendant was shown to be the owner of the death weapon and to have fired the first shot. He was successful in convincing the court he did not fire the fatal shot. The jury accepted the alternative view and concluded the appellant did. The record, built up by the prosecution and by counsel for the codefendant shows, beyond peradventure, how dire was appellant's need for a competent attorney. To place her on trial without the appointment of counsel violated her legal rights both under the Constitution and Statutes of North Carolina, and under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Implementing Article I, Section 11, Constitution of North Carolina, G.S. 15-4.1 provides: "When any person is bound over to the Superior Court to await trial for an offense for which the punishment may be death, the clerk of the superior court in the county shall, if he believes the accused may be unable to employ counsel, within five days notify the resident judge of the district, or any superior court judge holding the courts of the district, and request immediate appointment of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ counsel he shall appoint counsel to represent the accused as soon as practicable." Under the facts stipulated, the appointment of counsel was mandatory. *S. v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563; *In re Taylor,* 230 N.C. 566, 53 S.E. 2d 857; *S. v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320; *S. v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778; *S. v. Collins,* 70 N.C. 241; 27 N. C. Law Review, 422; Fourteenth Amendment to the Constitution of the United States; *Hedgebeth v. North Carolina,* 334 U.S. 806 (affirming *S. v. Hedgebeth, supra*); *Powell*

*v. Alabama,* 287 U.S. 45; *Rice v. Olson,* 324 U.S. 786; *Wade v. Mayo,* 334 U.S. 672; *Palmer v. Ashe,* 342 U.S. 134.

Upon arraignment and plea of not guilty the State elected not to press the charge for murder in the first degree. On that account the learned judge seems to have concluded the law did not require the appointment of counsel. In this he was in error. The statute provides counsel *shall* be appointed when the accused is unable to employ counsel and is bound over to the Superior Court to answer a charge, the punishment for which may be death. The record shows the indictment for murder in the first degree was returned in March. The accused was already in jail. She was a pauper. She was entitled to have the clerk and the judge proceed as provided in G.S. 15-4.1 and appoint counsel. It was immaterial whether she requested the appointment. Failure to make the request indicates either she did not realize her predicament or did not know she had a right to have the court appoint an attorney for her. The statute says the clerk shall notify the judge in five days and the judge shall make the appointment as soon as practicable. An appointment made promptly is contemplated to the end the attorney may investigate the case before facts, if any, favorable to the defense are lost sight of or covered up.

The appellant went to trial and judgment without counsel. She was tried and convicted without due process of law. Her assignment of error No. 1 must be sustained. We have not considered and do not pass upon the other assignments of error. Counsel for appellant and the Attorney General have filed excellent briefs. We commend the latter for his frankness in stating: "The Attorney General freely acknowledges the serious import of failure to have counsel."

For the error pointed out, the verdict and judgment are set aside and the cause returned to the Superior Court of Robeson County for a New trial.

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J. W. HARRIS, PLAINTIFF, v. CAROLINA POWER & LIGHT COMPANY, ORIGINAL DEFENDANT, AND DIXON & TOM-A-TOE OF NORTH CAROLINA, INC., ADDITIONAL DEFENDANT.

(Filed 13 January, 1956.)

**Appeal and Error § 6c (3½)—**

An exception and assignment of error of one appellant to the action of the court in denying portions of its motion to strike, as shown in the order appealed from, and the exception and assignment of error of the other appellant to the action of the court in allowing portions of the adverse party's motion to strike, as shown by the order appealed from, fail to

point out any particular ruling excepted to and are ineffectual as broadside assignments of error.

APPEAL by both defendants from *Carr, J.*, Regular September Civil Term 1955 of ALAMANCE.

Civil action for damages for personal injuries.

The Carolina Power & Light Company in its answer filed a cross-action against Dixon & Tom-A-Toe of North Carolina, Inc., asking that it be made a party defendant, and praying that, if the plaintiff recovers damages from it, Carolina Power & Light Company, that it have and recover judgment over against Dixon & Tom-A-Toe of North Carolina, Inc., (a) by way of indemnity for the full amount of plaintiff's recovery against it under the doctrine of primary and secondary liability between joint tort-feasors, which are not *in pari delicto*, or (b) if not entitled to recovery under (a), then by way of contribution, as provided by G.S. 1-240 between joint tort-feasors *in pari delicto*.

Upon motion of the Carolina Power & Light Company, Dixon & Tom-A-Toe of North Carolina, Inc., was made an additional party defendant. Whereupon Dixon & Tom-A-Toe of North Carolina, Inc., filed an answer to the cross-action against it of the Carolina Power & Light Company, and after admitting some and denying most of the allegations of the cross-action against it, alleged five alternative defenses—numbered 2, 3, 4, 5 and 6—, and prayed that the cross-action against it be dismissed.

The case was heard upon motion of the Carolina Power & Light Company to strike from the answer of Dixon & Tom-A-Toe of North Carolina, Inc., the following:

From the further answer and defense:

1. A portion of paragraph 3.
2. A portion of paragraph 4.
3. All of paragraphs 5, 6, 7, 8, 9 and 10.

All of the second, third, fourth, fifth and sixth alternative defenses.

The basis of the motion being that such allegations are irrelevant, redundant and prejudicial, and constitute a sham and frivolous defense.

The judge entered an order striking out from the further answer and defense and the alternative defenses of Dixon & Tom-A-Toe of North Carolina, Inc., the following:

1. A part of the challenged part of paragraph 3.
2. A part of the challenged part of paragraph 4.
3. The entire paragraph numbered 5.
4. A part of paragraph numbered 6.
5. A part of paragraph numbered 7.

6. The third, fifth and sixth alternative defenses. The rest of the motion to strike was denied.

Both defendants appeal, assigning error.

*A. Y. Arledge and Cooper, Long, Latham & Cooper for Defendant, Appellant, Carolina Power & Light Company.*

*Long, Ridge, Harris & Walker for Dixon & Tom-A-Toe of North Carolina, Inc., as Appellee and Appellant.*

PER CURIAM.

APPEAL BY DEFENDANT CAROLINA POWER & LIGHT COMPANY.

The Carolina Power & Light Company has one assignment of error: "the action of the court in denying portions of its motion to strike, as shown in the order appealed from." This assignment of error is based on this exception: "Carolina Power & Light Company objects, and excepts to that portion of the foregoing order which denies parts of its motion to strike."

This is a general broadside assignment of error. It specifies nothing: it designates no particular ruling to which exception is taken. It blithely invites us to go on a "voyage of discovery" through the Record. Under our cases it presents no question for decision by this Court, and the appeal will be dismissed. *Insulation Co. v. Davidson County,* 240 N.C. 336, 81 S.E. 2d 925; *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Arnold v. Trust Co.,* 218 N.C. 433, 11 S.E. 2d 307; *Howerton v. Scherer,* 170 N.C. 669, 86 S.E. 712.

APPEAL BY DEFENDANT DIXON & TOM-A-TOE OF NORTH CAROLINA, INC.

Dixon & Tom-A-Toe of North Carolina, Inc., has one assignment of error: "the action of the court in allowing portions of the original defendant's motion to strike, as shown in the order appealed from." This assignment of error is based on this exception: "the additional defendant excepts to that portion of the foregoing order, which allows a part of said motion to strike."

This is also a general broadside assignment of error, specifying nothing, and presents no question for decision by us. The appeal will be dismissed.

Appeal of Carolina Power & Light Company Dismissed.

Appeal of Dixon & Tom-A-Toe of North Carolina, Inc., Dismissed.

JAMES W. CHESHIRE, JR., v. VERNIE DEAN WRIGHT AND H. J. CAPPS.

(Filed 13 January, 1956.)

APPEAL by defendant Capps from *Hubbard, Special Judge,* at February Special Term, 1955, of ORANGE.

Civil action in tort tried upon the following issues, answered as indicated:

"1. Was the plaintiff injured and his automobile damaged by the negligence of the defendant, Vernie Dean Wright, as alleged in the complaint? Answer: Yes.

"2. Was the defendant Vernie Dean Wright, the agent or employee of the defendant, H. J. Capps, and as such acting within the scope of his employment and in furtherance of his principal's business, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff, by his own negligence, contribute to his personal injury and property damage, as alleged in the defendant's answer? Answer: No.

"4. In what amount, if any, is the plaintiff entitled to recover of the defendant, Vernie Dean Wright and the defendant, H. J. Capps, or either of them, for personal injury? Answer: $30,000.00.

"5. In what amount, if any, is the plaintiff entitled to recover of the defendant, Vernie Dean Wright and the defendant, H. J. Capps, or either of them for damages to his automobile? Answer: $1,869.10.

"6. Was the negligence of the defendant, Vernie Dean Wright, primary, and that of H. J. Capps, secondary? Answer: Yes."

From judgment upon the verdict the defendant H. J. Capps appealed.

*J. Q. LeGrand for plaintiff, appellee.*

*Cooper, Long, Latham & Cooper for defendant, appellant.*

PER CURIAM. The jury, under application of settled principles of law, resolved the issues of fact against the defendants. While the appellant's well-prepared brief presents contentions involving fine distinctions and close differentiations, a careful examination of the assignments of error discloses no new question or feature requiring extended discussion. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

MRS. ADDIE LILLIAN SMITH v. UNIVERSITY CONSTRUCTION COMPANY, INC., W. G. FIELDS AND WIFE, MINNIE B. FIELDS, GLYNN FIELDS AND WIFE, JACKIE FIELDS, W. G. FIELDS, JR., AND WIFE, NANETTE WOOD FIELDS, FRANK M. CARLISLE AND WIFE, THEO FIELDS CARLISLE, INDIVIDUALLY AND DOING BUSINESS AS UNIVERSITY CONSTRUCTION COMPANY.

(Filed 13 January, 1956.)

APPEAL by defendants from *Bickett, J.*, May Term, 1955, of ORANGE.

This is a civil action to recover for personal injuries sustained by the plaintiff when the defendants' garbage truck, which had been parked near the plaintiff's home, with the motor running, where it remained unattended for some ten minutes, rolled downhill toward plaintiff's house and struck the plaintiff who was on her porch, pinning her to the porch and inflicting upon her serious injuries.

The jury returned a verdict in favor of the plaintiff and from the judgment entered thereon the defendants appeal, assigning error.

*John T. Manning and Reade, Fuller, Newsom & Graham for appellee.*

*Bonner D. Sawyer and L. J. Phipps for appellants.*

PER CURIAM. We have carefully examined the defendants' assignments of error and in our opinion they present no prejudicial error of sufficient merit to justify a new trial. Hence, in the trial below we find

No error.

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STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, v. YOUNGBLOOD TRUCK LINES, INC., APPLICANT-PETITIONER; GREAT SOUTHERN TRUCKING COMPANY, McLEAN TRUCKING COMPANY, INC., MILLER MOTOR EXPRESS, INC., FREDRICKSON MOTOR EXPRESS CORP., HELMS MOTOR EXPRESS, INC., OVERNITE TRANSPORTATION COMPANY, AND THURSTON MOTOR LINES, INC.

(Filed 3 February, 1956.)

**1. Utilities Commission §§ 3, 5—**

Where the Utilities Commission dismisses a petition on the ground that it is without jurisdiction to grant the relief sought, the merits of the controversy are not before it for decision, and neither the order of the Commission nor the judgment of the Superior Court on appeal should contain findings of fact or conclusions of law in respect to the merits, and such irrelevant findings and conclusions may be stricken.

**2. Pleadings § 19a—**

Upon motion to dismiss on the ground that the court has no jurisdiction of the subject matter, the court is limited to a consideration of factors bearing on the question of jurisdiction as disclosed by the record and the pleadings.

**3. Utilities Commission § 2: Carriers § 5—**

The Utilities Commission has no jurisdiction to determine a petition of an irregular truck carrier to be authorized to exchange freight with a regular truck carrier when the regular truck carrier does not join in the petition and the petition nowhere alleges that the regular truck carrier had made or is desirous of making an agreement with petitioner for interchange of freight.

APPEAL by Protestants, Helms Motor Express, Inc., Great Southern Trucking Company, McLean Trucking Company, Inc., Miller Motor Express, Inc., Fredrickson Motor Express Corp., Overnite Transportation Company, and Thurston Motor Lines, Inc., from *Clarkson, J.*, at 1 August, 1955, Special Term of MECKLENBURG.

Proceeding instituted before the North Carolina Utilities Commission by petition of Youngblood Truck Lines, Inc., for authority to interchange freight with Helms Motor Express, Inc.

The petitioner alleges that it is an irregular route common carrier of motor freight in the State of North Carolina, operating under franchise certificate issued by the North Carolina Utilities Commission authorizing it to transport freight over irregular routes to and from all points and places in the State west of U. S. Highway No. 1; that petitioner's franchise certificate was granted under the Grandfather Clause of the North Carolina Truck Act of 1947, now codified as G.S. 62-121.11; that the petitioner also holds franchise certificate of the Interstate Commerce Commission, authorizing it to transport interstate freight in the same area described in its North Carolina certificate, and in other areas and many other states, north, east, south and west thereof; that prior to 1 January, 1947 (the qualifying date of the Grandfather Clause), the petitioner engaged in interchange of freight with Helms Motor Express, Inc., at points within petitioner's franchise territory, "where interchanges were practicable and for the best interests of the shipping public"; that the petitioner "is desirous of continuing said interchange of freight with the said Helms Motor Express, Inc., . . ."; that petitioner's "shippers and customers are entitled to the service available to them by . . . continuation of said interchange"; that petitioner "is entitled to have permission and approval of the right to interchange motor freight within its franchise (territory) with said Helms Motor Express, Inc."

The protestants, all being regular route common carriers of motor freight in the State of North Carolina, came in as intervenors and objected to the petition, alleging that the creation of authority to interchange freight between the petitioner and the regular route common carrier, Helms Motor Express, Inc., would create a new service into the territory presently served directly or through interchange over routes of the protesting carriers; that the routes are adequately served by regular route common carriers and that there is no need for the additional authority sought by the petitioner; that to grant the additional authority would seriously jeopardize operations presently carried on by the protesting carriers, and other regular route common carriers within the State.

The cause came on for hearing before the North Carolina Utilities Commission, hereinafter referred to as the Commission, on 29 March, 1955. By consent, the case was consolidated for trial with seven other similar cases in which Youngblood Truck Lines, Inc., is petitioner.

Thereupon the protestants directed attention to Section 24 of the North Carolina Truck Act of 1947 and to Revised Rule 44 of the Commission. The pertinent part of Section 24 of the Truck Act (now codified as G.S. 62-121.28(2)) is as follows:

> "(2) Except under special conditions and for good cause shown every common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle, *and with the approval of the Commission, may do so with irregular route common carriers by motor vehicle,* common carriers by railroad and/or express and/or water." (Italics added.)

The protestants, in view of the foregoing statute and Revised Rule 44, moved the Commission to dismiss the petition on the ground that it was without jurisdiction to grant the relief sought, it appearing that Helms Motor Express, Inc., is not a petitioning party to the proceeding and that the petitioner does not allege that Helms Motor Express, Inc., has made, or is desirous of making, an interchange agreement with the petitioner.

After argument of counsel, the Commission sustained the motion of the protestants and Chairman Winborne stated that the proceeding was dismissed. The petitioner noted an exception to the ruling and indicated a desire to appeal. Following this, Chairman Winborne announced that the ruling would be put in the form of an order, which would be subject to petition for rehearing and other rules of appellate procedure.

On 22 April, 1955, the Commission filed and promulgated its order sustaining the motion to dismiss. The order contains a statement of background facts and conclusions in part as follows:

"Prior to the passage of the North Carolina Truck Act of 1947, the only carriers of property by motor vehicle which were regulated in the State of North Carolina were those transporting property over regular routes. The carriers which operated as irregular route carriers were in a sense 'free lance' operators who were permitted to operate free from regulation insofar as the State of North Carolina was concerned. When the North Carolina Truck Act was passed in 1947, a declaration of policy was enunciated, and it was stated:

> 'that upon investigation, it has been determined that the tranportation of property by motor carrier for compensation over the public highways of the State is a business affected for the public interest; that there has been shown a definite public need for the continuation and preservation of all existing motor carrier service, and to that end it is hereby declared to be the policy of the State of North Carolina to preserve and continue all motor carrier services now afforded this State.' (From Section 1, North Carolina Truck Act—G.S. 62-121.5.)

"Section 2 (G.S. 62-121.6) of the Truck Act delegated jurisdiction with full power and authority to adequately enforce the provision of said Act, and to make and enforce reasonable and necessary rules to that end to the North Carolina Utilities Commission.

"Under Section 3 (G.S. 62-121.7), Subsection (13) of the said Act, common carriers were defined as:

> 'Common carrier by motor vehicle means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of property of any class, or classes, thereof for compensation whether over regular or irregular routes.'

"Under the power and authority vested in it by Section 2 of the Truck Act, and specifically under the authority authorizing the making and enforcement of reasonable and necessary rules and regulations to carry out and administer said Truck Act, the North Carolina Utilities Commission adopted a rule as a part of the 'Rules and Regulations for the Administration and Enforcement of said Act,' known as Rule No. 44 which prescribes that:

> 'No traffic shall be interchanged between contract carriers, nor between a contract carrier and a common carrier, nor between a regular route common carrier and an irregular route common car-

> rier, nor between two irregular route common carriers, except after application to the Commission.' . . .

and after notice to all parties of interest, and a hearing thereon, such be authorized by the Commission.

"Section 7 (G.S. 62-121.11) of the North Carolina Truck Act, familiarly known as the Grandfather Clause, provides:

> '(1) . . . "If any carrier or predecessor in interests was in *bona fide* operation as a common carrier by motor vehicle on January 1, 1947, over the route or routes or within the territory for which application is made under this section, and has so operated since that time, or if engaged in furnishing seasonal service only, was in *bona fide* operation on January 1st, 1947, during the season ordinarily covered by its operation, and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue a certificate to such carrier without requiring further proof that public convenience and necessity will be served by such operation" '—

if such carrier qualifies itself as in the manner prescribed by other subsections of section 7.

"The petitioner obtained its certificate to operate as an irregular route carrier under and by virtue of Sec. 7 of the Grandfather Clause of the Truck Act immediately hereinabove quoted.

"The petitioner alleges and contends that prior to the passage of the Truck Act, and specifically prior to the 1st day of January, 1947, the qualifying date for Grandfather Rights under the Truck Act, that it was engaged in the interchange of freight with HELMS MOTOR EXPRESS, INC. at points and places within its franchise area, and it alleges that by reason thereof, it has the legal right to now interchange with HELMS MOTOR EXPRESS, INC. It bases its contention in this respect upon the decision of the Supreme Court of North Carolina in the case entitled, State of North Carolina *ex rel.* UTILITIES COMMISSION *v.* JULIUS M. FOX, reported in Volume 239 N.C. p. 253. The FOX case was a proceeding wherein Julius M. Fox, an irregular route carrier authorized to transport certain properties in a certain area of North Carolina, and who obtained said rights by virtue of the Grandfather Clause of the Truck Act, sought authority from the Commission to interchange freight with other carriers for the reason that the said Julius M. Fox was engaged in interstate transportation, and could obtain no rights to interchange interstate freight without holding a certificate for such authority in intrastate commerce. In the language of the Supreme Court of North Carolina it considered the question: 'Does the Commis-

sion have the power to promulgate a rule, pursuant to the provision of General Statutes 62-121.6, purporting to regulate common carriers of property by motor vehicle under the North Carolina Truck Act, and then interpret or enforce the rule in such manner as to deny the exercise of rights which the Legislature in clear and express terms preserved to all motor vehicle carriers of property who were in *bona fide* operation on 1 January 1947, and who have met the additional requirements contained in Section 7 of the Act?' The Court said the answer must be in the negative. It further says:

. . .

'We do not express an opinion as to the validity or reasonableness of Rule No. 44, insofar as its provisions may be applicable to intrastate carriers of property by motor vehicle pursuant to a certificate granted by the Commission upon a finding of public convenience and necessity. However, if the applicant, a holder of a franchise or certificate pursuant to the grandfather clause contained in the North Carolina Truck Act, in light of the provisions contained in Rule 44, must have permission or approval of the Commission to interchange freight with other intrastate carriers, whether he intends to exercise such right or not, in order to retain his right to interchange freight with interstate carriers, he is entitled to such permission or approval. Moreover, he is entitled to this permission or approval not as a matter of discretion or as an act of grace, but as a matter of law.'

"After the decision in the FOX case the Commission, with notice to all common carriers over both regular and irregular routes in the State of North Carolina, and in a duly constituted hearing for such purpose, revised Rule 44 of its Rules and Regulations for the Administration and Enforcement of the Truck Act, and prescribed Rule 44 revised to be:

'(1) Except under special conditions and for good cause shown, all regular route common carriers of general commodities by motor vehicle operating in intrastate commerce in North Carolina SHALL establish through routes and joint rates with other such common carriers, and shall interchange intrastate traffic as a matter of course under interchange agreements.'

'(2) All common carriers of property by motor vehicle operating in intrastate commerce in North Carolina, whether regular route or irregular route common carriers MAY establish through routes and joint rates and interchange intrastate traffic with any and all common carriers of property by motor vehicle, railroad, express, or water, with respect to traffic which either originates at or is destined to points in North Carolina not on any route of a regular route carrier of general commodities, such interchange of traffic to

be made pursuant to agreements between the participating carriers therein, copies of which said agreements shall be filed with the Commission.'

'(3) Subject to the provisions of paragraphs (1) and (2) hereof, no motor carrier of property operating in intrastate commerce in North Carolina shall interchange intrastate traffic except after application to and written permission from the Commission. In such cases, the applicant shall file with the Commission a correct and true copy of the proposed interchange agreement, together with a statement under oath of facts from which the Commission may determine that the proposed interchange of traffic in the particular case is, or will be, in the public interest.'

"The effect of Rule 44 is not to deprive any carrier, whether he be a regular or an irregular route carrier of the right to interchange freight with other common carriers, but is to provide an orderly procedure whereby such an arrangement may be put into effect. The rule provides for such interchange of traffic to be made pursuant to agreements between the participating carriers, copies of which are to be filed with the Commission, together with a statement under oath of the facts from which the Commission may determine that proposed interchange of traffic in the particular case is, or will be, in the public interest. The rule further provides that the same shall not apply to or affect in any manner whatsoever the interchange of interstate traffic at points in the State of North Carolina. If there is to be maintained an orderly and workable system of transportation by motor vehicle within the State of North Carolina, the same must be based upon reasonable rules and regulations administered for the protection of the rights of all common carriers and to the welfare of, and in the best interest of the general public. This is what the Commission seeks to do by revised Rule 44.

"It is to be noted that in the FOX case the Supreme Court ruled that an irregular route carrier had the right to interchange with other carriers, upon the same basis he had interchanged prior to January 1, 1947, the qualifying date for Grandfather Rights. The Court did not hold such carriers were required to interchange, nor that other carriers were required to interchange with such carriers. It merely held that the Commission could adopt no rule which deprived an operator of the right to interchange if he could qualify under the Grandfather Clause. It is to be further noted that the Supreme Court did not rule out the authority of the Commission to make reasonable rules and regulations for the enforcement of the Truck Act. In fact, the Court recognized the right of the Commission to make such rules and regulations. Had the Court held that the Commission could not prescribe reasonable rules and regulations, the effect would have been to destroy the Truck

Act by rendering it useless as a regulatory measure. If all carriers were to be permitted to do just as they had prior to the passage of the Truck Act, without any prescribed rules or regulations to follow, then the Truck Act itself would be ineffective.

"Interchange of freight from one carrier to another has always been based upon an agreement between the carriers involved. The law requires that all regular route carriers interchange with one another, but makes no such requirement as to irregular route carriers. The interchange agreements made between carriers are to provide points of interchange, the division of rates and charges, and any and all other necessary and pertinent arrangements that need to be made between said carriers to properly effectuate the interchange. *The Commission has judicial knowledge of the fact that irregular route carriers, although not regulated by the Commission prior to the enactment of the Truck Act, in many instances prior to January 1, 1947, did interchange freight with other carriers, both regular and irregular. It likewise has judicial knowledge of the fact that all such interchange arrangements were by agreements entered into by the carriers involved. The decision of the Supreme Court in the FOX case in our opinion in nowise obviated the necessity of an agreement between carriers who wish to interchange being made prior to their engaging in such with one another.* (Italics added.)

"A regular route common carrier is defined under the Rules and Regulations of the Commission to be:

> 'The words "regular route" identify this type of carrier as one who makes regular trips over the same highways between the same points, and the word "common" identifies the carrier as one who serves the general public.
>
> 'A regular route common carrier makes his service available to the public by operating over the same route with such regularity that shippers may rely upon a truck being along at reasonably regular intervals. It is a scheduled operation. That does not mean that the trucks of the carrier will operate on fixed time schedules as is necessary in the transportation of passengers by train or bus. The operation is a scheduled or regular route operation if it may be anticipated by shippers without making any special arrangement or contract with the carrier. Such a service may be at some time during a certain hour, or it may be at some time during the forenoon or at some time during the afternoon or at some time during the day or on certain days of the week in cases in which business on the route does not justify daily service. Whether the operations are hourly, daily, or weekly, it is the known practice or plan of carriers to operate over the route at regular intervals that makes the operation a scheduled or regular operation.

'Any operation over the same highways between the same points that is made known to the public by advertising, through a course of dealing with shippers, or by any other means that leads shippers to understand that they may depend upon its regularity over the route, is a regular route operation.'

"An irregular route common carrier is defined to be:

'The service rendered by this type of common carrier is in direct contrast with that of a regular route carrier. The words "regular" and "irregular" have a very different meaning, and the two types of service are just as different. They are both common carriers but they differ widely in the way they operate.

'An irregular route carrier may operate every day and all day, but his operations over the same highways or between the same points are irregular. He may operate over the same highway between the same points two or more times on a single day and then not operate over that highway again for a month. His operations are not repeated over any highway or between any points according to any predetermined or prearranged plan or understanding with shippers. Such a carrier makes his service available to the public by responding to specific calls. He goes when and where he is called upon within the bounds of the territory he undertakes to serve. One call may be for very desirable business over a paved highway, and the next call may be for less desirable business to some isolated point or to a farmhouse or to a sawmill in the woods. If the call is for service within the territory he undertakes to serve and is for the transportation of property or commodities he undertakes to haul for the public, he must perform the service. That is the type of service an irregular carrier elects to give the public, and he is not permitted to channel his operation into the type of service the regular route carriers elects to perform.

'Such an election is made by the carrier by the application he files for operating rights. Neither type of carrier may change the rights granted except upon a new application and after a hearing before the Commission.'

"To permit, authorize, or require unlimited interchange of property between irregular route carriers, or between irregular and regular route carriers would have the effect of abolishing the distinction between the two which is well recognized by law. It would likewise have the effect of enlarging the scope of operation for all irregular route carriers which was not the intent of the General Assembly when it prescribed the Truck Act. In this proceeding the petitioner seeks to interchange traffic with a regular route carrier whose operations are wholly within the territory the petitioner is authorized and obligated to serve. If the

HELMS MOTOR EXPRESS, INC. was required to interchange any and all traffic with the petitioner without the right to agree upon terms and conditions surrounding such interchange, the petitioner could assemble freight in any quantity throughout the territory it is authorized to serve, and require HELMS MOTOR EXPRESS, INC. to distribute the same from an interchange point to points upon the Helms route on such terms and conditions as the petitioner might see fit to impose. Thus, the Commission prescribes by rule that if such interchange is to be effectuated, that the same must be upon an agreement entered into by both parties to the interchange, specifying the terms and conditions of such interchange, the method and manner of dividing tariffs therefor, and all in the best interests of the general public. We think such a rule to be fair and reasonable. The petitioner herein is not being denied the right or privilege of interchanging freight with other carriers in North Carolina. It has that right in the words of the Supreme Court of North Carolina, 'not as a matter of discretion or as an act of grace, but as a matter of law.' It need not apply to this Commission to establish that right which it has at law, but it cannot seek from the Commission authority to interchange freight with any carrier without bringing such other carrier before the Commission with an agreement entered into between it and said carrier. If it desires to make interchange of traffic with HELMS MOTOR EXPRESS, INC., and HELMS MOTOR EXPRESS, INC. desires to handle freight in conjunction with the petitioner by interchange, then both parties need but to file their agreement with the Commission, accompanied by a statement under oath of the facts surrounding such, from which the Commission may determine that the interchange of such traffic is in the public interest.

"Thus, the Commission finds:

"(2) . . . that prior to January 1, 1947, the qualifying date for Grandfather Rights under the said Truck Act, the petitioner engaged in the interchange of freight with Helms Motor Express, Inc. to and from points and places within its franchise area; . . .

"(4) That no agreement has been entered into between the petitioner, Youngblood Truck Lines, Inc., and Helms Motor Express, Inc., concerning the interchange of freight; *and that prior to January 1, 1947, all interchange arrangements between irregular route carriers and other carriers were by virtue of an interchange agreement entered into between the carriers making such interchange;* and (Italics added.)

"(5) That in the absence of such an agreement, the Commission is without jurisdiction to authorize or require an interchange of property between these carriers.

"WHEREFORE, the motion of the protestants herein that this cause be dismissed is granted and allowed, and it is therefore ORDERED that said

cause be and the same is hereby dismissed; and that a copy of this order be transmitted to the petitioner and its attorney of record, and to all protestants and their attorneys of record."

In due course and pursuant to the procedure outlined in G.S. 62-26.6, both sides petitioned the Commission for rehearing. Youngblood's petition specifies numerous grounds on which it considers the Commission's decision and order of dismissal unlawful, unwarranted, and erroneous. The protestants, being satisfied with the ultimate decision of the Commission in dismissing the proceeding for want of jurisdiction, nevertheless took exception to a number of findings set out in the formal order entered by the Commission.

Both petitions to rehear were denied *in toto* and each side, as allowed by statute (G.S. 62-26.6), appealed to the Superior Court.

The case was heard on appeal by Judge Clarkson, after which judgment was entered, which in material part is as follows:

"The Court being of the opinion that the Order entered by the North Carolina Utilities Commission on the 22nd day of April 1955 *does not, as contended by the applicant, retain in the North Carolina Utilities Commission any discretion or grace as to Applicant's rights to interchange traffic with* HELMS MOTOR EXPRESS, INC. *if it is able to effect an interchange agreement with said carrier";* (Italics added.)

"The Court being of the opinion that the words contained in said Order such as 'from which the Commission may determine that proposed interchange of traffic in the particular case is, or will be, in public interest' are not by effect or meaning an attempt of the Utilities Commission of North Carolina to deprive the Applicant of its right of interchange with said carrier, but is merely a reservation of the power vested in said body to assure that all operations of motor carriers are conducted in the public interest; and

"The Court being of the opinion that the Applicant herein, Youngblood Truck Lines, Inc., pursuant to said Order *has the right if it can do so to re-establish an interchange relationship with said Helms Motor Express, Inc., and upon establishing such a relationship may put same into effect by filing the written terms of said interchange agreement with the North Carolina Utilities Commission and that the only power obtained by the North Carolina Utilities Commission in said Order is the regulatory power of assuring that all of the terms of said agreement are to the public interest, just as they would in the regulation of tariffs, schedules, operations, etc.:* and (Italics added.)

"The Court being further of the opinion that the Protestants' exceptions to the findings of fact contained in said Order are not well taken and that said findings of fact are supported by the pleadings, admissions of counsel in the record, the undenied allegations of the petition

offered in evidence and the records of the North Carolina Utilities Commission, but the Court being further of the opinion that even if said findings of fact were not supported by competent evidence, the Protestants were not injured or damaged thereby nor were the Protestants injured or damaged by the ruling of the Commission in dismissing the action upon their motion; and

"The Court being of the opinion that said Order places in the hands of the Protestants solely the power of voluntarily entering into an agreement with the Applicant or not as they see fit, and the Court therefore finding as a fact that the Protestants are not in any way adversely affected by the Commission's Order or the findings of fact contained therein and for said reasons is of the opinion that the Protestants' objections and exceptions should be overruled and denied; and

"The Court, pursuant to the provisions of Section 62-26.10 of the General Statutes of North Carolina, being vested with the power of interpreting and modifying the orders of the North Carolina Utilities Commission and determining the meaning and applicability of the terms of any Commission action as a matter of law;

"IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED, and DECREED as follows:

"(1) That this Court interprets and to that extent modifies the order of the North Carolina Utilities Commission in this cause dated the 22nd day of April 1955, by ruling that same does not contravene the decision of the Supreme Court of North Carolina in the case of FOX *v.* UTILITIES COMMISSION, 239 N.C. 253, and does not retain in the North Carolina Utilities Commission any grace or discretion as to the general right of Youngblood Truck Lines, Inc., to interchange freight with Helms Motor Express, Inc. as a matter of law by merely reserving to said body the general supervisory powers vested in it by the North Carolina Truck Act over all motor freight operations to assure that said operations are not contrary to public interest.

"(2) Except as herein modified and interpreted the Order of the North Carolina Utilities Commission in this cause dated the 22nd day of April 1955 be, and is hereby affirmed.

"(3) Except as hereinabove set forth all objections and exceptions of the Applicants and Protestants are overruled and denied."

From the foregoing judgment the protestants appealed to this Court.

*Allen & Hipp, Bunn & Bunn, and J. Ruffin Bailey for appellants.*

*Williams & Williams for appellee.*

JOHNSON, J. This appeal derives from the ruling of the North Carolina Utilities Commission on protestants' motion to dismiss the petition

for want of jurisdiction of the subject matter. The motion was grounded on the contention that the petitioner is not entitled to the relief sought unless it is made to appear that Helms Motor Express, Inc., the carrier with whom the petitioner seeks authority to interchange freight, desires to enter into a freight interchange arrangement with the petitioner. The motion was allowed and the proceeding was dismissed on the ground that the following jurisdictional defects were disclosed by the pleadings and the record: (1) that Helms Motor Express, Inc. is not a petitioning party to the proceeding, and (2) the petitioner does not allege that Helms Motor Express, Inc. has made, or is desirous of making, an interchange agreement with the petitioner. Thus the proceeding was not heard on its merits. This being so, the scope of decision before the Commission was limited to a consideration of facts bearing on the question of jurisdiction as disclosed by the record and the pleadings. Therefore, any facts found by the Commission outside the record and pleadings were irrelevant to the Commission's inquiry and unnecessary to its decision.

While the order entered by the Commission contains a well-reasoned discussion of the legal principles applied by it in reaching decision, nevertheless it appears that the order also contains findings deduced from sources outside the record and pleadings and which are not germane to decision. The following findings are subject to challenge in this respect and will be treated as surplusage:

1. "The Commission has judicial knowledge of the fact that irregular route carriers, although not regulated by the Commission prior to the enactment of the Truck Act, in many instances prior to January 1, 1947, did interchange freight with other carriers, both regular and irregular. It likewise has judicial knowledge of the fact that all such interchange arrangements were by agreements entered into by the carriers involved."

2. ". . . that prior to January 1, 1947, all interchange arrangements between irregular route carriers and other carriers were by virtue of an interchange agreement entered into between the carriers making such interchange."

When the case reached the Superior Court on appeal, the scope of decision there was limited, no less than before the Commission, to a consideration of factors bearing on the question of jurisdiction as disclosed by the record and the pleadings. And the Superior Court was without authority to rule on matters affecting the merits of the proceeding. "It is well established that upon a motion to dismiss an action for want of jurisdiction of the subject matter thereof, matters affecting the merits of the action cannot be considered." 17 Am. Jur., Dismissal

and Discontinuance, Sec. 48; *Thacker v. Hubard & Appleby,* 122 Va. 379, 94 S.E. 929, 21 A.L.R. 414.

However, the presiding Judge in reviewing the decision of the Commission appears to have gone further and considered and dealt with matters relating to the merits of the proceeding. For example:

1. The statement that the court is of the opinion that the order entered by the Commission "does not, as contended by the applicant, retain in the North Carolina Utilities Commission any discretion or grace as to Applicant's rights to interchange traffic with HELMS MOTOR EXPRESS, INC. if it is able to effect an interchange agreement with said carrier."

2. The statement that Youngblood Truck Lines, Inc. "has the right if it can do so to re-establish an interchange relationship with said Helms Motor Express, Inc., and upon establishing such a relationship may put same into effect by filing the written terms of said interchange agreement with the North Carolina Utilities Commission and that the only power obtained by the North Carolina Utilities Commission in said Order is the regulatory power of assuring that all of the terms of said agreement are to the public interest just as they would be in the regulation or tariffs, schedules, operations, etc."

In making the foregoing conclusions the court was dealing with the merits of the proceeding, based in each instance on a state of facts not disclosed by the record. The questions dealt with were beyond the scope of review. They were hypothetical questions. The conclusions, and others of like import, along with the adjudications based thereon, should be eliminated. To that end, it is directed that the judgment of the Superior Court be modified so as to eliminate therefrom all conclusions and adjudications relating to matters affecting the merits of the proceeding, so that the judgment as modified shall decree that the petitioner's exceptions be overruled and that the order of the Commission be affirmed, subject to the modifications herein directed.

It is not perceived that the order of the Commission when so modified will contravene the decision of this Court in *Utilities Commission v. Fox,* 239 N.C. 253, 79 S.E. 2d 391. The order of the Commission aptly points out the factors which distinguish the instant case from the *Fox case.*

We have not overlooked the fact that the protestants have brought here on this appeal only a general exception to the judgment. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. See also *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; *Greene v. Spivey,* 236 N.C. 435, 73 S.E. 2d 488. Nevertheless, the general exception presents the question whether errors of law prejudicial to the protestants appear upon the face of the record.

*Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592; *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53.

The errors pointed out appear on the face of the record.

Conceding, *arguendo,* that the order entered by the Commission dismissing the proceeding contains, in addition to the findings ordered stricken, other findings or conclusions which reach beyond the scope of decision and deal with matters which are irrelevant, even so, our examination of the record leaves the impression that any such erroneous findings or conclusions are not prejudicial to the protestants, appellants.

Modified and affirmed.

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STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA UTILITIES COMMISSION, v. YOUNGBLOOD TRUCK LINES, INC., APPLICANT-PETITIONER; GREAT SOUTHERN TRUCKING COMPANY, McLEAN TRUCKING COMPANY, INC., MILLER MOTOR EXPRESS, INC., FREDRICKSON MOTOR EXPRESS CORP., HELMS MOTOR EXPRESS, INC., OVERNITE TRANSPORTATION CO., AND THURSTON MOTOR LINES, INC., PROTESTANTS.

(Filed 3 February, 1956.)

APPEAL by Protestants, Great Southern Trucking Company, McLean Trucking Company, Inc., Miller Motor Express, Inc., Fredrickson Motor Express Corp., Helms Motor Express, Inc., Overnite Transportation Co., and Thurston Motor Lines, Inc., from *Clarkson, J.,* at 1 August, 1955, Special Term of MECKLENBURG.

Proceeding instituted before the North Carolina Utilities Commission by petition of Youngblood Truck Lines, Inc., an irregular route common carrier of motor freight, for authority to interchange freight with Goldston Motor Express, Inc., a regular route common carrier of motor freight.

The protestants, all being regular route common carriers of motor freight in the State of North Carolina, came in as intervenors and objected to the petition. The cause came on for hearing before the Commission on 29 March, 1955. By consent, the case was consolidated for trial with seven other similar cases in which Youngblood Truck Lines, Inc., is petitioner.

The protestants moved the Commission to dismiss the petition, on the ground that it was without jurisdiction to grant the relief sought. After argument of counsel, the Commission sustained the motion of the protestants, and Chairman Winborne stated that the proceeding was dismissed. The petitioner noted an exception to the ruling and

indicated a desire to appeal. Whereupon Chairman Winborne announced that the ruling would be put in the form of an order, which would be subject to petition for rehearing and other rules of appellate procedure.

On 22 April, 1955, the Commission filed and promulgated its order sustaining the motion to dismiss.

In due course and pursuant to the procedure outlined in G.S. 62-26.6, both sides petitioned the Commission for rehearing. Both petitions to rehear were denied *in toto* by the Commission, and each side, as allowed by statute, appealed to the Superior Court. The case was heard on appeal by Judge Clarkson, after which judgment was entered modifying and affirming the order of the Commission.

From the judgment so entered the protestants appealed to this Court.

*Allen & Hipp, Bunn & Bunn, and J. Ruffin Bailey for appellants.*
*Williams & Williams for appellee.*

PER CURIAM. In this case (No. 252) the judgment of the Superior Court will be modified and affirmed in accord with what is said in the opinion filed simultaneously herewith in the companion case of State of North Carolina *ex rel.* North Carolina Utilities Commission *v.* Youngblood Truck Lines, Inc., *et al.*, *ante*, 442, which is decisive of the questions raised by the instant appeal.

Modified and affirmed.

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ORKIN EXTERMINATING COMPANY, INC., v. I. H. O'HANLON, EDWARD A. RASBERRY, JAMES MONTGOMERY AND ANTEX EXTERMINATING COMPANY, INC.

(Filed 3 February, 1956.)

**1. Appeal and Error § 2—**

An order of amendment substituting one plaintiff for another affects a substantial right and is appealable.

**2. Pleadings § 3a—**

Where the complaint alleges a contract between plaintiff corporation and one of defendants, but the contract attached to the complaint as an exhibit discloses that the contract sued on was between the individual defendant and a different corporation, the exhibit puts to naught the action asserted in the complaint, since the legal entity of each corporation may not be disregarded.

**3. Pleadings § 19c—**

Where the complaint alleges causes of action for breach of contracts executed by two of defendants, respectively, with the corporate plaintiff, as shown by the contracts attached as exhibits, but thereafter the summons and complaint are amended by substituting a different corporate plaintiff, the action may not be maintained by the original plaintiff, since its name had been stricken as plaintiff and no action is pending in its name, nor by the substituted plaintiff, since the contracts alleged in the amendment are not between the individual defendants and the substituted plaintiff.

**4. Pleadings § 22: Process § 3—**

The court does not have discretionary power to permit an amendment of the summons and complaint by striking the name of the plaintiff and substituting therefor another plaintiff when such amendment changes the cause of action. In an action to enjoin violation of contracts, an amendment substituting for the original corporate plaintiff the name of a separate corporate entity changing the cause of action, and may not be allowed. G.S. 1-163.

**5. Pleadings § 23½—**

Where an amendment allowed by the trial court is set aside on appeal for want of authority of the court to allow the amendment, the case stands as never amended.

**6. Pleadings § 15—**

A demurrer is a pleading within the purview of G.S. 1-151 requiring that pleadings be liberally construed with a view to substantial justice between the parties.

**7. Pleadings § 17—**

Demurrer, in this case, liberally construed *held* to substantially set forth as the ground of demurrer a misjoinder of both parties and causes, even though it does not use the specific words.

**8. Pleadings §§ 2, 19b—**

Causes of action against three separate defendants based on the alleged violation of three separate and distinct contracts, entered into at different times, with different expiration dates, are improperly joined, there being no allegations disclosing a connected series of transactions connected with the same subject of action, and demurrer for misjoinder of parties and causes of actions should have been allowed.

**9. Pleadings § 20½—**

Where there is an improper joinder of both parties and causes of action, the action must be dismissed upon demurrer.

**10. Contracts § 26—**

In an action to restrain individuals from breaching their contract not to engage in competitive employment in a designated area for a specified time, the corporation employing such individuals is not under contractual duty to plaintiff, nor may it be held liable as inducing the individual defendants to breach their contract when there is no allegation that the defendant corporation had any knowledge or notice of the alleged contracts.

**11. Same—**

An action may not be maintained against a third party for inducing breach of an agreement by covenantor when the amended complaint fails to show that the alleged contract was made by the covenantor with the plaintiff.

APPEAL by plaintiff and the individual defendants from *Nimocks, J.*, September Civil Term 1955 of CUMBERLAND.

Civil action for injunctive relief allegedly arising out of contracts of employment containing restrictive covenants as to time and place of competitive activities, heard upon plaintiff's motion for a temporary restraining order, and upon demurrers written and *ore tenus* to the complaint entered by the defendants, and upon a motion by plaintiff to amend the summons, complaint and all papers filed in the case by the plaintiff by striking out in all these papers the name of Orkin Exterminating Company, Inc., and substituting in lieu thereof as plaintiff Orkin Exterminating Company of Raleigh, Inc.

The original plaintiff was Orkin Exterminating Company, Inc., a North Carolina corporation, having its principal office and place of business in Wake County.

This is a summary of the material allegations of the complaint.

For many years plaintiff has been engaged in the exterminating and pest and termite control business in the States of North Carolina and South Carolina, has built up a large and valuable business, and has acquired a substantial good will, which constitutes a valuable asset in its business.

The defendant O'Hanlon had been an employee of the plaintiff prior to 1 November 1954. On that date plaintiff and O'Hanlon entered into another employment contract terminating their previous contract. The complaint alleges that a full and true copy of this contract of 1 November 1954 is attached to the complaint, and marked Exhibit "A." Exhibit "A" is a contract between Orkin Exterminating Company of Raleigh, Inc., and O'Hanlon, and not a contract between plaintiff and O'Hanlon. In the contract marked Exhibit "A" O'Hanlon was referred to as Manager. The complaint alleges these material parts of the contract marked Exhibit "A": The company and the manager agree that the company is in the termite and pest control business, and has built up a valuable and extensive trade in the "Cities of Fayetteville, Clinton, Garland, Roseboro, Salemburg, Aberdeen, Carthage, Laurel Hill, Parkton, Laurinburg, Lumber Bridge, Pinebluff, Pinehurst, Raeford, Spring Lake, Southern Pines, Vass, Wagram, Fairmont, Lumberton, Maxton, Pembroke, Red Springs, Rowland, St. Paul, Biscoe, Hamlet, Ellerbee, Mt. Gilead, Robbins, Rockingham, Troy, Wadesboro, all within the State of North Carolina, and a 25 mile radius of each of

said cities." The manager expressly covenants and agrees that he will not, during the term of this agreement, and for a period of two years immediately following the termination of this agreement, for any reason whatsoever, directly or indirectly, for himself, or on behalf of, or in conjunction with, any other person, persons, company, partnership or corporation engage in competition in business with the company anywhere within the territory above set forth. In the course of his employment O'Hanlon acquired knowledge of the company's confidential processes and systems of exterminating and controlling pests and termites, and of its customers and business.

On 3 June 1955 plaintiff terminated its contract with O'Hanlon. Immediately thereafter O'Hanlon and Philip Melotto chartered the defendant Antex Exterminating Company, Inc., in which O'Hanlon and Melotto are the principal stockholders, directors and officers. The Antex Exterminating Company, Inc. is engaged in the same business with plaintiff, and in direct competition with it in the area set out in the contract of 1 November 1954 between plaintiff and O'Hanlon. O'Hanlon has advertised himself as being principal owner and manager of said company, and has procured former customers of plaintiff to become customers of this company. This company has engaged O'Hanlon, either as its chief executive officer, or one of its chief executive officers, and it and O'Hanlon are still engaged in solicitation of plaintiff's customers.

Plaintiff and the defendant Rasberry entered into a contract of employment, dated 13 February 1953. A copy of this contract is attached to the complaint and marked Exhibit "B." This contract shows that this contract was between plaintiff and Rasberry, and it contains substantially identical covenants and agreements, as set forth above in the O'Hanlon contract. On 30 June 1955, Rasberry left plaintiff's employment, and immediately thereafter entered the employment of the Antex Exterminating Company, Inc., by procurement of it and O'Hanlon, in which employment he is in direct competition with plaintiff, in violation of his contract with plaintiff.

The complaint alleges substantially the same facts against the defendant Montgomery as it does against the defendant Rasberry. A copy of the Montgomery contract is attached to the complaint, marked Exhibit "C," and shows that this contract was between plaintiff and Montgomery. It was entered into on 15 August 1949, and terminated on 7 June 1955.

O'Hanlon, Rasberry and Montgomery, by reason of their employment by plaintiff, knew the names of plaintiff's customers, and, as employees of Antex Exterminating Company, Inc., have caused many of plaintiff's customers to cancel their service contracts with plaintiff, and to give

them to their employer, and will solicit others to cancel their contracts with plaintiff. These activities by the defendants are causing plaintiff serious money loss, and, if permitted to continue, will cause the plaintiff to suffer irreparable loss.

Wherefore, the plaintiff prays that all the defendants be enjoined from competitive activity with it during the time, and within the area, set forth in its contracts with the defendants O'Hanlon, Rasberry and Montgomery.

Judge Nimocks signed an order to show cause why a restraining order should not issue. The defendants have not answered. Before the order to show cause was heard, the corporate defendant filed a written demurrer stating that the complaint does not state facts sufficient to constitute a cause of action, as it appears from the face of the complaint, that the corporate defendant, a legal entity, owes no obligation to plaintiff, has caused plaintiff no legal injury, and has neither committed, nor threatened to commit, any act for which injunctive relief should be granted. At a similar time the individual defendants filed a written demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, as it appears from the complaint, as a matter of law, that the contracts on which the complaint is based are void, and on the further ground that there is a misjoinder of parties in that the individual defendants are being sued on separate contracts.

After these demurrers were filed counsel for plaintiff and counsel for defendants stipulated, and agreed that at the time of the institution of this action there were two Orkin Companies operating in North Carolina: one of these was incorporated under the laws of this State as Orkin Exterminating Company, Inc., and the other was incorporated under the laws of this State as Orkin Exterminating Company of Raleigh, Inc.

Judge Nimocks, upon motion of plaintiff, and over the objection and exception of the defendants, and two months after the order to show cause was issued, in his discretion, allowed plaintiff to amend the summons, complaint, and all papers filed by it in the cause, by striking out the name of Orkin Exterminating Company, Inc., and inserting in lieu thereof the name Orkin Exterminating Company of Raleigh, Inc., on the ground that the former name was entered on these papers by inadvertence.

Whereupon, the defendants, and each of them as individuals, during the course of the argument on their written demurrers, demurred *ore tenus* on the following grounds: on the ground of a misjoinder of parties and causes, for that said alleged violations arose out of separate and distinct contracts with separate and distinct companies under different

conditions. O'Hanlon further demurred *ore tenus* on the ground that the complaint, which included the contract between him and plaintiff, did not allege a cause of action against him, for the reason that his contract was with the Orkin Exterminating Company of Raleigh, Inc., and not with Orkin Exterminating Company, Inc. The defendants Rasberry and Montgomery further demurred *ore tenus* on the ground that, after the name of plaintiff was changed from the Orkin Exterminating Company, Inc. to Orkin Exterminating Company of Raleigh, Inc., the complaint did not state a cause of action against them, because their contracts were attached to the complaint as exhibits, and show that their contracts were with Orkin Exterminating Company, Inc., and not with the Orkin Exterminating Company of Raleigh, Inc.

The motion to show cause was heard by Judge Nimocks upon evidence offered by the parties.

The judge made elaborate findings of fact. He sustained the corporate defendant's demurrer, using this language: "11. The demurrer of the corporate defendant is sustained because the plaintiff has failed to state a cause of action against said defendant in that it has failed to show any legal duty owing to the plaintiff by the corporate defendant, and because the purpose of the injunctive relief asked against the corporate defendant will be adequately accomplished by the injunction herein granted to the plaintiff against the individual defendants." He overruled the demurrers, written and *ore tenus*, of the individual defendants. The judge then entered an order restraining the individual defendants, and each one of them, from engaging in competing activities with the plaintiff for the times and within the area as set forth in the contracts of employment of each individual defendant, pending the final hearing of this action.

From that part of the order sustaining the demurrer of the corporate defendant, the plaintiff excepts and appeals, assigning error.

From that part of the order overruling their written demurrer, and from the court's findings of fact and conclusions of law and issuing its temporary injunction, and from the court's order allowing the name of the plaintiff to be changed from Orkin Exterminating Company, Inc., to Orkin Exterminating Company of Raleigh, Inc., the individual defendants, and each one of them, except and appeal, assigning error.

*Tally, Tally & Brewer and McKenzie, Kaler & Shulman for Plaintiff, Appellee and Plaintiff, Appellant.*

*Rose, Sanford & Weaver and Nance & Barrington for Defendant, Appellee and Defendants, Appellants.*

EXTERMINATING CO. *v.* O'HANLON.

APPEAL BY DEFENDANTS O'HANLON, RASBERRY AND MONTGOMERY.

PARKER, J. The defendants assign as error the order of the court in striking out the name of the Orkin Exterminating Company, Inc. as plaintiff and in substituting in lieu thereof the name of the Orkin Exterminating Company of Raleigh, Inc. as plaintiff.

Orkin Exterminating Company, Inc., and Orkin Exterminating Company of Raleigh, Inc. are different corporations, and each one has a distinct legal entity. *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; 18 C.J.S., Corporations, Sec. 4.

This assignment of error presents for decision this question: Under the broad powers of amendment in the discretion of the court authorized by G.S. 1-163, did the lower court have the power to substitute Orkin Exterminating Company of Raleigh, Inc., as plaintiff, in lieu of Orkin Exterminating Company, Inc., thereby working an entire change of parties plaintiff, and introducing a new cause of action?

This order of amendment affects a substantial right of the appellants, and is appealable. *Snipes v. Estates Administration, Inc.,* 223 N.C. 777, 28 S.E. 2d 495.

The facts here do not present a case of a misnomer or defect in the description of a party, where an amendment is permissible, as was the case in *Propst v. Trucking Co.,* 223 N.C. 490, 27 S.E. 2d 152, and *Clevenger v. Grover,* 212 N.C. 13, 193 S.E. 12.

In *Grandy v. Sawyer,* 9 N.C. 61, the Court was considering the general provisions for amendment given by the Act of 1790. That Act, which appears in Laws of North Carolina, Iredell, page 696, reads in part: "And the said courts respectively shall . . . and may at any time permit either of the parties to amend anything in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion and by their rules prescribe." The Court said: "But comprehensive as the words are, they can scarcely be thought to warrant a total change of parties, except in a case where the parties were merely nominal, and the person concerned in interest had also been a party from the beginning."

This Court said in *Snipes v. Estates Administration, Inc., supra:* "It has been held, as stated in the case of *Street v. McCabe,* 203 N.C. 80, 164 S.E. 329, that 'Whenever objection is made the court has no authority to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. It is not permissible, except by consent, to change the character of the action by the substitution of one that is entirely different. *Merrill v. Merrill, supra* (92 N.C. 657); *Clendenin v. Turner,* 96 N.C. 416; *Hall v. R. R.,* 146 N.C. 345; *Bennett v. R. R.,* 159 N.C.

345; *Reynolds v. Cotton Mills,* 177 N.C. 412; *Jones v. Vanstory,* 200 N.C. 582.' "

The Court said in *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559: "Ordinarily, an amendment of process and pleading may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party. Citing authorities. But not so where the amendment amounts to a substitution or entire change of parties."

In *Clendenin v. Turner,* 96 N.C. 416, it is said: "The Court has no authority to allow such amendments as to parties, or as to the cause of action, as make a new, or substantially a new action, unless by the consent of the parties. Indeed, this would not be to *amend,* in any proper sense, but to substitute a new action by order, for and in place of a pending one, which the Court cannot do."

In Annotation 135 A.L.R. 326, where many cases from many jurisdictions are cited in support, it is said: "As a general rule, either at common law or under amendment statutes not providing expressly that the cause of action may be changed, the right to amend pleadings by substituting a new plaintiff for the original one depends upon whether such amendment will introduce a new cause of action into the case. Where such substitution will introduce a new cause of action into the case it cannot be allowed, while if it will not introduce a new cause of action it may be permitted." See also: Elaborate Annotation 135 A.L.R. 325, *et seq.,* entitled "Substitution of plaintiff as proper subject for amendment of Complaint"; 39 Am. Jur., Parties, Sec. 98; 67 C.J.S., Parties, pp. 1021-1022, pp. 1075-1077, p. 1089.

We have held in the following cases that one plaintiff may be substituted for another plaintiff, working an entire change of plaintiffs, by amendment, where no substantial change in the nature of the claim demanded in the complaint was involved. In *Bullard v. Johnson,* 65 N.C. 436, there was a substitution of the assignee as plaintiff in lieu of the assignor, original plaintiff: a decision in accord with the view generally adopted by the courts, Anno. 135 A.L.R. 340-347. In *Talbert v. Becton,* 111 N.C. 543, 16 S.E. 322, an action to recover land, a purchaser, after the commencement of the action, was substituted as party plaintiff on the ground that the action was based on the legal title alone. In *Hill v. R. R.,* 195 N.C. 605, 143 S.E. 129, a substitution of one administratrix in place of another administratrix in an action for damages for wrongful death was allowed by amendment, because it did not constitute a new cause of action. See also: *Grandy v. Sawyer, supra; Bray v. Creekmore,* 109 N.C. 49, 13 S.E. 723; *Commissioners v. Candler,* 123 N.C. 682, 31 S.E. 858; *Gibbs v. Mills,* 198 N.C. 417, 151 S.E. 864.

Orkin Exterminating Company, Inc., the original plaintiff, alleges in paragraph 5 of its complaint: "5. On 8 May 1945 plaintiff and defend-

ant, O'Hanlon, entered into a written contract by which defendant O'Hanlon on that date entered into the service of plaintiff as an employee and specifically as Manager of its Raleigh, North Carolina office. On 5 September 1945 plaintiff and defendant O'Hanlon entered into a new contract of employment by which defendant O'Hanlon became Manager of plaintiff's Fayetteville, North Carolina office. . . . On 1 November 1954 plaintiff and defendant O'Hanlon entered into another contract terminating their previous contracts of employment . . ." A contract dated 1 November 1954, and attached to the complaint as Exhibit A, contains the provisions as to competing activities copied in the remaining part of paragraph 5, and is a contract between Orkin Exterminating Company of Raleigh, Inc. and O'Hanlon, and not a contract between Orkin Exterminating Company, Inc. and O'Hanlon.

Orkin Exterminating Company, Inc. alleges a contract with the defendant Rasberry, and the contract attached to the complaint marked Exhibit B is a contract between Orkin Exterminating Company, Inc. and Rasberry. An identical factual situation exists as to the defendant Montgomery. It seems clear that the name of Orkin Exterminating Company, Inc. was not written as plaintiff by inadvertence, as plaintiff contends, instead of Orkin Exterminating Company of Raleigh, Inc., because of the allegations of the complaint as to the defendants Rasberry and Montgomery and their attached contracts.

The allegations of the complaint of the original plaintiff against O'Hanlon are neutralized by the contract attached to the complaint marked Exhibit A, which "puts to naught the cause of action asserted" in the complaint against O'Hanlon. *Hall v. Refining Co.*, 242 N.C. 707, 89 S.E. 2d 396. If the substitution of parties plaintiff here were permissible, the identical result would be reached as to the defendants Rasberry and Montgomery.

The substitution of parties plaintiff was an attempt to change the liability sought to be enforced against O'Hanlon from a contract alleged in the body of the complaint between O'Hanlon and the original plaintiff to an alleged contract between O'Hanlon and the substituted plaintiff, a wholly distinct and different contract, and an entirely different plaintiff, and to wipe out the conflict between the allegations of the complaint as to O'Hanlon and the contract attached thereto, marked Exhibit A. In other words, the complaint failing to state a cause of action in the original plaintiff against O'Hanlon, by substitution of parties plaintiff, an attempt is made to make the complaint state a cause of action against O'Hanlon by the substituted plaintiff, and a further cause of action by the substituted plaintiff against the corporate defendant as substantially the *alter ego* of O'Hanlon. See: *Sineath v. Katzis*, 218 N.C. 740, 756, 12 S.E. 2d 671; 67 C.J.S., Parties, p. 1022.

In *Austin v. Hallstrom,* 117 Vt. 161, 86 A. 2d 549, the Court said: "The amendment asked for would change the parties and introduce a new cause of action. It would, in effect, substitute a plaintiff who could maintain trespass on the freehold for plaintiffs who cannot maintain this action. Such an amendment cannot be allowed and the court properly denied the motion to amend."

Broad as are the provisions of G.S. 1-163 as to amendments, and liberally as we construe them (*Clevenger v. Grover, supra*), they are not broad enough to permit the substitution of parties plaintiff under the facts here. This Court said in *Goldston Brothers v. Newkirk,* 234 N.C. 279, 67 S.E. 2d 69: "The lower court may allow or disallow such amendments as it may think proper in the exercise of its sound discretion (G.S. 1-163; *Gilchrist v. Kitchen,* 86 N.C. 20), bearing in mind, of course, that the nature of the cause of action as previously charted may not be substantially changed." The assignment of error by the individual defendants as to the substitution of parties plaintiff is good.

The order of amendment permitting a substitution of Orkin Exterminating Company of Raleigh, Inc. as plaintiff in lieu of Orkin Exterminating Company, Inc., having been improperly made without authority, and the amendment set aside here, the case stands as though never amended. *Brooks v. Ulanet,* 116 Vt. 49, 68 A. 2d 701; *Hill v. Jamieson,* 16 Ind. 125, 79 Am. Dec. 414; 71 C.J.S., Pleadings, p. 694.

The individual defendants filed a written demurrer, which states as one ground thereof: "There is a misjoinder of parties in that the individual defendants are each being sued on separate contracts, the fact situation is different in each case, such joinder will confuse and obscure the respective defenses."

A demurrer is generally considered as a pleading. *Wilkinson v. Cohen,* 257 Ala. 16, 57 So. 2d 108; *Inman v. Willinski* (Maine), 65 A. 2d 1; 71 C.J.S., Pleadings, Sec. 211, p. 418. G.S. 1-124 states: "The only pleading on the part of the defendant is either a demurrer or an answer."

G.S. 1-151 provides: "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."

The written demurrer does not use the specific words, a misjoinder of both parties and causes, but a liberal construction of the words used in the written demurrer leads us to the conclusion that it substantially sets forth as a ground of demurrer a misjoinder of both parties and causes.

The individual defendants, and each one of them, assign as error the overruling of their written demurrer.

The allegations against these three defendants are based on the alleged violations of three separate and distinct contracts, each contract entered into at different times by different parties, each terminated at a different time, and if we consider alone the contracts attached to the complaint, two contracts entered into by the original plaintiff and one by the substituted plaintiff. It is clear that the alleged cause of action against O'Hanlon does not affect Rasberry and Montgomery; that the cause of action against Rasberry does not affect the other individual defendants, and the same applies to Montgomery. The several causes of action united in the complaint do not "affect all the parties to the action," as required by G.S. 1-123.

*Utilities Com. v. Johnson,* 233 N.C. 588, 64 S.E. 2d 829, was a suit instituted by the Utilities Commission against five defendants, taxicab operators, to restrain alleged violation by each of them of G.S. 62-121.47. The Court said: "It is apparent that the plaintiff has improperly sought to unite in the same complaint separate and distinct causes of action against five different persons among whom there is no joint or common liability and no privity or community of interest. Suit against one of the defendants for the causes alleged in nowise affects the other four, and hence joinder may not be permitted under G.S. 1-123 . . ."

The court said in *Snotherly v. Jenrette,* 232 N.C. 605, 61 S.E. 2d 708: "It has been uniformly held by this Court that separate and distinct causes of action set up by different plaintiffs or against different defendants may not be incorporated in the same pleading, and that such a misjoinder would require dismissal of the action." See also: *Tart v. Byrne, ante,* 409, 90 S.E. 2d 692; *Johnson v. Scarborough,* 242 N.C. 681, 89 S.E. 2d 420.

The facts alleged in the complaint 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.

It is obvious that in the instant case there is a misjoinder of both parties and causes, and such being the case the demurrer of the individual defendants should have been sustained, and the action dismissed. *Tart v. Byrne, supra; Snotherly v. Jenrette, supra; Sasser v. Bullard,* 199 N.C. 562, 155 S.E. 248.

APPEAL BY PLAINTIFF.

The plaintiff assigns as error the sustaining of the corporate defendant's demurrer.

The defendant Antex Exterminating Company, Inc. is a distinct legal entity, and is not a party to any contract not to engage in a competing business with either Orkin Exterminating Company, Inc., or Orkin Exterminating Company of Raleigh, Inc. There are no allegations in the complaint that the corporate defendant knew or had any notice of the alleged non-competitive contracts of Rasberry and Montgomery with Orkin Exterminating Company, Inc. The allegations as to them are that they entered into the contracts attached to the complaint with the original plaintiff, the termination of those contracts, the employment of them by the corporate defendant, and their competing activities.

The plaintiff relies upon this statement in *Sineath v. Katzis, supra,* which it quotes in its brief: "However, a stranger to the covenant may properly be enjoined from aiding the covenantor in violating his covenant or receiving any benefit therefrom. Hence, a stranger to the covenant may well be enjoined from, in conjunction with the covenantor, or with his assistance, conducting a business in competition with the covenantee." A few sentences later on this opinion states: "Knowledge of the contract, of course, is a condition of liability."

The plaintiff further contends that the complaint alleges an interference by the corporate defendant with the alleged contract relationships of the individual defendants with itself, the original plaintiff, and cites in support thereof a quotation from 30 Am. Jur., Interference, Sec. 23, p. 75, and this statement from Annotation 84 A.L.R. 83: "It is not justification for knowingly procuring the breach of a contract that defendant acted without an improper purpose, and sought only to further his own interests. . . . thus, competition is not a justification for inducing one to commit a breach of a contract, and thereby to interfere with the business of the other party thereto."

In 30 Am. Jur., Interference, Sec. 22, p. 75, it is said: "Knowledge of the existence of a contract is a condition of liability for procuring its breach." In the same annotation from A.L.R. quoted by plaintiff, it is said on p. 49: "Knowledge of the contract is, of course, a condition of liability."

The complaint states no cause of action against the corporate defendant in respect to its relations with Rasberry and Montgomery, because there is no allegation to the effect that the corporate defendant had any knowledge or notice of the alleged contracts between them and Orkin Exterminating Company, Inc.

As we have stated above, the allegations of the complaint that O'Hanlon is a covenantor with Orkin Exterminating Company, Inc. are "neutralized" and "put to naught" by the contract attached to the complaint and marked Exhibit "A." Therefore, the complaint states

no cause of action against the corporate defendant so far as its connection with O'Hanlon is concerned, for it does not appear that O'Hanlon was a covenantor with Orkin Exterminating Company, Inc.

If we had adopted the view that, when the amendment substituting Orkin Exterminating Company of Raleigh, Inc. as plaintiff in lieu of Orkin Exterminating Company, Inc. was vacated here, the case did not stand as never amended, it would avail the original plaintiff nothing, because for lack of any plaintiff no action would be pending.

It is to be distinctly understood that we have not by anything said here expressed any opinion as to the validity or invalidity of the provisions in the contracts attached to the complaint as to non-competitive activities.

On plaintiff's appeal—Affirmed.

On individual defendants' appeal—Reversed and Action Dismissed.

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WACHOVIA BANK AND TRUST COMPANY AS EXECUTOR UNDER THE WILL OF ADDIE HEREFORD UPTON, v. CAMILLE H. WOLFE, AND THE AMERICAN NATIONAL RED CROSS.

(Filed 3 February, 1956.)

**1. Wills §§ 31, 39—**

The objective of construction is to ascertain the intent of testator as expressed in the will, and to this end the conditions and circumstances surrounding testator at the time he executed the instrument, including the relationship between testator and the beneficiaries named therein, and the condition, nature and extent of testator's property, are competent to be considered, the extrinsic evidence being admissible to aid the court in ascertaining the intent of the testator as expressed in the will, and not to supply, contradict, enlarge or vary the words of the instrument.

**2. Wills § 34e—**

Ordinarily, the word "estate," unless restricted by the context, embraces a testator's entire property, real and personal, although in its technical sense it may refer only to the degree, quantity, nature and extent of a person's interest in land.

**3. Same—**

The word "property" and the words "personal property" have varied meanings according to the context and circumstances.

**4. Wills § 39—**

Testatrix bequeathed to her sister "my furniture, household effects and personal property. The balance of my estate I leave to" the American National Red Cross. *Held:* The words "personal property" present a

patent ambiguity as to the intent of testatrix, and extrinsic evidence as to the circumstances surrounding testatrix at the time of executing the instrument should have been considered by the court in determining the question.

**5. Same: Appeal and Error § 1—**

Where the lower court erroneously excludes extrinsic evidence bearing upon the intent of testatrix, the cause will be remanded, and the Supreme Court will not consider the excluded evidence, even though it appear of record, nor attempt to decide what portions of the excluded evidence would be competent upon the question, since the Supreme Court possesses no original jurisdiction in such matters, but has jurisdiction only to review the rulings of the lower court in respect thereto.

**6. Appeal and Error § 40b: Pleadings § 22—**

When it appears that the lower court denied motion for leave to amend a pleading under a misapprehension of the pertinent law, the ruling will be set aside with leave to appellant to renew the motion, if so advised.

**7. Wills § 39—**

Extrinsic evidence is competent to explain a latent defect in a will to identify a described property or beneficiary. In such case the court construes the will, but the jury, under appropriate instructions, passes upon the issue or issues of fact.

**8. Same—**

When a will contains a patent ambiguity, extrinsic evidence is not admissible to explain the meaning of the words used, and it is the duty of the court to declare the testator's intent as expressed in the instrument in accordance with established rules of construction, but when the patent ambiguity relates to intent, extrinsic evidence as to the facts and circumstances surrounding testator at the time he executed the instrument is competent to aid the court in ascertaining the intent of testator from the language of the instrument. In such case it is for the court to find the facts in regard to the circumstances attendant, although in its discretion it may submit such questions of fact to the jury.

APPEAL by defendant Wolfe from *Armstrong, J.*, September, 1955, Term, of ROWAN.

Action for declaratory judgment brought by executor for construction of the will of Addie Hereford Upton.

Testatrix, a resident of Rowan County, died 5 August, 1953. Her holographic will, executed 2 October, 1951, was probated 18 August, 1953.

The dispositive provisions of the will are these:

"I hereby will and bequeath ten thousand dollars (10,000.) to the Charity Hospital in New Orleans, Lousiana. To St. Andrews Episcopal Church in New Orleans, Louisiana, I will the sum of five hundred (500.00) dollars. To St. Luks (*sic*) Episcopal Church in Salisbury, N. Carolina, I leave the sum of (500.00) five hundred dollars. To the

Red Cross of Salisbury, N. Carolina, I leave five hundred (500.00) dollars. To my sister Mrs. Camille H. Wolfe, I leave my furniture, household effects and personal property. The balance of my estate I leave to the National Red Cross society of America."

The pleadings establish these facts: The value of the gross estate was $33,356.55, consisting of (1) cash on hand, $221.65, (2) bank and building and loan balances, $3,193.90, (3) stocks and bonds, of the value of $29,641.00, and (4) household furniture and personal effects, of the value of $300.00. After payment of the four specific bequests aggregating $11,500.00, the ascertained liabilities, and exclusive of furniture and household and personal effects, the present value of the residuary estate, is as follows: (1) cash, $911.42, and (2) "bonds and securities," $20,915.78.

It was stipulated that "National Red Cross Society of America," referred to in the will, is the American National Red Cross, a charitable corporation organized under Act of Congress, defendant herein.

Each defendant claimed said residuary estate of the testatrix. The executor prayed the advice and instructions of the court, posing this specific question:

"Did the testatrix intend that the bequest of *all* of her 'personal property' to her sister, Camille H. Wolfe, include the aforementioned cash, bonds, and securities or did the testatrix intend that said cash, bonds and securities not be included in the term 'personal property' and should pass to the defendant, American National Red Cross, as her residuary estate?" (It is noted that the word, "all," is not used in the will in conjunction with the bequest to defendant Wolfe.)

The only allegations *of fact* in the pleadings in respect of the circumstances and relationships of the testatrix when she made the will are set forth below.

Defendant Wolfe alleged: "The testatrix was a widow and left no lineal descendants; this defendant is her only surviving sister or brother and nearest of living kin. The testatrix and this defendant were lifelong companions and resided together for many years."

Defendant Red Cross alleged:

". . . the defendant Camille H. Wolfe is a sister of the testatrix and one of ten (10) sisters and brothers that the testatrix had; . . ." Also, ". . . the testatrix, who was a childless widow over 80 years of age, had resided all of her life in the State of Louisiana until she moved to the home of a niece, Mrs. F. M. Warlick, 105 Mitchell Avenue, Salisbury, North Carolina, in 1948, where she resided for several years until she began renting an apartment at the home of another niece, Mrs. J. O. Clamp, at 416 West Horah Street, Salisbury, North Carolina, permitting her sister, Mrs. Camille H. Wolfe, to reside with her until

her death on August 5, 1953. That the testatrix did not own any real property on October 2, 1951, the date of the execution of the will of testatrix, or at any time thereafter."

At pre-trial hearing, both defendants moved that they be permitted to offer evidence to aid in the construction of the will. Defendant Wolfe moved further for a trial by jury on eleven specific issues tendered by her. Defendant Red Cross opposed this motion for a jury trial.

The court denied defendant Wolfe's motion for a jury trial, refusing to submit the issues tendered by her. In addition, the court ruled that "extrinsic evidence" was inadmissible; but, noting that "it is to be understood that the Court does not consider this evidence in construing the will," allowed defendants, if they desired to do so, to "make a record" of such excluded "extrinsic evidence."

Defendant Wolfe then offered evidence as appears in the record. Defendant Red Cross offered no evidence. Its counsel cross-examined the witnesses of defendant Wolfe. This was done "for the record."

After offering this evidence, defendant Wolfe moved for leave to amend her answer, "by adding to the allegations of extrinsic circumstances already contained in said Answer, further specific averments covering the evidence presented." The court denied the motion.

The court's construction was that the testatrix "did not intend the words 'personal property' in her legacy to the said Camille H. Wolfe to include stocks, bonds, securities and cash and did intend that said properties should pass to the defendant the American National Red Cross."

Accordingly, judgment was entered in favor of defendant Red Cross. Defendant Wolfe excepted and appealed. Her assignments of error are that the court erred: (1) "in refusing to receive and consider extrinsic evidence in the construction of the will"; (2) "in refusing to allow Jury trial"; (3) "in refusing to submit issues tendered" by her; (4) in denying her motion for leave to amend her answer; and (5) in construing the will and in entering judgment in favor of the defendant Red Cross.

*Craige & Craige, Clarence Kluttz, and Lewis P. Hamlin, Jr., for defendant Wolfe, appellant.*

*Woodson & Woodson for defendant American National Red Cross, appellee.*

BOBBITT, J. Did the testatrix use the words "personal property" to denote everything she owned except real property? Defendant Wolfe says, "Yes." Defendant Red Cross says, "No," contending that when

used in the clause, "I leave my furniture, household effects and personal property," the "personal property" in mind was *ejusdem generis,* that is, tangible articles of household and personal use.

The court, based solely on the will itself and the admissions, construed the will and entered judgment in favor of defendant Red Cross.

The controversy concerns the assets, noted above, now in the hands of the executor. Admittedly, one of the defendants is entitled thereto. Each contends that there is no uncertainty as to the proper interpretation of the will, but the *plain meaning* thereof as asserted by each is exactly opposite to that asserted by the other. To resolve its dilemma, the executor invokes the advice and instructions of the court, an appropriate course when in such plight.

The situation is this: The assets of the estate and the beneficiaries thereof are identified. The testatrix was a widow, without lineal descendants, and defendant Wolfe is her sister. These facts, nothing else, are established by admissions in the pleadings or by stipulation.

For the reasons stated below, we refrain from construing the will upon the record now before us.

The authority and responsibility to interpret or construe a will rest solely on the court. Its objective is to ascertain the intent of the testator, as expressed in the will, when he made it. *Trust Co. v. Green,* 239 N.C. 612, 80 S.E. 2d 771; *Trust Co. v. Waddell,* 237 N.C. 342, 75 S.E. 2d 151.

*Barnhill, J.,* now *C. J.,* in *Trust Co. v. Waddell, supra,* says: "In ascertaining the intent of the testator, the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made. Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410; *Heyer v. Bulluck,* 210 N.C. 321, 186 S.E. 356; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; *In re Will of Johnson,* 233 N.C. 570, 65 S.E. 2d 12.

"'. . . the court should place itself as nearly as practicable in the position of the testator . . . at the time of the execution of the will.' *In re Will of Johnson, supra.*"

*Clark, C. J.,* in *Patterson v. McCormick,* 181 N.C. 311, 107 S.E. 12, in a sentence frequently quoted, puts it this way: "The will must be construed, 'taking it by its four corners' and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant."

Generally, "the circumstances attendant" when the will was made refers to the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of his property. *Hubbard v. Wiggins,* 240 N.C. 197, 81 S.E. 2d 630; *Heyer v. Bulluck, supra; Herring v. Williams,* 153 N.C. 231, 69 S.E. 140; *Woods v. Woods,* 55 N.C. 420.

It is frequently said, as in *Heyer v. Bulluck, supra,* that "the attendant circumstances" are to be considered "where the language is ambiguous, or of doubtful meaning." In such case, the court undertakes "to put itself in the testator's armchair." In so doing, as well expressed by *Torrance, C. J.,* in *Thompson v. Betts,* 74 Conn. 579, 51 Atl. 566, 92 Am. St. Rep. 235: "In short, the court may, by evidence of extrinsic facts, other than direct evidence of the intention of the testator, put itself as near as may be 'in the condition of the testator in respect to his property and the situation of his family,' for the purpose of rightly understanding the meaning of the words of his will."

The admission of evidence of "the circumstances attendant" to enlighten the court in its task of ascertaining the intent of the testator, *as expressed in the will,* is quite different from the admission of extrinsic evidence to supply, contradict, enlarge or vary the words of the will.

We advert to the well established rule in relation to the admissibility of extrinsic evidence to explain a *latent* as distinguished from a *patent* ambiguity in a writing, be it deed or will. As to deeds, see *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889. As to wills, consideration of the opinion of *Pearson, J.,* later *C. J.,* in *Institute v. Norwood,* 45 N.C. 65, is appropriate.

As pointed out by *Pearson, J.,* later *C. J.:* A *patent* ambiguity presents *a question of construction;* and "the only purpose of construction is to find out *what the instrument means,* and that must depend upon *what the instrument says.*" A *latent* ambiguity presents *a question of identity*—"a fitting of the description to the person or thing, which can only be done by evidence outside or *dehors* the instrument; . . ." Reference is made to the illustrations given. Suffice it to say that, in illustrating what is meant by a *patent* ambiguity, the instances cited relate to bequests or devises held void because the description of property or of beneficiary was so vague that nothing appeared therein that could be identified by fitting extrinsic evidence to the words used in such description. Thus, where "&c" appeared in the will, this was held a *patent* ambiguity. *Taylor v. Maris,* 90 N.C. 619, 624.

*Merrimon, J.,* later *C. J.,* in *McDaniel v. King,* 90 N.C. 597, 602, says: "If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it." For additional citations, see *Reynolds v. Trust Co.,* 201 N.C. 267, 277-278, 159 S.E. 416.

Ordinarily, the word "estate," unless restricted by the context, embraces a testator's entire property, real and personal. *Harrell v. Hoskins,* 19 N.C. 479; *Hunter v. Husted,* 45 N.C. 141; *Foil v. Newsome,* 138 N.C. 115, 50 S.E. 597; 57 Am. Jur., Wills sec. 1337. Yet in its primary, technical sense it may refer only to the degree, quantity, nature and extent of a person's interest in land. *Bond v. Hilton,* 51 N.C. 180.

Our decisions fully justify the statement of *Rodman, J.,* in *Wilson v. Charlotte,* 74 N.C. 748, viz.: "The word 'property' is not such a technical one that if properly used it has everywhere the same precise and definite meaning. Its meaning varies according to the subject treated of and according to the context." This is equally true in respect of the words, "personal property." Annotations: "What passes under term 'personal property' in will." 137 A.L.R. 212; 162 A.L.R. 1134. "Every expression, to be correctly understood, ought to be considered with a view to the circumstances of its use." *Stacy, C. J.,* in *Heyer v. Bulluck, supra.*

The definition of "personal property" in G.S. 12-3 (6) embraces "choses in action and evidence of debt, including all things capable of ownership, not descendable to heir at law." This definition is expressly applicable to the construction of *statutes.* Even so, it is not applicable in that connection if "such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute."

In the will before us, there is no *latent* ambiguity. There is no question of identifying a beneficiary or a particular property by fitting the person or thing to the description. There is no suggestion that any provision of the will is void for vagueness of description either of beneficiary or of property.

The controversy turns on the sense in which the testatrix used the words "personal property." The ambiguity appears on the face of the will. The court must ascertain and declare the intent of the testatrix. The will, in its entirety, *and* the facts constituting "the circumstances attendant" when made, are to be considered. We hold, therefore, that the court was in error in refusing to consider evidence tending to show "the circumstances attendant." What bearing, if any, they will have in interpreting the sense in which the testatrix used the words, "personal property," is not presently before us. This must be determined, in the first instance, by the trial court.

Appellee contends that the "excluded evidence," when considered in the light most favorable to defendant Wolfe, supports the construction of the will made by the court. The court below did not consider such evidence. Nor do we consider it.

*Barnhill, J.*, now *C. J.*, in *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888, in words apposite here, says:

"Why doesn't this Court perform this judicial function and be done with it? Simply because this Court possesses no original jurisdiction in such matters. Its duty is to review the decisions of the Superior Courts of the State. The court below must exercise its original jurisdiction. If the parties are not then satisfied with the judgment entered they may bring the cause back for review."

Nor is it appropriate for us to attempt to mark out what portions of the "excluded evidence" would be competent for consideration by the court below, should the same evidence be offered at the next hearing. *Grandy v. Walker,* 234 N.C. 734, 68 S.E. 2d 807.

It appears that the court's denial of defendant Wolfe's motion for leave to amend her answer so as to allege additional facts was made under the misapprehension of law that facts tending to show "the circumstances attendant" were not competent for consideration. Hence, this ruling is set aside and leave is granted defendant Wolfe to renew said motion, if so advised. *Morris v. Wilkins,* 241 N.C. 507, 85 S.E. 2d 892. Perhaps it is well to note the distinction between facts embraced with "the circumstances attendant" and contentions as to the construction of the will.

One further matter requires consideration. The court below ruled, and rightly so, that the question posed was for the court, without a jury. In the absence of stipulation, "the circumstances attendant" are to be established by findings of fact by the court.

As stated by *Clark, C. J.*, in *Cecil v. Cecil,* 173 N.C. 410, 92 S.E. 158, referring to a similar situation: "These are not issues of fact, but incidental questions of fact, properly found by the judge in construing the will, which is a matter of law for the court." Further on in the opinion, we find these words: "The extraneous evidence was properly 'admitted for placing the court at testator's point of view when he made the will and thereby aiding in the right interpretation of the will.' *Wooten v. Hobbs,* 170 N.C. 214."

Incidentally, the trial judge, in his discretion, *may* submit questions of fact to a jury for determination. *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500; G.S. 1-172.

Appellant relies upon *Trust Co. v. School for Boys,* 229 N.C. 738, 51 S.E. 2d 477; *Trust Co. v. Board of National Missions,* 226 N.C. 546, 39 S.E. 2d 621; and *Raines v. Osborne,* 184 N.C. 603, 114 S.E. 846.

In *Trust Co. v. School for Boys, supra,* the controversy was over a provision in a will making a bequest of $10,000.00 to the "Plumtree School at Plumtree, N. C." A private school, Plumtree School for Boys, Inc., and the Board of Education of Avery County, each of which

operated a school at Plumtree, N. C., were the rival claimants. Extrinsic evidence was admitted to determine which of these two was the object of the bounty of the testatrix. Jury trial was waived. Upon the court's findings of fact, it was held that the testatrix meant the Plumtree School for Boys, Inc. The facts here fit the rule, stated above, under which extrinsic evidence is admissible to fit the person, the beneficiary, to the description, that is, to explain a latent ambiguity.

In *Trust Co. v. Board of National Missions, supra,* issues were submitted to and answered by a jury. The controversy turned upon whether the "Asheville Normal and Associated Schools, of Asheville, N. C.," had ceased to exist as a public educational institution, so that a bequest to it passed over to a named contingent beneficiary. The main controversy, and the evidence bearing thereon, concerned what transpired subsequent to the death of the testator. True, as appears in the record, the first five issues answered by the jury identified four named schools as comprising the Asheville Normal and Associated Schools, of Asheville, N. C., owned and operated by a named church board, at the time the testator executed his will and when he died. This falls in the category of identification, that is, fitting the beneficiary to the description in the will.

Examination of the original record and briefs discloses that *Raines v. Osborne, supra,* was tried by Bryson, J., at September (Fall) Term, 1922, of Polk Superior Court. The action was brought by six plaintiffs. Each contended that he (or she) was entitled to a bequest made by the testatrix "to any household servant or any other household employee." Evidence was offered to identify each plaintiff as a beneficiary by showing the character of the services each performed. Judgment of nonsuit was entered as to five plaintiffs, the court ruling that the evidence was insufficient to bring any of them within the intent of the testatrix. Their appeal, brought forward separately, was considered in *Raines v. Osborne,* 184 N.C. 599, 114 S.E. 849, where the judgment of nonsuit was affirmed. The motion for judgment of nonsuit was overruled as to the plaintiff H. E. Constant. The jury, under a charge free from error, answered the issue in his favor. The defendant's appeal from the judgment in favor of this plaintiff, brought forward separately, was considered in *Raines v. Osborne,* 184 N.C. 603, 114 S.E. 846, where the decision was, "no error." (The reference to "appeal by defendant from Lane, J.," is erroneous.)

In *Raines v. Osborne, supra,* we have a case of the admission of extrinsic evidence to identify a beneficiary as a member of a class described in the will. Attention is called to what is said by *Walker, J.,* in opinion on plaintiff's appeal, to the effect that testimony as to declarations of a testator as to his intentions is incompetent.

Generally, these conclusions emerge from the decided cases:

1. In case of a latent defect, extrinsic evidence is admissible to identify a described property or beneficiary. This occurs when the description, while definite in some respects, has meaning only when specific property or a specific beneficiary is identified (fitted to the description) by evidence *dehors* the will. In such case, the court construes the will; but the jury, under appropriate instructions, passes upon the issue(s) of fact.

2. A patent ambiguity occurs when the description of property or persons is so vague that nothing appears therein that can be identified (fitted to the description) by evidence *dehors* the will. In such case the devise or bequest is void. Too, a patent ambiguity occurs when doubt arises from conflicting provisions or provisions alleged to be repugnant. *Field v. Eaton,* 16 N.C. 283; *Richardson v. Cheek,* 212 N.C. 510, 193 S.E. 705.

In short, when the doubt arises otherwise than from a latent ambiguity, it is for the court to declare the testator's intent as expressed in the will, in accordance with established rules of construction. In such case, extrinsic evidence, as understood in relation to a latent ambiguity, that is, to explain the testator's intention, is incompetent.

These conclusions would seem to be in accord with the weight of authority in other jurisdictions. Annotation: "Admissibility of extrinsic evidence to aid interpretation of will." 94 A.L.R. 26, and supplemental decisions.

However, in resolving doubt, other than in relation to a latent ambiguity, as to the testator's intention, the court, as indicated above, does take into consideration "the circumstances attendant" when the will was made, that is, facts such as indicated above; and, in the absence of stipulation, the court makes its findings, upon the evidence offered, as to any "incidental questions of fact" relating to such circumstances.

The judgment is vacated and the cause remanded for further hearing, at which the court will construe the will according to its terms and in the light of "the circumstances attendant" when made.

Error and remanded.

P. D. McMICHAEL, ADMINISTRATOR OF LAWRENCE L. PROCTOR, DECEASED, v. FRANCES C. PROCTOR, WIDOW, JOHN PROCTOR AND WIFE, EMMA PROCTOR, GLENN PROCTOR AND WIFE, EULA PROCTOR, HATTIE P. WILSON AND HUSBAND, IRVIN WILSON, FRANCES P. MILLS AND HUSBAND, PAUL MILLS, CURTIS PROCTOR, SINGLE, JAMES PROCTOR AND WIFE, INDIA PROCTOR, AND SHIRLEY ANN PROCTOR, MINOR, BY AND THROUGH HER GENERAL GUARDIAN, CURTIS PROCTOR.

(Filed 3 February, 1956.)

**1. Dower § 9: Descent and Distribution § 3b—**

The acquittal of a widow of the murder of her husband is a complete defense to the claim that she had, by firing the pistol causing his death, forfeited her property rights in his estate. G.S. 30-4, G.S. 52-19, G.S. 28-10.

**2. Same: Statutes § 5a—**

The statutes enumerating the grounds for forfeiture by a widow of her right to dower exclude any other reason for such forfeiture under the maxim *inclusio unius est exclusio alterius.* G.S. 30-4, G.S. 52-20, G.S. 52-19, G.S. 28-10, G.S. 30-7.

**3. Common Law—**

When the General Assembly legislates in respect to the subject matter of any common law rule, the statute supplants the common law and becomes the public policy of this State in respect to that particular matter.

**4. Equity § 1—**

Equity does not override the law or create rights which the common law has denied.

**5. Executors and Administrators § 3—**

The clerk of the Superior Court, as probate judge, has exclusive jurisdiction to hear and decide a motion to remove an administrator for cause. G.S. 28-32.

**6. Attorney and Client § 1—**

While the court has inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, questions of propriety and ethics are ordinarily for consideration of the North Carolina Bar, Inc. G. S. 84-23, 28.

**7. Appeal and Error § 39c—**

Appeal from the refusal of the court to order the administrator to cease and desist from aiding the widow in the prosecution of her claim for dower is without substantial legal merit on the heirs' appeal when the identical question is presented by the widow on her appeal.

**8. Executors and Administrators § 29—**

An administrator should maintain a position of strict impartiality as between contending claimants, and the clerk should not allow compensation or counsel fees for his services or the services of his counsel in furthering the claim of the widow in conflict with those of the heirs.

APPEAL by petitioner and respondents from *Johnston, J.*, May Term 1955, ROCKINGHAM.

Special proceeding instituted by petitioner administrator to procure the approval of his final account in solemn form.

The petitioner made the widow and all the heirs and next of kin of the deceased, together with their spouses, if any, respondents. To facilitate discussion of the questions presented, the respondent Frances C. Proctor will hereafter be referred to as the widow, and the respondent heirs and next of kin will be referred to as the heirs.

The administrator's final account attached to his petition as an exhibit and as a part thereof discloses that it was necessary to sell all the land of the deceased to make assets to pay debts, and that according to the calculation of the administrator, the present cash value of the widow's dower interest in said land amounts to $26,432.69 of which he has on hand, and for which he takes credit, $26,352.16. This item is the bone of contention between the parties. The heirs, in answering the petition, allege as an affirmative defense against the allowance of a dower interest to the widow that the widow "did wrongfully and intentionally kill her husband . . . with a deadly weapon, to-wit: a pistol." They allege that the widow, by wrongfully slaying her husband as alleged, "lost, abandoned and forfeited all of her legal and equitable interests in the said estate . . ." They pray that it be adjudged (1) that the widow is not entitled to a dower interest in the land of plaintiff's intestate; (2) that the fund reserved by the petitioner as representing the present cash value of the widow's dower be distributed among the heirs-at-law of the intestate; or (3) in lieu thereof that the widow be adjudged to hold said fund in trust "for the exclusive use, benefit and enjoyment of the heirs of Lawrence L. Proctor and such other persons as would have shared in the estate of Lawrence L. Proctor if Frances C. Proctor had predeceased her said husband." No other exception to the account was entered. They further pray that the cause be transferred to the civil issue docket of the Superior Court to the end that the issues raised by the pleadings may be tried by jury.

The petitioner replied to the further answer of the heirs and pleaded the provisions of G.S. 30-4 and 30-5. He further pleads that said widow has been duly tried on a charge of second degree murder and was acquitted by a jury. He prays that the objection of the heirs to the final account in respect to the widow's dower be disallowed.

The widow answered the petition and admitted the allegations therein contained. She likewise replied to the further answer of the heirs in which she admits that she fired the pistol that caused the death of her husband, but that "she shot Lawrence L. Proctor in self-defense; that at the November 1953 Criminal Term of Court of Rockingham County,

North Carolina, a Rockingham County Jury found Frances C. Proctor not guilty of any felonious slaying of her husband, Lawrence L. Proctor." She further pleads the provisions of G.S. 30-4 and 30-5, and prays that the administrator be directed to pay her forthwith the present cash value of her dower interest in the land of which her husband stood seized and possessed during coverture, in the amount calculated by him.

Thereafter the heirs demurred to the reply (It is not stated whether reference is made to the reply of the petitioner or of the widow.) for that the fact the widow was acquitted on a criminal charge of murdering her husband therein pleaded does not constitute a valid defense to their affirmative allegations. They likewise moved to strike paragraphs 1, 3, and 4 of the reply. (Evidently this demurrer and motion to strike is directed to the reply filed by the petitioner and the motion to strike is a motion to strike references to G.S. 30-4 and G.S. 30-5 and the allegation of acquittal of the widow on a trial for murder of petitioner's intestate.)

The petitioner moved for judgment on the pleadings. After all the pleadings were filed and the motions were made, the clerk, on 26 April 1955, entered his judgment (1) adjudging that the questions raised by the demurrer and motions to strike are not within his jurisdiction; (2) denying the motion to strike a portion of petitioner's reply; and (3) denying the administrator's motion for approval of his final account, and (4) transferring the cause to the civil issue docket.

After the cause had been transferred to the civil issue docket, the heirs filed a motion in the Superior Court in which they seek the removal of the present administrator and the dismissal of this proceeding for the conduct of the petitioner in joining forces with the widow in that he filed an identical plea in reply to the affirmative facts pleaded in the answer of the heirs; or, in the alternative, that the court decree that the widow holds said dower interest in trust for the use and benefit of the heirs of plaintiff's intestate who would take had said widow predeceased her husband.

When the cause came on to be heard in the court below, the court entered its order (1) striking from the widow's reply the following: "that at the November 1953 Criminal Term of Court of Rockingham County, North Carolina, a Rockingham County Jury found Frances C. Proctor not guilty of any felonious slaying of her husband, Lawrence L. Proctor;" (2) striking paragraphs 2 and 3 of said reply in which the widow pleads the provisions of G.S. 30-4 and 30-5; (3) sustaining the demurrer of the heirs to the reply of the petitioner; (4) adjudging "That the clerk's order denying the petitioner's motion that the final account be approved is premature and therefore is stricken;" (5) ap-

proving the order of the clerk transferring the cause to the civil issue docket; and (6) denying the motion to remove the administrator "for that this court is without jurisdiction inasmuch as original jurisdiction is in the clerk in such matters."

The petitioner, the widow, and the heirs all excepted to the order entered and appealed.

*Brown, Scurry & McMichael for administrator.*

*Brown, Scurry & McMichael and Price & Osborne for widow, Frances C. Proctor.*

*P. W. Glidewell, Sr., and Gwyn & Gwyn for respondents.*

BARNHILL, C. J. The heirs challenge the final account filed by the petitioner in one respect only. They assert that the payment of the present cash value of the widow's interest in the land sold to make assets should not be paid to her; that she wrongfully slew her husband, petitioner's intestate; that she thereby forfeited her interest in her husband's estate; and that the sum which represents the present cash value of her dower interest should be paid to those who would have inherited the same if she had predeceased plaintiff's intestate.

Thus the appeals of the petitioner and the widow present one primary question for decision, and that is: Does the fact the widow has been tried and acquitted of the charge that she feloniously and unlawfully murdered her husband, plaintiff's intestate, constitute a valid and complete defense to the plea that she has forfeited her dower interest in her husband's estate, or may the heirs again raise that issue for trial by jury in this proceeding? To state it contrariwise, does the plea that the widow wrongfully slew her husband, without further alleging that she has been convicted therefor, constitute cause for disallowing her claim for dower?

We are constrained to hold that her indictment, trial and acquittal of the charge of the felonious murder of her husband is a complete defense to the plea of forfeiture contained in the answer of the heirs, and that the court below erred (1) in sustaining the demurrer of the heirs to the reply of the petitioner, (2) in striking any part of the reply of the widow, and (3) in ordering that this proceeding be placed on the civil issue docket for trial by jury.

The plea of the heirs is wholly inadequate to constitute an affirmative defense or to defeat the widow's right to dower in her husband's real property. On the other hand, the plea interposed by her and the petitioner that she has been acquitted of the murder of her husband is a complete defense to the claim that she has forfeited her property rights as widow of petitioner's intestate.

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; *Elliott v. Elliott*, 235 N.C. 153, 69 S.E. 2d 224, and cases cited.

But the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.

Such is the case as to the property rights of a wife in the real property of her husband. The General Assembly has enacted statutes defining the rights of a woman in the real property of her husband and prescribing the grounds for forfeiture thereof.

"Widows shall be endowed as at common law as in this chapter defined," G.S. 30-4, and "Subject to the provision in section 30-4, every married woman, upon the death of her husband intestate . . . shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during coverture . . ." G.S. 30-5.

Four different grounds upon which the wife may forfeit her right of dower are provided, to wit: If the wife (1) "shall commit adultery, and shall not be living with her husband at his death," G.S. 30-4, G.S. 52-20; or (2) "elopes with an adulterer, or willfully and without just cause abandons her husband and refuses to live with him, and is not living with her husband at his death," G.S. 52-20; or (3) "shall be convicted of the felonious slaying of her husband, or being accessory before the fact to the felonious slaying of her husband," G.S. 30-4, G.S. 52-19, and G.S. 28-10; or (4) is divorced from bed and board on the application of the husband, G.S. 52-20.

Then, in addition to a forfeiture of her dower interest in her husband's estate for these several reasons defined by statute, her dower interest is barred or defeated by a decree *a vinculo*, G.S. 28-10, or by deed of conveyance executed as provided by law, G.S. 30-7.

Thus is the public policy of the State in respect to a married woman's right of dower in the lands of her husband fixed and determined. *Inclusio unius est exclusio alterius.*

To permit a person who commits a murder or any person claiming under him to benefit by his criminal act would be contrary to public policy, and it is a rule recognized and, in proper cases, enforced in this jurisdiction. *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68. But it is pointed out in the *Parker case* that the rule is enforced by equity in cases where the property interest involved is not conferred by statute and the statute itself does not recognize any exceptions. When the

right of succession is conferred by statute, and the statute provides the causes for forfeiture, the statutory provisions control. That is to say, "It is not the way of equity to override the law or . . . to destroy property rights." *Vernon v. Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710. Nor does equity create rights which the common law denied. *Sappenfield v. Goodman*, 215 N.C. 417, 2 S.E. 2d 13. The right must exist before equity may be invoked. *Streater v. Bank*, 55 N.C. 31.

The widow admits she fired the pistol which inflicted the wound that caused the death of plaintiff's intestate. She has been tried therefor on a charge of murder by a court of competent jurisdiction and acquitted. She cannot again be tried for the same offense.

The language of the statutes, G.S. 30-4 and G.S. 52-19, is positive, direct and unequivocal. On this record anything short of a conviction or plea of guilty is insufficient to constitute a valid defense to the widow's claim of dower. The Legislature has so decreed and we must so hold. The courts cannot and will not extend those provisions by providing still another or additional cause for forfeiture.

In fact, before the enactment of the statutes now codified as G.S. 30-4 and G.S. 52-19, this Court expressly held that a conviction of the widow for the murder of her husband would not suffice to defeat or cause a forfeiture of the widow's interest in her deceased husband's estate. *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794. Incidentally, the Legislature, at the next session of the General Assembly following that decision, enacted the statutes now under consideration.

We have carefully examined the cases relied on by the appellees and find that they are distinguishable. They do not relate to the forfeiture of a widow's dower. Furthermore, in each case, except in *Parker v. Potter, supra*, the heir who was entitled to take under the statute had been convicted. In the *Parker case*, the husband murdered his wife and then committed suicide. Of course, he had not been tried and convicted and, as he was dead, could never be tried. But the record contained the admission that the husband "wrongfully, unlawfully and feloniously shot and killed his said wife." The court in that case held that the admission was sufficient to bar the rights of those who claimed by, through or under the husband. But there is no such admission here. Instead, the record discloses affirmatively that the widow has been tried and was acquitted.

We concur in the opinion of the court below that the clerk, acting as probate judge, has exclusive original jurisdiction to hear and decide a motion to remove an administrator for cause. G.S. 28-32; *Murrill v. Sandlin*, 86 N.C. 54; *Jones v. Palmer*, 215 N.C. 696, 2 S.E. 2d 850; *In re Estate of Galloway*, 229 N.C. 547, 50 S.E 2d 563.

The only assignment of error made by the heirs is as follows:

"His Honor erred in failing to sustain the motion of the respondents (other than Frances C. Proctor), as appears in the record, that the court order the administrator to withdraw his reply and direct his counsel to cease and desist from representing the widow in her claim for dower."

The question the heirs seek to raise by this assignment of error is one of propriety or ethics. While the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, under our present statute questions of propriety and ethics are ordinarily for the consideration of the North Carolina Bar, Inc., which is now vested with jurisdiction over such matters. G.S. 84-23, 28.

In any event, the widow in her pleadings presents for decision the identical question the administrator seeks to present in his reply. And even if we should hold that the administrator has improperly and unethically directed his counsel to abandon the administrator's position of neutrality and to advance the cause of the widow, this would not constitute grounds for the forfeiture of the widow's right of dower. Hence the appeal of the heirs is without substantial legal merit.

It is not amiss to note, however, that an administrator is an officer of the court charged with the duty of administering the estate of his intestate under the law and as by the court directed. He represents, in a trust capacity, both the creditors and the next of kin. And as between contending factions or claimants, he should ever be on the alert to maintain his position of strict impartiality.

It was not the function of the administrator in this proceeding to reply to the answer of the heirs and assert the widow's defense to the affirmative allegations made by the heirs as the basis of their claim that the widow had forfeited her right of dower. Hence, when the clerk comes to consider the amounts he will allow the administrator for commissions and for counsel fees, no compensation should be allowed for his services or for the services of his counsel in this respect.

There is no issue of fact raised by the answer of the heirs. Therefore, the court below will remand the cause to the clerk with directions that he proceed to audit and file petitioner's final account in accord with this opinion and as by law provided.

Error and remanded.

C. W. DAVIS (SINGLE) v. W. S. VAUGHN AND WIFE, SUDIE VAUGHN; EDWARD DAVIS AND WIFE, MATTIE DAVIS; THOMAS DAVIS; MATTIE SECHREST COX; H. N. WILLIARD, TRUSTEE; HIGH POINT SAVINGS AND TRUST COMPANY; C. N. COX, TRUSTEE; E. L. SHAW; E. R. PROCTOR; RUFUS K. HAYWORTH, TRUSTEE; CUMBY-ORRELL MORTUARY INC.; W. W. SMITH AND T. P. DWIGGINS.

(Filed 3 February, 1956.)

**1. Appeal and Error § 39c—**

The admission of evidence relating to an issue withdrawn cannot be prejudicial.

**2. Appeal and Error § 39e—**

The admission of evidence over objection cannot be prejudicial when testimony of like import is thereafter admitted without objection.

**3. Husband and Wife § 12c—**

A conveyance by the wife of her lands to the husband, either directly or indirectly, without complying with the requirements of G.S. 52-12, is void.

**4. Same: Husband and Wife § 14—**

A wife owning the fee in lands conveyed same, with the joinder of her husband, to third parties by deed which failed to incorporate certificate of the certifying officer that the deed was not unreasonable or injurious to her, as required by G.S. 52-12. On the same day the third persons reconveyed the lands to the wife and husband. The simultaneousness of the transaction, coupled with the averments of answers offered in evidence, manifested an intention to thus vest in the husband and wife an estate by entireties. *Held:* The conveyances are void, since parties cannot do by indirection that which they cannot do directly. Therefore the fee remained in the wife, and upon her death, her heirs are entitled to the lands as against the surviving husband or his lienee.

**5. Appeal and Error § 6c (1)—**

Where demurrer *ore tenus* to two further defenses set up by some of defendants and four further defenses set up by other defendants, stating separate grounds therefor, is sustained, an exception and assignment of error to the action of the court in sustaining the demurrer *ore tenus* are not sufficiently specific to meet the requirements of Rule 19 (3) of the Rules of Practice in the Supreme Court.

**6. Trial § 29—**

While ordinarily a verdict may not be directed in favor of the party having the burden of proof, when only one inference can be drawn from the facts admitted, the court may draw the inference and peremptorily instruct the jury.

APPEAL by defendants W. S. Vaughn and wife, Sudie Vaughn, H. N. Williard, Trustee, and High Point Savings and Trust Company, from *Phillips, J.*, at 21 March, 1955 Term of GUILFORD—High Point Division.

Civil action for the purpose of quieting title to certain lands in Guilford County, North Carolina, and removing cloud upon title as set forth in the complaint by setting aside as void certain recorded deeds, mortgages and deeds of trust.

The record and case on appeal disclose substantially the following:

(1) That on 21 September, 1928, by deed duly registered on 15 February, 1929, in office of Register of Deeds of Guilford County, North Carolina, Amos Realty Company conveyed to Andy Hiatt and his wife, Eldora Hiatt, in fee simple, certain lots in Milbourne Heights described in the complaint, *and referred to as Tract One.*

(2) That defendants W. S. Vaughn and his wife, in their answer, and defendant H. N. Williard, Trustee, and High Point Savings and Trust Company, by stipulation of their counsel, admit that Andy Hiatt was the husband of Eldora Hiatt; that *Tract One* was conveyed to them as an estate by the entirety; that subsequent to said conveyance and prior to 24 February, 1944, Andy Hiatt died, and Eldora Hiatt became the sole owner of said *Tract One;* that subsequent to death of Andy Hiatt and prior to 24 February, 1944, Eldora Hiatt married W. S. Vaughn; and that no children were born of the marriage of Andy Hiatt and Eldora Hiatt or of the marriage of Eldora Hiatt and W. S. Vaughn.

(3) That as alleged in paragraph 6 of the complaint, on 24 February, 1944, by deed duly registered 26 August, 1944, in the office of Register of Deeds of Guilford County, North Carolina, R. T. Amos and wife and Charles L. Amos and wife conveyed to Eldora Hiatt Vaughn in fee simple a certain tract of land in Milbourne Heights, described in the complaint, *and referred to as Tract Two.* The defendants W. S. Vaughn and wife, Sudie Vaughn, admit the allegation of the complaint in this respect. But the defendants H. N. Williard, Trustee, and the High Point Savings and Trust Company aver that as to this allegation they do not have sufficient information upon which to form a belief, and therefore deny the same, except as admitted in their further answer. And in their second further defense they aver that the conveyance from R. T. Amos and Charles L. Amos to Eldora Hiatt Vaughn did not constitute a gift from W. S. Vaughn, but on the other hand was made pursuant to an agreement between W. S. Vaughn and his wife, etc.

(4) That on 20 April, 1953, Eldora Hiatt Vaughn, formerly Eldora Hiatt, and husband, W. S. Vaughn, in recited consideration of Ten Dollars and other considerations attempted to convey to T. W. Garner and wife, Susie V. Garner, *Tracts One and Two,* by separate purported deeds, the executions of which were acknowledged by Eldora Hiatt

Vaughn and husband, W. S. Vaughn, before the same notary public on 20 April, 1953, and the purported deeds were filed for registration on 21 April, 1953, *one* at 9:35 o'clock A.M., and *the other* at 9:45 o'clock A.M., and were registered in the office of Register of Deeds of Guilford County, North Carolina.

(5) That on same day, 20 April, 1953, T. W. Garner and wife, Susie V. Garner, in recited consideration of Ten Dollars and other considerations, attempted to convey to Eldora Hiatt Vaughn and her husband, W. S. Vaughn, *Tracts One and Two,* by separate deeds, the executions of which were acknowledged on 20 April, 1953, by T. W. Garner and his wife, Susie V. Garner, before the same notary public, and the same notary public before whom Eldora Hiatt Vaughn and husband, W. S. Vaughn, acknowledged the deeds referred to in preceding paragraph. The deeds thus acknowledged were filed for registration on 21 April, 1953, at 9:50 A.M.

(6) That plaintiff alleges in his complaint, and defendants W. S. Vaughn and his wife, Sudie Vaughn, admit in their answer that T. W. Garner and Susie V. Garner are the son-in-law and daughter of W. S. Vaughn.

(7) That plaintiff further alleges in his complaint that the attempted conveyances, described and referred to in paragraphs 4 and 5 hereinabove, were intended to vest by indirect means an estate by the entirety in Eldora Hiatt Vaughn and husband, W. S. Vaughn; that the acknowledgments as to Eldora Hiatt Vaughn in the two deeds from Eldora Hiatt Vaughn and husband, W. S. Vaughn, to T. W. Garner and wife Susie V. Garner, described and referred to in paragraph 4, hereinabove, were not in the form required by G.S. 52-12, in that as to each deed the certifying officer did not incorporate a statement of his conclusions and findings of fact as to whether or not said deed was unreasonable or injurious to Eldora Hiatt Vaughn; and that by reason thereof each of said deeds was a nullity and of no force and effect and title to said property remained in Eldora Hiatt Vaughn as the sole owner, and said deeds constitute a cloud on the title of plaintiff and the other heirs at law of Eldora Hiatt Vaughn, deceased, to the property above described. And that in respect to these allegations, plaintiff offered in evidence certified copies of the record of the deeds referred to in paragraph 4 above, and also portions of amended answer of defendants W. S. Vaughn and his wife, Sudie Vaughn, and of the third further answer and defense of defendants H. N. Williard, Trustee, and the High Point Savings and Trust Company, respectively, in reference to Eldora Hiatt Vaughn, the following: "That these defendants are further informed and believe that in lieu of making a will she was advised to convey

her property to a third party and then back to herself and her husband in an estate by the entirety."

(8) That plaintiff also alleges in his complaint that on 20 July, 1953, W. S. Vaughn, then a widower, executed, among others, a purported deed of trust to H. N. Williard, Trustee, and the High Point Savings and Trust Company, which was recorded on 21 July, 1953, in office of Register of Deeds for Guilford County, North Carolina; and that same is uncanceled of record and purports to be an outstanding lien against the property here involved, and constitutes a cloud on the title of plaintiff and the other heirs of Eldora Hiatt Vaughn.

(9) That plaintiff further alleges in his complaint that he is the owner of one-third undivided interest in and to all the property above described, free and clear of all purported encumbrances described in the complaint, and is a tenant in common therein with defendants Edward Davis, Thomas Davis and Mattie Sechrest Cox, and, along with them is entitled to possession thereof. And that upon trial plaintiff offered evidence tending to show that he and the above named defendants are the heirs at law of Eldora Hiatt Vaughn.

The record further shows that when plaintiff first rested his case, defendants H. N. Williard, Trustee, High Point Savings and Trust Company and W. S. Vaughn and wife, Sudie Vaughn, made a motion for judgment as of nonsuit, which the court overruled, and the movants excepted. Exception No. 4.

Thereupon plaintiff demurred *ore tenus* to the following portions of the answer and further defenses of the respective defendants, among others:

1. The further answer and defense and the second further defense of the defendant W. S. Vaughn and wife, Sudie Vaughn, as appear of record.

2. The first, second, third and fourth further defenses of the defendant H. N. Williard, Trustee for High Point Savings and Trust Company, as set forth in their further answer to the complaint, all as appear of record.

The grounds upon which the demurrer is based were set out at length and in detail. The court sustained the demurrer as to each of the counts. The defendants H. N. Williard, Trustee, and the High Point Savings and Trust Company and W. S. Vaughn and Sudie Vaughn excepted thereto. Exception No. 5.

Plaintiff withdrew the issue of mental capacity.

Defendants W. S. Vaughn and Sudie Vaughn offered no evidence.

The defendants High Point Savings and Trust Company and H. N. Williard, Trustee, in the absence of the jury, offered testimony of J. E. Amos as to conversations with Eldora Hiatt Vaughn, in which she was

seeking advice which he gave, as to how she could give her property to her husband at her death. Motion of plaintiff to strike was allowed, and defendants excepted. And the record shows that, without objection, the court asked the witness this question: "Q. And you advised her this as a means of giving her property to her husband after her death, either by transferring the property to a third person and they (he) in turn transfer it back to her and her husband as tenants in common by the entirety, or making a will?", to which the witness answered, "Yes, sir."

Thereupon defendants closed their case, and defendants H. N. Williard, Trustee, High Point Savings and Trust Company, W. S. Vaughn and Sudie Vaughn, at the close of all the evidence, renewed their motion for judgment as of nonsuit. The motion was overruled. The defendants excepted. Exception No. 6.

The case was submitted to the jury upon these issues (deleting book and page of recordation), which were answered as indicated:

"1. Was the deed dated April 20, 1953, from Eldora Hiatt Vaughn and husband, W. S. Vaughn, to T. W. Garner and wife, Susie V. Garner . . . void for failure to comply with G.S. 52-12?

"Answer: Yes.

"2. Was the deed dated April 20, 1953, from Eldora Hiatt Vaughn and husband, W. S. Vaughn, to T. W. Garner and wife, Susie V. Garner, . . . void for failure to comply with G.S. 52-12?

"Answer: Yes.

"3. Did the deed dated April 20, 1953, from T. W. Garner and wife, Susie V. Garner, to Eldora Hiatt Vaughn and husband, W. S. Vaughn, . . . convey the title to the lands described in the deed?

"Answer: No."

"4. Did the deed dated April 20, 1953, from T. W. Garner and wife, Susie V. Garner, to Eldora Hiatt Vaughn and husband, W. S. Vaughn, . . . convey the title to the lands described in the deed.

"Answer: No."

Thereupon the court in judgment signed ordered, adjudged and decreed in pertinent part (1) that plaintiff and defendants Edward Davis, Thomas Davis and Mattie Sechrest Cox, are declared to be the owners and entitled to the possession of the lands described in the complaint as tenants in common,—plaintiff, one-third undivided interest, Edward Davis and Thomas Davis jointly one-third undivided interest, and Mattie Sechrest Cox, one-third undivided interest; (2) that the deeds described in issues Numbers 1, 2, 3 and 4 are declared null and void and of no effect; (3) that, among others, the deed of trust executed by W. S. Vaughn, widower, to H. N. Williard, Trustee, and the High Point Savings and Trust Company is declared null and void.

Defendants W. S. Vaughn and wife, Sudie Vaughn, and H. N. Williard, Trustee, and the High Point Savings and Trust Company excepted to the judgment, and appeal to Supreme Court and assign error.

*Robert M. Martin and James B. Lovelace for plaintiff, appellee.*

*Sprinkle & Coffield for defendants H. N. Williard and High Point Savings and Trust Company, appellants.*

*T. J. Gold for defendants W. S. Vaughn and Sudie Vaughn, appellants.*

WINBORNE, J. The appellants present for decision numerous assignments of error based upon grouped exceptions pertaining to kindred subjects. The Court so treats such of them as seem to merit particular expression.

Assignments of error Numbers 1, 2 and 3 are based upon exceptions of like numbers to the action of the trial judge in overruling objection to question asked certain witnesses as to the mental condition and capacity of Eldora Hiatt Vaughn.

These exceptions are untenable for two reasons: (1) The issue as to mental capacity was withdrawn, and the matter to which objection is made became immaterial. Hence if there were error, it was harmless. (2) Even though as held in the case of *In re Lomax,* 224 N.C. 459, 31 S.E. 2d 369, a witness should not be permitted to answer questions as to whether the person, whose mental capacity is the subject of inquiry, had sufficient mental capacity to make a will or execute a deed, yet exceptions to the overruling of objection to questions in that respect cannot be sustained, because, as stated by *Parker, J.*, writing for the Court in *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263, "It appears that testimony of like import was thereafter admitted without objection," citing cases. See also *Shelton v. R. R.,* 193 N.C. 670, 139 S.E. 232, and cases cited. *Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7; *Owens v. Lumber Co.,* 212 N.C. 133, 193 S.E. 219; *S. v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730; *Edwards v. Junior Order,* 220 N.C. 41, 16 S.E. 2d 466; *S. v. Williams,* 220 N.C. 445, 17 S.E. 2d 769; *S. v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590.

Assignments of error Numbers 4 and 6 are based upon exceptions of like numbers to rulings of the trial court in denying motions of appealing defendants, aptly made, for judgment as of nonsuit. In this connection, this Court has uniformly held that a deed of a wife, conveying land to her husband, is void, unless the examining or certifying officer, taking the acknowledgment of the wife to her execution of the deed, incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not the deed is "unreasonable or inju-

rious to her" as required by the provisions of G.S. 52-12, formerly C.S. 2515. *Fisher v. Fisher,* 217 N.C. 70, 6 S.E. 2d 812, and cases there cited. See also *Fisher v. Fisher, S. C.,* 218 N.C. 42, 9 S.E. 2d 493; *Ingram v. Easley,* 227 N.C. 442, 42 S.E. 2d 624; *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *Perry v. Stancil,* 237 N.C. 442, 75 S.E. 2d 512; *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598.

Indeed, as stated in *Ingram v. Easley, supra,* "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."

Moreover, in order to create an estate by the entirety the husband and wife must be jointly entitled, as well as jointly named in the deed. And so if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. *Ingram v. Easley, supra,* citing *Sprinkle v. Spainhour,* 149 N.C. 223, 62 S.E. 910; *Speas v. Woodhouse,* 162 N.C. 66, 77 S.E. 1000.

To like effect, among numerous other cases, are these: *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157; *Wood v. Wilder,* 222 N.C. 622, 24 S.E. 2d 474; *Duckett v. Lyda,* 223 N.C. 356, 26 S.E. 2d 918. See also *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468.

In the light of these principles, applied to case in hand, the evidence offered upon trial is sufficient to take the case to the jury, and to support the verdict rendered. Admittedly Tract Number One became the sole property of Eldora Hiatt, as the survivor in an estate by entireties; and the case on appeal shows that the second tract was conveyed to her individually as Eldora Hiatt Vaughn, by deed in form sufficient to convey a fee simple title, with full covenants of seizin, right to convey, freedom from encumbrances and general warranty. Such was the state of the title at the time Eldora Hiatt Vaughn and her husband, W. S. Vaughn, executed the two deeds conveying the two tracts to his daughter and her husband (T. W. Garner and wife, Susie V. Garner), who simultaneously conveyed both tracts to Eldora Hiatt Vaughn and her husband, W. S. Vaughn—that is, in form to vest an estate by the entirety.

Plaintiff alleges that this was an attempt to do indirectly that which could not be done directly. The simultaneousness of the transaction, coupled with the averments of the answers offered in evidence, manifests an intention by the means employed to vest in the husband and the wife an estate by the entireties. The case of *McCullen v. Durham, supra,* relied upon by appellant is distinguishable in factual situation. Therefore, since the certificate of acknowledgment attached to the

deeds from Eldora Hiatt Vaughn and W. S. Vaughn, her husband, as aforesaid, failed to comply with the provisions of G.S. 52-12, the deeds were void, and title remained in her. Hence the motions of defendants for judgment as of nonsuit were properly overruled.

Assignment of error No. 5 is based upon exception No. 5 taken to the action of the trial court in sustaining demurrers *ore tenus* to two further defenses set up by defendants W. S. Vaughn and wife, and four further defenses set up by H. N. Williard, Trustee, and High Point Savings and Trust Company. While the record shows that plaintiff demurred to each further defense and upon separate grounds, and that the court sustained the demurrers *ore tenus* to each of the defenses, the entry of these defendants is that "as to the sustaining of the demurrers *ore tenus*, the defendants (naming them) object and except. Exception No. 5." Moreover, the assignment of error based on this exception is described as "the action of the court in sustaining the plaintiff's demurrer *ore tenus* to the further answer and defense of defendants." Such exception, and the assignment based thereon are not specific, and fail to meet the requirements of Rule 19 (3) of the Rules of Practice in the Supreme Court, 221 N.C. 544, at 554. And even if the exception and assignment conformed to the rule, appellants fail to show error in any respect as to the ruling of the court.

Assignments of error 13 and 14 are based upon exceptions of like number to peremptory instructions given by the jury with respect to the issues submitted.

While ordinarily a verdict may not be directed in favor of the party having the burden of proof, when only one inference can be drawn from the facts admitted, the court may draw the inference and peremptorily instruct the jury. See McIntosh, North Carolina P. & P., 632. *La Vecchia v. Land Bank,* 218 N.C. 35, 9 S.E. 2d 489; *Finance Co. v. O'Daniel,* 237 N.C. 286, 74 S.E. 2d 717.

In the present case the record of the deeds involved, the simultaneousness of the transaction and the admissions of defendants in their pleadings point unerringly to the single purpose to do indirectly what the statute G.S. 52-12 forbids to be done directly, that is, vest the separate real property of the wife in the husband and the wife as an estate by the entireties without the certificate of the officer, who took the acknowledgment of the wife, that the deed was not unreasonable nor injurious to her. Therefore, the instruction as given was without error.

The record and case on appeal show other assignments of error based upon exceptions (1) to refusal of the trial court to submit other issues tendered by defendants, (2) to give instructions specifically requested

by defendants, and (3) to portions of the charge as given. However, upon consideration of them prejudicial error is not made to appear.

Hence for reasons stated, in the judgment from which appeal is taken, we find

No error.

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IN THE MATTER OF THE RESOLUTIONS PASSED BY THE CITY COUNCIL OF THE CITY OF DURHAM ON MARCH 3, 1952, AND MARCH 17, 1952, RELATING TO PROPOSED STREET PAVING, WATER, SANITARY SEWER AND STORM SEWER IMPROVEMENTS ON LIBERTY STREET FROM DILLARD STREET TO HYDE PARK AVENUE AND THE RESOLUTIONS PASSED BY THE CITY COUNCIL OF THE CITY OF DURHAM ON OCTOBER 19, 1953, AND ON NOVEMBER 16, 1953, CONFIRMING OR PURPORTING TO CONFIRM THE ASSESSMENT ROLLS ASSESSING OR PURPORTING TO ASSESS THE LANDS ABUTTING ON LIBERTY STREET WITH THE COSTS OF SAID IMPROVEMENTS.

(Filed 3 February, 1956.)

**1. Statutes § 2: Municipal Corporations § 30—**

An act applicable to a single municipality which authorizes the municipality to make street improvements and assess the cost thereof against abutting property owners without a petition *held* not in contravention of Section 29, Article II, of the Constitution of North Carolina, since the act is merely declaratory of the powers given the municipality under the general law and does not purport to authorize the laying out of a particular street or streets or to authorize the maintenance or discontinuance of a designated street or streets.

**2. Municipal Corporations § 30—Statutory procedure for public improvements held substantially complied with.**

In this proceeding to test the validity of assessments for public improvements made by defendant municipality pursuant to Chapter 924, Session Laws of 1949, the admissions and evidence disclosed that all the procedural requirements of the statute, including notice and an opportunity to be heard, were complied with, except that the original notices failed to state the reasons for making the proposed improvements. There were no contentions that the improvements were not necessary in the public interest or that petitioner's property had not been enhanced in value in an amount equal to the assessments, and it appeared that petitioner made no written objection to the validity of the assessments at the hearing as required by Section 2 (f) of the act, and further that the reasons for making the improvements were incorporated in the minutes of the city council at a later date. *Held:* The stipulations and evidence support the court's finding that the statutory procedure had been substantially complied with, and the validity of the assessments is upheld.

**3. Municipal Corporations § 32—**

Where a triangular area condemned by a municipality for street purposes lies between the lot of petitioner and the actual street, so that the last twenty feet of petitioner's lot abuts on the triangular area rather than on the street, such twenty feet may not be used in calculating the number of feet of petitioner's property which abuts the street for the purpose of assessment in the absence of evidence that the area had been used for street and sidewalk purposes by the municipality.

APPEAL by petitioner from *Fountain, Special Judge,* February Term, 1955, of DURHAM.

The City Council of the City of Durham, pursuant to the provisions contained in the acts, referred to hereinafter, and, without a petition, made certain improvements on Liberty Street, from Dillard Street to Hyde Park Avenue, namely: paving, water, sanitary sewer, storm sewer, curb, gutter and drainage. Liberty Street runs in an easterly direction from Church Street to U. S. Highway No. 70.

The petitioner owns property abutting on the north side of Liberty Street in the block between Peachtree Place and Elizabeth Street, and on the south side of Liberty Street between Taylor Street and Elizabeth Street.

Chapter 224 of the Private Laws of 1927 originally applied to only seven cities, but was amended to include Durham by Chapter 425 of the Session Laws of 1947, thereby making the act apply to the City of Durham. This Private Act is a comprehensive one and authorizes the cities named therein to make local improvements and to assess all or part of the cost thereof against the abutting property.

Chapter 924 of the Session Laws of 1949 applies only to the City of Durham and is supplemental to and independent of the powers and authority granted by the General Assembly of North Carolina as contained in the General Statutes and as contained in Chapter 224 of the Private Laws of 1927, as amended by Chapter 425 of the Session Laws of 1947.

The City of Durham is authorized under the provisions of Chapter 924 of the Session Laws of 1949 to make local improvements and to assess the entire cost thereof, except such part thereof as is incurred at street intersections, against the abutting property without a petition therefor. Section 2 of Chapter 924 of the Session Laws of 1949 reads as follows:

"When it is proposed to make without petition any improvement or improvements described in Section 1 hereof, the governing body shall adopt a resolution which shall contain substantially the following:

"(a) That this proceeding is taken under and will be governed by the provisions of this Act (stating the number of the Chapter and the Session at which passed by the General Assembly);

"(b) A statement of the reasons proposed for the making thereof;

"(c) A brief description of the proposed improvement or improvements;

"(d) The proportion of the cost of the improvement or improvements to be specially assessed and the terms of payment;

"(e) A notice of the time and place when and where a public hearing will be held on the proposed improvement or improvements. (The time fixed for such public hearing shall be such as to allow of notice being given thereof not less than ten days prior thereto);

"(f) A notice that all objections to the legality of the making of the proposed improvement or improvements shall be made in writing, signed in person or by attorney, and filed with the clerk of the municipality at or before the time of such hearing, and that any such objections not so made will be waived.

"The resolution shall be published one time in a newspaper published in the municipality, the date of publication to be not less than ten days prior to the date fixed for the hearing."

It is conceded by all parties that the various resolutions adopted by the City Council of the City of Durham stated that the proceedings with reference to such improvements were taken pursuant to the provisions of Chapter 924 of the Session Laws of 1949, and those portions of Chapter 224 of the Private Laws of 1927, as amended, which are incorporated into and made a part of Chapter 924 of the Session Laws of 1949.

It is stipulated in the record that the various resolutions and notices were actually published in the newspapers as specified by them and as recited therein.

There is no contention that the applicable acts have not been complied with in the proceedings, except the appellant contends and it is admitted by the appellee that the preliminary resolutions calling for the publication of the proposal to make the local improvements, as well as in the final resolutions ordering the improvements to be made, did not contain a statement of the reasons proposed for the making of such improvements, at the time they were published, as provided in Section 2 (b), Chapter 924 of the Session Laws of 1949. However, it does appear from the record that on 16 November, 1953, the same day the final resolution was passed confirming the assessment roll for the improvements, the City Council of the City of Durham adopted the report of a special committee, appointed to consider objections and protests to the confirmation of the assessment roll, which report, among other

things, contained a recommendation to amend, if necessary, the preliminary resolutions, and stated the reasons proposed for making the improvements as follows: "In order to promote the safety, health, sanitation, comfort, convenience, and welfare of the public of the City of Durham and for the special benefit of abutting properties located on said street."

No written objection to the legality of the proposal to make the improvements was filed by any affected property owner, as required by Section 2, subsection (f), of Chapter 924 of the Session Laws of 1949.

The petitioner has interposed no objection to the improvements made, but objected only to the assessment against his property based on the grounds set forth in his appeal.

Upon the final adoption of the assessment roll, after the City Council had found as a fact that each lot abutting upon said improvements, including the lands of the petitioner, has been specially benefited by such improvements in an amount at least equal to the assessment specially assessed against such land, and that the assessments shown on the assessment roll are in proportion to such special benefits, the petitioner gave notice of appeal to the Superior Court. He petitioned the Honorable Leo Carr, Resident Judge of the Tenth Judicial District (now the Fifteenth Judicial District), for a *writ of certiorari*, requiring the proper officials of the City of Durham to certify to the Superior Court all resolutions adopted or purported to have been adopted by the City Council of the City of Durham in connection with these local improvements. The writ was granted and the matter came on for hearing in the court below on three contentions, viz.: (1) that the acts under which the proceedings were conducted are invalid because they are repugnant to Section 29, Article II, of the Constitution; (2) that if the acts are constitutional, respondents failed to comply with the provisions thereof by failing to state in the preliminary resolutions, passed 3 March, 1952, the reasons proposed for making the improvements; and (3) if the acts are valid and it is held that they were substantially complied with, then the assessment on the south side of the street is for twenty feet more frontage than abuts upon the improvement, and an adjustment as to these twenty feet should be made.

The parties waived a jury trial and agreed that the trial judge might hear the evidence, find the facts, make his conclusions of law and render judgment thereon.

The court found the facts accordant with those hereinabove stated and concluded that there had been a substantial compliance with all the statutory requirements in connection with the making of the improvements and the assessments against the respective abutting prop-

erties. Whereupon, judgment was entered confirming the assessments. The petitioner appeals, assigning error.

*Spears & Spears for the petitioner.*
*Claude V. Jones for appellee City of Durham.*

DENNY, J. It would seem that this appeal may be disposed of on its merits by a consideration of the three contentions urged in the lower court without a *seriatim* discussion of the numerous exceptions and assignments of error set out in the record.

We shall consider the grounds upon which these contentions are based in the order posed.

Are the acts, pursuant to which the City Council of the City of Durham acted in making these local improvements and assessing the cost thereof, repugnant to Section 29, Article II, of our Constitution?

In our opinion, the acts complained of do not come within the purview of Section 29, Article II, of our Constitution which precludes the General Assembly from passing any local, private or special act "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys." It will be noted that this section of the Constitution takes away from the General Assembly the power to pass any local, private or special act "relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns and townships," etc. But, we have held that local acts relating to the improvement of streets and alleys generally in a city or town, and authorizing the assessment of the cost thereof against the abutting property, do not conflict with Section 29, Article II, of our State Constitution. *Holton v. Mocksville,* 189 N.C. 144, 126 S.E. 326; *Gallimore v. Thomasville,* 191 N.C. 648, 132 S.E. 657. Unquestionably, an act purporting to authorize the laying out of particular streets or highways, or to authorize the maintenance of a designated street or streets, or the discontinuance thereof, would be repugnant to the above section of our Constitution. *Deese v. Lumberton,* 211 N.C. 31, 188 S.E. 857.

In the last cited case, this Court said: "Before Chapter 216, Private Laws of 1925, could be in violation of Article II, Section 29, of the Constitution, it would have to relate to laying out, opening, altering, or discontinuing of a *given, particular* and *designated* highway, street or alley." *Cf. Matthews v. Blowing Rock,* 207 N.C. 450, 177 S.E. 429.

It would seem that the acts challenged are only declaratory of, or supplementary to, the powers given the City of Durham under the general law. *Hill v. Commissioners,* 190 N.C. 123, 129 S.E. 154.

In the case of *Holton v. Mocksville, supra,* the constitutionality of Chapter 86, of the Private Laws of 1923, entitled, "An act relating to the financing of street and sidewalk improvements in the Town of Mocksville," was attacked. This Court, speaking through *Connor, J.,* said: "Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending the charter of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in Section 4, Article VIII of the Constitution rendering this Act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by Section 29 of Article II to legislate. *Kornegay v. Goldsboro,* 180 N.C. 441."

Likewise, in *Gallimore v. Thomasville, supra,* Chapter 217 of the Private Laws of 1925 provided: "that any and all acts heretofore done and steps taken by the city of Thomasville in the paving of streets . . . and the assessments levied therefor are hereby in all respects approved and validated." The plaintiff there, like the petitioner here, contended that the act was unconstitutional. The Court, again speaking through *Connor, J.,* said: "Plaintiff's contentions that said act is invalid, because the General Assembly was prohibited by the Constitution of the State from passing it, cannot be sustained. It is not in violation of Section 29, Art. II, of the Constitution; it does not authorize the laying out, opening, altering, maintaining, or constructing of highways, streets or alleys."

It is true that in *Holton v. Mocksville, supra,* and in *Gallimore v. Thomasville, supra,* the Private Acts were passed to validate the proceedings pursuant to which these respective towns had made local improvements and purported to assess certain portions of the cost thereof against abutting property. This does not make these cases any less authoritative on the question posed, since the General Assembly cannot validate by a public-local, private or special act that which it could not have authorized by a similar act in advance. *Edwards v. Commissioners,* 183 N.C. 58, 110 S.E. 600; *Construction Co. v. Brockenbrough,* 187 N.C. 65, 121 S.E. 7; *Storm v. Wrightsville Beach,* 189 N.C. 679, 128 S.E. 17; *Commissioners v. Assell,* 194 N.C. 412, 140 S.E. 34; *Barbour v. Wake County,* 197 N.C. 314, 148 S.E. 470; *Greene County v. R. R.,* 197 N.C. 419, 149 S.E. 397; *Efird v. Winston-Salem,* 199 N.C. 33, 153 S.E. 632; *Crutchfield v. Thomasville,* 205 N.C. 709, 172 S.E. 366.

This Court, in *Brown v. Commissioners,* 173 N.C. 598, 92 S.E. 502, held that, "An Act to authorize the board of commissioners of Mc-

Dowell County to issue bonds for road purposes in North Cove Township in said county," was a valid law and not in conflict with Section 29, Article II, of our Constitution.

In *Mills v. Commissioners,* 175 N.C. 215, 95 S.E. 481, Chapter 575, of the Public-Local Laws of 1917, was upheld. The act provided for the issuance of bonds by Iredell County "for the purpose of building bridges over the Catawba River jointly with the county of Catawba."

Furthermore, in *S. v. Kelly,* 186 N.C. 365, 119 S.E. 755, we held that a public-local act providing for the maintenance of highways in Pender County by the levy of taxes or the issuance of bonds for such purpose, was not in conflict with Section 29, Article II, of the Constitution, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways.

In light of our decisions, we hold that the acts involved on this appeal are valid and not repugnant to the above section of our Constitution.

Did the failure to state in the preliminary resolutions, passed on 3 March, 1952, the reasons proposed for making the improvements as provided in Section 2 (b) of Chapter 924 of the Session Laws of 1949, invalidate the proceedings?

There is no contention that the petitioner did not have notice of the proposal to improve Liberty Street and of the intention to assess his property with its pro rata share of the cost. There is no contention that the proposed improvements were not adequately described in the published notices, or that such improvements were not necessary in the public interest, or that the petitioner's property has not been enhanced in value by such improvements in an amount equal to the assessments against the property. Nothing by which the petitioner could possibly have been prejudiced was omitted from the published notices. Moreover, the petitioner filed no written objection to the legality of the proceedings on or before the hearing of the proposal to make such improvements, as required by Section 2 (f) of the act; and the act further provides that any objection not so made will be waived. Furthermore, the reasons for making the improvements were given and incorporated in the minutes of the City Council at a later date. Even so, the act only requires a substantial compliance with Section 2 thereof and not a strict or literal compliance.

The finding of the court below to the effect that the City Council of the City of Durham substantially complied with the requirements of Section 2 of Chapter 924 of the Session Laws of 1949 is supported by the evidence and must be upheld. *Schank v. Asheville,* 154 N.C. 40, 69 S.E. 681; *Gallimore v. Thomasville, supra; Vester v. Nashville,* 190 N.C. 265, 129 S.E. 593; *Asheboro v. Miller,* 220 N.C. 298, 17 S.E. 2d 105.

This Court said in *Gallimore v. Thomasville, supra,* "There is a presumption in favor of the regularity of a proceeding under which public improvements, authorized by the General Assembly, have been made. An attack upon the validity of such proceeding, for mere irregularities, first made after the improvements have been complete, by those who seek, by such attack, to have their property, which has received the benefit of such improvements, relieved of assessments made for the purpose of paying for the improvements, will not be sustained, when it appears that notices required by statute have been given and ample opportunity afforded for all interested persons to be heard before the improvements were ordered and made."

The assignments of error relating to this contention are overruled.

Is the assessment on the south side of Liberty Street for twenty feet more frontage than actually abuts directly on the improvement, illegal and void?

We interpret the factual situation with respect to this property to be as follows: It abuts directly for 113.62 feet on the south side of Liberty Street. The confluence of Liberty and Taylor Streets begins at the northwest corner of the petitioner's property, forming an arc, beginning and ending in the western line of the petitioner's property. All the land within the arc is the unused portion of the triangular lot condemned for street purposes. But the paving is outside the arc and the area within the arc is unimproved, and we can find no evidence in the record tending to show that the City of Durham actually dedicated this remaining portion of the triangular lot for street purposes.

The petitioner's property abuts directly on this small area at the base of the arc, it being twenty feet from the petitioner's property line to the western tip of the arc. The twenty feet against which the assessment is levied being arrived at by drawing a perpendicular line at the western tip of the arc to Liberty Street, parallel with the western line of the petitioner's property.

Counsel for the appellee did not argue to this Court that the area in controversy has been dedicated for street purposes. He merely said in his brief, "The record contains no evidence or agreement that this triangular-shaped area has not been dedicated and set apart as a part of the public street and sidewalk." *Winborne, J.,* in speaking for the Court in *Winston-Salem v. Smith,* 216 N.C. 1, 3 S.E. 2d 328, said: ". . . in the absence of a finding that the street lines as fixed by the city include the strip, it is apparent that there is intervening land between defendant's property and the improvement. . . . Nor do we think that the acquisition of the whole lot for street purposes and the construction of a street and a sidewalk on a part thereof amount to a dedication of the whole lot by the city for street purposes. . . . There-

fore, the fact that the city purchased a lot in fee simple and constructed a street thereon, without more, does not show that the entire lot is dedicated as a street. Plaintiff contends that defendant's property is subject to the assessment for that defendant has the right of ingress and egress over the intervening line to the improvement, but in the light of the agreed facts that the fee simple title thereto is in the city and *there being no evidence of a dedication to public purposes,* we do not think the position tenable." (Italics ours.) Anno. 166 A.L.R. 1092.

We think the assessment against the property of the petitioner of the cost of the paving, curb and gutter along the additional twenty feet in controversy, in the absence of evidence that the area in question has been dedicated for street and sidewalk purposes, by the City of Durham, is without legal authority and is null and void, and we so hold. We do not think the twenty feet abuts directly on the property as contemplated by our statutes. G.S. 160-78 and G.S. 160-85. Neither do we think the fact that the City of Durham obtained the triangular lot for street purposes by condemnation rather than by deed distinguishes this case from the case of *Winston-Salem v. Smith, supra.*

The judgment of the court below will be modified to the above extent and the assessment roll amended accordingly.

Modified and affirmed.

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BETTER HOME FURNITURE COMPANY OF WINSTON-SALEM, INC., v. ROBERT BARON.

(Filed 3 February, 1956.)

**1. Statutes § 2—**

A statute providing for the maintenance of a small claims docket in the Superior Court of one county and for the trial of such small claims without a jury unless the parties to the action aptly demand a jury trial and advance the costs as prescribed by the act, does not relate to the establishment of a court inferior to the Superior Court within the purview of Article II, Section 29, Constitution of North Carolina, but is solely procedural in character. Article IV, Section 12.

**2. Constitutional Law § 8a—**

The question of the propriety, wisdom and expediency of legislation is exclusively a legislative matter.

**3. Constitutional Law § 18—**

If an act is otherwise unobjectionable, all that can be required of it is that it be general in its application to the class or locality to which it applies and that it be public in its character.

**4. Constitutional Law § 8a: Statutes § 12—**

A statutory provision that no local act shall have the effect of repealing or altering any public law unless the caption of the local act refers to the public law (G.S. 12-1), *is held* ineffectual, since one General Assembly cannot restrict or limit the constitutional power of a succeeding Legislature.

**5. Statutes § 13—**

A statute providing for a small claims docket in the Superior Court of one county and providing for the trial of such cases without a jury unless a jury trial is aptly demanded and the costs advanced as prescribed by the act, does not purport to repeal any general law but merely provides an optional method of trial in the Superior Court of the county in cases coming within the statutory definition of small claims.

**6. Constitutional Law § 22—**

The 7th Amendment to the Federal Constitution is not applicable to the states.

**7. Same: Constitutional Law § 6½—**

Chapter 1057, Session Laws of 1951, providing for the trial of small claims without a jury in actions instituted pursuant thereto unless a demand is made for a jury trial in the manner set out and the costs advanced as required therein, is not unreasonable, and failure to demand a jury trial and advance the costs as stipulated in the statute is a waiver of the right to trial by jury. Article I, Section 19, Article IV, Section 13, of the Constitution of North Carolina. G.S. 1-172.

**8. Attorney and Client § 6—**

Where competent counsel representing a party fails to demand trial by jury as required by applicable statute, the right to trial by jury will be deemed waived, since ordinarily the attorney has control and management of the suit in matters of procedure.

**9. Appeal and Error § 40b—**

A motion for a continuance is addressed to the discretion of the trial court, and its refusal of the motion is not reviewable in the absence of a showing of abuse of discretion or that defendant has been deprived of a fair trial.

APPEAL by defendant from *Sharp, Special Judge,* May Term, 1955, of FORSYTH.

The plaintiff instituted this action in the Superior Court of Forsyth County on 29 April, 1954, alleging that the defendant purchased from the plaintiff the articles of personal property set out in the complaint, and executed a conditional sales contract to secure the balance of the purchase price. The complaint alleged default in payment as prescribed by the alleged contract and prayed for a money judgment of $1,000.00 and that the property be sold and the proceeds applied to the debt. An undertaking was given in the sum of $2,000.00, an affidavit in claim

and delivery was made by the plaintiff, and an order in claim and delivery was issued for the property. The summons was issued by the Clerk of the Superior Court of Forsyth County pursuant to Chapter 1057 of the Session Laws of 1951.

The foregoing writs were duly served on the defendant on 29 April, 1954. The defendant gave an undertaking in the sum of $2,000.00 and retained the property. Subsequently, the defendant employed the firm of Hayes and Hatfield, which firm prepared and filed on 13 July, 1954, the original answer which appears in the record, denying that the merchandise measured up to the representations made by the plaintiff and set up a counterclaim for breach of warranty in the sum of $200.00.

The case was called for trial on 16 May, 1955, at the term of the Superior Court beginning on that date, the case having been continued by consent at a previous term. On 16 May, 1955, an order was signed by the presiding judge, permitting the defendant's original counsel to withdraw as counsel of record for the defendant since the defendant had employed other counsel, to wit: W. Scott Buck. This order had been consented to by the defendant on 9 May, 1955.

Upon the call of the case for trial on 16 May, 1955, the present counsel for defendant moved for a continuance and for a jury trial, which motion was disallowed. The court, however, announced that the case would not be tried before Thursday, 19 May, 1955, in order to give counsel time to confer with his client and interview necessary witnesses.

When the case was called for trial on 19 May, 1955, the defendant moved that the action be dismissed for the reason that Chapter 1057 of the Session Laws of 1951 was an invalid enactment, which motion was overruled. The defendant then moved that the plaintiff be required to give an undertaking as prescribed by G.S. 1-109, which motion was also overruled. Thereupon, the defendant moved for a jury trial. The motion was denied. The defendant then filed a written motion for a continuance to a subsequent term and for a jury trial, and the court likewise overruled this motion.

The court proceeded to hear the case without a jury; made findings of fact adverse to the defendant, and entered judgment in favor of the plaintiff. The defendant appeals, assigning error.

*Clyde C. Randolph, Jr., for appellee.*

*W. Scott Buck for appellant.*

DENNY, J. The first assignment of error is directed to the refusal of the court below to sustain the defendant's motion to dismiss the action on the ground that Chapter 1057 of the Session Laws of 1951 is invalid.

The pertinent sections of the above Act are as follows:

"Section 1. The procedure for adjudicating small claims in the Superior Court for Forsyth County shall be as herein set forth. A small claim is defined as an action in which the relief prayed for is a money judgment only and costs of court, in which the sum demanded (exclusive of interest and costs of court) by the plaintiff, defendant or other party does not exceed one thousand dollars ($1,000.00), and in which no jury trial is demanded; it may include the ancillary remedies of claim and delivery and attachment.

"Sec. 2. The Clerk of the Superior Court for Forsyth County shall maintain a small claims docket. The clerk shall docket in the small claims docket any action in which the plaintiff in his complaint (or application for extension of time in which to file complaint) demands only a money judgment for a principal amount not in excess of one thousand dollars ($1,000.00), and does not demand a jury trial. No prosecution bond shall be demanded of plaintiff when instituting such action, and he shall be required to advance costs of the clerk's office only as prescribed in the next Section.

"Sec. 3. In all small claims actions, the clerk shall require the advance payment of costs by plaintiff, as in other actions, but at one-half the usual amount.

"Sec. 4. If any party to such action files an answer or other pleading in which affirmative relief is demanded for other than a money judgment not in excess of one thousand dollars ($1,000.00), the action shall be transferred to the regular civil issue docket; provided such party at the time of filing his pleading advances to the clerk the remaining one-half of court costs not advanced by plaintiff, and also files a prosecution bond for costs payable to the adverse party or parties in the sum of twenty-five dollars ($25.00). The bond, except as herein specified, shall be controlled by the provisions of General Statutes, Sec. 1-109. If such party fails to pay such additional advance costs or to file such prosecution bond, the portion of his pleading setting out his claim for affirmative relief shall be stricken on motion or *ex mero motu.*

"Sec. 5. No jury shall be had in such small claims action, unless a party thereto shall demand a jury trial in the first pleading filed by him, and shall also comply with the provisions of Section 4 hereof as to advance costs and prosecution bond."

The Act contains no repealing clause and became effective upon ratification.

An examination of the foregoing Act reveals that its purpose is procedural in character and does not purport to relate to the establishment of a court inferior to the Superior Court within the purview of Article II, Section 29, of the Constitution of North Carolina. This being so,

we know of no constitutional provision prohibiting the General Assembly from enacting such legislation. Hence, *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313, and similar cases are not controlling. In fact, Article IV, Section 12, of our State Constitution provides that the General Assembly may "regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution." *Horton v. Green,* 104 N.C. 400, 10 S.E. 470; *Power Co. v. Power Co.,* 175 N.C. 668, 96 S.E. 99; *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187.

In *Power Co. v. Power Co., supra,* this Court quoted with approval from Cooley on Constitutional Limitations (7th Ed.), at page 554, Note 2, where it is said: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act," citing *S. v. County Commissioners of Baltimore,* 29 Md. 516; *Pollock v. McClurken,* 42 Ill. 370; *Haskel v. Burlington,* 30 Iowa 232; *Unity v. Burrage,* 103 U.S. 447, 26 L. Ed. 405.

The question of the propriety, wisdom, and expediency of legislation is exclusively a legislative matter and if an Act is otherwise unobjectionable, all that can be required of it is that it be general in its application to the class or locality to which it applies and that it be public in its character. *Kornegay v. Goldsboro, supra; Newell v. Green,* 169 N.C. 462, 86 S.E. 291; *S. v. Moore,* 104 N.C. 714, 10 S.E. 143, 17 Am. St. Rep. 696.

The defendant also contends that Chapter 1057 of the General Session Laws of 1951 is invalid because in its caption it does not purport to comply with G.S. 12-1, which provides that, "No act, which by its caption purports to be a public-local or private act, shall have the force and effect to repeal, alter or change the provisions of any public law, unless the caption of said public-local or private act shall make specific reference to the public law it attempts to repeal, alter or change."

In considering this identical question with respect to the above statute, in the case of *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602, this Court held that, ". . . one Legislature cannot restrict or limit by statute the right of a succeeding Legislature to exercise its constitutional power to legislate in its own way," citing 12 C.J., Constitutional Law, section 238. See also *Kornegay v. Goldsboro, supra;* 82 C.J.S., Statutes, section 243 (b), page 412, *et seq.*

The Act under consideration does not purport to repeal any general law, but merely to provide an additional or optional method of trial in the Superior Court in Forsyth County in cases where the relief sought

is a money judgment only and costs of court, in which the sum demanded (exclusive of interest and costs of court) by the plaintiff, defendant or other party does not exceed $1,000.00, and in which no jury trial is demanded. Cases coming within this category may still be tried before a jury in Forsyth County in the same manner that they were triable before the enactment of this Act, where the plaintiff does not exercise his optional right to bring his action pursuant to the terms of this Act. Likewise, a defendant may demand and get a jury trial in an action brought pursuant to the provisions of the Act, if he so demands in the first pleading filed by him, and shall also comply with the provisions of Section 4 of the Act with respect to costs and prosecution bond. Hence, we hold that the defendant's first assignment of error is without merit.

We might note in passing that Chapter 1057 of the 1951 Session Laws has served as a model for Chapter 1337 of the 1955 Session Laws, a state-wide Act passed by the General Assembly containing provisions almost identical with those of Chapter 1057. The purpose of such legislation is to provide a method whereby small claims for a money judgment only may be tried expeditiously and without requiring the time and incurring the expense necessarily involved in a jury trial.

The defendant excepts to and assigns as error the refusal of the court below to grant him a jury trial as guaranteed by Amendment 7 to the Constitution of the United States, by Article I, section 19, of the Constitution of North Carolina, and by G.S. 1-172.

Amendment 7 to the Constitution of the United States is not applicable to the states, *St. Louis & S. F. R. Co. v. Brown,* 241 U.S. 223, 60 L. Ed. 966, the provisions thereof apply only to the federal government. *Pearson v. Yewdall,* 95 U.S. 294, 24 L. Ed. 436; *Southern Railway Co. v. Durham,* 266 U.S. 178, 69 L. Ed. 231, 185 N.C. 240, 117 S.E. 17, 35 A.L.R. 1313. However, Rule 38 of the Federal Rules of Civil Procedure requires a party to demand a trial by jury if one is desired and to serve notice of the demand on the other parties in the manner set out in the Rule or such right will be deemed waived. United States Supreme Court Digest, Annotated, Court Rules, page 231.

Our State Constitution, in Article IV, section 13, provides, "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict of a jury." But, ordinarily, the manner of such waiver is controlled by statute. See G.S. 1-184; G.S. 1-188; G.S. 1-513, and *Electric Co. v. Light Co.,* 197 N.C. 766, 150 S.E. 621.

In an action brought pursuant to the provisions of G.S. 1-513, where neither party moves for a jury trial on the issues raised by the plead-

ings, such issues may be determined by the court. *Cannon v. Wiscassett Mills,* 195 N.C. 119, 141 S.E. 344. Likewise, while a compulsory reference pursuant to the provisions of G.S. 1-189 does not deprive either party of his constitutional right to a trial by jury on the issues of fact raised by the pleadings, nevertheless, "the party who would preserve the right to have the issues found by a jury, must duly except to the order of reference, and, on the coming in of the referee's report, if it be adverse, he must file exceptions thereto in apt time, properly tender appropriate issues, and demand a jury trial on each of the issues thus tendered." *Booker v. Highlands,* 198 N.C. 282, 151 S.E. 635; *Marshville Cotton Mills v. Maslin,* 200 N.C. 328, 156 S.E. 484; *Simmons v. Lee,* 230 N.C. 216, 53 S.E. 2d 79.

It is said in 50 C.J.S., Juries, section 117, page 832: "The Constitutions in guaranteeing the right of trial by jury do not guarantee the right to litigate without expense, but merely protect the parties against the imposition of terms so unreasonable as materially to impair the right; and, except in the case of a party entitled to sue *in forma pauperis,* it is no infringement of the right to require as a condition of obtaining a jury trial the payment or deposit of a jury fee or docket fee or the giving of a bond for costs." 31 Am. Jur., Jury, section 33, page 581; Anno. 32 A.L.R. 865; *Knee v. Baltimore City Pass. R. Co.,* 87 Md. 623, 40 A. 890, 42 L.R.A. 363; *Humphrey v. Eakley,* 72 N.J.L. 424, 60 A. 1097, 5 Ann. Cas. 929, aff. 74 N.J.L. 599, 65 A. 1118; *Stephens v. Kasten,* 383 Ill. 127, 48 N.E. 2d 508; *Reliance Auto Repair Co. v. Nugent,* 159 Wisc. 488, 149 N.W. 377, Ann. Cas. 1917B 307; *State ex rel. Murphy-McDonald Builders' Supply Co. v. Parks* (Fla. 1950), 43 So. 2d 347; *Walker v. Parkway Cabs, Inc.,* 50 Ohio App. 250, 197 N.E. 921.

We hold that the provisions in the Act under consideration, to the effect that no jury trial shall be had in an action instituted pursuant thereto, unless a demand is made therefor in the manner set out in the Act, and the costs advanced and the prosecution bond filed as required therein, are not unreasonable provisions and will be upheld.

The defendant having been represented by competent counsel and having filed an answer without demanding a jury trial, as required in this particular type of action, if one is so desired, the right thereto will be deemed to have been waived. "Ordinarily, an attorney, by virtue of his employment as such, has control and management of the suit in matters of procedure . . ." *Harrington v. Buchanan,* 222 N.C. 698, 24 S.E. 2d 534; *Coker v. Coker,* 224 N.C. 450, 31 S.E. 2d 364; 7 C.J.S., Attorney and Client, section 100 (c), page 922, *et seq.* This assignment of error is overruled.

The defendant's fourth assignment of error is based on his exception to the refusal of the court to grant him a continuance to a subsequent term. In the recent case of *S. v. Ipock,* 242 N.C. 119, 86 S.E. 2d 798, *Higgins, J.,* in speaking for the Court, said: "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," citing *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 has been shown on the present record, or a showing that the defendant has been deprived of a fair trial.

The judgment of the court below is

Affirmed.

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IN THE MATTER OF IMOGENE R. MILLER, CLAIMANT, RT. 1, BOX 76, ROCKWELL, NORTH CAROLINA, S. S. No. 239-26-2869, AND CANNON MILLS COMPANY, KANNAPOLIS, NORTH CAROLINA, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, N. C.

(Filed 3 February, 1956.)

**1. Statutes § 5d—**

Statutes dealing with the same subject matter must be construed together and harmonized so as to give effect to all the provisions of each, if this can be done by any fair and reasonable construction, there being a presumption against inconsistency.

**2. Master and Servant § 60—**

Construing G.S. 96-13 and G.S. 96-14 together to harmonize and give effect to all of the provisions of each, it *is held* that the words "available for work" as used in G.S. 96-13 mean "available for suitable work" in the same sense as the words "suitable work" are used in G.S. 96-14.

**3. Same—**

A textile worker whose religious faith impels her to regard the period from sundown Friday until sundown Saturday as the true Sabbath, and who therefore seeks only such employment as would not require her to do secular work during this period, *held* not unavailable for work within the purview of G.S. 96-13, properly construed, since her refusal to engage in work which would offend her moral conscience would not render her unavailable for suitable work.

BARNHILL, C. J., dissents.

APPEAL by claimant from *Armstrong, J.,* at May, 1955, Mixed Term of ROWAN.

Proceeding to determine validity of claim for unemployment compensation filed with the Employment Security Commission of North Carolina by Imogene R. Miller, a former employee of Cannon Mills, Inc., Salisbury, North Carolina.

These in material part are the facts found by the Employment Security Commission:

"1. The claimant filed for benefits on June 4, 1954, and continued this claim through August 19, 1954, . . . Prior to filing her claim the claimant worked last for Cannon Mills Company as a spinner. She worked for this employer approximately thirteen years.

"2. That in addition to working as a spinner claimant has worked as a sweeper and has brushed rails and picked rollers. She has worked only in the textile industry and does not have any special skill or training for any other particular type of work.

"3. During the time claimant worked with her last employer she worked on third shift and during the last period of her employment she was working third shift. Sometime previous to May 28, 1954 the claimant became interested in the creed and religious teachings of the Seventh Day Adventist Church and as a result became convinced that she should not work on the Sabbath as understood by this denomination, it being from sundown Friday until sundown on Saturday. On the Friday before May 28, 1954 the claimant asked permission to be off from her job from the employer and was granted this request. On Friday, May 28, 1954 the claimant remained away from her job without the permission of the employer. Upon returning to work on the following Monday she was discharged by the employer.

"4. The claimant has been able to work since filing her claim on June 4, 1954 and has sought work with various textile mills in the area and has sought first shift work only with a number of these employers. She has made reapplication for employment with her last employer on the first shift. . . . Approximately 95% of all job openings in textile plants in the textile plants in the area are for third shift workers. (note: The evidence discloses that the three shifts as a rule run from seven in the morning until three in the afternoon; from three in the afternoon until eleven at night; and from eleven at night until seven the next morning.)

"5. There are a number of people who have the same religious belief and creed respecting the observance of the Sabbath from Friday sundown until Saturday sundown as the claimant and there are approximately forty-five people in the Salisbury area that are members of the Seventh Day Adventist Church that work in the textile industry. There are others of the same belief who work in Albemarle, High Point and

elsewhere. Some of the employers arranged to let such individuals off on their Sabbath. Others of these individuals worked first shift."

Upon the foregoing facts found, the Commission elaborated and concluded in pertinent part as follows:

1. "Under the Employment Security Law of North Carolina an individual who is discharged for misconduct in connection with his work is subject" to a disqualification penalty.

2. "In the present case the claimant who believed it would violate the teachings of the Bible to work during the period from sundown Friday to sundown Saturday remained away from her job on the third shift on Friday, May 28, 1954. When she returned to her work on the following Monday she was discharged by the employer. She did not have any previous record of unexplained absences from her work and insofar as the record discloses she had not remained away from her job previously without permission of the employer. Under such circumstances the claimant was discharged but not discharged for misconduct in connection with her work and no penalty should be inflicted against her on account of her separation from her last employment."

3. "The Employment Security Law requires that each individual who files a claim for benefits must meet certain eligibility conditions of the law. These conditions apply uniformly to all individuals who file claims. The law requires that in order to be entitled to receive benefits during any week of unemployment that the individual must be available for work and in addition must be able to work and actively seeking work in addition to registering for work at the office of the Employment Security Commission."

4. "Here the claimant has been able to work and has made an active and reasonable search for employment but the question remains as to whether she has been available for work. She sought work with numerous employers and restricted her services with some of these employments to first shift only and she freely admits that she would not take any work which would require her to work during any time from sundown Friday to sundown Saturday night. This means, of course, that she would not be able to take work in any textile plant or other industry on either second or third shift if she was required to work on Friday nights for the employer. The evidence shows that it is customary for the textile plants in the area to run five days a week and that this is the normal work week, from Monday through Friday night, and in addition it is disclosed by the evidence that the textile mills in the area customarily hire new employees for third and second shift work and promote such individuals to first shift in accordance with the length of time that the individual has worked for the employer."

5. "In this case the claimant is experienced only as a textile worker and it is logical that she would be more likely to find work in that field than any other particularly in view of the fact that she is approximately 56 years old. She, however, has restricted her services to what amounts to first shift work by refusing to work on Friday from sundown until sundown on Saturdays. It is true the evidence shows that there are some employers who have made exceptions to individuals similarly situated as the claimant and have arranged the work of such individuals so that they do not have to work these hours. This appears to be the exception rather than the general custom of the industry. The claimant by restricting her services as stated has so limited the circumstances under which she would accept work as substantially to eliminate herself from consideration for potential job opportunities and she is, therefore, considered unavailable for work."

Upon the facts found and the conclusions made, the Commission held that the claimant was ineligible for compensation benefits. On appeal to the Superior Court, the order of the Commission was affirmed.

The claimant appeals to this Court.

*Whitlock, Dockery, Ruff & Perry and Lyn Bond, Jr., for Claimant, Appellant.*

*William H. Beckerdite for Cannon Mills Company, Appellee.*

*W. D. Holoman, R. B. Billings, R. B. Overton, and D. G. Ball for Employment Security Commission of North Carolina, Appellee.*

*R. Mayne Albright; Leo Pfeffer, Will Maslow and Shad Polier (of the New York Bar) for Amici Curiae. American Jewish Congress and North Carolina Association of Rabbis.*

JOHNSON, J. The question for decision is whether the claimant, who is a member of the Seventh Day Adventist Church, which teaches that the true Sabbath is from sundown Friday until sundown Saturday, and who personally entertains the sincere religious belief that it is wrong to perform secular work during these hours, is, by reason of her stated purpose not to work on Friday nights, ineligible for benefits under the Employment Security Law of North Carolina, on the ground that during the time of her unemployment she was unavailable for work.

The determination of this question involves consideration of the two sections of the Employment Security Law which prescribe the general rules of eligibility for unemployment compensation benefits. These sections are codified as G.S. 96-13 and 96-14. The first section prescribes the basic conditions which have to be met by a claimant in order to qualify for benefits; the latter section enumerates a series of disqualifications. However, as cognate statutes the two sections

provide the over-all formula governing the right to benefits. Being thus *in pari materia,* the statutes are to be construed together. *Midkiff v. Granite Corp.,* 235 N.C. 149, 69 S.E. 2d 166.

Among the provisions of G.S. 96-13 is the requirement that in order for a claimant to be eligible for benefits it must be made to appear that he is *"available for work."* (Italics added.) Among the disqualifications enumerated in G.S. 96-14 are these: (a) leaving work voluntarily "without good cause attributable to the employer"; (b) being unemployed because of discharge "for misconduct" connected with work; (c) failure "without good cause (i) to apply for available *suitable work,* when so directed by the Employment office; or (ii) to accept *suitable work* when offered him." (Italics added.) Subsection (1) of section (c) provides in part, "In determining whether or not any work is *suitable* for an individual, the Commission shall consider the degree of risk involved in his health, safety, and morals, . . ." (Italics added.)

The Commission found that the claimant was not discharged for misconduct in connection with her work and that no penalty should be inflicted against her by reason of her separation from her last employment. In short, the Commission found and concluded that she was free of any and all elements of disqualifying conduct referred to in G.S. 96-14. Decision below was rested wholly and solely on the conclusion that the claimant by eliminating herself from job opportunities on her Sabbath had thereby limited her availability for work to the extent that she was not "available for work" within the meaning of G.S. 96-13, and that as a consequence she was totally ineligible for unemployment compensation benefits.

If the phrase, "available for work," as used in G.S. 96-13, is susceptible of the interpretation applied by the Commission, the logic of the thing would seem to be that the phrase may be applied so as to disqualify, or render ineligible for benefits, the vast majority of people who are not available for work on Sunday or who do not work on any night. If this be so, then the *rationale* of the statute would seem to be that in order to be eligible for benefits a claimant must be "available for work" at any and all times, night and day, Sunday and week days alike. Moreover, the interpretation applied in the instant case appears to render the two statutes, G.S. 96-13 and 96-14, inconsistent. For example, to make a claimant eligible under G.S. 96-13 only in the event he is willing to accept work without any limitation, but to disqualify him under G.S. 96-14 only in the event he should refuse to take "suitable work," would fix it so the disqualification could never operate, since a person willing to take only "suitable" work would always be ineligible in the first instance by virtue of G.S. 96-13. "It is a fundamental rule of statutory construction that for the purpose of learning

and giving effect to the legislative intention, all statutes relating to the same subject are to be compared and so construed in reference to each other that effect may be given to all the provisions of each, if it can be done by any fair and reasonable construction." *Alexander v. Lowrance,* 182 N.C. 642, 109 S.E. 639. Moreover, there is a presumption against inconsistency, and when there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by fair and reasonable interpretation. *Young v. Davis,* 182 N.C. 200, 108 S.E. 630. We conclude that the language of G.S. 96-13 does not sustain the strict interpretation applied below. The words, "available for work," as used in the statute mean "available for suitable work" in the same sense as the words, "suitable work," are used in the cognate statute, 96-14.

We do not undertake to formulate an all-embracing rule for determining in every case what constitutes being "available for suitable work" within the meaning of G.S. 96-13. The phrase is not susceptible of precise definition that will fit all fact situations. Necessarily, what constitutes availability for work within the meaning of the statute depends largely on the facts and circumstances of each case. However, we embrace the view that work which requires one to violate his moral standards is not ordinarily suitable work within the meaning of the statute. And necessarily the precepts of a religious belief to which one conscientiously and in good faith adheres is an essential part of one's moral standards. Therefore, where, as here, a person embraces a religious faith, the tenets and practices of which impel her to treat as her true Sabbath the period from sundown Friday until sundown Saturday, and to refrain from all secular work during this period, it would offend the moral conscience of such person to require her to engage in secular work during such period.

We conclude that to have forced the claimant to work on her Sabbath would have been contrary to the intent and purpose of the statute, G.S. 96-13. The claimant, by refusing to consider employment during her Sabbath, did not render herself unavailable for work within the meaning of the statute. On the facts found by the Commission, she was "available for work" within the meaning of G.S. 96-13, and is entitled to an award of compensation benefits.

We do not reach for decision the question whether the evidence supports the finding of the Commission that 95% of all job openings in textile plants in the vicinity of Salisbury are for third shift work. Nor do we reach the constitutional questions discussed in the briefs and debated upon the argument.

With us, this is a case of first impression. However, decision here reached is supported in principle by well-considered decisions from other jurisdictions, including the following which deal, as here, with claims made by Seventh Day Adventists: *Tary v. Board of Review, etc.*, 161 Ohio St. 251, 119 N.E. 2d 56; *Swenson v. Michigan Employment Security Commission*, 340 Mich. 430, 65 N.W. 2d 709. See also 81 C.J.S., Social Security and Public Welfare, Sections 201 and footnotes.

The decisions and authorities cited and relied on by the appellees are either factually distinguishable or are not considered controlling with us.

Let the judgment below be vacated and set aside, to the end that the cause may be remanded to the Employment Security Commission of North Carolina with direction that an award be made to the claimant in accord with decision here reached.

Error and remanded.

BARNHILL, C. J., dissents.

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KATHERINE ANN BOWLING AND BILLIE JEAN BOWLING, MINORS, BY THEIR NEXT FRIEND, ROGER S. UPCHURCH, v. AGNES P. BOWLING, INDIVIDUALLY, AGNES P. BOWLING, ADMINISTRATRIX OF THE ESTATE OF DR. WM. W. BOWLING, AND AGNES P. BOWLING, GUARDIAN OF KATHERINE ANN BOWLING AND BILLIE JEAN BOWLING.

(Filed 3 February, 1956.)

**1. Husband and Wife § 15a—**

An estate by the entirety in personal property is not recognized in this State.

**2. Estates § 16—**

Nothing else appearing, money in a bank to the joint credit of husband and wife and also stock issued to husband and wife, belong one-half to the husband and one-half to the wife.

**3. Same—**

Where agreements relating to deposits provide that each should be held for the account of a husband and wife as joint tenants with right of survivorship and not as tenants in common, and the agreements are executed by both husband and wife, the right of survivorship exists pursuant to the contracts, and upon the death of the husband the widow is entitled to take the whole.

APPEAL by plaintiffs from *Hall, J.*, at October 1955 Term, of DURHAM.

Civil action to determine and declare the ownership of certain savings accounts, securities and stock recorded in the joint names of Agnes P. Bowling and her husband, Dr. Wm. W. Bowling, now deceased.

The parties stipulate, and the court finds that the facts are as set forth in the verified complaint and admitted in the verified answer filed herein. Pursuant thereto, and upon further stipulation as hereinafter stated, the parties desired the court to make a determination of the cause and enter judgment accordingly.

The facts are substantially these:

I. The defendant Agnes P. Bowling and William W. Bowling were married in June 1936, and the infant plaintiffs are the children born of this marriage. He died intestate on 23 October, 1954. She was living with him at the time of his death, and their children have continued to live, and are now living with her. And she is the duly qualified, and acting administratrix of his estate, and also the duly qualified and acting general guardian of her said children.

II. Agnes P. Bowling, individually, claims the properties which are the subject of this action as her sole property but, as administratrix of her husband's estate, and as guardian of her said children, she desires the advice of the court as to the proper disposition of said properties, and she is, therefore, joined as a defendant in her capacities as administratrix and as general guardian for the purpose of determining the rights of the parties in said properties.

III. The estate of William W. Bowling had ample personal assets exclusive of the properties which are the subject of this action to discharge all administration expenses, debts and taxes of all kinds.

IV. The four items in controversy are these: (1) On July 12, 1948, Agnes P. Bowling personally and without her husband opened a savings account, No. 1384, with Security Building and Loan Association, Inc., of Durham, North Carolina, and a savings share account book was issued in the following name: "Mrs. Agnes P. Bowling &/or Dr. W. W. Bowling, 1017 Demarias Street." The name of Dr. W. W. Bowling was placed on the account at the request of Mrs. Bowling. No joint account was executed through error, but the Association has always recognized that the account was a joint account with the right of the survivor to withdraw the funds individually. The initial deposit of $5,000 on 12 July, 1948, was derived (a) partly from a savings account with Fidelity Bank of Durham, North Carolina, recorded in the name of "Agnes Paulk Bowling," which she opened March 30, 1943, and over which she had sole control as to pass book, deposits and withdrawals, and (b) partly from a "joint account," opened February 23, 1937, with the Depositor's National Bank of Durham, North Carolina, in the

name of "Dr. and/or Mrs. W. W. Bowling or the survivor,"—"the signature card and contract with the Bank with respect to said bank account" authorized the bank "to recognize either of the signatures—'W. W. Bowling—Mrs. W. W. Bowling'—in the payment of funds, or the transaction of any other business for our account. Either one, or the survivor, or both may sign checks; and the signature of either shall be sufficient for the withdrawal of all, or any part, of the funds standing to the credit of the above account."

With respect to the Savings Share Account, No. 1384, the Savings Share Account Book has been usually in the physical control and possession of Agnes P. Bowling, but there is no independent record of the source of or identification of deposits or the disposition of the withdrawal therefrom, but withdrawals in the amount of dividends credited to the account were made by Agnes P. Bowling and deposited in individual savings account of minor plaintiffs.

(2) On August 1, 1941, an optional savings account, No. 375, in name of "Bowling, Dr. W. W. or wife, Mrs. Agnes P. Bowling" was opened up with the Home Building & Loan Association of Durham, North Carolina, by a cash deposit and execution of a written agreement with said institution with respect to such account, which was signed by Mrs. Agnes P. Bowling and W. W. Bowling, and provided: "It is understood and agreed that the shares hereby subscribed for are issued by the association, and all moneys paid or that may hereafter be paid thereon are paid by the undersigned, and such shares together with all accumulations thereon are held by the Association for our account, as joint tenants with right of survivorship and not as tenants in common, and that said shares may be resold subject to the by-laws of the Association, by either before or after the death of either, and either is authorized to pledge the same as collateral security to a loan." Money deposits of $100 and $200 were made by Agnes P. Bowling.

(3) On January 14, 1949, a Savings Share Certificate Account No. 182-B was opened up with the First Federal Savings & Loan Association of Durham, North Carolina, by a deposit and execution of a written agreement with said institution with respect to such account, which was signed by Agnes P. Bowling and W. W. Bowling. Exhibit C. The account as set forth in the Exhibit is designated "Membership of joint holders (with right of survivorship) of a share account." It reads in part: "The undersigned hereby apply for a membership and for a joint share account in the First Federal Savings & Loan Association of Durham, North Carolina, and for the issuance of evidence of membership in the approved form in the joint names of the undersigned as joint tenants with the right of survivorship and not as tenants in common . . .," and certificate was issued in accordance therewith.

There is no independent record of the source of deposits. The dividend accumulations were withdrawn from time to time by Mrs. Agnes P. Bowling and placed in accounts of the infant plaintiffs. $1,000 was withdrawn on March 20, 1952 by W. W. Bowling and employed for the purchase of an automobile.

(4) In addition to the savings accounts above described there was certificate for 125 shares of the common stock of Life & Casualty Insurance Company of Tennessee registered with the company as follows: "William W. Bowling and Mrs. Agnes Paulk Bowling, as joint tenants with right of survivorship and not as tenants in common."

V. The cause came on for hearing before Hall, Judge Presiding, at October 1955 Civil Term of Superior Court of Durham County, the parties having stipulated as aforesaid and "having further stipulated that Agnes P. Bowling had no source of earned income during her marriage, that her husband, Dr. Wm. W. Bowling, had a substantial income from his dental practice prior to his death, and that from time to time during the marriage real estate was sold, the record title of some being in her name alone, some in his name alone, with the greater part being in both names as tenants by the entirety.

"And it further appearing to the court that the parties are unable to produce any competent evidence of any further or additional facts regarding the ownership of the personal property which is the subject matter of this action.

"The court, therefore, finds the facts to be as admitted in the pleadings and as stipulated by the parties, as above stated."

Thereupon the court concluded as matters of law: (1) Both with respect to the Savings Share Account No. 1384 (item 1 above) with the Security Building & Loan Association, and with respect to the 125 shares of common stock of Life & Casualty Company of Tennessee (item 4 above) that (a) the facts are insufficient to establish that either the estate of Wm. W. Bowling, deceased, or Agnes P. Bowling is the sole owner of the entire funds of the account, or of said shares of stock; (b) a presumption of equal ownership by the co-depositors of said funds or by the registered holders of the shares of stock applies to the account in the one case, and to the shares of stock in the other, and (c) that in the one case the estate of Wm. W. Bowling, deceased, is the owner and entitled to possession of one-half of the funds and accrued dividends and interest thereon, and in the other is the owner and entitled to one-half of the stock, and that in each case Agnes P. Bowling is the owner and entitled to the other one-half.

And (2) both with respect to the Optional Savings Account No. 375 (item 2 above) with the Home Building & Loan Association, and with respect to the Savings Share Certificate Account No. 182-B (item 3

above) and with the First Federal Savings & Loan Association, (a) that in each case there was a valid written contract covering the account, which contract in each case was executed by W. W. Bowling (Wm. W. Bowling) and Agnes P. Bowling, copies of which were attached to the complaint as an exhibit; (b) that by the terms of the contract in each case it was agreed that the survivor of Wm. W. Bowling and Agnes P. Bowling would be the owner of the funds on deposit in the account; and (c) that Agnes P. Bowling as the survivor is the sole owner and entitled to possession of the entire funds in said account and accrued dividends and interest thereon.

Judgment was entered in accordance with the conclusions of law just stated.

Plaintiff moved to set aside the conclusions of law in respect to each of the four items as hereinabove stated, the subject matters of this case, on the ground that the court erred in so far as it is concluded that Agnes P. Bowling is the owner and entitled to possession of any of the funds or of the stock. Motions were denied, in each instance, and plaintiff excepted to each.

From judgment signed, plaintiff appeals to Supreme Court and assigns error.

*Roger S. Upchurch for plaintiffs, appellants.*

*Albert W. Kennon for defendant, appellee.*

WINBORNE, J. In connection with the assignments of error based upon the exceptions taken and presented on this appeal, it must be borne in mind that an estate by the entirety in personal property is not recognized in North Carolina. *Turlington v. Lucas,* 186 N.C. 283, 119 S.E. 366; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; *Smith v. Smith,* 190 N.C. 764, 130 S.E. 614; *Winchester-Simmons v. Cutler,* 194 N.C. 698, 140 S.E. 622; *Dozier v. Leary,* 196 N.C. 12, 144 S.E. 368; *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468.

And, under the laws of this jurisdiction, nothing else appearing, money in bank to the joint credit of husband and wife belongs one-half to the husband and one-half to the wife, as this Court held in *Smith v. Smith, supra.*

Moreover, as stated by *Denny, J.,* writing for the Court in *Wilson v. Ervin, supra,* "When property held by tenants by the entirety is sold, the proceeds from the sale will not be held as tenants by the entirety with the right of survivorship. Ordinarily, nothing else appearing, the proceeds from the sale of properties held by the entireties are held as tenants in common, but the parties would have the right to determine by contract what disposition should be made of the funds or how they

should be held." And the opinion then goes on to say that "Since the abolition of survivorship in joint tenancy, G.S. 41-2, the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision," citing *Taylor v. Smith,* 116 N.C. 531, 21 S.E. 202.

In the light of these principles applied to the facts in hand the wife, Agnes P. Bowling, would in any event be entitled to one-half of the four items of subject matter in controversy; and since the parties having contracted and agreed that the savings accounts described hereinabove as the second and third items, respectively, were held by them "as joint tenants with right of survivorship, and not as tenants in common," the right of survivorship existed, and in so holding the trial judge ruled in accordance with decisions of this Court.

Hence the judgment from which plaintiff appeals is

Affirmed.

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THE BURLINGTON CITY BOARD OF EDUCATION v. HARVEY M. ALLEN AND MRS. SAMPSON ALLEN.

(Filed 3 February, 1956.)

**1. Eminent Domain § 14—**

Prescribing the procedure for the taking of land for public use is the exclusive prerogative of the Legislature, limited only by the constitutional requirement that just compensation be paid.

**2. Eminent Domain § 6—**

The General Assembly has delegated to the respective local school administrative units the authority to take land for school sites and other school facilities and has prescribed the procedure therefor. G.S. 115-125.

**3. Eminent Domain § 14—**

Under G.S. 115-125, the local school administrative unit is an administrative agency of the government in selecting a site for a new school building or other school facilities.

**4. Same: Administrative Law § 4—**

Where a local school administrative unit cannot acquire the site selected by it by gift or purchase and proceeds to condemn the property under G.S. 115-125, the notice prescribed by the statute is sufficient and issuance of summons as in case of special proceedings and civil actions is not required, G.S. 1-394, G.S. 1-88, since the proceeding is not judicial in nature unless and until an appeal is taken from the final report of the appraisers. The clerk of the Superior Court, in appointing appraisers under the statute, acts as the agent designated by the General Assembly to perform this duty, and not in his capacity as a judicial officer.

**5. Eminent Domain § 14: Administrative Law § 6—**

Under G.S. 115-125, the selection of a site for a new building or other school facilities by the local school administrative unit is a matter committed to the sound discretion of such administrative agency, which exercise of discretion the courts can review only for arbitrary abuse of discretion or disregard of law, the appeal from the final report of the appraisers being solely upon the question of the amount of compensation to be paid for the land taken.

**6. Same: Appeal and Error § 2—**

In proceedings instituted by a local school administrative unit to condemn land for a school site under G.S. 115-125, an appeal prior to the hearing upon exceptions to the final report of the appraisers is premature.

APPEAL by petitioner and respondents from *Carr, J.*, August Term, 1955, ALAMANCE.

Proceeding to condemn land for public school use.

The petitioner proposes to build a new school building to be known as Grove Park Elementary School and has selected as the site on which to locate said school building 23.02 acres of land in Burlington owned by the respondents. It has been unable to obtain said site from the respondents by gift or purchase.

On 13 July 1955 the superintendent of the Board of Education, hereinafter referred to as the board, prepared and had served on the respondents a notice of the intention of the petitioner to appropriate said land for public school use. The notice contains all the information required by G.S. 115-125, 1955 supplement. The notice was returnable on 20 July 1955. On said date said superintendent filed with the clerk of the Superior Court of Alamance County a petition in the name of the petitioner reciting the service of said notice which was thereto attached and praying the appointment of appraisers to lay off by metes and bounds the land described in the notice and to assess the value thereof in strict accord with the provisions of G.S. 115-125, 1955 supplement.

On said date, 20 July 1955, the respondents made a special appearance through counsel and moved to dismiss this proceeding "for that the Court has not in this proceeding properly acquired jurisdiction over the person of the said Harvey M. Allen and Mrs. Sampson Allen." They assert in their motion "that the applicable law with respect to the acquisition of sites for school purposes has not been sufficiently complied with to make them parties to this proceeding." However, they do not specify any particular failure to comply with the applicable statute. The clerk denied the motion, and the respondents excepted and appealed to the Superior Court.

When the cause came on for trial in the court below, "the Court being of the opinion that the order of the said Clerk of the Superior Court should be affirmed," entered judgment affirming the order of the clerk and remanding the proceeding to the clerk for further proceedings.

The respondents excepted to the order and appealed, and the court, on motion of respondents, stayed further proceedings pending the appeal. To the order staying proceedings petitioner excepted and appealed.

*W. L. Shoffner and Young, Young & Gordon for petitioner.*

*P. W. Glidewell, Sr., and Long, Ridge, Harris & Walker for respondents.*

BARNHILL, C. J. In the beginning it is necessary for us to note that General Statutes Ch. 115 was revised and re-enacted by the 1955 session of the General Assembly. The new Act is Ch. 1372, Session Laws 1955, and is entitled "AN ACT REWRITING, REARRANGING, RENUMBERING AND AMENDING CHAPTER 115 OF THE GENERAL STATUTES, AND REPEALING CERTAIN OBSOLETE SECTIONS THEREOF."

This new Act has been codified as a part of the 1955 cumulative supplement to recompiled volume 3A of our General Statutes. It is designated as Ch. 115 of the 1955 supplement as it is in the bound volume. But the subject matter of the several sections as contained in the bound volume has been completely changed. For instance, the pertinent part of the General Statutes which prescribes the procedure for condemning land for public school use is G.S. 115-85, as amended by Ch. 1335, S.L. 1955, whereas in the 1955 cumulative supplement it is G.S. 115-125. Hence it must be understood that references to any section or sections of General Statutes Ch. 115 hereafter made are to such section or sections as it or they appear in the 1955 cumulative supplement which is the law now in force and controlling here.

It is the exclusive prerogative of the Legislature—limited only by our organic law which requires that just compensation shall be paid for the land so appropriated—to prescribe the method of taking land for the public use. *Durham v. Rigsbee,* 141 N.C. 128.

In discharging this function in respect to schools, the General Assembly has delegated to the respective local school administrative units the authority to take land for school sites and other school facilities and has prescribed the procedure therefor. G.S. 115-125.

In prescribing the procedure for condemning land for public school use, it designated the clerk of the Superior Court of the county in which the property is situate as the one to select or appoint the appraisers and before whom all proceedings should be had up until the question of

just compensation arises. This, no doubt, was done for three reasons: (1) it provides a disinterested person to select the appraisers; (2) the proceeding will, in any event, in all probability reach the courts as such; and (3) it affords a ready means of providing a permanent record of the title acquired by the condemning governmental agency.

Therefore, as presently constituted, this is not a judicial proceeding. The petitioner is an administrative agency of the government. In selecting a site for a new building and other school facilities, it acts in its administrative capacity. If it cannot acquire the site selected "by gift or purchase," it may proceed to condemn the property selected as provided by G.S. 115-125.

Thus it is that this proceeding is not instituted before the clerk as a judicial officer but as an agent designated by the General Assembly to perform certain specific duties in connection with the condemnation of land for public school use. Consequently, it is not required that the proceeding be instituted by the issuance of a summons as in case of special proceedings or civil actions. G.S. 1-394; G.S. 1-88. Likewise, for the same reason the procedure is not the same.

The advisability of taking the property for public school use is a matter committed to the sound discretion of the petitioner with the exercise of which neither the respondents nor the courts can interfere. "It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. (Authorities cited.)," except as provided by statute. *Durham v. Rigsbee, supra; Selma v. Nobles,* 183 N.C. 322, 111 S.E. 543; *S. v. Jones,* 139 N.C. 613.

The action of the petitioner in selecting the site (not to exceed thirty acres) and in condemning the land so selected is not even subject to review by the courts except for arbitrary abuse of discretion or disregard of law. *Selma v. Nobles, supra; Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896.

"As to the procedure in a case of this kind, our decisions are to the effect that notwithstanding the appearance of issuable matter in the pleadings, it is the duty of the clerk, in the first instance, to pass upon all disputed questions presented in the record, and go on to the assessment of the damages through commissioners (or appraisers, as here) duly appointed, and allowing the parties, by exceptions, to raise any questions of law or fact issuable or otherwise to be considered on appeal from him in his award of the damages as provided by law." *Selma v. Nobles, supra; Abernathy v. R. R.,* 150 N.C. 97.

". . . No appeal lies until the final report of the commissioners (here appraisers) comes in, when, upon exceptions filed, the entire record is sent to the Superior Court, where all of the exceptions . . . may be then presented . . ." *Abernathy v. R. R., supra.*

The right of appeal is granted by the statute, G.S. 115-125, and it is by the appeal and docketing of the record in the Superior Court that the proceeding becomes judicial in nature.

Even then it is not upon the appropriation of the land for public use but upon the question of damages for the land so appropriated—just compensation—that the owner is entitled of right to a hearing in court and the verdict of a jury. *S. v. Jones, supra; Durham v. Rigsbee, supra.* It is upon the appeal that the respondents have their day in court and an opportunity to be heard before they are hurt.

The respondents have been given due and proper notice as required by law that the machinery to take their property for public school use and to fix and establish the "just compensation" they are to receive therefor has been set in motion. They may respond thereto as they may be advised. Their motion to dismiss is without merit, and their appeal was premature.

The court was in error in staying the condemnation proceeding pending the appeal. However, that question has now become moot.

The court below will remand this proceeding to the clerk to the end that he may proceed to appoint appraisers to lay off the land selected by the petitioner by metes and bounds, assess the fair value thereof, and make their report in writing. After the appraisers have filed their report in writing, the respondents may file exceptions thereto and raise such questions of law or issues of fact as they may be advised. If the appraised value of the property is not acceptable to them, the cause, on their exceptions, will be transferred to the civil issue docket, and they will be afforded their day in court to which they are entitled.

Appeal dismissed.

# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH

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## SPRING TERM, 1956

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W. J. HAYES, ADMINISTRATOR OF THE ESTATE OF W. J. HAYES, JR., v. CITY OF WILMINGTON, NORTH CAROLINA; TOWLES-CLINE CONSTRUCTION COMPANY; E. B. TOWLES CONSTRUCTION COMPANY, AND S. E. COOPER, TRADING AND DOING BUSINESS AS S. E. COOPER COMPANY; JOHN LINDSEY NEAL AND SEABOARD SURETY COMPANY.

(Filed 29 February, 1956.)

**1. Torts § 6—**

In order for the original defendant to be entitled to the joinder of an additional party for the purpose of contribution under G.S. 1-240, the cross complaint must allege facts so related to the subject matter declared on in plaintiff's complaint as to disclose that plaintiff, had he desired to do so, could have joined the additional party as a defendant, and that such additional party is liable to plaintiff, along with the original defendant, as a joint tortfeasor.

**2. Same—**

The original defendant may file answer denying negligence, and alleging negligence of other defendants as a sole proximate cause, and also alleging conditionally or in the alternative, for the purpose of the joinder of a third party for contribution, that if defendant were negligent, such third party also was negligent, and that the negligence of such third party concurred in causing the injury in suit, since a defendant who elects to plead a joint tortfeasor into his case is not required to surrender other defenses available to him.

**3. Same—**

When an alleged joint tortfeasor is brought into a case as an additional party defendant, and it turns out that no cause of action is stated against him, either in the main action or in a cross-action pleaded by another

defendant, he is an unnecessary party to the action and, on motion, may have his name stricken from the record as mere surplusage.

**4. Same: Pleadings § 31—**

The motion of an additional party to have his name stricken from the pleadings on the ground that no cause of action was stated against him either in the main action or in the original defendant's cross-action operates, for all practical purposes, as a demurrer challenging the legal sufficiency of the challenged pleadings to state facts sufficient to constitute a cause of action against him.

**5. Appeal and Error § 51a—**

Decision on a former appeal is the law of the case upon the questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal upon the same facts.

**6. Same—**

The doctrine of the law of the case applies only to such points as are actually presented and necessarily involved in determining the case, and while the doctrine applies to every point presented and decided even though any one of such points is sufficient to support the decision, the doctrine does not apply to points which are not actually presented and necessarily involved in determining the case and which are therefore *obiter dicta*.

**7. Same—**

The doctrine of the law of the case is basically a rule of procedure rather than of substantive law, and in determining the correct application of the rule, the record on former appeal may be examined for the purpose of ascertaining what facts and questions were before the Court, particularly when the case is still in the interlocutory stage and nothing has been done that can prejudice either of the parties.

**8. Torts § 6: Pleadings § 31—**

Where an additional defendant joined for contribution on the cross complaint of the original defendant moves to have his name stricken from the pleadings on the ground that the cross complaint fails to state facts sufficient to constitute a cause of action against him, the motion for practical purposes is a demurrer, presenting the sole question of the sufficiency of the cross complaint to state a cause of action against him, and in determining the question, the allegations of the complaint should not be considered, and certainly it should not be assumed that they will be proven at the trial.

**9. Appeal and Error § 51a—On appeal from granting motion to strike cross complaint, conclusions predicated on other pleadings are obiter.**

On appeal from the granting of the motion of additional parties, joined for the purpose of contribution, to strike their names from the pleadings on the ground that the original defendant's cross complaint did not allege facts sufficient to state a cause of action against them for contribution, decision upholding the granting of the motion on the ground that the cross complaint failed to allege joint tortfeasorship is the law of the case upon the pleadings as then constituted, but statements in the decision to the

effect that the motion was also properly allowed on the ground that it appeared from the allegations of the complaint that the negligence of the original defendant was primary and also that the negligence of the original defendant insulated any negligence of the additional defendants, relate to matters not presented by the record for decision in determining the correctness of the order, and therefore are *obiter dicta* and not a part of the law of the case.

**10. Appeal and Error § 1—**

An appeal presents the question whether the ruling or judgment of the court below is correct and not whether the reason given therefor by the lower court or the ground on which it professed to base the ruling or judgment is sound or tenable.

**11. Appeal and Error § 51a—**

Where an order of the Superior Court recites matters not presented for decision as a basis for its order, and on appeal such matters extrinsic to the decision are also discussed, the conclusions in the decision are *obiter* nonetheless because they derive from unfounded reasons given by the lower court for its decision.

**12. Torts §§ 4, 6—Allegations held sufficient to state cause of action for contribution against additional defendants.**

This action was instituted to recover for the death of intestate who was killed in an explosion caused by the ignition of gas which had seeped into the house. The gas escaped from a connection at the meter which was jarred loose when an excavator struck the gas pipe leading from the street to the house. Plaintiff sued the city, the street contractors and the subcontractor doing the preliminary excavating work, alleging that defendants knew or should have known of the location of the pipes in the area of the work, that the grader struck the pipe with such force as to make it evident that the pipe had been dislocated in the house, but that the employees of the subcontractor, after examining the exposed pipe, continued the grading operations instead of taking prompt safety precautions. The subcontractor filed a cross-action for contribution against the gas company alleging that the gas company was negligent in that it failed to place a vent on the governor at the meter, that it installed the service pipe under the house without supporting it to joists or anchoring it at the meter, that the pipe was buried too shallow for safety in violation of municipal regulations, that it failed to lower the service pipes after having been notified that the grading and excavating on said street was about to commence, and that it should have foreseen that unless the pipes were lowered an explosion was likely to occur in the way and manner in which it did actually occur. The cross complaint further alleged that if defendant were negligent, the negligence of the gas company concurred in causing the explosion and resultant death of intestate. *Held:* The cross complaint states a cause of action against the gas company for contribution, and does not state facts attracting as a matter of law the doctrine of insulated negligence or the doctrine of primary and secondary liability.

**13. Pleadings § 7—**

A defendant may set up and rely upon contradictory defenses.

**14. Negligence § 7—**

In order for the negligence of one wrongdoer to insulate the negligence of another, it must break the chain of causation set in motion by the original wrongdoer and become itself solely responsible for the injuries, and be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer and produce a result which otherwise would not have occurred, and which reasonably could not have been anticipated.

**15. Negligence § 8—**

The doctrine of primary and secondary liability as applied in tort cases is a branch of the law of indemnity, and the doctrine is not applicable when the person against whom indemnity is sought breaches substantially equal duties owed to the injured person, since if both are *in pari delicto*, neither will be required to relieve the other of the entire loss.

PARKER and BOBBITT, JJ., concur in result.

BARNHILL, C. J., dissenting.

APPEAL by defendants, S. E. Cooper, John Lindsey Neal, Towles-Cline Construction Company, and E. B. Towles Construction Company, from *Stevens, J.*, at December Civil Term, 1954, of NEW HANOVER.

Civil action for the alleged wrongful death of plaintiff's intestate, heard below on motion of Tide Water Power Company and Carolina Power & Light Company to strike their names as defendants.

This case was here on former appeal. It was heard and determined at the Fall Term, 1953. The facts disclosed on former appeal may be summarized as follows:

On 31 December, 1951, there was a gas explosion in Wilmington, North Carolina, which demolished the residence of W. J. Hayes on Barnard Drive and killed his intestate son, W. J. Hayes, Jr. Out of this incident the cause of action here sued on arose, along with some thirty companion cases. The plaintiff originally joined as defendants the City of Wilmington, Towles-Cline Construction Company, E. B. Towles Construction Company, and S. E. Cooper. The complaint alleges in substance: (1) that the City of Wilmington contracted with Towles-Cline Construction Company to grade and pave Barnard Drive between Chestnut and Market Streets; (2) that Towles-Cline Construction Company transferred or set over to E. B. Towles Construction Company all or certain portions of the work to be performed under the contract; (3) that the construction companies contracted with the defendant Cooper to do the preliminary excavating and grading; (4) that on 31 December, 1951, at about 7:30 a.m., the defendant Cooper, acting through his employees, and under the direction of the other defendants in accordance with specifications furnished by the City of Wilmington, began grading Barnard Drive with a diesel grader. After

three or four cuts were made, the blade of the grader struck a gas pipe leading to the home of W. J. Hayes and family located on the west side of the street; "that the blade of the grader struck the pipe with such force as to bend the . . . pipe at the point of impact and rip the gas line from its connection at the gas meter under the . . . corner of the Hayes home, . . . leaving an open gas service line and causing highly volatile . . . commercial gas to pour into the confined area beneath the Hayes home; that the driver and the foreman present examined . . . the exposed and bent section of pipe, but . . . instead of taking prompt safety precautions, the foreman ordered the driver of the grading machine to continue grading, which he did; that the . . . operator continued grading for a considerable distance southwardly on Barnard Drive until the grader struck another pipe, whereupon the operator and the foreman . . . examined . . . the exposed section of the second pipe . . .; that approximately one-half hour after the Hayes gas service pipe was stuck, the . . . Hayes home . . . was completely demolished in a devastating explosion, the proximate . . . result of the . . . accumulation of . . . gas cause . . . by the negligent acts of the defendants in breaking . . . the Hayes service pipe . . .;" (5) that the defendants knew or should have known the location of the gas pipes within the area of the work; that they knew or should have known, from the appearance and condition of the Hayes gas service pipe after it was struck and dislocated that it was loose at the meter and was emptying highly explosive gas beneath the Hayes home, thus creating a deadly danger to the Hayes family and to all inhabitants of the area; (6) that the defendants were negligent, in that: (a) they failed to take reasonable steps to determine the location of the gas pipe or its distance below the surface of the ground and failed to furnish information in respect thereto to those actually engaged in the grading operation, in order to prevent striking the pipe; (b) they failed to halt grading operations after striking the Hayes service pipe, but continued operations without investigating or reporting the damage done; (c) they failed to give warning or notice to the residents of the area or to those in charge of the distribution of gas of the dangerous situation created by the breaking of the gas pipe, to avoid injury to persons and property in the vicinity; (7) that "as a result of the joint and concurring negligence of the defendants as . . . alleged, the plaintiff's intestate . . . was . . . fatally injured. . . ."

At the time of the explosion, gas for cooking, heating, and other purposes was furnished the citizens of Wilmington by the Tide Water Power Company, and it was one of its underground pipes leading from the street to the Hayes home that was hit by the defendant Cooper's grading machine. Since the explosion, the Tide Water Power Company

has merged with and been absorbed by the Carolina Power & Light Company.

For convenience, the two power companies will be referred to hereinafter at times as the power company.

The defendant Cooper, answering, denied the material allegations of the complaint, and by further defense alleged negligence on the part of the City of Wilmington and of Towles-Cline Construction Company (1) as "the sole proximate cause" of the explosion, and (2), by way of alternate defense, as entitling Cooper to indemnity over against the city and the construction company under application of the doctrine of primary and secondary liability. The details of these defenses are omitted as not being pertinent to decision.

The defendant Cooper's original answer also contains a section captioned, "Further Defense and Cross-action" against the power company. These in gist are the allegations made against the power company:

1. That the Tide Water Power Company owned all the gas pipes, lines and fittings in the vicinity of the W. J. Hayes home including "the service pipe, meter, governor and fittings up to and including the point where the service line . . . attached to a connection on the right-hand outlet side of the meter; . . . that the pressure on the line . . . was high pressure and the gas . . . served was . . . highly explosive; . . . that a governor was placed on the . . . meter to reduce the pressure before going into the service pipe leading from the meter to the fixtures, and that when a higher pressure than that which the governor is set for comes into the line the mercury would be blown from the governor and permit the gas to escape under the said building"; that the power company failed and neglected to place a vent on the governor to keep the gas from being released underneath the house if the governor should fail to operate; that the power company installed the service line from the street to the Hayes house in a shallow trench, at an unsafe depth of about 12 inches, and at the curb line, or point of impact, only about 9 inches; that under the house the line was exposed, "having a fall from the meter to the main gas line."

2. ". . . that the gas service pipe was not anchored at the meter, but was merely attached to the same with one-half-inch fittings, which the said Tide Water Power Company knew, or should have known, was not proper installation, nor was the . . . service gas line supported to joists or other fastenings to the house so that the . . . pipe could not be easily moved."

3. ". . . that the Tide Water Power Company had notice that Barnard Drive in the City of Wilmington was to be paved, and that

the . . . Tide Water Power Company would have to lower their lines to a depth to insure safety."

4. That the power company was negligent in that (a) it failed to install and maintain the service gas pipe at a depth and in such manner as to insure the safety of persons or property; (b) it failed to install properly and fasten the service gas line under the Hayes residence in such manner as to prevent injury or damage to persons and property; (c) it failed to lower the service gas pipes on Barnard Drive to a depth below the grade to be cut after having been notified that grading and excavating on said street was about to commence.

5. ". . . that the negligent acts of the . . . Tide Water Power Company . . . as hereinbefore set forth, or one or more, or all of said acts, were the sole, direct and proximate cause, or one or more of the sole proximate causes of the injuries to and death of W. J. Hayes, Jr., deceased, as referred to in the complaint, and as in this answer set forth."

6. ". . . that by reason of the matters and things alleged in this further defense and cross-action,. . . the Tide Water Power Company and its successor, the Carolina Power & Light Company, are proper and necessary parties to this action, . . ."

By *ex parte* order of the court, Tide Water Power Company and its successor, by merger, Carolina Power & Light Company, were made defendants. Carolina Power & Light Company, for itself and as successor to the Tide Water Power Company, moved the court to strike its name and that of Tide Water Power Company as parties defendant, on the ground that the cross complaint of Cooper did not state facts sufficient to constitute a cause of action against either of them and did not show that the power company was a necessary party to the action. This motion was heard at the February Term, 1953, of the Superior Court of New Hanover County. The motion was allowed and the name of the power company was ordered stricken from the record. From this order the defendant Cooper appealed. The appeal was heard at the Fall Term, 1953. Our decision, reported in 239 N.C. 238, 79 SE 2d 792, affirmed the order of the Superior Court.

When the case went back to the trial court, John Lindsey Neal, operator of Cooper's motor grader, was made a party defendant on motion of the plaintiff.

Thereafter, the defendant Cooper under leave of court filed an amended answer, in which John Lindsey Neal joined. The first part of the amended answer, like Cooper's original answer, is devoted to a paragraph-by-paragraph denial of the material allegations of the complaint. Then follows a 26-paragraph section which is captioned, "Further Defense and Cross-action, under Section 1-240, General Statutes of

North Carolina, Against" the power company and the City of Wilmington. The first 17 paragraphs of this section contains a plea over against Cooper's original co-defendants, City of Wilmington, Towles-Cline Construction Company, and E. B. Towles Construction Company, in which Cooper and Neal allege that if they be found negligent, then and in that event, the negligence of the city and the construction companies was primary and theirs secondary only. The amended plea of Cooper and Neal over against the original co-defendants is substantially the same as was made by Cooper in that portion of his original answer designated as "Further Defense," except it is not alleged in the amended pleading that the negligence of the city and the construction companies was the "sole, direct and proximate cause" of the intestate's death. Instead, the amended plea is for indemnity or contribution, as the facts may disclose.

In paragraphs 18 to 25, inclusive, of the amended "Further Defense," the defendants Cooper and Neal plead over against the power company and the City of Wilmington for contribution under the joint tortfeasorship statute. In this section of the amended pleading, Cooper and Neal bring forward in substance the allegations of negligence contained in Cooper's original "Further Defense and Cross-action" against the power company, which on former appeal were held insufficient to state a cause of action for contribution under the joint tortfeasorship statute. Also, it is noted that the amended cross complaint contains allegations which (1) amplify and make more definite and certain several elements of negligence originally alleged against the power company, (2) charge new elements of negligence against the power company, and (3) allege joint tortfeasorship, with demand for contribution, against the power company and the City of Wilmington based on specific averments of negligence set out in the amended cross complaint.

Under leave of court, the two construction companies, Towles-Cline Construction Company and E. B. Towles Construction Company, also filed amended answers, each containing a plea over against the power company and the City of Wilmington for contribution, based on substantially the same allegations contained in the amended plea filed by the defendants Cooper and Neal.

Thereafter, at the April Term, 1954, by order entered "without prejudice to the rights" of the power company, it was brought back into the case as a defendant. Again, the power company appeared and moved to strike its name as a defendant from the record, assigning as grounds: (1) that each cross complaint fails to state facts sufficient to constitute a cause of action against the power company for contribution as a joint tortfeasor; (2) that the cross complaints state no facts which show that the power company is a necessary or proper party to the action;

and (3) that the adjudication on the former appeal bars maintenance of the cross-actions, on the theory that the former decision established the law of the case. The motion, heard at the December Civil Term, 1954, of the Superior Court of New Hanover County, was allowed and the name of the power company again was ordered stricken from the record. The defendants against whom the ruling was made, namely: (1) Cooper and Neal, (2) Towles-Cline Construction Company, and (3) E. B. Towles Construction Company, appealed to this Court. The appeal was heard on regular call of the docket at the Spring Term, 1955. However, the Court, on its own motion under Rule 31, directed a re-argument. The case was reheard on call of the Fourteenth and Seventeenth Districts at the Fall Term, 1955.

*McClelland & Burney, McLean & Stacy, and R. M. Kermon for defendants Cooper and Neal, appellants.*

*R. L. Savage and James & James for Towles-Cline Construction Company and E. B. Towles Construction Company, appellants.*

*Hogue & Hogue and A. Y. Arledge for Carolina Power & Light Company, appellee.*

JOHNSON, J. Decision here turns on whether the amended cross complaint filed by the defendants Cooper and Neal states facts sufficient to constitute a cause of action for contribution against the power company. In determining this question, these principles of law established by our decisions come into focus:

1. Liability for contribution under the provisions of G.S. 1-240 may not be invoked except among *joint* tortfeasors. Therefore, in order for one defendant to join another as a third-party defendant for the purpose of contribution, he must allege facts sufficient to show *joint* tortfeasorship and his right to contribution in the event plaintiff recovers against him. *Hayes v. Wilmington,* 239 N.C. 238, 79 S.E. 2d 792.

2. In order to show *joint* tortfeasorship, it is necessary that the facts alleged in the cross complaint be sufficient to make the third party liable to the plaintiff along with the cross-complaining defendant in the event of a recovery by the plaintiff against him. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. Also, the allegations of the cross complaint must be so related to the subject matter declared on in the plaintiff's complaint as to disclose that the plaintiff, had he desired to do so, could have joined the third party as a defendant in the action. *Hobbs v. Goodman,* 240 N.C. 192, 81 S.E. 2d 413; *s. c.,* 241 N.C. 297, 84 S.E. 2d 904. However, it is established by our decision that when a defendant in a negligent injury action files answer denying negligence but alleging, conditionally or in the alternative, that if he were negli-

gent, a third party also was negligent and that the negligence of such third party concurred in causing the injury in suit, the defendant is entitled, on demand for relief by way of contribution, to have such third person joined as a co-defendant under the statute, G.S. 1-240. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; *Lackey v. Sou. Ry. Co.,* 219 N.C. 195, 13 S.E. 2d 234; *Wilson v. Massagee,* 224 N.C. 705, 32 S.E. 2d 335.

3. When an alleged joint tortfeasor is brought into a case as an additional party defendant, and it turns out that no cause of action is stated against him, either in the main action or in a cross-action pleaded by another defendant, he is an unnecessary party to the action and, on motion, may have his name stricken from the record as mere surplusage. *Fleming v. Light Co.,* 229 N.C. 397, 50 S.E. 2d 45; *Winders v. Southerland,* 174 N.C. 235, 93 S.E. 726. For all practical purposes, the motion to strike operates as a demurrer and tests the legal sufficiency of the challenged pleading to state facts sufficient to constitute a cause of action against the additional party defendant. *Bank v. Gahagan,* 210 N.C. 464, 187 S.E. 580.

The former appeal in this case was from an order allowing the motion of the power company to strike its name from the record on the ground that Cooper's cross complaint failed to state a cause of action against the power company for contribution. We affirmed the order of the lower court. It is to be noted, however, that the cross complaint did not fail because of lack of allegations of negligence against the power company. Indeed, the defective cross complaint contained plenary allegations of negligence against the power company. The fatal defect arose out of the manner in which Cooper dealt with the crucial element of proximate cause—his failure to allege joint tortfeasorship between himself and the power company. He alleged that the negligence of the power company was the sole proximate cause of the explosion. This allegation, positively made by Cooper, was never modified or varied by conditional averment or alternative plea to the effect that if the court should find him actionably negligent, then and in that event, the negligence of the power company concurred with his own negligence in causing the explosion and resultant death of the intestate. The result was that Cooper's original cross complaint failed to allege joint tortfeasorship—the prime essential to the statement of a cause of action for contribution under G.S. 1-240. The opinion on former appeal takes cognizance of the three elements of negligence alleged against the power company, and then points out that "Nowhere is it alleged that the negligence of the power company concurred with the negligence of Cooper in causing the death of the intestate. Instead, he alleges that the negligence of the power company was the sole proxi-

mate cause of . . . injury and death." (239 N.C. mid. p. 243, 79 S.E. 2d, top p. 796). Thus, for want of allegations showing concurrent negligence of Cooper and the power company, Cooper's first cross complaint came to naught. The decision on former appeal was rested on this omission.

However, the power company now contends that the former decision rests on a broader base. It is urged that the former decision decided in part that Cooper's first cross complaint affirmatively disclosed negligence on his part which (1) intervened as an outside agency and completely insulated the negligence, if any, of the power company, or (2) at least invoked the doctrine of primary and secondary liability as between Cooper and the power company and exposed Cooper to primary liability. In support of these contentions, the power company relies on the following statements appearing in the opinion immediately after the pronouncement that Cooper's cross complaint failed to allege concurrent negligence on the part of Cooper and the power company:

"If we concede that Cooper has sufficiently alleged negligence on the part of the power company and that plaintiff will prove the acts of negligence he alleges against Cooper (which Cooper does not even conditionally concede in his cross complaint), it is made to appear that the acts of Cooper were the acts of an 'outside agency or responsible third person' which completely insulated the negligence, if any, of the power company (citing authorities).

"The negligence, if any, of the power company was passive; that of defendant was active. Without the negligence of Cooper, the negligence of the power company would have caused no harm. The intervening acts of Cooper did not merely operate as a condition on or through which the negligence of the power company operated to produce the injury and deaths of plaintiff's intestates, or merely accelerate or divert the negligence of the power company. It broke the line of causation, . . . so that it cannot be said that the power company could have reasonably foreseen the negligence of Cooper or that the two are joint tort-feasors.

"Moreover, the acts of negligence of the power company alleged by Cooper, when related to the negligence alleged by plaintiff, at least invokes the doctrine of primary and secondary liability, Cooper being the one primarily liable. And it is axiomatic that one who is primarily liable cannot recover over against one who is secondarily liable."

The power company points to the foregoing expressions and contends that the conclusions therein stated are part of the law of the case. The contention is supported by the further argument that since the amended cross complaint brings forward the same aspects of negligence which were alleged against the power company in Cooper's original cross

complaint, it logically follows that the conclusions stated in the opinion of the Court on former appeal in respect to intervening negligence and primary liability bar maintenance of the new cross-action under application of the doctrine of the law of the case. The appellants, on the other hand, contend (1) that the original cross complaint filed by Cooper does not disclose that his negligence intervened and insulated, or relegated to a position of secondary liability, the negligence of the power company, and (2) that the conclusions to the contrary expressed in the opinion on former appeal are *obiter dicta* and therefore are not precedents in the sense of settling the law of the case.

As bearing on these contentions, it may be conceded that as a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal. *Penny v. R. R.*, 161 N.C. 523, 77 S.E. 774; *McGraw v. R. R.*, 209 N.C. 432, 184 S.E. 31; *Robinson v. McAlhaney*, 216 N.C. 674, 6 S.E. 2d 517; *Templeton v. Kelley*, 216 N.C. 487, 5 S.E. 2d 555; *Wall v. Asheville*, 220 N.C. 38, 16 S.E. 2d 397; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366; *Bruce v. O'Neal Flying Service*, 234 N.C. 79, 66 SE 2d 312; 3 Am. Jur., Appeal and Error, Sec. 985.

However, the doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case. See: *Griffith v. Griffith*, 240 N.C. 271, 279, 81 S.E. 2d 918, 924; *Moose v. Com'rs.*, 172 N.C. 419, pp. 433 and 434, 90 S.E. 441, 448; *Rodwell v. Rowland*, 137 N.C. 617, at pp. 638 and 640, 50 S.E. 319, 327; *Barney v. Winona & St. P. R. Co.*, 117 U.S. 228, 29 L. Ed. 858, 6 S. Ct. 654; *Re Norton*, 177 Ore. 342, 162 P. 2d 379, 161 A.L.R. 439; *Chicago, S. F. & C. R. Co. v. Swan*, 120 Mo. 30; *Jesse v. Cater*, 28 Ala. 475; *Wilson v. Devine*, 80 Cal. 385; 3 Am. Jur., Appeal and Error, Sec. 996; 14 Am. Jur., Courts, Sec. 83; 5 C.J.S., Appeal and Error, Sec. 1964.

"In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta.*" *Hill v. Houpt*, 292 Pa. 339, 141 A. 159, 160.

On the subject of *obiter dicta*, we find this statement in Black, Law of Judicial Precedents, at page 173: ". . . if the statement in the opinion was . . . superfluous and not needed for the full determination

of the case, it is not entitled to be accounted a precedent, for the reason that it was, so to speak, rendered without jurisdiction or at least extra-judicial. Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings. Over and above what is needed for the solution of these questions, its deliverances are unofficial."

True, where a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided, and the opinion expressed on each point becomes a part of the law of the case on subsequent trial and appeal. In short, a point actually presented and expressly decided does not lose its value as a precedent in settling the law of the case because decision may have been rested on some other ground. 21 C.J.S., Courts, Sec. 190, p. 314.

The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power. *Reamer's Estate,* 331 Pa. 117, 200 A. 35, 119 A.L.R. 589; 3 Am. Jur., Appeal and Error, Sec. 985 (Supp.). Therefore, in determining the correct application of the rule, the record on former appeal may be examined and looked into for the purpose of ascertaining what facts and questions were before the Court. *Alerding v. Allison,* 170 Ind. 252, 83 N.E. 1006; 3 Am. Jur., Appeal and Error, Sec. 985. Moreover, "An appellate court may on second appeal, correct an entry in the former judgment so as to make it express the true decision of the case." 3 Am. Jur., Appeal and Error, Sec. 986. Particularly is this so where, as here, the case is still in the interlocutory stage and nothing has been done that can prejudice either of the parties. *Durham v. Eno Cotton Mills,* 144 N.C. 705, 57 S.E. 465.

Thus we come to consider the crucial question: Does Cooper's original cross complaint allege negligence on his part which as a matter of law (1) intervened and insulated the negligence, if any, of the power company, or (2) invoked the doctrine of primary and secondary liability as between Cooper and the power company and fixed Cooper with primary liability? If such negligence, in either or both aspects, on the part of Cooper is disclosed by the facts alleged in the original cross complaint, then the conclusion to that effect expressed in the opinion on former appeal must be treated as the law of the case in respect to the aspect or aspects of such negligence as may be so disclosed. On the other hand, if the challenged conclusions be unsupported by the facts

alleged in the original cross complaint, they will be treated as *dicta* only.

An examination of the record on former appeal discloses that Cooper nowhere in his original answer or cross complaint admits or alleges negligence of any sort on his part. He denies all the allegations of negligence made against him by the plaintiff. Whereas all the allegations of negligence contained in his cross complaint are asserted against the power company as the sole proximate cause of the explosion. All this is stated in the opinion on former appeal. What, then, is the factual basis for the conclusions therein expressed to the effect that Cooper is fixed with negligence which (1) intervened and insulated the negligence, if any, of the power company, or (2) at least relegated the power company's negligence to a position of secondary liability? The challenged conclusions, as stated in the opinion, are based on the assumption "that plaintiff will prove the acts of negligence he alleges against Cooper, . . ." It thus appears that the premise upon which the challenged conclusions rest is based upon facts appearing in the plaintiff's complaint against Cooper, rather than in Cooper's cross complaint against the power company. This being so, the premise must be rejected as being based on facts not presented by or involved in the appeal. The single question before the Court was whether Cooper's cross complaint alleged facts sufficient to state a cause of action for contribution. In making this determination, the Court could not borrow from the allegations of the complaint or assume that the allegations thereof would be proved against him. The question whether Cooper was negligent was determinable wholly and solely on the basis of the allegations of his original cross complaint. The power company's motion to strike, used as a demurrer, tested only the sufficiency of the allegations of the cross complaint. It is elemental that a demurrer may not call to its aid facts not appearing on the face of the challenged pleading. *Trust Co. v. Wilson,* 182 N.C. 166, 108 S.E. 500; *Wood v. Kincaid,* 144 N.C. 393, 53 S.E. 4; *Davison v. Gregory,* 132 N.C. 389, 43 S.E. 916. *A fortiorari,* decision on demurrer may not be resolved on the basis of an assumption that the ultimate proofs will be different from those alleged.

It necessarily follows from what we have said that the challenged conclusions derive from sources outside the scope of decision and relate to questions not presented for decision. Therefore, they will be treated as *obiter dicta* and disregarded as settling the law of the case.

We have not overlooked the fact that while the power company in its motion to strike did not assign as ground therefor the application of either the doctrine of intervening negligence or that of primary and secondary liability, nevertheless, the order entered by the presiding

judge allowing the motion recites that he was of the opinion that the doctrine of intervening negligence applied and precluded Cooper from recovering over against the power company. And conceding, as we may, that the presiding judge's controlling reason for allowing the motion was his belief that the doctrine of intervening negligence applied, even so, his reason as so assigned, arising as it did outside the scope of the motion and being wholly unsupported by the facts alleged in the cross complaint then under test, was immaterial to decision on appeal. When the case reached this Court, the question for review and decision was whether the ruling of the court below was correct, and not whether the reason given therefor or the ground on which it professed to be based is sound or tenable. 5 C.J.S., Appeal and Error, Sec. 1464. See also *Bell v. Cunningham,* 81 N.C. 83; *Hughes v. McNider,* 90 N.C. 248; *Alabama Public Service Com. v. Mobile Gas Co.,* 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; *Collier v. Stamatis,* 63 Ariz. 285, 162 P. 125; *Duckwell v. Gregg's Adm'r.,* 297 Ky. 730, 181 S.W. 2d 263; *Brown v. Allen,* 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397.

Manifestly, the challenged conclusions appearing in the opinion on former appeal relate to questions not presented by the record for decision. The conclusions are *obiter* nonetheless because they derive from unfounded reasons given by the lower court for its decision. In this sense, the challenged conclusions are not only *dicta* but double *dicta.*

We have given due consideration to the appellee's citations of authorities and argument relating to the principles governing *res judicata* and *stare decisis.* On this record, these principles may not be called to the appellee's aid. The authorities cited are factually distinguishable.

We now return to the main question for decision, which is: Do Cooper and Neal in their amended cross complaint state facts sufficient to constitute a cause of action for contribution against the power company? The amended pleading brings forward and amplifies the allegations of negligence contained in the original cross complaint. It states facts sufficient to charge the power company with negligence in several particulars. The acts and omissions of negligence as charged against the power company are alleged to have concurred with any negligence chargeable against Cooper and Neal in causing the explosion and resultant death of the intestate, and due demand is made for contribution. In short, the amended pleading closes all the hiatuses which rendered the first pleading fatally defective. All the essentials requisite to the statement of a cause of action for contribution have been met.

True, the allegations to the effect that the negligence of the power company concurred with the negligence of Cooper and Neal are made in the alternative, expressly conditioned upon actionable negligence

being found against them. However, we think such conditional plea of concurrent negligence is sufficient to enable Cooper and Neal to invoke the right of contribution under the statute, G.S. 1-240. There is no merit in the power company's contention that the conditional plea of joint and concurrent negligence as made by Cooper and Neal is a mere conclusion of the pleader to be disregarded. The form of the plea as made has the sanction of the Court. See *Freeman v. Thompson, supra* (216 N.C. 484); *Lackey v. Sou. Ry. Co., supra* (219 N.C. 195); *Mangum v. Sou. Ry. Co.,* 210 N.C. 134, 137, 185 S.E. 644.

Nor is there any merit in appellee's further contention that the conditional plea of concurrent negligence made by Cooper and Neal is destroyed by their positive denials of negligence and by their allegations of negligence over against other defendants asserted in other portions of their amended answer. As to this contention, it is enough to say that a defendant who elects to plead a joint tortfeasor into his case is not required to surrender other defenses available to him. Nor may an additional party defendant who is brought in as a joint tortfeasor on cross complaint of an original defendant escape the plea against him by borrowing from contradictory allegations made by the cross-complaining defendant by way of defense against the plaintiff or by way of separate pleas over against other defendants. It is elemental that a defendant may set up and rely upon contradictory defenses. *Freeman v. Thompson, supra.*

Moreover, the amended cross complaint is free of allegations implying negligence as a matter of law on the part of Cooper and Neal which intervened and insulated the negligence, if any, of the power company.

The doctrine of intervening negligence is well established in our law. Its essential elements and governing principles are well defined and elaborately explained in former decisions of this Court. Further elaboration here is unnecessary. *Balcum v. Johnson,* 177 N.C. 213, 98 S.E. 532; *Kiser v. Carolina Power & Light Co.,* 216 N.C. 698, 6 S.E. 2d 713; *Beaver v. China Grove,* 222 N.C. 234, 22 S.E. 2d 434; *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63; *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273; *Tillman v. Bellamy,* 242 N.C. 201, 87 S.E. 2d 253. These decisions emphasize the principle that an intervening cause which will relieve the original wrongdoer of liability must be a new cause intervening between the original negligent act or omission and the injury ultimately suffered, which breaks the chain of causation set in motion by the original wrongdoer and becomes itself solely responsible for the injuries. It must be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer "and produces a

result which would not otherwise have followed, *and which could not have been reasonably anticipated.*" (Italics added.) *Hall v. Coble Dairies, supra* (234 N.C. at p. 211, 67 S.E. 2d at p. 67).

It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, *the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it. Balcum v. Johnson, supra.* (Italics added.)

"The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, *is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.*" (Italics added.) *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808. See also *Beach v. Patton,* 208 N.C. 134, 179 S.E. 882.

In 38 Am. Jur., Negligence, Sec. 67, pp. 722 and 723, the principle is stated this way: "In order to be effective as a cause superseding prior negligence, the new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, *and produces a different result, that reasonably might not have been anticipated.*" (Italics added.)

"If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation so as to relieve the original wrongdoer from responsibility for the injury. 38 A.J. 723. A superseding cause cannot be predicated on acts which do not affect the final result of negligence otherwise than to divert the effect of the negligence temporarily, or of circumstances which merely accelerate such result (citing authority).

" 'The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' " *Riggs v. Motor Lines, supra* (233 N.C. at p. 165, 63 S.E. 2d at p. 201).

Ordinarily, "the connection is not actually broken if the intervening event is one which might in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation." Shearman and Redfield on Negligence, Revised Ed., Vol. 1, Sec. 38, p. 101.

The allegations made by Cooper and Neal against the power company in the amended cross complaint disclose averments of negligence in substance as follows: (1) that the power company placed the gas pipe leading from the street to the Hayes home in shallow ground, dangerously near the surface of the street, only nine inches below the surface at the curb line, where it was struck by the motor grader; (2) that it installed the pipe under the Hayes house in an insecure manner, unanchored at the meter or along the joists and exposed and unsupported along the fall line from the meter to the feed line at the side of the house, so that the pipe under the house could be swayed, moved, and easily broken off at the meter; (3) that the Hayes house was bricked up tight underneath, and in making the installation the power company failed to provide a vent to allow leaking gas to escape or be channeled to open air, thereby creating a condition by which escaping gas when accumulated would seep through the floors and walls of the house and come into contact with fire, and thus cause an explosion; (4) that the power company knew that by regulation of the City of Wilmington its gas pipes were required to be kept at a safe depth—"in this case more than 20 inches below the surface of the street, . . ."; (5) that the power company had notice that Barnard Drive was to be graded and paved; that it should have foreseen that unless the pipes were lowered, the grading machine would likely strike the gas pipe in the street and disrupt the connection under the house and thereby permit gas to escape into the tight compartment under the house, which had no outside vent, and that an explosion was likely to occur in the way and manner in which it did actually occur, yet the power company took no step to remedy the dangerous installations made by it in the street and under the Hayes house.

These allegations, and others of similar import, when taken as true, as is the rule on motion to strike used as a demurrer, disclose negligence on the part of the power company which continued as an active, operative force down to the time of the explosion. Indeed, the allegation that the power company allowed the dangerous condition allegedly created by it to continue after notice that the grading was about to commence implies the existence of a new activating force negligently set in motion on the eve of the explosion. Also, it is noted that the element of reasonable foreseeability, the presence of which defeats operation of the doctrine of intervening negligence, is not left to inference or implication, as is usually the case in negligence pleading. *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893. Here it is expressly alleged that the power company was charged with foreseeing the explosion.

It is manifest that the amended cross complaint does not disclose negligence on the part of Cooper and Neal which as a matter of law intervened and insulated the alleged negligence of the power company.

Nor does the amended cross complaint disclose negligence on the part of Cooper and Neal which fixes them as a matter of law with primary liability under application of the doctrine of primary and secondary liability. This doctrine as applied in tort cases is a branch of the law of indemnity. The doctrine rests on flexible principles of equity and natural justice. *Taylor v. Construction Co.*, 195 N.C. 30, 141 S.E. 492; *Clothing Store v. Ellis Stone*, 233 N.C. 126, 63 S.E. 2d 118; *Hunsucker v. Chair Co., supra* (237 N.C. 559). It has no all-embracing definition. However, in general terms, the rationale of the doctrine as deduced from the decisions may be stated as follows: Where two persons are jointly liable in respect to a tort, one being liable because he is the actual wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, ordinarily will be allowed to recover full indemnity over against the actual wrongdoer. Decision here does not require an extended discussion of the principles governing application of this remedy. See these decisions involving municipal street cases: *Dillon v. Raleigh*, 124 N.C. 184, 32 S.E. 548; *Gregg v. Wilmington*, 155 N.C. 18, 70 S.E. 1070; *Guthrie v. Durham*, 168 N.C. 573, 84 S.E. 859; *Conway v. Ice Co.*, 169 N.C. 577, 86 S.E. 524; *Ridge v. High Point*, 176 N.C. 421, 97 S.E. 369; *Bowman v. Greensboro*, 190 N.C. 611, 130 S.E. 502; *Ferguson v. Asheville*, 213 N.C. 569, 197 S.E. 146; *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 464, 17 S.E. 2d 646. See these decisions involving agency and imputed liability cases: *Smith v. R. R.*, 151 N.C. 479, 66 S.E. 435; *Gadsden v. Crafts*, 175 N.C. 358, 95 S.E. 610; *Taylor v. Construction Co., supra* (195 N.C. 30); *Johnson v. Asheville*, 196 N.C. 550, 146 S.E. 229); *Cheshire v. Wright, ante*, 441, 90 S.E. 2d 687; *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732. See also these decisions involving defective property cases, defectively manufactured articles, and miscellaneous other fact situations: *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496; *Crowell v. Air Lines*, 240 N.C. 20, 81 S.E. 2d 178; *Davis v. Radford*, 233 N.C. 283, 63 S.E. 2d 822; *Lucas v. R. R.*, 165 N.C. 264, 80 S.E. 1076; *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648; *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886; *Hunsucker v. Chair Co., supra* (237 N.C. 559). See also 27 Am. Jur., Indemnity, Sections 18 and 19.

For the purpose of decision here it suffices to direct attention to an established rule of exclusion which prevents application of the principles of indemnity. The rule may be stated in gist as follows: Indemnity is not permitted where the indemnity seeker and the person against whom

indemnity is sought breached substantially equal duties owed to the injured person. Where this occurs, the violations produce no great difference in gravity of fault as between the joint tortfeasors, and both are on substantially the same plane of moral fault. Both parties being *in pari delicto*, neither will be held in law to be the principal wrongdoer, and therefore neither party will be required to relieve the other of the entire loss. It is a case for contribution rather than indemnity. *Taylor v. Construction Co., supra; Crowell v. Air Lines, supra; Ridge v. High Point, supra* (176 N.C. 421); *Power Co. v. Mfg. Co.*, 180 N.C. 597, 105 S.E. 394. See also *Williams v. Stores Co., Inc., supra* (209 N.C. 591).

Reference has already been made to the crucial phases of negligence alleged against the power company by Cooper and Neal in their amended cross complaint. The allegations, when taken as true, imply that the power company breached duties of the gravest sort owed by it to the members of the Hayes family, including the intestate. It is manifest that the duties allegedly breached by the power company were substantially equal to the duties owed by Cooper and Neal to the intestate. Necessarily, then, upon the record as presented, the power company is at least *in pari delicto* with Cooper and Neal. This defeats application of the principles of indemnity in favor of the power company.

The power company is privileged to plead and rely on the defense of intervening negligence and also that of indemnity. But since these defenses do not affirmatively appear upon the face of the Cooper-Neal pleading, they may not be brought in by way of speaking demurrer when the pleading is being tested only to determine whether it alleges a cause of action for contribution. *Trust Co. v. Wilson, supra* (182 N.C. 166).

Since the allegations set out in the cross complaint filed by the defendants Towles-Cline Construction Company and E. B. Towles Construction Company are substantially the same as those alleged in the amended pleading filed by Cooper and Neal, we conclude that each cross complaint alleges facts sufficient to constitute a cause of action for contribution against the power company. This necessarily works a reversal of the judgment below in favor of each appellant.

Reversed.

PARKER and BOBBITT, JJ., concur in result.

BARNHILL, C. J., dissenting: In cases such as *Hayes v. Wilmington*, 239 N.C. 238, 79 S.E. 2d 792, where the only exceptive assignment of error is directed to alleged error in the judgment in that the judgment is made to rest on an erroneous conclusion of law, it is well to read the

judgment before stating that a substantial and material part of the opinion in the case is *obiter dictum* as is here done.

In that case the presiding judge not only concluded that the facts alleged by Cooper disclose as a matter of law that his conduct constituted an intervening act of a responsible third party which was not foreseeable by the power company and which completely insulated the negligence, if any, of the power company, but he also, in effect, wrote an opinion setting forth that conclusion and cited pertinent opinions of this Court in support thereof. He wrote in part as follows:

". . . It is common knowledge that gas lines, such as are described by the defendant Cooper, are in common use in all of the large cities and towns. They are buried beneath the surface of the earth and are harmless if let alone. If the gas pipes in question in this case were buried too near the surface of the ground, that, in itself, could not make them an active source of danger. If the power companies were negligent at all, such negligence was passive and inactive; it was dormant, and in order to become a source of danger the intervention of an active negligent act became necessary. Following the reasoning laid down in WHARTON ON NEGLIGENCE, Section 136: Supposing that if it had not been for the intervention of a responsible third party, the defendant's (Power Companies') negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? The question must be answered in the negative; for the reason that causal connection between negligence and damage is broken by the interposition of independent human action. Say I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.

"To the same effect see:

BUTNER *v.* SPEASE 217 NC 82
SMITH *v.* SINK 211 NC 725
HINNANT *v.* R. R. 202 NC 489
GUTHRIE *v.* GOCKING 217 NC 476

"See also in particular: BAKER *v.* R. R. 205 NC 333.

"So that here we have this state of fact: The two power companies, or, rather the Tide Water Power Company, constructed a system of gas lines under the streets of the City of Wilmington, in order to supply gas to the citizens. Connecting pipes carried the gas from the Mains in the streets into the residences of citizens. These pipes, if left alone,

in their original condition, were not dangerous at all. There was no way that the Power Companies could foresee that such a disaster would occur as did occur on December 31, 1951.

"But somebody SLIPPED A COG, an intervening force, moving independently, comes in, one of the gas pipes is twisted out of position so that the connection in the residence of plaintiff's intestate is broken, gas escapes, is ignited, and two human beings are launched into eternity from a terrific explosion which followed.

"The court cannot see, under the facts as alleged in the pleadings of the defendant Cooper, that the two power companies can be held liable for what happened. . . ."

He thereupon entered judgment on the conclusion thus made, striking the names of the power companies as additional parties defendant. Cooper excepted and appealed, and in his brief on appeal he devotes approximately two pages of his brief to an attempt to refute the conclusion that his conduct insulated the negligence of the power company as alleged by him. That question is likewise discussed at some length in the brief of the appellees.

That is to say, both the appellant and the appellees recognized that the judgment entered could not be reversed unless the appellant convinced this Court that the trial judge erred in his conclusion on the question of insulated negligence.

Under these circumstances I am at a loss to conceive how this Court could either affirm or reverse the judgment under review in that case without considering and deciding whether the judge was correct in arriving at the conclusion on which he made his judgment rest. Yet it is now said that the discussion of that question in *Hayes v. Wilmington, supra*, is *obiter dictum* and wholly unnecessary to that decision. To this I cannot agree, and as I still hold to the opinion there expressed, I vote to affirm.

It is well to note that the procedure pursued on the original hearing and the dismissal of the additional defendants on the grounds that their negligence, if any, was insulated is in accord with recent decisions of this Court. *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67; *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919; *Troxler v. Motor Lines*, 240 N.C. 420, 82 S.E. 2d 342, and cases cited; *McLaney v. Motor Freight, Inc.*, 236 N.C. 714, 74 S.E. 2d 36.

Since the foregoing was written, the majority opinion has been substantially revised. Even so, I shall permit my dissent to remain as it is with the following addition to meet the change of position in the majority opinon.

When Cooper failed to file a petition for rehearing, the original opinion became the law of the case. To avoid the effect of his failure

so to do and to justify the novel procedure adopted to grant a rehearing, the majority now undertake to treat the original notice and motion to strike as a demurrer *ore tenus*. Judge Grady labeled his judgment "JUDGMENT ON MOTION OF (power companies) AND ON DEMURRER ORE TENUS TO FURTHER ANSWER AND CROSS-BILL OF S. E. COOPER." The motion of the power companies was a motion to strike for the reason the cross action does not allege a cause of action which may be pleaded under the terms of G.S. 1-240. There is no notation of a demurrer *ore tenus* in the record or any reference thereto except as noted above.

An original party defendant may not have a third party made an additional defendant for the purpose of seeking contribution until or unless he alleges a cross action which the plaintiff might have pleaded against such third party if he had elected so to do. Thus we must look to the complaint as well as to the cross action alleged to determine whether or not the original defendant has alleged a cross complaint which entitles him to have the third party made a party defendant. That the cross complaint does not constitute a cause of action which might have been pleaded by the party plaintiff is the one ground which entitles the third party to have his name stricken. If the cross action does allege such a cause of action, the motion to strike should be denied. If it does not allege such a cause of action, the name of the third party should be stricken as a matter of right.

The two pleadings—a motion to strike and a demurrer *ore tenus*—are essentially different in purpose and effect. When a motion to strike is allowed, the movant goes out of court and is no longer a party to the action. On the other hand, when a demurrer *ore tenus* for failure to state a cause of action is sustained, the pleader may amend his pleading so as to allege sufficient facts to constitute a good cause of action, and the demurrant must then answer. On the original appeal all the parties treated the motion just as it was—a motion to strike. The majority now seek to make it a demurrer *ore tenus* so as to justify the novel procedure adopted to reverse the original opinion without saying so. If a majority of the Court has determined that we were in error in our conclusion in the original opinion, we should say so and be done with it. We are human, and, as others, we make mistakes, and when we conclude that we have made a mistake, we should not hesitate to admit the fact without attempting to explain it away without admission of error. It does not take nineteen pages to admit an error in one opinion.

It is stated that what was said in the original opinion about insulated negligence and primary and secondary liability was *obiter dictum*. Oddly enough, the majority opinion now devotes six to eight times as

much space to a discussion of these two doctrines as was used in the original opinion.

It might not be amiss to make further comment on other statements contained in the majority opinion. However, if the Court is to adopt this unusual and indirect method of granting a rehearing of the former decision, any discussion of those questions would serve no useful purpose.

I dissent for the reasons that:

(1) I am still of the opinion that the admitted conduct of Cooper insulated the negligence, if any, of the power companies. *Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 56 S.E. 2d 689, is directly in point except that the facts here alleged by Cooper and plaintiff make out a stronger case of insulated negligence than does the evidence in the *Gas Co. case.*

(2) The majority attempt to treat the motion to strike as a demurrer; and

(3) When Cooper failed to petition for a rehearing, the original opinion became the law of the case, and I cannot concur in the novel method now adopted to avoid the effect of that opinion. It will surely rise up to plague us in the future.

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MARCIA SUSAN HAYES, BY HER NEXT FRIEND, W. J. HAYES, v. CITY OF WILMINGTON, NORTH CAROLINA, TOWLES-CLINE CONSTRUCTION COMPANY, E. B. TOWLES CONSTRUCTION COMPANY, S. E. COOPER, TRADING AND DOING BUSINESS AS S. E. COOPER COMPANY, JOHN LINDSEY NEAL AND SEABOARD SURETY COMPANY.

(Filed 29 February, 1956.)

**1. Pleadings § 30—**

Motions to strike which are made in apt time are made as a matter of right and are not addressed to the discretion of the lower court.

**2. Negligence § 18—**

In an action for damages for personal injury, evidence that the defendant's liability for the act complained of has been insured by a third party is ordinarily incompetent.

**3. Negligence § 16: Pleadings § 31—**

In an action for personal injury, allegations in the cross action of one defendant against another defendant to the effect that such other defendant was required under the contract for the work out of which the injury arose to furnish faithful performance bond and take out and maintain liability and property damage insurance, are irrelevant and are properly

stricken on motion aptly made even though the surety company, later joined as a party, fails to move that such allegations be stricken.

**4. Appeal and Error § 6a: Pleadings § 30—**

Even though the surety company carrying indemnity insurance for defendants does not move to strike from the cross complaint of the other defendant allegations in regard to the insurance, the insured defendants are entitled to object thereto as a matter of right upon motion to strike made in apt time, since such allegations are prejudicial as to them.

**5. Torts § 6—**

Motion to strike names of additional defendants, joined on cross complaint for contribution, *held* erroneously allowed on authority of *Hayes v. Wilmington, ante*, 525.

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

APPEAL by defendants Towles-Cline Construction Company, E. B. Towles Construction Co., S. E. Cooper, trading and doing business as S. E. Cooper Company, and John Lindsey Neal from *Stevens, J.*, December Civil Term 1954 of NEW HANOVER.

Civil action to recover damages for injuries to a child allegedly caused by a gas explosion under the home of W. J. Hayes heard upon a special appearance and two motions: one, a motion by the appellants, other than John Lindsey Neal, to strike allegations in the further answer and defense of their co-defendant the city of Wilmington, and two, a special appearance and motion by the Carolina Power & Light Company, in its own right, and as successor by merger to Tide Water Power Company, to strike its name and the name of Tide Water Power Company as parties defendant in the cross-actions of the appellants.

During the year 1951 the defendant city of Wilmington was engaged in a program of street paving and improvements, which included the grading of that portion of Barnard Drive between Chestnut and Market Streets, according to plans and specifications furnished by the city.

On 15 August 1951 the defendant Towles-Cline Construction Company contracted with the city to do this work. Subsequent to the execution of this contract the Towles-Cline Construction Company transferred to E. B. Towles Construction Company all or certain portions of the work it had agreed to do under its contract with the city. Then it contracted with the defendant S. E. Cooper to do the necessary grading and excavating on Barnard Drive and other streets. Under the contract between the city and the Towles-Cline Construction Company it was the duty of the city to establish grades and furnish surveys and charts so that the work could be safely performed.

During this time the Tide Water Power Company was the public service company which furnished gas for cooking and domestic pur-

poses to the inhabitants of the city of Wilmington. Under ground gas pipes led from the gas main on Barnard Drive to residences of customers near by, including a gas pipe to the home of W. J. Hayes.

About 7:30 a.m. on 31 December 1951, pursuant to directions and specifications furnished to both construction companies by the city of Wilmington, S. E. Cooper, by his employee John Lindsey Neal, began grading that part of Barnard Drive between Chestnut and Market Streets with a caterpillar diesel grading machine. It would seem from the pleadings that the maximum depth to be excavated on Barnard Drive was 20 inches. A few inches below the surface of the ground a blade of the grading machine struck a gas pipe leading to the home of W. J. Hayes situate on the west side of Barnard Drive. This blow bent the gas pipe and ripped it from its connection at the gas meter under the Hayes home, thereby permitting highly volatile and explosive gas to pour into a confined area under the house.

The operator of the grader examined the pipe, and moved on, and after going a considerable distance, struck another pipe on Barnard Drive. About one-half hour after the gas pipe leading to the Hayes home had been struck, a devastating explosion caused by the accumulation of escaping gas under the house completely demolished the house, injured the plaintiff, and killed her mother and 3½ year old brother.

Towles-Cline Construction Company filed answer, and pleaded as a further defense the contract between the city of Wilmington and itself, on 2 November 1951, and that it had employed Cooper as an independent contractor to do the grading, and that on 28 November 1951 it had employed E. B. Towles Construction Company as an independent contractor to do all the work it had contracted with the city to do, except such grading as Cooper was to do. That prior to 29 December 1951 the city of Wilmington gave to E. B. Towles Construction Company a cut sheet showing the depth of excavations to be made in grading, which company in turn delivered this cut sheet to Cooper. This included the grading on Barnard Drive. On 29 December 1951 a representative of the engineer of the city came to Barnard Drive, and directed the beginning of the excavation, saying no pipes were in the way. That the acts of Cooper were those of an independent contractor acting under the supervision and direction of the city of Wilmington.

E. B. Towles Construction Company filed a substantially identical answer and further defense.

The city of Wilmington filed answer, pleaded a further defense, and a cross-action against the Seaboard Surety Company, surety upon the bond of Towles-Cline Construction Company for the faithful performance of its contract with the city. In its further defense the city alleged the contract between it and Towles-Cline Construction Company. The

allegations of the further defense of the city, which the appellants, other than Neal, ask to be stricken are:

(1) The work was to be completed in 390 consecutive calendar days. That the contract provided for the inclusion therein, and as a part thereof, of advertisements for bids, instructions to bidders, general conditions, specifications, contract plans and detailed plans for said improvements, including the furnishing by the independent contractor of a faithful performance bond. That the contract further provides that the contractor shall take out, and maintain all insurance as required under instructions to bidders, and shall attach upon completion of the contract documentary proof of compliance. The said contract, together with all documents referred to, and incorporated therein, are hereby pleaded.

(2) Under the general specifications forming a part of the contract it is provided that bidders are cautioned to carefully examine the proposed locations of work as well as plans and specifications and to go over the whole project thoroughly with the engineer before submitting bids. And the general specifications further provide that the contractor shall not commence work under the contract, until the contractor has taken out and maintained during the life of the contract public liability and property damage insurance for claims of property damage, personal injuries or death which may arise under the contract, whether such obligations be by the prime contractor, or a subcontractor, or anyone employed by either of them.

(3) Under the general conditions incorporated in the contract it is understood and agreed by the contracting parties that the following documents form an essential part of the contract: advertisement, information for bidders, general and technical specifications, proposal, specific contract, contractors' bond, drawings, plans, maps, profiles. The general conditions further provide that the contractor in signing the contract acknowledges that he has read, and is familiar with the specifications, that they are entirely clear, that he is fully acquainted with the ground where the work is to be done, that he is fully prepared to sustain all losses and damages incurred by the action of the elements, or from any unforeseen obstructions that may be encountered, that he is prepared to provide the necessary equipment, materials and labor, and to guarantee that the work done will be in strict compliance with the contract.

(4) In the signed bid and proposal by Towles-Cline Construction Company, which forms a part of the contract, it is recited that the construction company has examined the plans, specifications, instructions to bidders, the contract and bond attached, all of which are understood and agreed to.

This part of the further answer of the city is not asked to be stricken: The general conditions further provide that in the event of damages to persons or property of any kind legally existing along or adjacent to the work, the contractor agrees to make the repairs for damages or injuries as may be necessary, and that the contractor shall take all risks, and be responsible for all expenses and damages attending the presence or proximity of gas or water pipes, sewers, drains and conduits.

There are no allegations in the further defense of the city that the work was not finished in the time contemplated, that any insurance bond provided for in the contract was not taken out and maintained, that upon completion of the work documentary proof of compliance with the contract was not furnished, that the construction company did not go over the work to be done with the city engineer, and did not understand it, that the construction company did not understand the contract and all parts thereof, and agree to it. Neither is there any allegation in the further defense as to how any of these matters alleged, and challenged by the appellants, could have contributed in any way to plaintiff's injuries.

The allegations of the cross-action against the Seaboard Surety Company, which the appellants, other than Neal, ask to be stricken are in substance as follows: Contemporaneously with the execution of the contract between the city and Towles-Cline Construction Company, and as required by said contract, the Seaboard Surety Company executed as surety a faithful performance bond with the construction company as principal, conditioned among other things that the principal shall save harmless the city from any liability of any nature which may be incurred in the performance of the contract resulting from negligence or otherwise on the part of the principal. Many other conditions of the bond are alleged, which have no application to the instant case. That the principal and surety of the bond are obligated to pay any recovery in this case by plaintiff, and that if a recovery is had, plaintiff is entitled to judgment against the principal and surety.

Upon request of the city the Seaboard Surety Company was made a defendant at the April Civil Term 1953 of court. The surety company filed answer adopting the answer of Towles-Cline Construction Company. As to the cross-action it admitted the execution of the bond, and said that the allegations of the cross-action as to its liability are matters of law, which it is not required to answer, but that such allegations are not true as a matter of law. The surety company did not ask that the allegations of the cross-action against it be stricken.

John Lindsey Neal was not an original defendant, but was made a defendant on 25 August 1953.

At the December Civil Term 1954 the motions to strike the allegations of the further defense and the cross-action of the defendant city were denied, and the appellants appealed.

The appellants filed amended answers, and set up cross-actions under G.S. 1-240 against the Tide Water Power Company, and its successor by merger Carolina Power & Light Company as joint tort-feasors. At the August Civil Term 1954 the two power companies were made parties defendant, and accepted service of summons. Whereupon the Carolina Power & Light Company, in its own right and as successor by merger of the Tide Water Power Company, entered a special appearance, and moved to strike the names of Carolina Power & Light Company and Tide Water Power Company as parties defendants. At the December Civil Term 1954 the motion was granted, and the appellants appealed.

*McClelland & Burney, McLean & Stacy, and R. M. Kermon for S. E. Cooper, trading and doing business as S. E. Cooper Company, and John Lindsey Neal.*

*R. L. Savage and James & James for Towles-Cline Construction Company and E. B. Towles Construction Company.*

*Hogue & Hogue and A. Y. Arledge for Carolina Power & Light Company, Appellee.*

*Wm. B. Campbell for Defendant City of Wilmington, Appellee.*

PARKER, J. G.S. 1-153 prohibits the allegations of "extraneous, evidential, irrelevant, impertinent, or scandalous matter in a complaint or answer." *Spain v. Brown,* 236 N.C. 355, 72 S.E. 2d 918.

In the case at bar the motions to strike were made in apt time, and are therefore made as a matter of right, and are not addressed to the discretion of the court. *Baker v. Trailer Co.,* 242 N.C. 724, 89 S.E. 2d 388; *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660.

"The denial of a motion to strike matter from a pleading under the provisions of G.S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: '(1) that the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party.'" *Daniel v. Gardner, supra.*

It has long been held in North Carolina that in an action for damages for personal injury, evidence that the defendant's liability for the act complained of has been insured by a third party is ordinarily incompetent. *Flanner v. Saint Joseph Home,* 227 N.C. 342, 42 S.E. 2d 225; *Herndon v. Massey,* 217 N.C. 610, 8 S.E. 2d 914; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756; *Lytton v. Mfg. Co.,* 157 N.C. 331, 72 S.E. 1055.

Therefore, it is ordinarily improper to plead it. *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738; *Herndon v. Massey, supra.*

"That the defendant had the forethought to protect itself against such liability as the law imposes for such injuries, does not serve to enlarge or extend that liability." *Flanner v. Saint Joseph Home, supra.*

We have held in an action for damages for wrongful death that the liability insurer—where the contract is one of indemnity only—is not a proper party to the action. *Clark v. Bonsal,* 157 N.C. 270, 72 S.E. 954.

In *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726, it is said: "It has been repeatedly held that the fact that a defendant in an actionable negligence action carried indemnity insurance could not be shown on the trial. Such evidence is incompetent."

The cases we have cited above refer to efforts of plaintiffs to bring in the insurance or indemnity company. But we think that the same principle is applicable here, and that the reading to the jury from the further answer and cross action of the city of Wilmington of the allegations that the contractor shall take out, and maintain all insurance as required under instructions to bidders; the allegations in respect to the contractor furnishing a faithful performance bond; the allegations that the contractor shall not commence work under the contract, until the contractor has taken out and maintained during the life of the contract public liability and property damage insurance for claims of property damage, personal injuries or death which may arise under the contract, whether such obligations be by the prime contractor, or a subcontractor, or any one employed by either of them; and the allegations of the cross action as to the faithful performance bond of the Towles-Cline Construction Co., and Seaboard Surety Co., will cause the same harm and injustice to the appellants, as if those allegations were in the complaint. The only parties to the faithful performance bond are Towles-Cline Construction Co., Seaboard Surety Co., and the city of Wilmington. The city of Wilmington in its brief has favored us with no citation of case or authority to support their contention that these allegations should be retained in its answer. The lower court erred in not striking out these allegations in respect to insurance and an indemnity bond.

It is true that the Seaboard Surety Co. is not objecting, and has answered. But the appellants, who will be substantially prejudiced by these allegations, if they are permitted to remain in the pleading, do object, and they have objected in apt time, and in the proper manner by a motion to strike. *Hayes v. Wilmington,* 239 N.C. 238, 244, 79 S.E. 2d 792; 67 C.J.S., Parties, p. 1148.

The Towles-Cline Construction Co., in paragraph 6 of its amended answer, pleads its contract with the city of Wilmington to do this street paving and improvements, and alleges, "a duplicate of which contract is in the possession of this defendant, which contract will be produced at the trial of this cause, and speaks for itself." A similar allegation appears in the amended answer of E. B. Towles Construction Co. The amended answer of S. E. Cooper, trading and doing business as S. E. Cooper Co., and John Lindsey Neal, alleges that "these defendants were not parties to this contract, and are not familiar with all its terms and conditions, but said contract is in writing, and will speak for itself as to its terms, provisions and conditions, when, and if, produced at the trial of this cause."

The city of Wilmington in its answer alleges: "That this defendant and the defendant Towles-Cline Construction Co. entered into a complete and independent contract on the 15th day of August 1951, providing for the construction of municipal improvements primarily consisting of street paving improvements under Paving Project No. PAV-C-153-51." The appellants have not asked that this allegation be stricken out.

The appellants have not asked that these allegations of the further defense of the city of Wilmington be stricken out:

"(d) The said General Conditions above referred to further provide that in the event of damages to persons or property of any kind legally existing along or adjacent to the work, the contractor agrees to make the repairs or payments for damages or injuries as may be necessary, and that the contractor shall take all risks and be responsible for all expenses and damages attending the presence or proximity of gas or water pipes, or public or private sewers, or drains and conduits. Said General Conditions are hereby pleaded, which form a part of the said contract, and will be produced upon trial of this cause."

"(f) This defendant says and alleges that it has not done any act or thing contributing to or in anywise, or in any manner, causing injuries, damages, losses or death referred to in the complaint, and that all of the work done, and being done on December 31, 1951, was being done under the independent contract herein referred to and pleaded, under the direction and supervision of the contractor or a subcontractor employed by the prime contractor, and the said work was not being done under the direction and supervision of this answering defendant.

"(g) This answering defendant says and alleges that by reason of the matters and things herebefore alleged, and particularly by

reason of the prime and independent contract herein referred to and pleaded, with the several documents forming a part thereof, that this defendant is in nowise indebted to the plaintiff for any sum whatsoever, and that if the plaintiff recovers any amount or judgment against this answering defendant, that this defendant is entitled to judgment over against said contractor and any subcontractor doing or performing any work under said project or contract for or by the consent and employment of the prime contractor, and that this defendant is only secondarily liable and that all of the other defendants are primarily liable to this defendant to pay and satisfy any judgment, if there is a recovery therein in favor of the plaintiff, and this defendant hereby pleads against the other defendants primary liability, and this defendant pleads its primary right of recovery against the other defendants."

After a study of the record and the briefs of the parties, we have come to the conclusion that the allegations in the answer of the city of Wilmington, that these appellants ask to be stricken out, are irrelevant, and that their remaining therein will be prejudicial to the rights of these appellants in the trial of the case. The lower court should have allowed the motion to strike the challenged allegations from the answer of the city of Wilmington; and its failing to do so is reversible error.

The Carolina Power & Light Company, in its own right and as successor by merger of the Tide Water Power Company, entered a special appearance, and moved to strike the names of the Carolina Power & Light Company and the Tide Water Power Company as parties defendant. The motion was granted, and these appellants appealed. The identical question was decided by this Court in "W. J. Hayes, administrator of the estate of W. J. Hayes, Jr., *v.* City of Wilmington *et al.*"—the same defendants here—which case is reported *ante*, 525, 91 S.E. 2d 673. Upon authority of that case the ruling of the lower court in striking out the names of the Carolina Power & Light Company and of the Tide Water Power Company as parties defendant is reversed.

The orders of the lower court on the two motions to strike are

Reversed.

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

WILLIAM JONES, HERMAN WILLIAMS, CARRIE MAE VINES v. CARRIE JONES, IDA MAE JONES WHITE, GLADYS JONES WILLIAMS, RUFUS JONES, WARDELL JONES, ROSA LEE JONES, ELEANOR JONES REDDICK, ETHEL JONES, DESOTA JONES, STANLEY THAD JONES, ULYSSES JONES, S. T. WALLACE AND McKINLEY WALLACE.

(Filed 29 February, 1956.)

**1. Process § 6—**

Where neither the pleadings nor affidavit state the residences of respondents to be served with process by publication, nor that their addresses were unknown, nor that they were minors, when this fact is known to petitioner, service of process based thereon is void. G.S. 1-98.4 (b).

**2. Pleadings § 6—**

Where service is had by publication in a special proceeding, respondents should be given not less than ten days after the seven days from the last publication in which to answer or demur. G.S. 1-100.

**3. Same—**

Service by publication is in derogation of the common law, and the statutory prerequisites must be strictly complied with in order to support a valid order for substitute service.

**4. Judgments § 18—**

Unless a party is brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. Therefore, where service by publication as to certain respondents is fatally defective, the judgment is void as to such respondents.

**5. Same: Appeal and Error § 22—**

Recitals in the judgment that all interested and necessary parties were before the court are ineffective when the record clearly shows to the contrary, since the record must prevail in such instances.

**6. Appeal and Error § 50: Partition § 4c—**

Where, in partition proceedings, the evidence supports the court's findings of fact upon which it is adjudged that a deed of trust on the land be canceled and claim for betterments against the tenant in possession be denied, the judgment will be affirmed as to all parties properly before the court, but when it appears that some of respondents were not validly served with process, order for sale for partition must be set aside and the cause remanded so that they may be served and given an opportunity to show cause, if any they have, why they should not be bound by the judgment.

**7. Appeal and Error § 1—**

The Supreme Court may correct *ex mero motu* an error appearing on the face of the record and remand the cause when it affirmatively appears from the record that the court did not have jurisdiction of some of the parties.

APPEAL by respondent Carrie Jones from *Paul, J.*, November Term, 1955, of MARTIN.

This is a special proceeding instituted before the Clerk of the Superior Court of Martin County, North Carolina, by the issuing of summons and the filing of a verified petition on 8 September, 1953, for a partition by sale of the land described in the petition. Five of the respondents were personally served with process, to wit: Carrie Jones, Stanley Thad Jones, Rosa Lee Jones, Eleanor Jones Reddick and Rufus Jones. The remaining eight respondents were purportedly served by publication.

It is alleged in the petition that the interest in the land of the petitioners and the respondents is as follows: William Jones, Ulysses Jones, Carrie Mae Vines (subject to the curtesy right of her father, the petitioner Herman Williams), McKinley Wallace (subject to the curtesy right of his father, the respondent S. T. Wallace), a $\frac{1}{5}$ undivided interest each. That the respondents Ida Mae Jones White, Gladys Jones Williams, Rufus Jones, Wardell Jones, Rose Lee Jones, Eleanor Jones Reddick, Ethel Jones, DeSota Jones, and Stanley Thad Jones, each own a $\frac{1}{45}$ interest in the land subject to the dower right of their mother, the respondent Carrie Jones, widow of Ferd Jones.

The court's attention was called to the fact that Stanley Thad Jones and DeSota Jones are minors, without a general or testamentary guardian. The respondent DeSota Jones was in the Armed Services of the United States and personal service could not be obtained on him; Stanley Thad Jones was served with process.

The court appointed Robert H. Cowen as guardian *ad litem* for these minors, who filed an answer in their behalf.

The respondent Carrie Jones, in her answer filed on 19 September, 1953, undertook to plead ownership by adverse possession of the interest of the petitioner William Jones by reason of certain deeds of trust executed by him to B. A. Critcher, trustee, to secure certain indebtedness. Carrie Jones claimed an interest in the note secured by one of the deeds of trust and title to the interest of William Jones under a deed purported to have been executed pursuant to the foreclosure of the other deed of trust by B. A. Critcher, as trustee, to Eli Nicholson, dated 29 April, 1932, and recorded 29 September, 1954, in Book S-5, at page 145, and a deed from Eli Nicholson and wife, Millie Nicholson, to Carrie Jones, purporting to convey to her the interest of William Jones. The latter deed was recorded in Book S-5, at page 130, in the Public Registry of Martin County.

Whereupon, the court, at the April Term, 1955, ordered that B. A. Critcher, trustee, be made a party to the action. Summons was duly

issued and served on him on 2 May, 1955. Respondent Critcher filed no pleadings.

The respondent Carrie Jones, and other respondents who had been served, also undertook to set up in the answer a claim for betterments on behalf of the estate of Ferd Jones.

Rufus Jones, administrator of Ferd Jones, was made a party respondent. The administrator accepted service of summons, but filed no pleadings.

The petitioners filed a reply to the respondents' further answer, in which they undertook to set up a claim for betterments, alleging that the premises were reasonably worth the sum of $400.00 per year, and prayed for an accounting by Carrie Jones and her children, the heirs of Ferd Jones, less the improvements Ferd Jones and family had made on the premises.

The parties entered into the following stipulations before the trial:

"1. Parties in open court announced that they will waive a jury and request the court to hear the evidence, find the facts, enter its conclusions of law and judgment based thereon.

"2. It is stipulated that Mary Coefield Jones died intestate on or about August 20, 1926, seized in fee of the 8-acre tract of land described in the petition; that at the time of her death she left surviving as her sole heirs at law Cora Jones, Addie Jones, Ethel Jones, Ulysses Jones, William Jones and Ferd Jones; that Addie Jones died intestate on or about February ...., 1945, leaving no surviving children or issue of children.

"3. It is stipulated in open court that if petitioners are entitled to a partition that due to the number of interests, the small number of acres, the shape and condition of said lands, that an actual partition cannot be had, without injury to the owners.

"4. It is stipulated that William Jones is now living and is a party petitioner; that Cora Jones died intestate sometime in 1940, leaving as her sole heir at law Carrie Mae Vines, one of the petitioners, and her husband, Herman Williams, who is a party petitioner; that Ethel Jones died intestate in 1942, leaving a husband, S. T. Wallace, and one child, McKinley Wallace, who are parties respondent; that Ulysses Jones is living and is a party respondent; that Ferd Jones died intestate in 1952, leaving a widow, Carrie Jones, and nine children, who are parties respondent."

The following stipulations were entered into during the course of the trial:

"5. It is admitted by petitioners that Ferd Jones paid the taxes on the property in question while he was living.

"6. It is stipulated and agreed that the lands in question during the occupancy of Ferd Jones and his widow and heir at law had an average fair annual rental value of $300.00 per year.

"7. Respondents announce in open court that they do not seek to establish adverse possession as to any of the petitioners other than William Jones.

"8. It is further stipulated that the deed from B. A. Critcher, trustee, to Eli Nicholson, and the deed from Eli Nicholson and wife, Millie Nicholson, to Carrie Jones, widow, were adjudged null and void at the April 1955 Term, Martin County Superior Court, in an action entitled 'William Jones *v.* Carrie Jones and Eli Nicholson.' "

The trial judge, after reading the pleadings, hearing the evidence and arguments of counsel, found the facts, and those pertinent to this appeal are as follows:

1. "In 1927, Ferd Jones, with the permission and by agreement with William Jones, who was acting on behalf of himself and his other brothers and sisters, moved upon said lands and continued to live thereon until his death in 1952. The occupancy of said lands by Ferd Jones was by permission and agreement that he might cultivate said lands without paying rent to any of his co-tenants, and that he might make such improvements as he desired without charge to his co-tenants.

2. "The value of the improvements placed upon said lands by Ferd Jones, his widow and their children, did not exceed the sum of $3,000.00. The court finds that the fair rental value of said lands during the occupancy thereof by Ferd Jones, exceeded the cost of improvements and taxes made or paid by him."

3. That the note secured by the uncanceled deed of trust executed by William Jones and wife, Mary Jones, to B. A. Critcher, trustee for Eli Nicholson, and recorded in Book C-3, page 510, in the Public Registry of Martin County, has been paid and satisfied and should be canceled of record.

Upon the facts found, stipulations and pleadings filed in the proceeding, the trial judge found as a matter of law that the petitioners and respondents are the owners of the tract of land described in the petition in the proportions or shares set out in the petition, and that all interested and necessary parties are properly before the court. That the petitioners are not entitled to recover for rents and the respondents are not entitled to recover for the improvements set out in the pleadings. That the possession and occupancy of said lands by Ferd Jones, his widow and children, have not been adverse to William Jones, but the same has been with the permission and approval of the said William Jones. That an actual partition of said land cannot be made among the

several tenants in common without injury to some or all of the interested parties.

The court entered judgment directing the sale of the land for partition; directed the cancellation of the deed of trust referred to herein, which is recorded in Book C-3, page 510, in the Public Registry of Martin County; and appointed commissioners to sell the land as directed by the judgment, subject to confirmation by the court. The respondent Carrie Jones appeals, assigning error.

*R. L. Coburn for petitioners.*
*Richard Powell and Taylor & Mitchell for respondents.*

DENNY, J. All the exceptions and assignments of error brought forward in the case on appeal are directed to the findings of fact and conclusions of law with respect to betterments and the order directing the cancellation of the deed of trust executed by William Jones and wife, Mary Jones, to B. A. Critcher, trustee for Eli Nicholson, dated 14 April, 1928, and recorded in Book C-3, page 510, of the Public Registry of Martin County, to secure an original indebtedness of $25.00.

These exceptions and assignments of error are without merit.

The appellant, however, filed a motion in this Court in arrest of judgment on the ground that the purported service by publication on certain of the respondents was not made in accordance with the requirements of Chapter 919, Session Laws of 1953, codified as G.S. 1-98 through 1-104.

It is provided in G.S. 1-98.4 (a), among other things, that "To secure an order for service of process by publication or service of process outside the State, the applicant must file in the office of the clerk of the court where the action is brought a statement in his verified pleading or separate affidavit, sworn to by the applicant, his agent or attorney, stating:

"(1) That he is a party, or the agent or attorney of a party, to the action or special proceeding; and

"(2) The facts with sufficient particularity to show: That the action or special proceeding is one of those specified in G.S. 1-98.2, that a cause of action exists against the person to be served or that he is a proper party, and that the action or special proceeding is of such a kind that the court will have jurisdiction upon service of process by publication or service of process outside the State; and

"(3) That, after due diligence, personal service cannot be had within the State; and

"(b) Where such service is to be had upon a natural person, the verified pleading or affidavit must state:

"(1) The name and residence of such person, or if they are unknown, that diligent search and inquiry have been made to discover such name and residence, and that they are set forth as particularly as is known to the applicant;

"(2) That such person is a minor or an incompetent, if such fact is known to the applicant."

Neither the requirements of (b) (1) nor (b) (2) were complied with either in the pleadings or the affidavit for service of process by publication. Moreover, it is provided in G.S. 1-99.2 (c) that, "The Clerk shall mail a copy of the notice of service of process by publication to each party whose name and residence or place of business appear in the verified pleading or affidavit pursuant to the provisions of G.S. 1-98.4. Such copies shall be sent via ordinary mail, addressed to each party at the address of such party's residence or place of business as set forth in the verified complaint or affidavit, and shall be posted in the mails not later than five (5) days after the issuance of the order for service of process by publication. By certificate at the bottom of the order for service of process by publication or by separate certificate filed with the order, the clerk shall certify that a copy of the notice of service of process by publication has been duly mailed to each party whose name and residence or place of business appear in the verified pleading or affidavit, giving the date of posting thereof in the mails, and the clerk shall make an appropriate record thereof in accordance with the provisions of G.S. 2-42. Failure on the part of any party to receive a copy of the notice mailed in accordance with the provisions hereof shall not affect the validity of the service of process upon such party by publication, and no such copy of the notice need be mailed to any party as to whom the verified pleading or affidavit states that such party's residence or place of business is unknown and that diligent search and inquiry have been made to discover same."

While the provisions of G.S. 1-99.2 (c) may have been complied with, the record is silent with respect thereto. In any event, the residences of the respondents purported to have been served with process by publication were not given in the pleadings or the affidavit as required by G.S. 1-98.4 (b) (1). Furthermore, it is pointed out in the motion in arrest of judgment that the notice of publication gave the respondents only ten days from 10 October, 1953, to appear in the office of the Clerk of the Superior Court of Martin County and answer or demur to the petition filed in the proceeding, or the petitioners would apply for the relief demanded in the petition. Whereas, G.S. 1-100, as amended by Chapter 919, Session Laws of 1953, expressly provides that after service by publication is completed, the parties (respondents here), "shall then have such time thereafter to make defense as is provided

in G.S. 1-125," that is, not less than ten nor more than twenty days to demur or answer in a special proceeding. But the notice of publication fixed the time from which the ten-day period would begin to run, only four days from the date of the last publication of the notice, which was on 6 October, 1953. Whereas, the statute G.S. 1-100 also provides that, "In the cases in which service by publication is allowed, the summons is deemed served at the expiration of seven (7) days from the date of the last publication . . ."

In the case of *Comrs. of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144, *Barnhill, J.*, now *Chief Justice*, said: "The service of process by publication is in derogation of the common law and the statute making provision therefor must be strictly construed. The court must see that every prerequisite prescribed exists in the particular case before it grants the order of publication," citing authorities.

A prerequisite prescribed by statute to support an order of service by publication is jurisdictional. The omission from the pleadings or affidavit of any of the required information or averments, on which the order for substitute service is predicated, is fatal. *Groce v. Groce*, 214 N.C. 398, 199 S.E. 388; *Rodriguez v. Rodriguez*, 224 N.C. 275, 29 S.E. 2d 901; *Simmons v. Simmons*, 228 N.C. 233, 45 S.E. 2d 124; *Comrs. of Roxboro v. Bumpass, supra.*

In *Groce v. Groce, supra, Stacy, C. J.*, said: "It is the universal holding that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. *Stevens v. Cecil, ante*, 217; *Downing v. White*, 211 N.C. 40, 188 S.E. 815; *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283."

In our opinion, the purported service of process by publication in this proceeding is fatally defective, and we so hold. It follows, therefore, that the judgment entered below is null and void as to the respondents who have not been legally served, to wit: Ida Mae Jones White, Ethel Jones, Wardell Jones, Gladys Jones Williams, Ulysses Jones, DeSota Jones, S. T. Wallace and McKinley Wallace.

It is true the trial judge who heard this matter below found that all interested and necessary parties were before the court, but the record clearly shows otherwise and the record must prevail in such instances. *Williams v. Trammell*, 230 N.C. 575, 55 S.E. 2d 81; *Powell v. Turpin*, 224 N.C. 67, 29 S.E. 2d 26.

In view of the fact that the only matters in controversy in the hearing below involved the question of betterments and the cancellation of the deed of trust referred to hereinabove, we think the findings of fact and conclusions of law with respect thereto should be upheld. There is no

competent evidence on the record to support the view that Carrie Jones has ever had any interest in the property involved herein, other than a dower interest in the 1/5 undivided interest of which her husband, Ferd Jones, died seized. Moreover, there is no competent evidence to support a claim for betterments on behalf of the personal representative of Ferd Jones, his widow, or his children. Hence, the judgment will be affirmed in all respects except as to the order of sale. The petitioners are entitled, as a matter of right, to partition. *Moore v. Baker,* 222 N.C. 736, 24 S.E. 2d 749. However, they are not entitled, as a matter of right, to a sale for partition until all interested and necessary parties are served with process and given an opportunity to be heard if they so desire. *Patillo v. Lytle,* 158 N.C. 92, 73 S.E. 200. And where error appears upon the face of the record, this Court may correct it *ex mero motu. Duke v. Campbell,* 233 N.C. 262, 63 S.E. 2d 555; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320.

Therefore, so much of the judgment entered below as authorizes the sale of the premises at this time will be set aside. But in all other respects the judgment is affirmed as to the petitioners and respondents who have been duly and legally served with process.

This cause will be remanded to the end that the respondents named hereinabove who have not been served with process by publication or otherwise, may be served and given an opportunity to show cause, if any they have, why they should not be bound by the judgment entered below and the property sold for partition as provided by law. *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 266.

Error and remanded.

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STATE OF NORTH CAROLINA ON RELATION OF JAMES C. TILLETT, PETITIONER, v. EMILY MUSTIAN, ELTON TWIFORD, ROBERT YOUNG, H. R. MORRISON AND JIMMY GRAY, RESPONDENTS.

(Filed 29 February, 1956.)

**1. Pleadings § 15—**

A demurrer admits the allegations of fact contained in the complaint, but does not admit legal conclusions drawn therefrom by the pleader.

**2. Constitutional Law § 8a—**

Legislative power vests exclusively in the General Assembly. Constitution of North Carolina, Article II.

**3. Constitutional Law § 8c—**

The General Assembly may confer upon municipal corporations certain lawmaking powers relating to matters of local self-government. Constitution of North Carolina, Articles VII, VIII, IX.

**4. Constitutional Law § 8b—**

The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function.

**5. Municipal Corporations § 4—**

An election to vote on a proposed repeal of the charter of a municipal corporation created by special act, G.S. 160-353, *et seq.*, may not be held prior to or simultaneously with the first regular election to be held in such municipality, since the statute requires that the petition be signed by not less than 25 per cent of the voters in the preceding election, and the statute must be strictly construed, since such election is in effect to repeal the special act of the General Assembly creating the municipality.

APPEAL by plaintiff's relator from judgment of *Morris, J.*, heard 3 September, 1955, on demurrer to complaint, DARE.

Statutory action, in the nature of a proceeding in *quo warranto,* commenced 5 July, 1955, to declare nonexistent the Town of Kill Devil Hills and the municipal offices thereof, and to enjoin defendants from performing any duties of such nonexistent offices.

James C. Tillett, plaintiff's relator, alleges that he gave bond and obtained leave of the Attorney-General to bring this action in the name of the State under G.S. 1-515 *et seq.*

A summary of the allegations of the relator's complaint follows:

1. Relator is a citizen, resident and taxpayer of Kill Devil Hills.

2. The Town of Kill Devil Hills, North Carolina, was incorporated by Chapter 220, Session Laws of 1953. In accordance with its provisions, the Board of Commissioners of Dare County appointed its first officers, to wit, a mayor, three commissioners, and a treasurer, to serve until the first day of June, 1955; and these appointees qualified and proceeded to perform their respective duties. The 1953 Act provided that their successors were to be elected on Tuesday, after the first Monday in May, 1955, and biennially thereafter.

3. A petition was presented to the Commissioners at their regular meeting held 1 March, 1955, signed by "37 electors, residing within the territorial limits of the Town of Kill Devil Hills." The petitioners moved that a special or general election be called to allow the voters to determine whether the town charter should be retained or repealed in its entirety. Upon receiving the petition, the Mayor stated that "the Town Board was very glad to receive the petition and that it was the desire of said Board and himself as Mayor to present the matter

of repeal at a future election to be determined by a majority of the qualified voters in said town."

4. The Mayor and Board of Commissioners duly adjudged that the petition was in order; and, in compliance therewith, by resolution, "fixed Tuesday, May 3, 1955, as the day of election to vote upon the question of repeal of the charter of the Town of Kill Devil Hills, which day was also the date set by law to vote upon the office of Mayor, Commissioners, and Town Treasurer, . . ." The resolution dated 29 March, 1955, provides, *inter alia,* that "said election shall be conducted for the purpose of voting on a repeal of an act to incorporate the Town of Kill Devil Hills, Chapter 220 of the 1953 Session Laws of North Carolina"; designates the Town Hall as the polling place and place for registration; appoints the registrar and judges of election; prescribes the time when "all persons eligible to vote in the Town of Kill Devil Hills, as qualified by general law," may register; designates challenge day; and orders that "the resolutions shall be posted at four places in the Town of Kill Devil Hills."

5. The Mayor and Commissioners caused a notice to be published in the *Coastland Times,* a newspaper of general circulation in Dare County, three times, to wit, on 11 March, 25 March, and 1 April. This notice, over the signature of the Mayor, was addressed to the "Qualified Voters of the Town of Kill Devil Hills, N. C."; called attention to the 7-day period, commencing 16 April, for registration; and gave notice that the registration was "for the election on May 3, 1955, for the purpose of electing a Mayor, three Commissioners, a Treasurer, and voting upon the repeal of an act to incorporate the Town of Kill Devil Hills."

6. The Mayor and Commissioners caused another notice, dated 14 March, 1955, and bearing the signature of the Mayor, to be placed at the courthouse in Manteo, and "three other public places *in said County,*" in which, in addition to the notice given of the time and place for registration, they set forth: "The Board of Commissioners of the Town of Kill Devil Hills have called for the registration of all eligible voters for the purpose of participating in a regular election to elect a Mayor, three Commissioners and a Treasurer and to vote upon a repeal of an act to incorporate the Town of Kill Devil Hills, Chapter 220 of the 1953 Session Laws of North Carolina, *if upon examination the petition proves to be legal.*" (Italics added.)

7. "On May 3, 1955, and in accordance with law," an election was conducted, at which Emily Mustian was elected Mayor, and Elton Twiford, Robert Young and H. R. Morrison were elected Commissioners and Jimmy Gray was elected Town Treasurer. The persons so elected are the respondents herein.

8. On 3 May, 1955, on a separate ballot, 76 votes were cast, "For repeal of Town Charter," and 70 votes were cast, "Against Repeal of Town Charter." The majority of the qualified voters having cast their ballots in favor thereof, the Town Charter was thereby repealed; and thereafter, as the relator "is informed, believes and therefore alleges," the Board of Elections certified to the then acting mayor and commissioners "the results of the elections, both as to the question of repeal of said charter and the officers elected."

9. As the result of said election, "said town and its officers ceased to function legally after the first day of June 1955, but nevertheless the respondents and each of them voluntarily went before the Clerk of the Superior Court in Dare County on June 1, 1955, and were inducted into their respective purported offices."

10. "Each of said respondents has since June 1, 1955, been unlawfully attempting to possess said offices and usurping the powers and duties of same."

Defendants' demurrer, summarized, sets out these objections to the complaint:

1. The facts alleged do not entitle the relator to maintain this action under G.S. 1-515.

2. The provisions of G.S., Article 23, Chapter 160, are inapplicable to Kill Devil Hills, incorporated by direct special Act of the General Assembly.

3. If applicable, the facts alleged disclose that the election was initiated, not by ordinance of the governing board but by a petition that did not and could not meet the requirements of G.S. 160-356 because no "preceding regular election" had been held in Kill Devil Hills.

The court sustained the demurrer. The relator excepted and appealed, assigning as error the order sustaining the demurrer.

*Forrest V. Dunstan and John H. Hall for petitioner, appellant.*
*Edwards, Sanders & Everett for respondents, appellees.*

BOBBITT, J. The demurrer admits the allegations of fact contained in the complaint, but does not admit legal conclusions drawn therefrom by the pleader. *McKinley v. Hinnant*, 242 N.C. 245, 87 S.E. 2d 568.

The gist of relator's complaint is that, by reason of the election held 3 May, 1955, Kill Devil Hills ceased to exist as a municipal corporation on and after 1 June, 1955.

The relator alleges that he "is a citizen, resident and taxpayer of Kill Devil Hills." Yet he alleges the nonexistence of such municipal corporation. He alleges that on 3 May, 1955, respondents were duly elected to their respective offices. Yet he alleges the nonexistence of

such offices and asks that respondents be enjoined from performing any duties under color thereof. He makes no claim that he is entitled to any municipal office. Nor does he allege that any respondent, under color of his alleged nonexistent office, has interfered in any manner to the prejudice of his personal or property rights.

This action was brought in the name of the State, *pro forma,* by a private relator. The Attorney-General has not participated in the action beyond requiring the bond and granting leave as prescribed by G.S. 1-515.

Can an action to declare a municipal corporation nonexistent be brought except by the State, through the Attorney-General, acting *ex officio* as the representative of the public? Where the sole subject of controversy is the existence or nonexistence of the municipal corporation, can such action be brought against individuals rather than against the municipal corporation itself? Decisions in other jurisdictions, based in part on statutory provisions, would seem to point towards conflicting answers. *Steelman v. Vickers,* 51 N.J.L. 180, 17 A. 453, 14 Am. St. Rep. 675; *Holloway v. Dickinson,* 69 N.J.L. 72, 54 A. 529; *People v. Lewistown Community High School Dist.,* 388 Ill. 78, 57 N.E. 2d 486; *People v. Gentile Cooperative Ass'n,* 392 Ill. 393, 64 N.E. 2d 907; *Farrington v. Flood* (Fla.), 40 So. 2d 462; *Bass v. Addison* (Fla.), 40 So. 2d 466. In this connection, it is noted that this action involved a municipal corporation alleged to have been created and organized as a *de jure* municipal corporation. Does this distinguish this action from cases where the corporate existence is challenged on the ground that, for failure to meet statutory requirements prescribed by general law for its valid organization, the purported municipal corporation did not come into existence either as a *de jure* or as a *de facto* municipal corporation?

Since our decision is put on other grounds, we refrain from discussing the serious questions raised as to whether the relator could maintain the action as presently constituted if his legal position were otherwise correct.

The relator's entire case is based on the alleged repeal of the corporate charter of Kill Devil Hills by the result of the election held 3 May, 1955. His contention is that this election was held in substantial compliance with the provisions of G.S. 160-353 through G.S. 160-363, being Article 23, Subchapter II, of Chapter 160.

Legislative power vests exclusively in the General Assembly. Article II, Constitution of N. C. It may confer upon municipal corporations certain lawmaking powers relating to matters of local self-government. Articles VII, VIII, IX, Constitution of N. C.; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310; *Taylor v. Racing*

*Asso.*, 241 N.C. 80, 95, 84 S.E. 2d 390. The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function. *Boone County v. Verona,* 190 Ky. 430, 227 S.W. 804.

Section 4, Article VIII, Constitution of N. C., now provides:

"4. Legislature to provide for organizing cities, towns, etc.—It shall be the duty of the Legislature to provide *by general laws* for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment in contracting debts by such municipal corporations."

The italicized words, *by general laws,* were inserted by amendment submitted by ch. 99, Public Laws of 1915, ratified in the general election of November, 1916, and effective 10 January, 1917. This constitutional directive to the General Assembly was implemented by the enactment of ch. 136, Public Laws of 1917, now codified as Subchapter II of Chapter 160 of the General Statutes, under the caption, "Municipal Corporation Act of 1917."

In *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187, this Court held that the 1917 constitutional amendment did not restrict or impair the power of the General Assembly to legislate concerning municipal corporations by special act.

The validity of the 1953 Act incorporating Kill Devil Hills is alleged, not challenged. The legal existence of Kill Devil Hills until 1 June, 1955, is alleged, not challenged.

The Act of 1953 incorporates the Town of Kill Devil Hills. It defines the corporate limits. It provides that the Board of Commissioners of Dare County shall appoint its first officers, to wit, a mayor, three commissioners, and a treasurer, the treasurer to be *ex officio* clerk to the board of commissioners, to serve until the first day of June, 1955. It provides that "their successors in office shall be elected at an election to be held on Tuesday after the first Monday in May 1955, and biennially thereafter, in accordance with Section 160-30 of the General Statutes of North Carolina." As to its corporate powers, and the authority of its corporate officers, etc., there is no specific provision. It is provided generally that Kill Devil Hills "shall be subject to all of the provisions contained in Chapter 160 of the General Statutes of North Carolina, relative to cities and towns, and all provisions of said Chapter not inconsistent with this Act are hereby made a part of the same."

The election of officers on 3 May, 1955, was in strict compliance with the specific legislative provision therefor in the 1953 Act.

Under G.S. 160-353 *et seq.*, an election to vote on a proposed amendment to or repeal of the charter of a municipal corporation may be

initiated either (1) by ordinance of the governing body, predicated upon its findings that the amendment or repeal is "for the best interest of the municipality," or (2) by petition "signed by not less than twenty-five per centum of the qualified electors entitled to vote at the next preceding regular election in such municipality."

It is neither alleged nor contended that the election of 3 May, 1955, was initiated by ordinance of the governing body. The allegation is that the election was called on the basis of a petition signed by 37 electors residing within the territorial limits of the Town of Kill Devil Hills. Obviously, since there had been no "next preceding regular election in such municipality," the petition *did not* and *could not* comply with the statutory requirements.

If it be conceded that the provisions of Article 23, Chapter 160, G.S. 160-353 through G.S. 160-363, are applicable to the 1953 Act, a question on which we need not pass, the conclusion reached is that these statutes, construed *in pari materia,* disclose that the General Assembly did not contemplate or intend that the 1953 Act should be subject to repeal by an election initiated by petition and held prior to or simultaneously with the *first* regular election to be held in such municipality, to wit, the election of 3 May, 1955, prescribed by the 1953 Act for the choice of its first *elected* officers; and that the election of 3 May, 1955, while valid as to the election of municipal officers, was void in respect of the alleged repeal of the statutory charter. When a municipal corporation derives its corporate existence from the General Assembly by direct special Act of incorporation, the requirements of a prior general statute, under which an attempt is made in effect to repeal such special Act of the General Assembly, will be strictly construed. It is unnecessary to consider whether the petition, the call for election, the notice thereof, etc., failed to comply with statutory requirements in other respects.

For reasons stated, the order sustaining demurrer is

Affirmed.

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THE FIDELITY & CASUALTY COMPANY OF NEW YORK v. CHARLES W. ANGLE, INC., AND CHARLES W. ANGLE.

(Filed 29 February, 1956.)

**1. Indemnity § 1—**

Allegations to the effect that contract of indemnity was executed by the indemnitors and delivered to the indemnitee, and that the indemnitee was induced thereby to become surety for the principal indemnitor on numerous performance bonds, resulting in liability or loss to the indemnitee, are sufficient to state a cause of action on the indemnity agreement, notwith-

standing the indemnitee did not execute the agreement, the fact that the indemnitee accepted and acted upon the indemnity contract being sufficient to show the mutuality required by law.

**2. Indemnity § 2d—**

An indemnity agreement may contract against actual loss or liability, or both, and in this case the agreement indemnifying the surety on a contractor's performance bonds against all claims, demands, damages, etc., and obligating indemnitors to pay the indemnitee all amounts for which it should become liable by reason of the performance bonds, *is held* to warrant suit against the indemnitors for loss to indemnitee under the contractor's bonds prior to the determination of the amount of loss against the principal on the contractor's bonds.

APPEAL by plaintiff from *Crissman, J.*, at 24 October, 1955 Civil Term, of GUILFORD—Greensboro Division.

Civil action to recover on contract of indemnity dated 3 September, 1934, heard upon demurrer of individual defendant to complaint of plaintiff on the ground that the facts alleged are not sufficient to state a cause of action as hereinafter more fully stated,—the corporate defendant having answered.

The complaint alleges that plaintiff is a corporation organized and existing under the laws of New York, doing business in the State of North Carolina as authorized by law; that defendant Charles W. Angle, Inc., is a corporation organized and existing under the laws of the State of North Carolina; and that defendant Charles W. Angle is an individual and a resident of Greensboro, N. C.

The complaint further alleges (paragraph IV) that on or about 3 September, 1934, the defendants executed and delivered to the plaintiff a "contract of indemnity," a copy of which is thereto attached, marked Exhibit A, the contract being specifically pleaded and asked to be taken as a part of the complaint as fully as if same were set forth in its entirety.

Pertinent parts of Exhibit A are these: It is designated "CONTRACT OF INDEMNITY," and is between "Charles W. Angle, Inc. . . . called the principal, and . . . Charles W. Angle . . . called the INDEMNITOR, and THE FIDELITY & CASUALTY COMPANY OF NEW YORK . . . called the company."

And after reciting that "Whereas, at the special instance and request of the Principal and the Indemnitor, and on the security of this agreement, the Company is or is to become surety for the Principal on certain proposal, supply, contract, court, license, and other bonds," the contract declares that "therefore, in consideration of the premises and of the sum of one dollar in hand paid by the Company to the Principal and the Indemnitor, the receipt of which is hereby acknowledged, the

Principal and the Indemnitor hereby agree and bind themselves, their heirs, executors, administrators, successors and assigns as follows, among others:

"3. That the Principal and the Indemnitor shall and will at all times indemnify and keep indemnified the Company from and against any and all claims, demands, losses, damages, costs, charges, counsel fees, expenses, suits, orders, judgments, and adjudications whatsoever, that the Company shall or may for any cause at any time sustain or incur by reason of or in consequence of the said bonds or any renewal thereof or any new bond issued in continuation thereof or as a substitute therefor; and the Principal and the Indemnitor further covenant and agree to place the Company in possession of funds whenever necessary for the Company's protection against such claims, demands, losses, damages, costs, charges, counsel fees, expenses, suits, orders, judgments, and adjudications whatsoever, and to pay to the Company, before the Company shall be compelled to pay the same, all damages, losses, costs, charges, counsel fees, and expenses for which the Company shall become liable by reason of or in consequence of the said bonds or any renewal thereof or any new bond issued in continuation thereof or as substitute therefor.

"4. That immediately upon the Principal or the Indemnitor becoming aware of any demand, notice, or proceeding preliminary to determining or fixing any liability with which the Company may be subsequently charged under the said bonds or any renewal thereof or any new bond issued in continuation thereof or as a substitute therefor, the Principal or the Indemnitor shall notify the Company thereof in writing." . . .

"16. That in case any of the parties mentioned in this Agreement of Indemnity fail to execute the same, or in case the execution hereof by any of the parties be defective or invalid for any reason, such failure, defect, or invalidity shall not in any manner affect the validity of this Agreement of Indemnity, or the liability hereunder of any of the parties executing the same, but each and every party so executing shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect, or invalidity had not existed."

Then follows signature to the agreement in this manner:

"IN WITNESS WHEREOF, the Principal and the Indemnitor have

hereunto set their hands and affixed their seals the day and year first above written.

CHARLES W. ANGLE, INC.
(Full name of Principal)
By: C. W. Angle, President
C. W. Angle
(Full name of Indemnitor)

"Signed, sealed and delivered in the presence of
E. Tilley, Secy.
Stamped:
(F & C Atlanta)
( Sep. 26 1934 )
( Office )"

The complaint further alleges in paragraph V that:

"The aforesaid contract of indemnity was executed and delivered by the defendants to the plaintiff to induce the plaintiff to become surety for the defendant Charles W. Angle, Inc., on certain bonds to be given by the defendant Charles W. Angle, Inc., in connection with carrying on its principal business of general building construction and contracting, and by the terms of said indemnity agreement the defendant Charles W. Angle represented to the plaintiff that he had a substantial, material and beneficial interest in obtaining the said bonds and the said Charles W. Angle and Charles W. Angle, Inc., agreed that if the plaintiff would execute said surety bonds the defendants would indemnify the plaintiff from and against any loss, damages and expense of whatsoever kind or nature which the plaintiff might sustain by reason of or in consequence of executing said bonds, and further agreed fully to protect and save said plaintiff harmless on account of the execution of said bonds, *all as is more fully set out in said indemnity agreement.*" (Emphasis by the Court.)

And the complaint further alleges:

"VII. Relying upon the said indemnity agreement, the plaintiff from time to time from September 3, 1934, to September 11, 1950, became surety for the defendant Charles W. Angle, Inc., on numerous bonds for the performance of contracts entered into by the said defendant Charles W. Angle, Inc. The defendant Charles W. Angle has at all times from September 3, 1934, to date been the chief executive officer and principal stockholder of the defendant Charles W. Angle, Inc. and executed the aforesaid bonds as an officer of the defendant corporation, knowing that the plaintiff was relying upon the said indemnity agreement."

Among the bonds on which plaintiff became surety are, as is alleged, in paragraph VIII, three separate bonds copies of which are attached to complaint as Exhibits B, C, and D effective in the year 1950, and signed in name of Charles W. Angle, Inc., by C. W. Angle, President, specifically described, in the penal sums of $218,936.00, $191,300.00, and $125,170.00,—the latter being in respect to heating plant at A. & T. College.

And the complaint further alleges among other things:

"IX. The defendant Charles W. Angle, Inc., was unable to perform any of the aforesaid three contracts, and about March 26, 1952, the plaintiff as surety on the aforesaid bonds was called upon to make payment of certain obligations of the defendant Charles W. Angle, Inc. under each of these three contracts and bonds."

"XII. Pursuant to its obligations under the aforesaid three bonds and pursuant to the agreement of March 26, 1952, the plaintiff, as surety on said bonds, over a period from April 22, 1952, to April 6, 1955, paid the sum of $77,020.75 on behalf of the defendant Charles W. Angle, Inc. In repayment of said sums paid by the plaintiff, the plaintiff received on March 18, 1954, from the defendant Charles W. Angle the sum of $45,914.37, said sum being received from the renting and sale of property pledged to secure and indemnify the plaintiff as provided for in the aforesaid agreement of March 26, 1952. On August 1, 1954, the plaintiff received the sum of $10,615.38, said sum being the final payment due to the defendant Charles W. Angle, Inc. on the contract for the construction of the central heating plant at A & T College in Greensboro, North Carolina. The balance due to the plaintiff from the defendants, after crediting these two payments, is $20,491.00 plus interest."

"XIV. The defendants are justly and truly indebted to the plaintiff in the sum of $20,491 plus interest . . . and demand has been made upon the defendants for payment of this sum, and the defendants have failed and neglected and still fail and neglect to pay said obligation."

And accordingly plaintiff prays judgment.

The defendant Charles W. Angle demurred to plaintiff's complaint as hereinabove stated for that it appears from the complaint of plaintiff that the facts therein alleged are not sufficient to constitute a cause of action against him for that:

"1. The alleged liability of this defendant to plaintiff is based on an alleged contract, which was specifically pleaded, attached to the complaint, marked Exhibit A, and made a part of said complaint; that the parties to said alleged contract were Chas. W. Angle, Inc., as one of the parties, Chas. W. Angle, as a second party, and The Fidelity & Casualty Company of New York, as a third party; that said alleged

contract was not executed by The Fidelity & Casualty Company of New York and for that reason did not become binding upon this defendant.

"2. The liability of this defendant to plaintiff, if any, is strictly that of an indemnitor and not a surety; that the amount of plaintiff's loss, if any, resulting from the matters and things complained of, has not been determined and will not be determined until after the termination of plaintiff's action against Chas. W. Angle, Inc.: therefore it appears from the complaint of plaintiff that a cause of action does not now lie against this defendant."

The cause coming on to be heard and being heard before the judge presiding at the 24 October, 1955 Civil Term of Superior Court of Guilford County, Greensboro Division, "and it appearing to the court that the demurrer of defendant Charles W. Angle was based on the ground that it appears upon the face of plaintiff's complaint that the indemnity contract sued on by plaintiff and referred to in paragraph four (4) of plaintiff's complaint was a nullity and also upon the ground that it appears upon the face of plaintiff's complaint that defendant Charles W. Angle is strictly an indemnitor and that plaintiff's cause of action, if any, against said defendant does not lie until plaintiff's loss as surety for Charles W. Angle, Inc., has been actually determined; and it appearing to the court that the demurrer of defendant Charles W. Angle is meritorious in all respects and should, therefore, be sustained," the court sustained the demurrer in all respects, and ordered the action of plaintiff as to said defendant dismissed.

To the signing, rendition and entry of the judgment sustaining the demurrer as aforesaid, plaintiff excepted and appeals to Supreme Court and assigns error.

*Smith, Moore, Smith & Pope for plaintiff, appellant.*
*Andrew Joyner, Jr., for defendant, appellee.*

WINBORNE, J. Admitting the truth of the allegations of fact set out in the complaint in present action, as is done when testing the sufficiency of a pleading challenged by demurrer, the Court is unable to say that in no view of the case the complaint fails to state a cause of action. Hence, error is made to appear in the judgment from which appeal is taken.

As to the first ground on which demurrer is based, that is, that the contract here in suit, not having been executed by plaintiff, did not become binding upon the individual defendant, the demurrant:

From the pleadings and briefs filed in this Court, it seems to be conceded that the contract here involved is an indemnity agreement. Such

an agreement usually has only two parties to it, the indemnitor and the indemnitee. *Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826. And ordinarily it is not necessary for the person indemnified to sign the agreement. 42 C.J.S. 567, Indemnity 4 (a) "Signing." *Gushard v. Moyer*, 164 N.E. 281, 92 Ind. App. 519; *Berlinger v. Bernstein*, 156 A. 548, 102 Pa. Super. 225.

Indeed, the text writers, interpreting decided cases, say that the rules laid down relating to signing of contracts generally apply to a contract of indemnity; that signature is not always essential to the binding force of an agreement; that the object of a signature is to show mutuality or assent, which may be shown in other ways; and "that in absence of a statute," it need not be signed, "provided it is accepted and acted on, or is delivered and acted on." 42 C.J.S. 568, and 17 C.J.S., p. 410—Contracts 62. See also *Coppersmith v. Ins. Co.*, 222 N.C. 14, 21 S.E. 2d 838.

And, in this connection, it is alleged in the complaint in the present case that the defendants executed and delivered to plaintiff the contract of indemnity to induce plaintiff to become surety for the defendant Charles W. Angle, Inc., on certain performance bonds, and relying upon the indemnity agreement, plaintiff thereafter from time to time over a period of nearly sixteen years became such surety for defendant Charles W. Angle, Inc., on numerous such bonds, including the three specifically described.

These allegations would seem to be sufficient to admit of an inference that plaintiff, as indemnitee, accepted and acted on the indemnity contract on which this action is based.

Now as to the second ground on which the demurrer is based, that is, that the liability of demurrant to plaintiff, if any, is strictly that of indemnitor, and the amount of loss, if any, resulting from the matters and things of which complaint is made, has not been determined, and, hence, a cause of action does not now lie against him:

In this connection in 27 Am. Jur., p. 469, the author declares: "The necessity for actual damage to the indemnitee as a condition to the liability of the indemnitor depends upon the terms or conditions contained in the contract, actual damage being required in the case of strict contract of indemnity against loss or damage, and none in the case of an indemnity against liability. It therefore becomes necessary to distinguish between strict indemnity and indemnity against liability . . . It has been generally observed that a contract which simply indemnifies, and nothing more, is against loss or damage only, whereas a contract which binds the indemnitor to pay certain sums of money or perform other acts which will prevent harm or injury to the indemnitee is one of indemnity against liability. Contractors' bonds requiring

payment of claims for labor and material and obligating the contractor to perform as agreed in the contract are quite generally of the latter type. A single contract may, however, indemnify against both actual loss or damage and liability."

These principles are accordant with decisions in this State. And the rule as to accrual of cause of action is stated in *Hilliard v. Newberry*, 153 N.C. 104, 68 S.E. 1056, by *Hoke, J.*, speaking for the Court, in this manner: "On the question presented the authorities are to the effect that when a collateral obligation is in strictness one of indemnity, an action at law will not lie unless and until some actual loss or damage has been suffered; but when the obligation amounts to a binding agreement to do or refrain from doing some definite, specific thing materially affecting the rights of the parties, an action will presently lie for breach of such an agreement and no damage need be shown," citing *Burroughs v. McNeill*, 22 N.C. 297, and quoting from 16 A. & E. 179, Pingrey on Suretyship and Guaranty, Section 182. See also these cases: *Clark v. Bonsal*, 157 N.C. 270, 72 S.E. 954; *Supply Co. v. Lumber Co.*, 160 N.C. 428, 76 S.E. 273; *Lumberton v. Hood, Commr.*, 204 N.C. 171, 167 S.E. 641; *Boney, Ins. Commr., v. Ins. Co.*, 213 N.C. 470, 196 S.E. 837; *Lackey v. R. R.*, 219 N.C. 195, 13 S.E. 2d 234; *Casualty Co. v. Waller, supra.*

Applying these principles to the indemnity contract under consideration, it appears that the language used is sufficient to support an action on indemnity against actual loss or damage, or an action on indemnity against liability, or on both. Hence, the allegations of the complaint are sufficient to withstand the demurrer.

For reasons stated, the judgment from which appeal is taken is hereby Reversed.

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CAROLINA POWER AND LIGHT COMPANY, PETITIONER, v. JESSE C. CLARK, JR., HATTIE M. CLARK AND BUNCOMBE COUNTY, NORTH CAROLINA, DEFENDANTS.

(Filed 29 February, 1956.)

**1. Eminent Domain § 8—**

On the question of the amount of compensation to be paid for the taking of land under eminent domain, consideration of future uses to which the property is reasonably adapted should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered.

**2. Eminent Domain § 18c—**

Where respondents introduce evidence of the suitability of their land for a dam site and contend that the taking of the easement by petitioner decreased the present value of their land by impairing or destroying its availability for this purpose, it is error for the court to exclude testimony of a qualified witness as to the high cost of constructing a dam at the site as tending to show the remoteness of the availability of the property for this purpose so that such purpose would not enter into the contemplation of a prospective seller or purchaser of the property and thus affect or enhance the present market value of the land.

**3. Eminent Domain § 8—**

The nature and extent of the easement acquired determines whether there is any substantial difference between the value of the easement and a fee simple estate in the land, and each case must stand on its own exact facts.

**4. Same: Eminent Domain § 18c—Instruction that value of perpetual easement equaled the fee held prejudicial on facts of this case.**

Where, in proceedings to fix compensation for the taking of an easement for electric transmission line, the parties stipulate that the owners of the land should have full right and power to use the land for all purposes not inconsistent with the easement acquired, and that the easement should be limited to the construction, operation and maintenance of the transmission line, with right to enter upon the land for inspection, repairs and alterations, and to keep the right of way clear of all structures, except ordinary fences, trees, etc., *held:* The right of the landowners to use the land for all purposes not inconsistent with the easement and their rights to compensation for any additional burden which might thereafter be placed upon the land are substantial rights, and therefore instructions to the effect that the perpetual easement acquired for all practical purposes amounted to a fee, and the failure of the court to charge as to the use the landowners could make of the servient estate, is prejudicial error.

APPEAL by petitioner from *Nettles, J.,* October Term 1955 of BUNCOMBE.

Special proceeding instituted by petitioners, pursuant to the provisions of Chapters 40 and 56 of the General Statutes, for the purpose of obtaining a 30 foot right of way and easement for a distance of 1,528 feet over the lands of the individual defendants (Buncombe County has a lien for unpaid taxes) in Hominy Township, Buncombe County.

The parties being unable to agree as to the price to be paid by the petitioner for the easement, commissioners were appointed by the Clerk of the Superior Court of Buncombe County to appraise the right of way and easement described in the petition for condemnation. To this order the individual defendants objected, and excepted. The commissioners made their report to the Clerk, and assessed damages in the sum of $800.00. The individual defendants filed exceptions to the commission-

ers' report. The Clerk of the Court overruled the individual defendants' exceptions, and confirmed the commissioners' report. The individual defendants excepted to the order of confirmation, and appealed.

In the Superior Court it was stipulated and agreed by the parties that only this one issue should be submitted to the jury: "What amount of damages are the respondents (defendants) Jesse C. Clark, Jr. and Hattie M. Clark entitled to recover of the petitioner (plaintiff) for the easement taken by the petitioner over the lands of the respondents in this proceeding?" The jury answered the issue $5,000.00.

The defendant Buncombe County filed no answer.

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

*Charles F. Rouse, Robert F. Phillips, and Harkins, Van Winkle, Walton & Buck for Petitioner, Appellant.*

*W. W. Candler and Cecil C. Jackson for Defendant Respondents, Appellees, Jesse C. Clark, Jr., and Hattie M. Clark.*

PARKER, J. The evidence of the individual defendants introduced without objection, except as to the testimony of Sam W. Huddleston set forth below, which was objected to on the ground that he had not qualified as an hydraulic engineer to express an opinion, tends to show the following facts. They own a farm of about 100 acres in Beaverdam Valley. Beaverdam Creek, a clear mountain stream about 14 to 16 feet wide and 10 to 18 inches deep, runs approximately through the center of the farm. On the north end of the farm is a narrow gorge 100 to 150 feet wide, where a dam could be placed to create a lake and to make a development for residential lots. Before petitioner's power lines were placed on the easement, they had plans for the construction of a dam. A dam was needed to pond water for irrigation on the farm. Just before the power line was built, they had secured tractors and equipment to build a dam. The petitioner placed five poles on the easement on the farm to carry its lines. Their witness, Sam W. Huddleston, testified that a dam about 120 feet wide at the bottom and about 12 to 14 feet wide at the top could be built in the narrow gorge on the farm. The poles of the petitioner would damage the proposed lake, because the water of the lake would have to be maintained at a level not to interfere with the power lines.

In reply to the above evidence petitioner offered the testimony of Lee G. Warren, who has had experience in the building of hydroelectric developments for 22½ years. At the request of the petitioner he went out to the farm of the appellants, and made a survey or calculation as to the building of a dam wholly on their farm. He testified as to the

things to be considered in order to calculate and build a dam there. He was then asked this question by petitioner: "Do you have an opinion, from your inspection of this site which you speak of, the approximate cost of the construction of a dam there?" The appellants objected, the objection was sustained, and the petitioner excepted, which is its exception No. 5 and assignment of error No. 5. The witness, if permitted to answer, would have replied: "Yes, 20 feet high it would cost $50,000.00; that is a rolled clay dam, with rock rip-rap sides, surfaces, and for 10 feet high it would cost approximately $20,000." The jury did not hear this excluded testimony. The petitioner assigns the exclusion of this evidence as error.

In fixing values on property in condemnation proceedings for any and all uses or purposes to which the property is reasonably adapted and might, with reasonable probability, be applied, but has never been applied, its availability for future uses must be such as enters into and affects its market value, and regard must be had to the existing business or wants of the community, or such as may be reasonably expected in the immediate future to affect present market value. The test is what is the fair value of the property in the market. The uses to be considered must be so reasonably probable as to have an effect on the present market value. Purely imaginative or speculative value should not be considered. *Gallimore v. Highway Com.*, 241 N.C. 350, 85 S.E. 2d 392; *Light Co. v. Moss*, 220 N.C. 200, 17 S.E. 2d 10; *Power Co. v. Power Co.*, 186 N.C. 179, 119 S.E. 213; *Teeter v. Telegraph Co.*, 172 N.C. 783, 90 S.E. 941; *Land Co. v. Traction Co.*, 162 N.C. 503, 78 S.E. 299; *Brown v. Power Co.*, 140 N.C. 333, 52 S.E. 954; *Olson v. U. S.*, 290 U.S. 623, 78 L. Ed. 1236; *Boom Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 206; *Illinois Power & Light Corp. v. Parks*, 322 Ill. 313, 153 N.E. 483; *Pruner v. State Highway Com.*, 173 Va. 307, 4 S.E. 2d 393; *State Highway Com. v. Brown*, 176 Miss. 23, 168 So. 277; *Andrews v. Cox*, 127 Conn. 455, 17 A. 2d 507.

*Crisp v. Light Co.*, 201 N.C. 46, 158 S.E. 845, was an action to recover damages for the construction of an electric transmission line over the plaintiff's land. The Court said: "The defendant contends that several witnesses were allowed to give their opinion as to the purpose for which the lands are adapted or suitable and to give an opinion of its decreased value. We see no objection to the competency of this character of evidence." See also to same effect *Light Co. v. Rogers*, 207 N.C. 751, 178 S.E. 575; *Teeter v. Telegraph Co., supra.*

The individual defendants offered testimony to show that their land was plainly adapted for a dam site, and that the easement acquired by petitioner in impairing or destroying its availability for a dam site decreased the present value of their land. The excluded testimony of

petitioner's witness, Lee G. Warren, as to the high cost of constructing a dam upon their property, was competent as tending to show that, because of the high cost of building a dam upon this land, the availability of this property for a dam site would not enter into the contemplation of a prospective seller or purchaser of the property, and could not reasonably be held to affect or enhance its present market value. The exclusion of this testimony was prejudicial error to petitioner. Such error is apparent from a reading of the charge where it appears that the judge recapitulated the evidence of the individual defendants as to the availability of their land for a dam site to create a lake for purposes of irrigation and for selling building lots around it, and petitioner's evidence as to the high cost of constructing a dam upon this property was excluded from the knowledge and consideration of the jury.

The petitioner assigns as error No. 8 this part of the charge: "Where . . . a public utility takes by condemnation a perpetual easement entitling it to occupy and use the entire surface of a part of a tract of land . . ."

The petitioner assigns as error No. 9 this part of the charge: "The rule declares that the full market value of the part of the land covered by perpetual easement will be a proper element of the compensation, and forbids any diminution in the allowable compensation on account of any use which the landowner might make of any part of the land covered by the perpetual easement."

The petitioner assigns as error No. 10 this part of the charge: "Since the condemnor acquires the complete right to occupy and use all the land covered by the perpetual easement for all time to the exclusion of the landowners, the bare fee remaining in the landowner is, for all practical purposes, of no value, and the value of the perpetual easement acquired by the condemnor is virtually the same as the value of the land embraced by it."

At the beginning of the trial the parties to this special proceeding entered into a stipulation to this effect: The petitioner is a public utilities corporation existing under, and by virtue of, the laws of North Carolina, and is doing business within said State in the distribution of electricity for commercial, industrial and domestic use. That it has the power of eminent domain for the purposes of its business. That the petitioner, under its power of eminent domain, has taken an easement and right of way over the land of the individual defendants, which easement is specifically described in the stipulation, with the privilege to construct, operate and maintain in, upon, and through said land, in a proper manner, with poles, wires and other necessary apparatus and appliances, a line for the purpose of transmitting electricity, with

the right at all times to enter upon said land to inspect said line, and to make necessary repairs and alterations, with the right to permit the attachment of, and to carry in conduit wires and cables of any other company or person, together with the right to keep the right of way clear of all structures, except ordinary fences, trees, etc. "That, except for said purposes, the petitioner does not propose to interfere with the rights of the defendants; that the defendants shall have the full power and right to use the lands over which said right of way and easement shall be condemned for all purposes not inconsistent with the rights to be acquired therein and the use thereof by the petitioner . . . It is further stipulated and agreed that the land described in the preceding paragraphs is acquired by the petitioner for the purpose of conducting the business for which it is engaged, and the specific use of said land, right of way and easement for the purpose of laying out, constructing, maintaining, operating and preparing, altering, replacing and removing power lines and communication lines in connection with the business of said petitioner."

This Court said in *Highway Com. v. Black,* 239 N.C. 198, 79 S.E. 2d 778: "Whether there is any substantial difference between an easement and a fee simple estate in land depends upon the nature and extent of the easement."

The nature and extent of the easement acquired controls the rights of the parties. Each case must stand on its exact facts. *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906.

In *Light Co. v. Bowman,* 229 N.C. 682, 51 S.E. 2d 191, the Court said: "The general rule in regard to land condemned for use for electric power transmission lines seems to be that the landowner has the right to make use of the strip of land condemned in any manner which does not conflict with the rights of the Power Company, and which is not inconsistent with the use of the land for the purposes for which condemnation was allowed, and which does not interfere with the free exercise of the easement acquired."

According to the stipulation entered into by the parties here except the defendant Buncombe County, which did not answer, the easement acquired by petitioner in the instant case expressly states, *"that the defendants shall have the full power and right to use the lands over which said right of way and easement shall be condemned for all purposes not inconsistent with the rights to be acquired therein and the use thereof by the petitioner."* This is a substantial right for the appellants. According to the stipulated easement here, the landowners have this further substantial right, that, if any additional burden is put upon this right of way or easement not properly embraced in the general purposes for which condemnation was had, the compensation for such

additional burden will accrue to the owner and not to the petitioner. *Phillips v. Telegraph-Cable Co.*, 130 N.C. 513, 41 S.E. 1022; *Hodges v. Tel. Co.*, 133 N.C. 225, 45 S.E. 572; *Brown v. Power Co., supra; Teeter v. Tel. Co., supra; Rouse v. Kinston*, 188 N.C. 1, 123 S.E. 482; *Crisp v. Light Co., supra; Hildebrand v. Tel. Co.*, 219 N.C. 402, 14 S.E. 2d 252. The stipulation as to the easement in the instant case seems to have been entered into by the parties so as to conform to the general rule set forth in the paragraph immediately above in *Light Co. v. Bowman.*

The lower court in its charge, and particularly in the part of it which is covered by petitioner's assignments of error Nos. 8, 9 and 10, ignored the nature and extent of the easement acquired by petitioner here according to the express stipulation, and charged the law, as if petitioner had acquired the complete right to occupy and use the entire surface of the part of the land covered by a perpetual easement for all time to the exclusion of the individual defendants. In so charging, the court was in error, and assignments of error Nos. 8, 9 and 10 are good. Of course, if petitioner had acquired such an easement as the lower court charged, which it did not, "the bare fee remaining in the landowner is, for all practical purposes, of no value, and the value of the perpetual easement acquired by the condemnor is virtually the same as the value of the land embraced by it." *Highway Com. v. Black, supra.*

The petitioner assigns as error No. 13 the failure of the court to charge the jury as to the use that the appellants could make of the easement acquired as stipulated. This assignment of error is good.

This Court said in *Light Co. v. Carringer*, 220 N.C. 57, 16 S.E. 2d 453: "When an easement is acquired in land the fee remains in the original owner burdened by the uses for which the easement is acquired. Hence, in awarding compensation to the owner of land for an easement acquired due consideration is to be given to the fact that the fee remains in the own (owner) subject to the prior rights incident to the easement."

*Gas Co. v. Hyder*, 241 N.C. 639, 86 S.E. 2d 458, is distinguishable. In that case the Court said: "In the instant case, the nature of the easement is stipulated and does not purport to limit the petitioner's use to the exercise only of such rights as may be reasonably necessary to carry out the purposes for which the easement is sought."

For prejudicial error in the exclusion of evidence and for prejudicial errors in the charge, petitioner is entitled to a

New trial.

ALMA E. CUDWORTH, ADMINISTRATRIX OF JOHN M. CUDWORTH ESTATE, v. RESERVE LIFE INSURANCE CO.

(Filed 29 February, 1956.)

**1. Appeal and Error § 28—**

The brief must refer to the printed pages of the transcript where the exception and assignment of error appear which present the question discussed, Rule of Practice in the Supreme Court No. 28, and failure to comply with this rule results in a failure to present the question for review, since exceptions in the record not set out in appellant's brief will be taken as abandoned.

**2. Appeal and Error § 6c (1)—**

The rules governing appeals are mandatory and not directory, and will be enforced uniformly.

**3. Appeal and Error § 39e—**

Where an exhibit excluded from evidence does not appear of record, its exclusion will not be held for error, since it cannot be determined that its exclusion was prejudicial.

**4. Appeal and Error § 38—**

The burden is on appellant to show error amounting to the denial of some substantial right.

**5. Insurance § 39—Evidence held for jury on question of whether illness had its inception more than fifteen days after issuance of policy.**

The policy in suit provided that insurer would be liable for hospital expenses for sickness originating while the policy was in force and more than fifteen days after its date of issue. This action was instituted to recover for hospital expenses incurred when insured entered a hospital almost a year and a half after the issuance of the policy, and died of lung cancer. There was medical expert testimony that development of insured's type of cancer was slow, but that its rate of development varied, and there was expert opinion testimony that insured had cancer at the time the policy was issued and expert opinion testimony by the doctor who operated on insured's lung and made the diagnosis, that as far as the witness knew, insured did not have symptoms of cancer before the date the policy was issued. *Held:* There is some evidence from which the jury could find that insured's cancer did not originate until more than fifteen days after the date the policy was issued, and the conflicting testimony was for the jury to resolve and not the court.

**6. Trial § 23a—**

While the affirmative testimony of a credible witness is ordinarily more reliable than the negative testimony of an equally credible witness, nevertheless such negative testimony is evidence to be considered by the jury.

BARNHILL, C. J., dissents.

BOBBITT, J., concurs in result.

APPEAL by defendant from *Morris, J.*, September Civil Term 1955 of PASQUOTANK.

Civil action by the administratrix of John M. Cudworth, deceased, to recover hospital and surgical expenses incurred by him at the General Hospital, Norfolk, Va., between 31 March 1952 and 11 April 1952, and between 15 April 1952 and 13 May 1952, from the defendant upon Hospital and Surgical Expense Policy No. R-908861 issued by it to him on 21 September 1951, and in force at the time of his death on 13 May 1952.

From a judgment entered upon a verdict rendered in favor of the plaintiff, the defendant appeals, assigning error.

*John H. Hall for Plaintiff, Appellee.*
*LeRoy & Goodwin for Defendant, Appellant.*

PARKER, J. The defendant in its brief states that two questions are presented. One, did the court err in refusing to admit the hospital record of John M. Cudworth in the Albemarle Hospital? Two, did the court err in refusing the defendant's motion for judgment of nonsuit? On these two questions the defendant's brief has no reference anywhere to any exception or any assignment of error. The sole reference in its brief to any exception or assignment of error occurs on p. 17, where in discussing the failure of the court to grant its motion for judgment of nonsuit, it says the court permitted "Dr. Hotchkiss, over the objection of defendant, to testify that 'as far as I know he (plaintiff's decedent) didn't have symptoms of cancer before September 21, 1951,' as stated on page 14 of the record, said statement being made over timely objection and exception by defendant as shown on page 13 of the record, this being defendant's Exception No. 3."

The appellant's brief as to the two questions discussed in its brief does not conform with Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562-3 (these Rules are set forth in Vol. 4A, G.S. Appendix 1, pp. 157-200), which reads in part as follows: "Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment . . . 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." *Shepard v. Oil & Fuel Co.*, 242 N.C. 762, 89 S.E. 2d 464; *Ammons v. Layton*, 242 N.C. 122, 86 S.E. 2d 915; *S. v. Stantliff*, 240 N.C. 332, 82 S.E. 2d 84; *S. v. Newton*, 207 N.C. 323, 177 S.E. 184; *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302.

"We have held in a number of cases that the Rules of this Court, governing appeals, are mandatory and not directory . . . The Court

has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly." *S. v. Moore,* 210 N.C. 459, 187 S.E. 586.

The General Assembly, Ch. 129, Session Laws 1955, increased the judicial districts of the Superior Court from 21 to 30. It may not be amiss to quote what this Court said in 1913 in *Bradshaw v. Stansberry, supra:* "The number of appeals has been increasing year by year under conditions heretofore existing, and with the additional facilities for trials in the Superior Courts, brought about by four new judicial districts, we may reasonably expect a further increase of from 15 to 20 per cent. It is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them."

Though the appellant's brief fails to comply with the Rules of Practice of this Court we have examined the record, as was done in *Shepard v. Oil & Fuel Co., supra,* and have found no valid reason for disturbing the judgment of the lower court.

The hospital record of John M. Cudworth in the Albemarle Hospital is not a part of the record and case on appeal. The record and case on appeal merely show that the court permitted the defendant to have it identified and marked, and to have photostatic copies of it made, so that the original might go back to the hospital. The case on appeal was agreed upon by counsel. As this hospital record is not a part of the record and case on appeal, there is nothing to show that the defendant was prejudiced by the refusal of the court to admit it in evidence. *Hege v. Sellers,* 241 N.C. 240, 84 S.E. 2d 892; *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; *Coach Co. v. Motor Lines,* 229 N.C. 650, 50 S.E. 2d 909.

The headnote in *Fleming v. McPhail,* 121 N.C. 183, 28 S.E. 258, in our Reports, states: "Where an appellant fails to have printed as a part of the record on appeal an exhibit which was made, by the judge or by agreement of counsel, a part of the case on appeal, the appeal will be dismissed." See also: *Hicks v. Royal,* 122 N.C. 405, 29 S.E. 413. As to maps which are a part of the transcript on appeal see: Rule 19 (7), Rules of Practice in the Supreme Court, 221 N.C. 544, 556, and *Stephens v. McDonald,* 132 N.C. 135, 43 S.E. 592.

The defendant has not successfully carried the burden of showing prejudicial error amounting to the denial of some substantial right in the refusal of the court to admit this hospital record in evidence. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657.

The Hospital and Surgical Expense Policy here was issued by defendant to plaintiff's intestate on 21 September 1951, and was in force from then until his death on 13 May 1952. The record contains only a part

of the policy. The part introduced in evidence states that the company insures the applicant, and will pay, subject to all provisions and limitations herein contained, the benefits provided while this policy is in force "resulting from sickness the cause of which originates while this policy is in force and more than fifteen days after the date hereof."

Part II of the policy is headed Limitations and Exclusions, and Section two thereof reads: "Tuberculosis, cancer . . . shall be covered under this policy only if hospital confinement begins after this policy has been in force for six months or more." This policy had been in force six months and ten days before John M. Cudworth entered the General Hospital, Norfolk, Virginia, on 31 March 1952, as defendant states in its brief.

On 13 May 1952 John M. Cudworth died in the General Hospital at Norfolk from a lung cancer. The defendant contends that its motion for judgment of nonsuit should have been granted for the reason that all the evidence shows that John M. Cudworth was suffering from lung cancer at the time the policy was issued, with the exception of this testimony of plaintiff's witness, Dr. W. S. Hotchkiss, "as far as I know, he didn't have symptoms of cancer before September 21, 1951," which the defendant characterizes as "purely negative" testimony.

Dr. W. S. Hotchkiss practices in Norfolk, Virginia, and was found by the court to be "a medical expert, both as a general practitioner and as a surgeon specializing in chest surgery." His testimony tended to show these facts: John M. Cudworth entered the General Hospital in Norfolk on 31 March 1952. He first saw Cudworth there on 31 March 1952 or 9 April 1952; he gave both dates. A specimen washed out of Cudworth's lung showed T.B. germs. From a study of Cudworth's case he thought he had tuberculosis, with a possibility of cancer. When part of Cudworth's right lung was removed surgically on or about 17 April 1952, the specific diagnosis was squamous cell cancer of the lung, which caused his death on 13 May 1952. In his opinion, after surgery, there was no tuberculosis. He could not tell the date when this lung cancer originated, because cancers of the lung can, and do, vary a great deal in their rate of growth. He testified, "as far as I know, he didn't have symptoms of cancer before September 21, 1951." He also testified on cross-examination, "it is possible he had it prior to September 1951, and it is also possible he did not." He was called into the case by Dr. Alfred Kruger of Norfolk.

Dr. Alfred Kruger, a witness for the defendant, was found by the court to be "a specialist in internal medicine, and is qualified as an expert in diseases of the chest." His testimony tended to show these facts: He first saw Cudworth in the Norfolk General Hospital around 1 April 1952. Cudworth told him that three or four years before he had

developed a cough and a feeling of fatigue. His cough had continued since that date, and had increased in severity. He was losing weight, six months before had expectorated blood, and had shortness of breath. Cudworth showed him an X-ray taken in 1949. This X-ray showed some disease within the right upper lobe of the lung. A 1951 X-ray showed some increase in the disease. X-rays taken in the General Hospital, after his admittance, showed additional increase in this disease. From the history obtained from Cudworth, from an examination of the 1949, 1951 and 1952 X-rays, from a study of the part of the lung removed by surgery and the report received from the pathologist, who examined the removed part of the lung, it was his opinion that Cudworth's lung cancer existed prior to September 1951, and it was also his opinion, based on a reasonable degree of medical certainty, that Cudworth had lung cancer in 1949. On cross-examination Dr. Kruger testified that he noted on Cudworth's chart in the hospital "that I thought that the disease in his lungs was tuberculosis," and that the final diagnosis of cancer was at the time of surgery. He also said on cross-examination that from 15 April 1952 to 13 May 1952 Cudworth was primarily Dr. Hotchkiss' patient, and that cancer was definitely suspected before surgery, and that squamous cell cancer is a slow type. Cudworth did not have tuberculosis.

Between the dates of 31 March 1952 and 13 May 1952 the insured incurred hospital, surgical and related expenses of the kind and nature included within the policy here at the Norfolk General Hospital, in excess of the jury's verdict.

Doctors Hotchkiss and Kruger were the only persons who testified as to Cudworth's cancerous condition. Dr. Hotchkiss, the operating surgeon testified, "as far as I know, he (Cudworth) didn't have symptoms of cancer before September 21, 1952." He must have based this expert opinion on facts, which his study and examination of, and operation on, the patient disclosed, and it cannot be said that this testimony is without probative value. If Cudworth had no symptoms of lung cancer when the policy was issued, it would seem a permissible inference that the cancer did not originate within 15 days thereafter, in the light of the evidence that lung cancers vary a great deal in their rate of growth, and that these two experts did not definitely diagnose cancer until after surgery on 17 April 1952. Both doctors agreed that Cudworth did not have tuberculosis. Dr. Kruger testified that Cudworth had lung cancer when the policy was issued. For us to hold, as the defendant contends, that all the evidence shows that Cudworth's lung cancer existed when the policy was issued, would be to assert that we knew more about the inception of this lung cancer than the chest surgeon who studied the patient, and did the surgery. The evidence,

and the reasonable inferences to be drawn therefrom, are in conflict as to whether Cudworth's lung cancer did, or did not, originate while the policy was in force and more than fifteen days after the date of its issue, and we cannot usurp the province of the jury to resolve this conflict. See: *American Ins. Co. of Texas v. Brown,* 203 Okl. 407, 222 P. 2d 757; *Jacques v. Farmers Lumber & Supply Co.,* (Iowa) 47 N.W. 2d 236, 240; *Mutual Ben. Health & Accident Ass'n. v. Ramage,* 293 Ky. 586, 169 S.W. 2d 624; *Cohen v. North American Life & Casualty Co.,* 150 Minn. 507, 185 N.W. 939; *American Casualty & Life Co. v. Butler,* (Court of Civil Appeals Texas), 215 S.W. 2d 392; *Reserve Life Ins. Co. v. Kelly,* (Court of Civil Appeals Texas), 266 S.W. 2d 395; *Reserve Life Ins. Co. v. Everett,* (Court of Civil Appeals Texas), 275 S.W. 2d 713 (policy by defendant here with policy providing that the sickness must originate more than 15 days after the date of the policy); 45 C.J.S., Insurance, p. 972; Appleman on Insurance Law and Practice, Sec. 406. *McGregor v. Assurance Corp.,* 214 N.C. 201, 199 S.E. 641, is distinguishable.

We said in *Johnson & Sons, Inc. v. R. R.* and *Johnson v. R. R.,* 214 N.C. 484, 486, 199 S.E. 704: "While the affirmative testimony of a credible witness is ordinarily more reliable than the negative testimony of an equally credible witness, still testimony that a person near by who could have heard and did not hear the sounding of a whistle or the ringing of a bell is some evidence that no such signal was given." This principle of law is applicable to the affirmative testimony of Dr. Kruger and to the negative testimony of Dr. Hotchkiss here.

The charge of the court has not been brought forward. The record states the charge is considered by the defendant to have been fair to both sides, and free from material error.

In the trial below we find

No error.

BARNHILL, C. J., dissents.

BOBBITT, J., concurs in result.

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IN RE ADOPTION OF MONICA HOOSE.

(Filed 29 February, 1956.)

**1. Adoption § 3—Instrument held sufficient as revocation of consent to adoption.**

Intervenors, husband and wife, who had adopted the child in question in Germany, executed an instrument consenting to the adoption of the child

by another couple, and all the parties agreed that such other couple should have the care, support and maintenance of the child. Less than two months thereafter intervenors filed in the Superior Court of the county in which the child was residing verified statement that they could not permit the adoption of the said child by anyone else, that they were desirous that the child be immediately returned to them, and requested the dismissal of the adoption proceedings theretofore instituted in the county by the second couple. *Held:* The instrument is sufficient to constitute a withdrawal of the consent of the intervenors to the adoption of the child.

**2. Same—**

Consent is essential to an order of adoption, G.S. 48-7, unless it has been established that the child has been abandoned. G.S. 48-5.

**3. Same—**

Abandonment of a child within the meaning of the statute obviating the necessity of consent of the child's parents to its adoption, G.S. 48-5, connotes a wilful abandonment within the meaning of G.S. 14-322 and G.S. 14-326.

**4. Same—**

Ordinarily the consent of the parents of a child to its adoption may be withdrawn or revoked within six months from the date it is given. G.S. 48-11.

**5. Same—**

The act of the adoptive parents of a child in entering into a contract consenting to the adoption of their minor child by another couple does not constitute constructive abandonment of the child so as to obviate the necessity of their consent to its adoption by such other couple. Therefore, when such consent is withdrawn within six months, the proceedings for adoption by such other couple should be dismissed upon motion.

BARNHILL, C. J., dissents on the question of abandonment only.

HIGGINS, J., concurs in result.

APPEAL by intervenors from *Morris, J.*, December Term, 1955, of PASQUOTANK.

Proceedings instituted by John R. Holefelder and wife, Myrna M. Holefelder, to adopt Monica Hoose, in which Major Clinton M. Hoose and wife, Dorothy V. Hoose, adoptive parents, intervened.

On 29 April, 1955, Major Hoose, 49 years of age, and his wife Dorothy, 45 years of age, adopted, in Germany, two children, a boy, eight years of age, and a girl, Monica, age 2 years and 9 months, the latter of whom is the subject of this proceeding. Major Hoose is in the Intelligence Division of the United States Army, then stationed in Germany, now at the Pentagon in Washington. Upon the return of this couple to the United States this adoption was approved and the entry of these two alien children likewise approved by the Immigration Department,

the Department of State and the Adjutant General's Department. The adoption in Germany was approved by the German Courts there and by the Adjutant General's Department of the United States Army. A certified copy of the adoption proceedings in German, and a translation, were filed as a part of the record with the lower court at the time of the institution of the adoption proceedings.

Shortly after Major and Mrs. Hoose returned to this country from Germany, Major Hoose returned to duty at the Pentagon and his family took up residence in Bethesda, Maryland. Mrs. Hoose was sick, having had a serious operation. The children made her nervous. They discussed the idea of permitting a younger couple to adopt one or possibly both of the children. The matter was taken up with the Welfare Department of Maryland. The Maryland authorities approved the adoption of the boy and recommended that if there was a possibility that Monica was to be adopted by someone else that both the children be adopted and separated at the same time.

On 24 August, 1955, Major and Mrs. Hoose entered into what is designated as a "Statement of Intent" with Lt. and Mrs. John R. Holefelder of Elizabeth City, North Carolina, wherein Major and Mrs. Hoose consented to the adoption of Monica Hoose by the Holefelders. The parties mutually agreed that all care, support and maintenance of the said Monica Hoose should be assumed from and after 24 August, 1955, by Lt. and Mrs. Holefelder, notwithstanding the fact that Major and Mrs. Hoose were legally obligated to support the child by virtue of the fact they were the adoptive parents of the said child. Monica Hoose was turned over to Lt. and Mrs. Holefelder in Bethesda, Maryland, and brought to Elizabeth City, North Carolina, where she resided with them until the time of this hearing.

On 20 October, 1955, Lt. and Mrs. Holefelder, petitioners, filed this proceeding to adopt Monica Hoose in the Superior Court of Pasquotank County, filing the usual petition, and the usual consent, on the usual forms, executed by Major and Mrs. Hoose under date of 8 October, 1955. On the day of the filing, an order of reference was entered in the matter directing the Superintendent of Public Welfare of Pasquotank County to make the usual investigation required by statute to ascertain whether the child is a proper subject for adoption and to determine whether the proposed foster home is a suitable one for the child. No report of this investigation has ever been made; no interlocutory or other order entered.

According to the evidence, after Major and Mrs. Hoose had given their consent to the adoption of Monica Hoose by Lt. and Mrs. Holefelder, Mrs. Hoose discovered that her health had improved and the condition that had caused her nervousness had been corrected. There-

fore, on 27 November, 1955, Major and Mrs. Hoose requested the return of the child Monica, and on the next day filed a revocation and withdrawal of consent to the adoption of the child by the Holefelders in the Superior Court of Pasquotank County, before the Clerk, and moved to dismiss the adoption proceedings. On 10 December, 1955, they filed a petition to intervene in the adoption proceedings and were allowed to do so.

The court held that Major and Mrs. Hoose did not willfully abandon Monica Hoose but by entering into a contract with the Holefelders for her support and adoption, such conduct constituted in law a constructive abandonment of said child.

It having been stipulated that the consent of the State Board of Public Welfare had not been obtained for the bringing of Monica Hoose into the State of North Carolina, as required by G.S. 110-50, the court awarded her custody to the Superintendent of Public Welfare of Pasquotank County. From the judgment entered, the intervenors excepted and appealed to this Court, assigning error.

*LeRoy & Goodwin for intervenors.*

*J. W. Jennette for petitioners.*

DENNY, J. It is necessary to consider two questions in order to dispose of this appeal: (1) Is the instrument denominated "Revocation and Withdrawal of Consent, and Motion to Dismiss Adoption Proceedings," sufficient to constitute a withdrawal of the consent of Major and Mrs. Hoose to the adoption of Monica Hoose by Lt. and Mrs. Holefelder? (2) Did Major and Mrs. Hoose abandon their adopted child, Monica Hoose, within the meaning of our adoption statutes?

The appellants assign as error the finding of the Clerk and the affirmance thereof by the court below to the effect that a revocation of consent had not been properly filed by Clinton M. and Dorothy Hoose. The pertinent part of the instrument referred to above, verified and filed in the office of the Clerk of the Superior Court of Pasquotank County on 28 November, 1955, reads as follows: "That since the separation the undersigned have learned the extent to which they are attached to said child and are now definitely of the opinion that it will be impossible for them to permit the adoption of said child by someone else. That as the adoptive mother and father of said child the undersigned stand in the relation of parents, are highly desirous that said child be immediately returned to them and that this proceeding for adoption be dismissed and discontinued. Wherefore, the undersigned pray the court that the consent heretofore filed be revoked and stricken out; that an order be entered immediately returning the said child to

the undersigned as the rightful parents thereof; that this action be dismissed," etc.

While it is rather unusual that the appellants did not state plainly and unequivocally that they were withdrawing their consent to the adoption of Monica Hoose by the Holefelders, nevertheless, we think the instrument is sufficient to constitute the withdrawal of such consent. Consent is essential to an order of adoption, G.S. 48-7, unless it has been established that the child has been abandoned. G.S. 48-5; *Truelove v. Parker,* 191 N.C. 430, 143 S.E. 295; *In re Adoption of Doe,* 231 N.C. 1, 56 S.E. 2d 8. Consequently, in the absence of the consent of the adoptive parents, we hold that the court below is without jurisdiction to order the adoption of Monica Hoose unless Major and Mrs. Hoose, her adoptive parents, have abandoned such child within the meaning of our statutes.

G.S. 48-5 reads in pertinent part as follows:

"(a) In all cases where a court of competent jurisdiction has declared a child to be an abandoned child, the parent, parents, or guardian of the person, declared guilty of such abandonment shall not be necessary parties to any proceeding under this chapter nor shall their consent be required.

"(b) In the event that a court of competent jurisdiction has not heretofore declared the child to be an abandoned child, then on written notice of not less than ten days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment has taken place.

"(c) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk."

Likewise, G.S. 48-2 defines the meaning of the word "abandoned" as follows: "(3) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years who has been wilfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child."

The facts disclosed on this record conclusively refute any basis for a claim that Monica Hoose was abandoned for at least six months immediately preceding the institution of this proceeding, if indeed she has been abandoned at all.

Under our statute G.S. 48-7, except as provided in G.S. 48-5 and G.S. 48-6, before a child can be adopted, the written consent of the parents, or surviving parent or guardian of the person of the child must be obtained. Ordinarily, however, consent may be withdrawn or revoked within six months from the date it is given. G.S. 48-11.

Since the abandonment contemplated by our statute must be wilful in order to eliminate consent, *In re Adoption of Doe, supra; Ward v. Howard,* 217 N.C. 201, 7 S.E. 2d 625, and the court below having found as a fact that "Clinton M. and Dorothy V. Hoose have not wilfully abandoned such child," the motion to dismiss the adoption proceedings should have been allowed. Furthermore, the court's conclusion of law to the effect that the conduct of the intervenors by entering into the contract for the adoption of their minor child by the Holefelders constitutes constructive abandonment, will not support an adoption that must be bottomed upon willful abandonment in the absence of consent.

Wilfulness is as much an element of abandonment within the meaning of G.S. 48-2, as it is of the crime of abandonment. G.S. 14-322 and G.S. 14-326. *In re Adoption of Doe, supra; S. v. Falkner,* 182 N.C. 793, 108 S.E. 756.

The word "wilful" as used in criminal statutes was defined in *S. v. Whitaker,* 93 N.C. 590, by *Ashe, J.,* as follows: "The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute." This definition has been quoted with approval many times by this Court. See *S. v. Dickens,* 215 N.C. 303, 1 S.E. 2d 837, and cited cases.

Therefore, this proceeding will be remanded for disposition in accord with this opinion. The custody of the minor child, Monica Hoose, having been awarded to the Superintendent of Public Welfare of Pasquotank County, the interested parties, including the intervenors, may take such action with respect to the custody of the child as they may deem appropriate and in accordance with applicable law.

Error and remanded.

BARNHILL, C. J., dissents on the question of abandonment only.

HIGGINS, J., concurs in result.

PARK TERRACE, INC., v. PHOENIX INDEMNITY COMPANY (ORIGINAL DEFENDANT) AND PARK BUILDERS, INC. (ADDITIONAL DEFENDANT).

(Filed 29 February, 1956.)

**1. Appeal and Error § 1—**

The Supreme Court has general supervisory authority over the orders, judgments, and decrees of the Superior Courts of this State and will not hesitate to exercise this prerogative when necessary to promote the expeditious administration of justice. Constitution of North Carolina, Article IV, sec. 8.

**2. Corporations § 4—**

No less than three persons may operate under charter as a legal corporate entity. G.S. 55.

**3. Same—**

When one person acquires all of the stock of a corporation, the corporation becomes dormant or inactive and exists only for the purpose of holding legal title of the property for the use and benefit of the single stockholder who becomes seized of the beneficial title to the property, and such individual will not be permitted to cloak his action as an individual behind the legal fiction of the corporate entity.

**4. Parties § 1—**

Every action must be prosecuted in the name of the real party in interest. G.S. 1-57.

**5. Same: Corporations § 4: Principal and Surety § 8—**

An individual, in purchasing the entire stock of a corporation owning apartment buildings, executed an agreement that no claim should be made against the parties selling the stock on the ground of defective workmanship or inferior building materials in the construction of the apartments. Thereafter the corporation instituted suit to recover on the contractor's performance bonds for defective workmanship and inferior materials. *Held:* Any recovery by the corporation would inure to the benefit of the individual who is the real party in interest, and therefore he is a necessary party plaintiff to the action.

**6. Corporations § 4—**

Where a single individual purchases all of the stock of a corporation and thus becomes the sole beneficial owner of the assets of the corporation, he may not revitalize the fiction of the corporate entity as a cloak for his actions by thereafter transferring some of the stock to third parties.

**7. Appeal and Error § 43—**

Petition to rehear is allowed in this case in the furtherance of the expeditious administration of justice in order that the owner of all of the stock of the corporation should be made a party plaintiff in the suit instituted by the corporation. Constitution of North Carolina, Article IV, sec. 8.

JOHNSON and BOBBITT, JJ., concur in result.

ON rehearing.

The determinative facts in this case are stated in the opinion of this Court on the original appeal herein, *Terrace, Inc. v. Indemnity Co.*, 241 N.C. 473, 85 S.E. 2d 677, to which reference is had. It would serve no useful purpose to repeat them here except as it may become necessary in discussing the questions of law presented by the petition to rehear.

*Spry, White & Hamrick and Dallace McLennan for respondent.*

*Brooks, McLendon, Brim & Holderness for Phoenix Indemnity Company and Womble, Carlyle, Sandridge & Rice and Broaddus, Epperly & Broaddus for Park Builders, Inc.*

BARNHILL, C. J. When considered literally, the motion made was a motion to make McLean a party defendant so that the original defendants could plead the covenant contained in his contract executed contemporaneously with, and as a part of the consideration for, the purchase by McLean of the common stock of plaintiff corporation. However, broadly speaking, the motion seeks to have McLean made a party to the action so that the original defendants may plead his covenant contained in his contract in bar of any recovery in this action.

If we treat the plaintiff as an active corporation prosecuting this action as such, then it owned the alleged claim sued upon at the time McLean became a stockholder with its own officers and directors, and it is nowhere alleged that McLean was employed by plaintiff or possessed any authority to bind it by his contract. Hence, a cause of action would arise against him when and only when plaintiff recovers in this action. Not until then could it be determined what amount, if any, defendants are entitled to recover for breach of McLean's contract. The statute of limitations would not begin to run until a judgment is entered in this cause. Strictly speaking, therefore, McLean is not a necessary or proper party defendant. On this record the allegation that in executing the contract McLean was acting for and in behalf of the corporation is a mere conclusion unsupported by any allegation of fact.

When the cause was here on the original appeal, we considered a disposition of the motion in the light of the real purpose and intent thereof though it might be outside its letter, but finally concluded that the motion should be decided strictly as presented. That is, we considered then taking the course we now pursue which is presented with more emphasis in respondent's brief filed in connection with the petition to rehear.

After further reflection, consideration, and discussion, we have concluded that while McLean is not a proper party defendant, he is in fact a necessary party plaintiff. We now so hold.

If it be considered that the motion as made will not support this conclusion, our answer is this: This Court has general supervisory authority over the orders, judgments, and decrees of the Superior Courts of the State, N. C. Constitution, Art. IV, sec. 8. This is a prerogative which, in a proper case, when necessary to promote the expeditious administration of justice, we will not hesitate to exercise.

It requires three or more persons to obtain a certificate of incorporation, G.S. 55-2, and the certificate of incorporation must be signed by a majority of the applicants. If one dies before the organization of the corporation, some other person must be designated in his place and stead. G.S. 55-7. The corporation must have at least three directors who manage the affairs of the corporation, G.S. 55-48, and three officers, provided any two offices may be held by one person. So there must be at least two officers. G.S. 55-49. Real estate of the corporation may be conveyed by its president and two stockholders or by the president, attested by the secretary. G.S. 55-40. Three stockholders may call a meeting of the corporation, G.S. 55-6, and a majority of stockholders may dissolve the corporation, G.S. 55-121.

Thus the concept that a corporation is a combination of three or more persons who may operate as a legal entity when chartered so to do threads its way through the cited and practically every other section of our law on corporations. General Statutes, ch. 55. No lesser number will suffice.

So the question arises: When one person acquires all the stock of a corporation, what then is the status of the corporation and the property held in its name? We are of the opinion and so hold that the corporation becomes dormant or inactive and exists only for the purpose of holding legal title of the property for the use and benefit of the single stockholder who becomes seized of the beneficial title to the property. Not possessing the managerial agencies—stockholders, directors, or officers—contemplated by statute, it can no longer act as a corporation. Its decisions are the decisions of the single stockholder, and its action is his action.

It follows that when McLean purchased all the common stock of plaintiff he became at least the equitable owner of the corporate property. Only he could employ counsel and direct the institution of this action. And any recovery here would be for his use and benefit. Hence, he is the real party in interest, and as such he is a necessary party plaintiff to this action. He will not be permitted to use the cor-

poration, of which he is the sole beneficial owner, to cloak his action as an individual.

"Every action must be prosecuted in the name of the real party in interest . . ." G.S. 1-57.

We consider that our conclusion that McLean is a real party in interest is supported by the following authorities, to wit: *Bank v. Winchester,* 24 So. 351; *Felsenthal Co. v. Northern Assur. Co.,* 120 N.E. 268; *Wenban Estate v. Hewlett,* 227 P. 723; *Paper Co. v. Tuscany,* 264 S.W. 132; *Gypsum Co. v. Plaster Co.,* 199 P. 249; *Securities Co. v. Spiro,* 221 P. 856; *N. R. Co. v. Nield,* 216 S.W. 62; *Quaid v. Ratkowsky,* 170 N.Y.S. 812; *Minifie v. Rowley,* 202 P. 673; *Swift v. Smith,* 5 A. 534; *Holding Co. v. Snyder,* 79 F. 2d 263; *Walter & Co. v. Zuckerman,* 6 P. 2d 251; *Coal Co. v. Zinc Co.,* 145 P. 571; *Potts v. Schmucker,* 36 A. 592; *Hallett v. Moore,* 185 N.E. 474; *Gardiner v. Burrill,* 114 N.E. 617; *Hay v. Commissioner,* 145 F. 2d 1001; *Copeland v. Swiss Cleaners,* 52 So. 2d 223; *Watson v. Ins. Co.,* 63 P. 2d 295; *Mfg. Co. v. Trust Co.,* 12 A. 2d 40; Annos. 1 A.L.R. 616 and 34 A.L.R. 601.

With respect to a one-man dominated corporation, the corporation may be disregarded and he may look direct to the other party because the real facts and justice require it. Fletcher, Cyc. Corporations, Vol. 1, p. 90, sec. 25. See also secs. 41 and 42, and Vol. 5, p. 441, sec. 2099; Ballantine, Corporations, p. 296, sec. 126, p. 301, sec. 128.

"The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality." 13 A.J. 160; Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597.

On this record it is apparent that McLean, when he purchased the stock of Pollard, Burge, and Lester, and contracted to purchase the stock of Bolich, which was later delivered to him, understood or believed he was acquiring the assets of the corporation. He immediately demanded and received the resignation of its officers and directors, and the contract contemporaneously executed by him as a party of the second part contains language which so indicates. He contracted in part that: ". . . 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 . . . because of defective workmanship, defective or inferior building materials . . . and also because of any breakage or wear and tear . . . and all structures erected thereon and fixtures attached thereto are accepted in their present condition, and no guarantee of their conditions is made . . ."

It must be understood that if McLean became the sole beneficial owner of the assets of the corporation by virtue of the fact he acquired all the stock, he could not later, and cannot now, evade the consequences of his act by merely transferring some of the stock to third parties so as to comply with the statute.

The cause is remanded so that McLean may be made a party plaintiff with leave either to adopt the complaint or file a new complaint, and defendants may file an answer thereto pleading the covenants contained in the contract as a bar to the right of plaintiffs to recover herein. To that end the judgment entered in the court below is vacated.

Should McLean elect to refuse to file any pleadings herein, then and in that event defendants may file an amended answer alleging the facts which make McLean the real—and a necessary—party plaintiff and plead their contract with him in such manner as they may be advised.

The petition to rehear is allowed and the cause is remanded for further proceedings in accord with this opinion.

Remanded.

JOHNSON and BOBBITT, JJ., concur in result.

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JOHNNY YOUNGBLOOD v. THELMA BRIGHT, INTERNATIONAL LADIES GARMENT WORKERS UNION, AND NICK BONANO.

(Filed 29 February, 1956.)

**1. Appearance § 2a—**

A voluntary appearance whereby a defendant obtains an extension of time in which to plead, is a general appearance.

**2. Appearance § 2b—**

A general appearance waives any irregularity in or lack of service of process.

**3. Same—**

The Act of 1951 (G.S. 1-134.1) has no application where objection to the jurisdiction of the court is not made until after a defendant has applied for and obtained an extension of time in which to plead.

**4. Associations § 5—**

The common law rule that unincorporated associations, including labor unions, have no existence separate and distinct from their members and cannot sue or be sued as a legal entity, obtains in this State except as modified by statute.

**5. Same: Process § 11—**

An unincorporated labor union is subject to suit under G.S. 1-97(6) by service on the Secretary of State, only if it is doing business in this State in the sense of performing in this State the acts for which it is formed.

**6. Associations § 5—**

Chapter 545, Session Laws of 1955, has no application to actions commenced prior to its effective date.

**7. Same—**

Upon demurrer of defendant unincorporated labor union challenging the jurisdiction of the court on the ground that the union was not subject to suit as a separate entity under G.S. 1-97(6), the court must consider evidence and find the facts as to whether the union was doing business in this State within the meaning of the statute, and when the lower court has not done so, the cause will be remanded.

**8. Appeal and Error § 50—**

When it appears that an order was entered under a misapprehension of the applicable law, the order will be set aside and the cause remanded.

APPEAL by defendant International Ladies Garment Workers Union from *Nettles, J.*, Regular August, 1955, Term, of BUNCOMBE.

Civil action to recover damages for alleged tortious conduct.

Summons (First Summons), directed to the Sheriff of Buncombe County, was issued 10 June, 1955. This summons was duly served 10 June, 1955, by delivery of a copy thereof and of the complaint to defendants Bright and Bonano. Another summons (Second Summons), directed to the Sheriff of Wake County, for service on defendant Union, was issued 20 June, 1955. This summons was served 21 June, 1955, on the Secretary of State, as process agent for defendant Union, by delivering to him a copy thereof and of the complaint.

Defendants International Ladies Garment Workers Union and Bonano, through counsel, before the expiration of the statutory time therefor, made joint application for an extension of time in which to file answer, demurrer or otherwise plead. Thereupon, the clerk signed an order extending the time for pleading to 29 July, 1955. No date appears on this application or on this order.

Defendant Bright, through *separate* counsel, made like but separate application; and the clerk made a like but separate order of extension as to her. Her application and the order entered thereon bear date of 1 July, 1955.

On 29 July, 1955, defendant Union, through the same counsel by whom it had applied for and obtained the order of extension, filed a pleading, now quoted verbatim:

"Now COMES the International Ladies Garment Workers Union, an unincorporated association, and appears specially and for the sole and limited purpose of entering this demurrer only.

"The defendant enters a special demurrer to the plaintiff's complaint in the above entitled action and, as grounds therefor, respectfully shows unto the Court:

"1. The defendant is a labor union, an unincorporated association, and has its official and legal residence in New York, New York.

"2. This Court has no jurisdiction of the person of the defendant.

"3. This Court has not acquired and does not now have jurisdiction of the person of the defendant in that it appears affirmatively from the complaint and process that the defendant is an unincorporated association, a labor organization, without legal capacity to be sued, and that there has not been adequate or legally sufficient service of process upon defendant in this action.

"4. The purported service of process upon the defendant in this proceeding violates the Fourteenth Amendment to the Constitution of the United States.

"5. Nick Bonanno, upon whom purported service process was attempted, was not at the time of such attempted service, and is not now, an agent appointed by defendant upon whom process may be served as to the defendant.

"6. Hon. Thad Eure, Secretary of State of North Carolina, upon whom purported service of process was attempted, was not at the time of such attempted service, and is not now, an agent of the defendant upon whom valid service of process as to the defendant can or could be made in the manner attempted.

"7. The use of summons as attempted, in the purported service of the defendant through service of process upon the Secretary of State of North Carolina is not authorized by law, and is not legally sufficient to give this Court jurisdiction of the person of the defendant.

"WHEREFORE, for the reasons stated above, the defendant prays that this special demurrer be sustained and that this proceeding be dismissed as to the International Ladies Garment Workers Union at plaintiff's cost."

Upon hearing thereon, 20 August, 1955, the court overruled the "special demurrer" and allowed defendant Union 30 days from that date in which to file answer or other pleadings. Defendant Union excepted to this order and appealed therefrom; and the only assignments of error are directed to the making and signing of such order.

*Williams & Williams and William C. Morris, Jr., for plaintiff, appellee.*

*Cahoon & Alston for defendant, appellant.*

BOBBITT, J. A voluntary appearance whereby a defendant obtains an extension of time in which to plead, is a general appearance. *Wilson v. Thaggard,* and *Stone v. Thaggard,* 225 N.C. 348, 34 S.E. 2d 140, and cases cited. "A general appearance waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof." *Winborne, J.,* in *In re Blalock,* 233 N.C. 493, 504, 64 S.E. 2d 848. Defendant Union, by its general appearance, has waived any irregularity in or lack of service of process.

True, the Act of 1951 (ch. 245, Session Laws of 1951), now codified as G.S. 1-134.1, provides that other motions or pleadings presented *simultaneously* with the objection that the court has no jurisdiction over the person or property of the defendant shall not operate as a waiver of such objection; but the proviso in this statute explicitly declares "that the making of *any motion* or the filing of answer *prior* to the presentation of such objection *shall* waive it." (Italics added.) Defendant Union interposed no objection to the jurisdiction of the court until *after* it had applied for and had obtained an extension of time in which to plead.

It is apparent that the order of the court below was predicated solely on the ground that the general appearance by defendant Union dispensed with the necessity for service in compliance with the *method* prescribed by the Act of 1943 (ch. 478, Session Laws of 1943), now codified as G.S. 1-97(6). In so ruling, the court was correct. However, this alone was not determinative. The "special demurrer" of defendant Union, as indicated by appellee's brief, was treated solely as a demurrer to the court's jurisdiction "over its person." This pleading, in addition, challenged the jurisdiction of the court on the ground that defendant Union was not subject to suit as a separate entity under G.S. 1-97(6). No evidence was considered or offered, and no findings of fact were made, bearing on this question.

Appellant is an unincorporated labor union. The pleadings so declare. At common law, an unincorporated association, having no existence separate and distinct from its members, cannot sue or be sued as a legal entity. This rule of the common law has been applied to unincorporated labor unions. *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57; *Citizens Co. v. Typographical Union,* 187 N.C. 42, 121 S.E. 31; *Hallman v. Union,* 219 N.C. 798, 15 S.E. 2d 361.

Except as modified by statute, the common law rule prevails. *Ionic Lodge v. Masons,* 232 N.C. 648, 62 S.E. 2d 73, where petition to rehear

(232 N.C. 252, 59 S.E. 2d 829) was allowed; *Stafford v. Wood,* 234 N.C. 622, 68 S.E. 2d 268.

The question now posed is whether the status of defendant Union is such that it was subject to suit under the provisions of G.S. 1-97(6). The method of service prescribed by this statute is applicable only to an unincorporated association that is subject to suit under the terms thereof. As interpreted in *Stafford v. Wood, supra,* this statute does not modify the common law rule so as to authorize a suit against an unincorporated labor union *unless* it is doing business in North Carolina in the sense of performing in this State the acts for which it is formed.

The Act of 1955 (ch. 545, Session Laws of 1955), "in full force and effect from and after July 1, 1955," explicitly provides that unincorporated associations *"may hereafter sue or be sued* under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it." (Italics added.) It has no application to actions such as this, commenced prior to its effective date.

It was necessary to decision that the court consider evidence and find the facts as to whether defendant Union was doing business in North Carolina by performing acts in this State for which it was formed. Whether the facts alleged in the verified complaint, as to the presence and activities of defendant Union in North Carolina, if found to be true, would constitute doing business in this State within the meaning of G.S. 1-97(6), is a question not now before us.

It appears that the order was entered under a misapprehension of the law as to this feature of the case. *Merrell v. Jenkins,* 242 N.C. 636, 89 S.E. 2d 242; *Morris v. Wilkins,* 241 N.C. 507, 85 S.E. 2d 892. Hence, the order will be set aside and the cause remanded for further hearing in accordance with this opinion. It is so ordered. Upon further hearing, the pleading of defendant Union may be treated as a motion to dismiss for lack of jurisdiction, on the ground that defendant Union was not subject to suit as a separate entity under G.S. 1-97(6).

Error and remanded.

BETTY W. GANT, WIDOW, LAWRENCE S. GANT, WILLIAM R. GANT, AND DENNIS P. GANT, MINOR SONS, WILLIAM P. GANT, DECEASED, v. G. E. CROUCH AND ST. PAUL MERCURY INDEMNITY COMPANY.

(Filed 29 February, 1956.)

**1. Master and Servant § 52—**

The Industrial Commission is a continuing body which acts by a majority of its qualified members. Therefore, a decision reached by a 2-1 vote of its then members is a decision of the majority notwithstanding that a prior member of the Commission had voted *contra* on the question at a previous hearing. G.S. 97-77.

**2. Master and Servant § 40c—**

Evidence that, although the employee had been on a private mission of his own prior to the injury in suit, he had returned to his employment and was about his employer's business at the time of the accident, supports the conclusion of the Industrial Commission that the accident arose in the course of the employment.

**3. Master and Servant § 50—**

Where the recovery of compensation by the dependents of a deceased employee is resisted on the ground that the death of the employee was occasioned by his intoxication, the burden of proof on such defense is on defendants. G.S. 97-12.

**4. Master and Servant § 40d—**

Where there is conflicting evidence as to whether the accident causing the death of an employee was due to his intoxication or due to other traffic forcing the vehicle the employee was driving off the road onto the shoulders, which gave way, causing the vehicle to turn over, and resulting in the death of the employee, the finding of the Commission that the accident was not caused by the employee's intoxication, being supported by evidence, is binding on the courts.

**5. Master and Servant § 53b (4)—**

Where the notice of appeal from the Industrial Commission and the exceptions which defendants filed in the Superior Court recite that the insurance carrier excepted to the award and appealed to the Superior Court, the recital supports the finding of the Superior Court that the appeal was brought by the insurer, and supports the court's order that reasonable fees to the attorney for claimants should be allowed as a part of the costs. G.S. 97-88.

APPEAL by defendants from *Nettles, J.*, August 1955 Term, BUNCOMBE Superior Court.

This action originated before the North Carolina Industrial Commission upon a claim filed by the plaintiffs, widow and minor sons of William P. Gant, employee, against the defendants, G. E. Crouch, employer, and St. Paul Mercury Indemnity Company, insurance car-

rier, on account of the death of William P. Gant as a result of an injury by accident arising out of and in the course of his employment.

The defendants contested the plaintiffs' claim mainly upon two grounds: (1) That the injury resulting in the death of William P. Gant did not arise out of and in the course of his employment; and (2) that Gant's death was occasioned and brought about by his intoxication. The parties stipulated as follows:

"It is STIPULATED AND AGREED that this cause was first heard upon due notice before Robert L. Scott, Commissioner, North Carolina Industrial Commission, at Sylva, N. C. on July 31, 1951; that upon due notice a further hearing was held before J. Frank Huskins, Chairman, North Carolina Industrial Commission, on December 3, 1952, at Asheville, N. C.; that pursuant to said hearing an opinion was filed by Commissioner Scott on January 22, 1953, directing that an Award based thereon be issued denying the plaintiffs' claim for compensation; that on January 27, 1953 said Award was issued from which the plaintiffs in apt time appealed to the Full Commission for review of said Award; that after due notice a hearing was held by the Full Commission at Raleigh, N. C. on July 30, 1954; that after due notice and over defendants' objections, a further hearing was held by the Full Commission at Raleigh, N. C. on December 10, 1954; that on January 10, 1955 an opinion was filed by Frank H. Gibbs, Commissioner, for the Full Commission wherein it was ordered that the Opinion of Commissioner Scott dated January 22, 1953, and the Award based thereon be stricken and set aside, and directing that a new Award based upon the Opinion of the Full Commission filed on January 10, 1955 be issued in favor of plaintiffs; that on January 11, 1955 said Award was issued; that in apt time, upon due notice, the defendants appealed from the Award and Opinion of the Full Commission and in apt time docketed said appeal including Exceptions and Assignments of Error in the Superior Court of Buncombe County; that the cause came on to be heard upon the appeal of the defendants at the Regular August 1955 Term of the Superior Court of Buncombe County before Honorable Zeb V. Nettles, Judge Presiding, and from Judgment rendered overruling defendants' Exceptions and Assignments of Error and affirming the Findings of Fact, Conclusions of Law, Award of the Full Commission and from the further findings of the court, the defendants in open court gave notice of appeal to the Supreme Court of North Carolina and upon specific Exceptions and Assignments of Error.

"It is FURTHER STIPULATED AND AGREED that the notices of hearings before Commissioner Scott, Chairman Huskins and the Full

Commission and notice of appeal from the Hearing Commissioner to the Full Commission and from the Full Commission to the Superior Court of Buncombe County were duly and properly given and that said notices need not be printed as part of the record in this cause.

"It is FURTHER STIPULATED AND AGREED that the Regular August 1955 Term of the Superior Court of Buncombe County was duly organized and constituted and that the trial before Honorable Zeb V. Nettles was duly and properly held on August 12, 1955.

"1. That the employer-employee relationship existed between the claimant and the defendant employer.

"2. That all parties are subject to and bound by the provisions of the Workmen's Compensation Act, the defendant employer regularly employing more than four persons.

"3. That the St. Paul Mercury Indemnity Company is the insurance carrier for the defendant employer.

"4. That the incident giving rise hereto occurred on 23 August 1950.

"5. That the average weekly wage of the deceased employee at that time was $52.80."

The defendants appealed to the Superior Court from the findings of fact, conclusions of law and award made in favor of the plaintiffs by the North Carolina Industrial Commission.

*Uzzell & Dumont for defendants, appellants.*
*J. Y. Jordan, Jr., for plaintiffs, appellees.*

HIGGINS, J. The defendants contend the judgment of the Superior Court in this case should be reversed for that (1) the death of William P. Gant, the employee, was not the result of injury arising out of and in the course of his employment; (2) the death of the deceased employee was occasioned by his intoxication.

Commissioner Scott, who held the initial hearings, found as a fact the employee's death was occasioned by his intoxication and made an award denying compensation. After Commissioner Scott resigned and was succeeded by Commissioner Gibbs, the plaintiff within seven days appealed to and asked for a review by the full Commission. After further hearings the full Commission reviewed Commissioner Scott's finding and by a 2-1 vote found that the employee's death was not occasioned by his intoxication and made an award allowing compensation. Chairman Huskins dissented. The defendants contend that Commissioner Scott and Chairman Huskins, who participated in the

hearings, were of the opinion from the evidence that the employee's death was occasioned by his intoxication and that consequently there was no majority finding on that pivotal issue. The objection is without merit. The North Carolina Industrial Commission, created by statute, now G.S. 97-77, is a continuing body. As a commission it acts by a majority of its qualified members at the time decision is made. A vote of two of the then members, therefore, constituted a majority of the Commission empowered to act for the Commission.

The evidence before the Commission indicated that shortly before the accident the employee was not about his employer's business but was on a private mission of his own. However, there was evidence that he had returned to his duties and was in the act of discharging them at the time of his death. The evidence is amply sufficient to support finding No. 13 of the Commission "that Gant's death was the result of an injury by accident arising out of and in the course of his employment."

In order to defeat the claim for compensation, however, the defendants sought to prove that death of the employee was occasioned by his intoxication. The burden of proof was on the defendants (G.S. 97-12). There was evidence before the Commission that the pickup truck Gant was driving was forced off a very narrow mountain road by other vehicular traffic; that the shoulder of the road gave way, causing the vehicle to turn over and roll approximately 90 feet down the mountainside, killing Gant instantly. There was evidence from defendants' witness that Gant and his two companions had consumed about one-half pint of whiskey during a period of about four hours. There was evidence from one of defendants' witnesses that she and Oliver Paine had been with Gant from about noon, at which time they took one drink each, until the accident about 4:30; that Gant took another drink before they got to Soco Gap (time not given), and at Soco Gap he drank one bottle of beer. The witness further testified that Gant ate his lunch about 3:30 or 4:00 o'clock; that he had nothing to drink after that time. There was evidence the witness had made contradictory statements about the amount of liquor consumed. However, in the opinion of the Commission the defendants did not carry the burden of showing death was occasioned by the intoxication of the employee. As was said by this Court in the case of *Brooks v. Rim & Wheel Co.*, 213 N.C. 518, 196 S.E. 835:

"There was competent evidence to support the contention of both plaintiff and defendant upon this question, but the Commission having found as a fact that the accident in which the plaintiff was injured was not occasioned by his intoxication, the Judge of the Superior Court was bound by such finding, and we are likewise bound. *Morgan v.*

*Cloth Mills,* 207 N.C. 317, 177 S.E. 165; *West v. Fertilizer Co.,* 201 N.C. 556, 160 S.E. 765; *Southern v. Cotton Mills Co.,* 200 N.C. 165, 156 S.E. 861."

The defendants objected to the finding made by the Superior Court and to the court's order based thereon as follows:

"It having been found by the court that the appeal in this case was brought by the insurer, it is further ordered, adjudged and decreed that the costs in this action to be paid by the defendants herein shall include a reasonable attorney's fees to John Y. Jordan, Jr., attorney for the plaintiffs, the amount of said fee to be determined by the North Carolina Industrial Commission."

The defendants state as the ground of their objection: "No evidence in connection with this point was adduced in the hearing in the Superior Court and the finding of the court would thus appear to be improper." The notice of appeal to the Superior Court and the exceptions which the defendants filed in the Superior Court of Buncombe County carry the following recital: "G. E. Crouch, employer, and St. Paul Mercury Indemnity Company, carrier, except to the award and opinion of the North Carolina Industrial Commission dated January 11, 1955, and hereby give notice of appeal to the Superior Court of Buncombe County, . . ." The Superior Court, therefore, had before it the defendants' statement showing the defendants appealed. The statement supports the finding.

The finding of fact and order for attorney's fees are authorized by G.S. 97-88. *Brooks v. Rim & Wheel Co., supra; Williams v. Thompson,* 203 N.C. 717, 166 S.E. 906.

The judgment of the Superior Court of Buncombe County is without error of law and the same is

Affirmed.

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H. B. SAUNDERS v. M. G. WOODHOUSE AND O. L. WOODHOUSE, INTERVENOR.

(Filed 29 February, 1956.)

**1. Laborers' and Materialmen's Liens § 8—**

A laborer's or materialman's lien in proper form, which is properly filed and indexed as required by statute, relates back to materials furnished and labor done within six months prior to the filing date, and when perfected by institution of action thereon within six months from the date of filing, has priority over a deed of trust executed prior to the filing of the lien but within the six months period.

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

The filing of a lien for labor or materials imports more than mere delivery of the written claim to the clerk's office, and requires the transcribing of the notice of lien in the lien docket in the clerk's office and the indexing of same in the name of the claimant, G.S. 44-38, G.S. 2-42, but, as distinguished from liens required by statute to be registered in the office of the register of deeds, G.S. 161-22, does not require cross-indexing.

**3. Same—Laborers' and materialmen's liens and liens for old age assistance are required to be filed in the lien docket book in the clerk's office.**

The attachment of original notice and claim of lien, in due and proper form, to a page in the "lien docket" book in the clerk's office with the indexing of the same in the name of claimant, showing the name of the lienee, is a filing of the lien as required by statute, notwithstanding that the book was used for filing liens for old age assistance, G.S. 108-30.1, and notwithstanding that the clerk filled in blanks left exposed on the page relating to old age assistance, since both liens are required to be filed in the one lien docket book, G.S. 44-38, G.S. 2-42, and since the recitals relating to old age assistance, even though inconsistent, could not mislead. This result is not affected by the fact that another lien docket book was kept in the clerk's office, but had not been used for over thirty years, or the fact that all liens had theretofore been filed in the judgment docket.

APPEAL by plaintiff from *Morris, J.*, October Term 1955, CURRITUCK Superior Court.

Civil action instituted 29 December, 1954, by the plaintiff against M. G. Woodhouse for the recovery of $1,597.87, balance due for materials furnished and labor performed in the construction of a building on a certain described lot in Currituck County. The amended complaint alleges that notice of claim of lien was duly filed in the clerk's office within six months from the time the materials were furnished and the work was done; that suit was instituted within six months from the date of filing the lien. The defendant, M. G. Woodhouse, by answer admitted that materials were furnished and labor was done, but claimed the amount demanded was excessive.

By consent of both parties, O. L. Woodhouse was permitted to intervene. By answer, he alleged plaintiff's notice of lien was not filed and indexed as required by law and did not take precedence over a deed of trust executed for his benefit on 1 September, 1954, by the defendant, M. G. Woodhouse.

At the time of trial, attorneys for plaintiff and intervenor signed the following:

> "It is stipulated and agreed that at a pretrial conference the presiding judge inspected the notice of claim of lien as it appears in the records of the Clerk of the Superior Court of Currituck County. It was then agreed that the plaintiff would not introduce

said notice of claim of lien in his evidence but that on the coming in of the verdict the judge would find the facts as to the filing, or purported filing of said lien, and that he would then make his ruling as to the effect of said filing of said claim of lien herein involved."

On a proper issue the jury found the defendant, M. G. Woodhouse, was indebted to the plaintiff in the sum of $1,597.87. The court entered judgment for the plaintiff against the defendant M. G. Woodhouse accordingly. The court, as a part of the same judgment, set out its findings of fact with respect to the filing of the claim of lien and concluded as a matter of law that it was not filed in accordance with statutory requirements, did not give due and proper notice, and did not constitute a lien upon the property of M. G. Woodhouse.

To the findings of fact and to so much of the judgment as held the claim of lien was not properly filed and did not constitute a lien upon the property described in the lien, the plaintiff excepted and appealed.

*J. W. Jennette for plaintiff, appellant.*

*Frank B. Aycock, Jr., for defendant, O. L. Woodhouse, appellee.*

HIGGINS, J. The plaintiff's Assignment of Error No. 3 calls in question that part of the judgment following:

"It is further ORDERED, DECREED AND ADJUDGED that said judgment does not constitute a prior lien upon the property of M. G. Woodhouse, for that the material furnishers and laborers lien purported to be filed in the office of the Clerk Superior Court of Currituck County was not filed in accordance with the statute in such case made and provided . . .

"Upon the foregoing findings of fact the Court being of the opinion that the Notice of Claim of Lien in this case was not properly filed in the office of the Clerk Superior Court, so as to give due and proper notice, in compliance with the statute;

"It is ORDERED that said Claim of Lien is of no legal effect and that the Judgment hereby entered in this cause shall constitute a lien upon the property of the defendant to the same extent as if no Notice of Claim of Lien had been filed."

The complaint alleges and the answer admits the plaintiff during May, June and July, 1954, furnished material and labor in the erection of a building upon defendant's lot. The court found as a fact that on 1 November, 1954, the plaintiff

"caused to be filed with the Clerk . . . Notice of Claim of Lien . . . in regular form . . . duly and properly sworn to, . . . and there was attached to the same an itemized account showing material furnished and labor done . . . which said Notice of Claim of Lien was by the Clerk of the Superior Court in its original form attached to page 100 of Lien Docket kept in the office of the Clerk . . . for filing of Notice and Claim of Lien pursuant to G.S. 108-30.1, same being the section . . . providing for liens with reference to persons receiving old age assistance; that said Notice of Claim of Lien was indexed in said book under the name 'M. G. Woodhouse' as recipient and 'H. B. Saunders' as claimant, though the same was not cross-indexed; that the book . . . is labeled 'Lien Docket 1, Currituck County, Ralph E. Saunders, C.S.C.' . . . which is the only notation on the cover of the book; that immediately beneath the Notice of Claim of Lien is the following: 'H. B. Saunders *v.* M. G. Woodhouse. Notice and Claim of Lien.' Immediately beneath the name of M. G. Woodhouse is printed and in parenthesis 'Name of Recipient. Notice and Claim of Lien is hereby made and filed pursuant to the provisions of G. S. Sect. 108-30.1 by H. B. Saunders against the property of the above-named recipient who was on the 1st day of November, 1954, approved for and is currently receiving old age assistance.' "

The question of actual notice to the intervenor does not arise on this record. Admittedly the deed of trust under which he claims a lien was executed on 1 September, 1954, and registered. Plaintiff's claim of lien was filed 1 November, 1954. However, if it is properly filed and indexed the lien related back and attached to the building and lot for material furnished and labor done within the six months period prior to the filing date. The additional requirement that suit must be brought within six months from the date of filing the lien has been met by the institution of this suit on 29 December, 1954. *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390; *Atlas Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91; *King v. Elliott*, 197 N.C. 93, 147 S.E. 701; *Porter v. Case*, 187 N.C. 629, 122 S.E. 483.

Was the plaintiff's lien filed as required by G.S. 44-38? The section designates "the place of filing as the office of the Clerk Superior Court in any county where the labor has been performed or the material furnished if more than $200 or the title to real estate or any interest therein are involved." Filing means something more than the mere delivery of the written claim to the clerk's office. *Ely v. Norman*, 175 N.C. 294, 95 S.E. 543. This Court said in the case of *Cook v. Cobb*, 101 N.C. 68, 7 S.E. 700:

"The obvious purpose of this requirement is to give public notice, in the office designated of the plaintiff's claim—his debt—the amount of it, the materials supplied or the labor done, when done, on what property, . . . specified with such detail and certainty as will give reasonable notice to all persons of the character of the 'claim' and the property to which the lien, on account of the same attaches, and of the lien thereby established."

The section of the statute, G.S. 44-38, which provides for the lien does not set out what shall be done by the clerk to complete "filing." However, G.S. 2-42 does so provide. The section requires the clerk to keep 35 books in his office. No. 23 on the list is "Lien Docket, which shall contain a record of all notices of liens filed in his office, *properly indexed,* showing the names of the lienor and lienee." Filing, therefore, contemplates (1) the transcribing of the notice and claim of lien in the lien docket in the clerk's office, and (2) the indexing in the name of the claimant and in the name of the person against whose property the lien is claimed. It will be noted that the section does not require cross-indexing.

In this case the court found that plaintiff's claim of lien was delivered to the clerk complete and in order; that in its original form it was attached to page 100, Lien Docket, kept in the office of the Clerk Superior Court, Currituck County, for the filing of liens pursuant to G.S. 108-30.1 for old age assistance. The court also found that the book was labeled "Lien Docket 1, Currituck County, Ralph E. Saunders, C. S. C." Without question the book is intended to be and is the lien docket contemplated by G.S. 2-42. It is so designated on the book without reference to old age assistance. That no old age assistance lien docket is contemplated or provided for is made manifest by (1) omission from the list of books the clerk is required to keep in his office and (2) by the requirement of G.S. 108-30.1 that the claims for old age assistance *shall be filed in the regular lien docket.* (Emphasis added.) Not only is there no provision for an old age assistance docket, but the statute positively requires that such claims be filed in the regular lien docket. It is patent, therefore, that liens for old age assistance and for building materials and labor must be filed in the same book—the lien docket.

We may dismiss as of no consequence the finding there was another lien docket in the clerk's office. It had not been used for any purpose since 1920, except to occupy space in the rack of books, collect dust, and to await the time when some historian might find in it something of interest. Equally without significance is the finding that all liens between 1920 and 27 May, 1954 (the date when the new lien docket came into use) were filed in the judgment docket.

The plaintiff's lien was the first of its character filed in the current lien docket. The clerk had certain printed matter on some, or perhaps all pages to facilitate the filing of old age assistance liens. He attached plaintiff's lien to page 100 as having been filed on that page. In addition to attaching the lien, he filled in certain blanks left exposed on the page relating to old age assistance. In so doing the clerk neither added to nor detracted from the plaintiff's claim of lien which was complete in itself. It itemized the materials and the labor and showed the balance of $1,597.87 yet due. It described the lot on which the building was erected and on which the lien was claimed. This is implied by the court's finding that the lien was regular in form. This information could not be confused with any claim for old age assistance. The index disclosed that on page 100 H. B. Saunders had a claim of lien against M. G. Woodhouse. It is difficult to see how examination of the page could mislead. Suppose the recitals are inconsistent. The examiner would be put upon further inquiry. As was said in the case of *Miller v. White,* 49 N.C. 116: "An inconsistent recital in a bail bond as to who was the party plaintiff may be regarded as surplusage when there is enough besides on the face of the instrument to show who was really the plaintiff."

Attention has already been directed to the fact that G.S. 2-42 does not require the cross-indexing of liens filed *in the clerk's office.* That section is not to be confused with the requirements for registering liens, deeds, etc., *in the office of the register of deeds* as provided by G.S. 161-22, which does require cross-indexing. With this distinction it is readily understood that what is said here is in nowise in conflict with *Johnson Cotton Co. v. Hobgood, ante,* 227, 90 S.E. 2d 541; *Dorman v. Goodman,* 213 N.C. 406, 196 S.E. 352; *West v. Jackson,* 198 N.C. 693, 153 S.E. 257; *Ely v. Norman,* 175 N.C. 294, 95 S.E. 543, and cases therein cited.

The plaintiff's lien was filed according to statutory requirements. Assignment of Error No. 3 must be sustained. The judgment will be modified in the Superior Court in accordance with this opinion. The plaintiff may move in the Superior Court for such addition to the judgment as he may be entitled to in order to enforce his lien, and to have the addition made *nunc pro tunc.*

Modified and affirmed.

MRS. C. G. GARRENTON AND FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY v. WILLIE C. MARYLAND.

(Filed 29 February, 1956.)

**1. Negligence § 11—**

Contributory negligence on the part of plaintiff presupposes negligence on the part of defendant, and bars recovery if it concurs with defendant's negligence in proximately causing the injury.

**2. Negligence § 20—**

An instruction on the issue of contributory negligence to the effect that if plaintiff were guilty of contributory negligence which was the proximate cause of the accident, the issue should be answered in the affirmative, must be *held* for error as excluding the question of concurring proximate cause.

PARKER, J., dissents.

JOHNSON, J., dissenting.

APPEAL by defendant from *Bundy, J.*, September Term, 1955, PITT. New trial.

Civil action to recover damages allegedly caused by the negligence of the defendant in which the defendant pleads contributory negligence on the part of plaintiff's husband, who was operating her automobile at the time.

On 6 November 1953, at about 7:30 p.m., it was very dark. Rain and snow were falling, and the pavement of U. S. Highway 64 between Rocky Mount and Nashville was wet with snow and rain. A motorist who was traveling in a westerly direction on U. S. Highway 64 for some cause ran his vehicle into the road ditch. The left rear corner of his vehicle extended eight to ten inches on the pavement which was twenty feet wide. A patrolman was present to lend him assistance, and a wrecker had been called and was present. The automobile in the ditch and the automobile of the patrolman were on the north side of the road, headed toward Nashville, and the wrecker was on the opposite side of the road, headed toward Rocky Mount. The defendant, traveling in a western direction toward Nashville and at a rate of speed variously estimated at from 35 to 65 m.p.h., approached the scene and cut his vehicle to the left so that he straddled the center line with about half of his automobile on its left-hand side. When he had passed the parked vehicles some 50 to 100 feet, he met the automobile being operated by plaintiff's husband who, to avoid a collision with defendant's automobile, cut his vehicle sharply to the right and on the shoulder of the road. The two vehicles did not collide. After they passed, Dr. Garrenton cut his vehicle sharply to the left to get back on the pavement, and it went into a skid, struck the left rear portion of the wrecker and side-

swiped the same. He was traveling at from 40 to 55 m.p.h. The *feme* plaintiff was thrown out of the vehicle. The patrolman gave chase to defendant and caught up with and stopped him about two miles from the scene of the accident after defendant had turned off on a dirt road. Defendant then stated he was traveling 50 or 55 m.p.h.

In his original answer the defendant denies that he was guilty of any negligence and alleges that the collision between the Garrenton automobile and the wrecker "resulted and arose solely and exclusively from" the negligence of Dr. Garrenton. In an amended answer he pleads contributory negligence on the part of the operator of the Garrenton automobile.

Issues of negligence, contributory negligence, and damages were submitted to the jury, and the jury answered the issue of negligence in the affirmative, the issue of contributory negligence in the negative, and assessed damages. From a judgment on the verdict, defendant excepted and appealed.

*Richard Powell and Taylor & Mitchell for defendant appellant.*
*No counsel contra.*

BARNHILL, C. J. The court in its charge on the second issue instructed the jury as follows:

"The court charges you upon this issue that if the defendant has satisfied you from the evidence and by the greater weight of the evidence that each of the following two essential elements existed with respect to plaintiff's alleged damages, namely: First, that at the time and place in question plaintiff was guilty of negligence in the operation of her automobile, as has been explained to you; and, secondly, that such negligence on the part of the plaintiff was the proximate cause of the collision and of plaintiff's alleged damage, then you will answer the second issue yes.

"On the contrary, if defendant has failed to satisfy you by the greater weight of the evidence then you will answer the second issue no."

To this instruction the defendant duly excepts. The exception must be sustained.

Contributory negligence on the part of the plaintiff presupposes negligence on the part of the defendant, and the jury does not reach the second issue until and unless it has answered the first issue of negligence in the affirmative.

"The plaintiff's negligence need not be the sole proximate cause of the injury to bar recovery, for 'contributory negligence,' *ex vi termini*, signifies contribution rather than independent or sole proximate cause. . . . It is enough if it contribute to the injury as a proximate cause, or

one of them. . . . The plaintiff may not recover in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the result." *Noah v. Ry. Co.*, 229 N.C. 176, 47 S.E. 2d 844, and cases cited; *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887; *Godwin v. Cotton Co.*, 238 N.C. 627, 78 S.E. 2d 772; *McKinnon v. Motor Lines*, 228 N.C. 132, 44 S.E. 2d 735. There are numerous other cases to like effect which we need not here cite.

The indicated error in the charge on contributory negligence entitles the defendant to a new trial. The questions raised by the other exceptive assignments of error may not again arise on the retrial. Hence we refrain from any discussion thereof.

New trial.

PARKER, J., dissents.

JOHNSON, J., dissenting: The error for which this case is being sent back for retrial is essentially the same as was committed in *Godwin v. Cotton Co.*, 238 N.C. 627. My feeling here, as in that case, is that the error is not of sufficient moment to require retrial. Therefore, for the reasons assigned in my dissent in the *Godwin case*, I am constrained to disagree with the result reached here.

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J. P. ANDREW, LUCY W. ANDREW, JANIE E. HART, W. E. HART, BESSIE FORRESTER, OMA A. TURNER AND J. B. TURNER v. CLATA A. HUGHES AND ROY J. HUGHES.

(Filed 29 February, 1956.)

**Wills § 33d—**

A devise of lands to testator's niece in fee simple, followed by statements that testator was so disposing of his lands because he wanted his sister and her children (of whom the devisee was one) to get the benefit and that he wanted the devisee to have full control of the lands to use as she might see fit for her mother, brother, sisters, herself, or any other relative, *is held* to create an estate in fee simple, the additional statements being precatory and without mandatory force.

APPEAL by plaintiffs from *Carr, J.*, Resident Judge of the Fifteenth Judicial District, at Chambers in Graham, 29 July, 1955. From CHATHAM.

Civil action to establish and enforce a trust in lands devised by the will of Charles F. Fox, deceased, heard below on demurrer to the complaint.

These are the material facts disclosed by the complaint:

1. Charles F. Fox, late of Chatham County, died on 5 March, 1934, leaving a last will and testament (executed 23 February, 1933) which has been duly proved and admitted to probate in the office of the Clerk of the Superior Court of Chatham County.

2. The testator had no children. He was survived by his widow, Flora Murchison Fox, and an only sister, Emma Fox Andrew, "his next of kin."

3. Emma Fox Andrew died 12 April, 1935, being survived by five children, parties to this proceeding, namely: the plaintiffs J. P. Andrew, Janie E. Hart, Bessie Forrester, and Oma A. Turner, and the defendant Clata A. Hughes.

4. The testator's widow, Flora Murchison Fox, died 17 February, 1941.

5. The testator's landed estate was disposed of under the provisions of Paragraph Two of the will, the material part of which is as follows:

> "I will and devise to my beloved wife, Flora Murchison Fox, all of my real estate that I may own at the time of my death to have and to hold during the term of her natural life, and at her death I will and devise that Clatie Andrew, my trusted niece, shall have all of my real estate, except a portion hereinafter described and devised to my nephews, M. M. Fox and Ernest W. Fox, and I do hereby give and devise to my said niece, Clatie Andrew, after the death of my wife, the remainder of all of my real estate not hereinafter devised, to her, her heirs, and assigns in fee simple forever. I do this because I want my sister to have the benefit of said land, if she is living after the death of my wife; and if not, then her children will get the benefit, and I want my niece, Clatie Andrew, to have full control of said land and use it as she may see fit for her mother, brother, sisters, herself, or any other relative, and that is why I am devising it to Clatie Andrew in fee simple after the death of myself and my wife."

6. By the terms of Paragraph Two of the will, Flora Murchison Fox, widow, was devised a life estate in the lands in controversy; that "at the death of said Flora Murchison Fox, said lands were devised to Clata Andrew, now Clata Hughes, the defendant, as trustee for the use and benefit of her mother, the said Emma Fox Andrew, and after the death of the said Emma Fox Andrew, as trustee for the use and benefit of the said Clata A. Hughes, J. P. Andrew, Janie E. Hart, Bessie Forrester, and Omo A. Turner."

7. That since the death of testator's widow on 17 February, 1941, "the defendant Clata A. Hughes has had possession and control of the

said lands and has received the rents and profits derived therefrom"; that she has recently refused to account to her brother and sisters, plaintiffs herein, for the rents and profits, and has refused them an equitable division thereof; that on the contrary, she has appropriated the rents and profits to her own use.

The plaintiffs pray judgment for the establishment of a trust in the lands in their favor in accordance with their allegations, and for an appropriate accounting in respect to the rents and profits.

The defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, for that by the terms of the will of Charles F. Fox the lands in controversy were devised in fee simple absolute to the defendant Clata A. Hughes, and that the "plaintiffs have no right, title, interest or estate therein."

The demurrer was sustained, and from judgment so decreeing, the plaintiffs appeal.

*Haworth & Haworth for plaintiffs, appellants.*

*Barber & Thompson for defendants, appellees.*

JOHNSON, J. The single question presented by this appeal is whether the devise to Clatie Andrew is a devise in fee simple, or is a devise in trust for the benefit of the plaintiffs.

The language of the testator indicates a clear intent to create an estate in fee simple in Clatie Andrew (Hughes). His first dispositive statement as to her is: "I will and devise that Clatie Andrew . . . shall have all of my real estate, . . . and I do hereby give and devise to my said niece Clatie Andrew . . . to her, her heirs, and assigns in fee simple forever." By the language that follows, which the plaintiffs contend impressed a trust on the land in their favor, the testator was stating the motive for his devise in fee to Clatie Andrew. This is manifest from his further statement, "I do this because . . ., and that is why I am devising it to Clatie Andrew in fee simple . . ."

Here, then, the testator has made an absolute gift to Clatie Andrew. The later words, expressive of motive and confidence and merely suggestive of desire, are precatory in nature and are without mandatory force. The discretion of the legatee is unbridled. She is left to act or not to act "as she may see fit." The ruling below, to the effect that Clatie Andrew took title in fee simple, will be upheld under application of the principles explained and applied in these decisions: *In re Estate of Bulis*, 240 N.C. 529, 82 S.E. 2d 750; *St. James v. Bagley*, 138 N.C. 384, 50 S.E. 841; *Carter v. Strickland*, 165 N.C. 69, 80 S.E. 961; *Springs v. Springs*, 182 N.C. 484, 109 S.E. 839; *Brown v. Lewis*, 197 N.C. 704, 150 S.E. 328. See also G.S. 31-38; *Brinn v. Brinn*, 213 N.C. 282, 195

S.E. 793; *Randall v. Randall,* 135 Ill. 398, 25 N.E. 780, 25 Am. St. Rep. 373; Story, Eq. Jur. (Fourteenth Ed.), Vol. 3, Sec. 1446; Bogert, Trusts and Trustees, Sec. 48; Perry, Trusts and Trustees, Sec. 119; 54 Am. Jur., Trusts, Sections 54, 56, and 58.

The decisions relied on by the plaintiffs, including *Deans v. Gay,* 132 N.C. 227, 43 S.E. 643, are factually distinguishable.

Affirmed.

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STATE v. JAMES HAROLD ROBERTS, HOUSTON DUFF AND JOHN MANLEY SHERRER.

(Filed 29 February, 1956.)

1. **Criminal Law § 50f—**

While wide latitude is allowed in arguments to the jury, counsel may not travel outside the record and inject into the argument matters not adduced by the evidence.

2. **Same—**

When counsel argues matters to the jury outside the record, it is the duty of the presiding judge to correct the transgression upon objection, and when the remarks are prejudicial and require intervention by the court, the failure of the court to correct the error entitles appellant to a new trial.

3. **Same—**

Where defendant introduces no evidence, argument of the solicitor to the effect that defendant had not put on any evidence and that none of his family were in court to show that he was not within the municipality in question at the time the offense was committed therein, is improper and prejudicial and should have been corrected by the court upon objection.

4. **Same—**

Remarks of the solicitor in his argument to the effect that he had not said a word about defendant not going on the witness stand is forbidden by statute and prejudicial. G.S. 8-54.

APPEAL by defendant Sherrer from *Pless, J.,* at November 1955 Term, of RUTHERFORD.

Criminal prosecution upon a bill of indictment charging in three separate counts, briefly stated, that James Harold Roberts, Houston Duff and John Manley Sherrer at and in Rutherford County (1) did unlawfully, willfully and feloniously break and enter a certain building of Matheny Motor Company, Inc., with intent to steal certain property therein; (2) did feloniously steal certain property of Matheny Motor Company, Inc.; and (3) did feloniously receive certain property of

Matheny Motor Company, Inc., "then and there well knowing" same had been feloniously stolen.

The record discloses that upon trial in Superior Court the defendants offered no evidence and that the jurors, naming them, "after having heard the evidence and argument of counsel, and the charge of the court, do say upon their oath that the said James Harold Roberts, Houston Duff and John Manley Sherrer are guilty of breaking and entering Matheny Motor Company, Inc., with intent to take, steal and carry away safe, checks and money as charged in the bill of indictment." Upon the verdict separate judgments as to the several defendants were pronounced. Defendants excepted to the judgments and appeal to the Supreme Court.

And the record also shows that the defendants Houston Duff and James "Harrell" Roberts, under date of 30 December, 1955, filed in Superior Court of Rutherford County a writing reading as follows:

"The above named defendants hereby desire to withdraw their appeal to the Supreme Court of North Carolina and respectfully request that the Honorable Vance Price, Clerk of the Superior Court of Rutherford County, issue a commitment putting their sentences into effect."

And the record further shows that defendant John Manley Sherrer alone perfected his appeal, and filed brief in the Supreme Court.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*Hamrick & Hamrick for defendant, appellant.*

WINBORNE, J. Among the assignments of error presented by appellant on this appeal, the case on appeal shows that Number Three is based upon exception of like number. It is well taken. It relates to incident which occurred during the course of the trial, narrated as follows:

"During the course of his argument to the jury the Solicitor argued that the defendants had not put up any evidence to show that they were not present in North Carolina at Forest City on the night that Matheny Motor Company was robbed and that their mothers and fathers and brothers and sisters were not here in court to show where they were on that night and that none of their families were here to show that they were not in Forest City on that night. Defendants Objected to this course of arguments as prejudicial and improper because no subpoenaes had been issued for anyone and there was no evidence that any of these men had families or fathers and mothers living.

"The court overruled the objection of the defendants and during the argument the Solicitor also stated in the presence of the jury that he

had not said a word about the defendants not going on the witness stand themselves. To the ruling of the court in overruling their objection to the argument the defendants, in apt time, excepted."

In this connection, wide latitude is given to the counsel in making arguments to the jury. *S. v. O'Neal,* 29 N.C. 251; *McLamb v. R. R.,* 122 N.C. 862, 29 S.E. 894; *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542.

However, counsel may not "travel outside of the record" and inject into the argument facts of his own knowledge or other facts not included in the evidence. McIntosh N. C. P. & P., p. 621. *Perry v. R. R.,* 128 N.C. 471, 39 S.E. 27; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Little, supra; S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525.

And when the counsel does so, it is the right and, upon objection, the duty of the presiding judge to correct the transgression. *S. v. Little, supra,* and cases there cited.

In the present case, the defendant having offered no evidence, the remarks of the Solicitor to which the defendant objects and excepts injected into the case evidence outside the case. Moreover, in speaking to the objection in argument before the Judge, the remark of the Solicitor to the effect "that he had not said a word about the defendants not going on the witness stand themselves," would seem to have added emphasis to the previous language to which the defendant objects.

Furthermore, the latter remark is calculated to infringe upon the rule that comment may not be made upon the failure of a defendant in a criminal prosecution to testify. This is forbidden by statute, G.S. 8-54. See *S. v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537, and numerous other cases.

For these reasons this Court is impelled to hold that, under the circumstances shown, the argument and remarks of the Solicitor were prejudicial to defendant, requiring intervention by the court. The record fails to show that the error was corrected. Hence there must be a new trial.

Finally, it is appropriate to say that while it appears upon the face of the record, by which this Court is bound on this appeal, that the jury, as hereinbefore recited, returned a verdict of guilty only as to the first count, that is, the count charging breaking and entering with intent to steal, judgment was pronounced on two counts, the one charging larceny, and the other charging breaking and entering with intent to steal. Nevertheless, since there must be a new trial as to appellant for reasons above stated, this matter, in so far as he is concerned, becomes immaterial.

Other assignments of error need not be considered.

New trial.

SALLY P. BOGUE, ADMINISTRATRIX OF THE ESTATE OF HARDY Z. BOGUE, v. MARGUERITE HALL ARNOLD, ALLEN L. ARNOLD AND ESSO STANDARD OIL COMPANY.

(Filed 29 February, 1956.)

**1. Appeal and Error § 2—**

No appeal lies from an order allowing a motion to strike allegations of the complaint. Rule of Practice in the Supreme Court No. 4 (a).

**2. Appeal and Error § 13a—**

An attempted appeal from an order entered on motion to strike allegations from a pleading will be treated as a petition for writ of *certiorari* when, and only when, the order appealed from was entered prior to 1 January, 1956. Even so, the petition will be denied when the record discloses no sufficient reason why the exceptions to the rulings on the motion should be heard before final adjudication of the cause.

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

APPEAL by plaintiff from *Bundy, J.*, at October Term, 1956, of CRAVEN.

*Harvey Hamilton, Jr., Luther Hamilton, and George B. Riddle, Jr., for plaintiff, appellant.*

*Reade, Fuller, Newsom & Graham for defendant Esso Standard Oil Company, appellee.*

JOHNSON, J. Here the plaintiff has attempted to appeal from an order allowing a motion to strike allegations of the complaint. An order of this kind is no longer appealable under our rules of practice. The change was made by Rule 4 (a), which was adopted 19 October, 1955. It provides in part:

> "From and after the first day of the Spring Term 1956, this Court will not entertain an appeal:
>
> . . .
>
> "(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 full text of the foregoing rule was published in the 28 October, 1955, issue, and in each of the five succeeding issues, of our Advance Sheets. It also appears in the last published volume of the Reports, 242 N.C., at page 766.

The plaintiff concedes that by virtue of the new rule, the order entered below is not appealable. However, she moves in this Court to treat her appeal as a petition for writ of *certiorari.* In support of the motion, it has been made to appear that the order allowing the motion to strike was entered in the Superior Court of Craven County on 5 October, 1955, two weeks before Rule 4 (a) was adopted and more than three weeks before it was first published in the Advance Sheets. The motion appears to be meritorious. It is allowed. In consequence, the appeal as docketed will be treated as a petition for writ of *certiorari.*

We deem it appropriate to say that this procedure will be followed in respect to appeals from similar nonappealable orders entered prior to 1 January, 1956. However, Rule 4 (a) will be strictly enforced in respect to orders entered after that date.

The record on appeal discloses these facts: that the plaintiff is here suing to recover damages for the alleged wrongful death of her intestate, Hardy Z. Bogue; that the defendant Esso Standard Oil Company, before answering or otherwise pleading, moved to strike five specifically designated portions of the complaint; that the motion was allowed *in toto;* that the plaintiff excepted to the ruling of the court in respect to each portion of the complaint ordered to be stricken, and excepted to the order allowing the motion.

Our examination of the record, treated as a petition for writ of *certiorari,* discloses no sufficient reason why the plaintiff's exceptions to the rulings on the motion to strike should be heard before final adjudication of the cause. Therefore the petition is denied.

Petition denied.

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

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JOHN REYNOLDS v. CLARENCE EARLEY AND WIFE, ELVETA EARLEY.

(Filed 29 February, 1956.)

**Specific Performance § 4—**

Provision in a decree for specific performance of a contract to convey realty that if defendants failed to execute the deed according to the judgment, the judgment itself should operate as a conveyance, should be predicated upon the payment of the purchase price into the office of the clerk of the Superior Court by the purchasers.

APPEAL by defendants from *Nettles, J.,* September Term 1955 of BUNCOMBE.

Civil action to compel specific performance of an option, assigned to plaintiff, to purchase real estate.

From a judgment entered upon a verdict in favor of plaintiff, the defendants appeal, assigning error.

*McLean, Gudger, Elmore & Martin, and Ward & Bennett for Plaintiff, Appellee.*

*Cecil C. Jackson and W. W. Candler for Defendants, Appellants.*

PER CURIAM. This action was before the Court at the Spring Term 1955 upon an appeal by the defendants, and a new trial was ordered, because of an error in the charge. *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904.

A study of the record fails to disclose any exception of sufficient merit to require discussion, or to necessitate a new trial, by reason of the denial of any substantial right. *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657.

However, there must be a modification of the judgment. The judgment in the second paragraph thereof orders and decrees that the defendants execute and deliver to plaintiff, upon the payment to the defendants of the purchase price in the amount of $5,000.00 in cash, a good and sufficient deed in fee simple with usual covenants of warranty to the property described in the complaint, which is the subject matter of litigation. The judgment further provides in the third paragraph thereof that such a deed be delivered by defendants to plaintiff on or before 15 November 1955, and that, in the event of the failure of the defendants to comply with this judgment, then this judgment shall have the legal effect of transferring to plaintiff the legal title to said property, in accordance with G.S. 1-227, and this judgment shall be regarded as a deed of conveyance, and thereupon the plaintiff shall hold the legal title to said property, as though the conveyance herein ordered were in fact executed, and shall bind the defendants, and entitle the plaintiff in the same manner, and to the extent, as the conveyance would, if the same were executed according to this judgment. The judgment further provides in the fourth paragraph thereof that, upon failure of the defendants to comply herewith, then this judgment shall be registered in the Register of Deeds' Office for Buncombe County, as prescribed by law, and a copy of this judgment shall be certified by the Clerk of the Superior Court, under his seal, and the Register of Deeds of said county shall thereupon record both the judgment and the certificate.

This judgment must be modified in the Superior Court by inserting in the judgment in the third paragraph thereof after the words, "and that, in the event of the failure of the defendants to comply with this

judgment, then" these words, *upon the payment by the plaintiff, within 15 days after the date of the modification of this judgment in the Superior Court, of the sum of $5,000.00 in cash money of the United States into the Office of the Clerk of the Superior Court for the benefit of the defendants;* and it must be further modified in the fourth paragraph thereof by inserting after the words, "upon failure of the defendants to comply herewith, then," these words, *provided that the plaintiff has paid into the Office of the Clerk of the Superior Court the said sum of $5,000.00 in cash for the benefit of the defendants within the time limit heretofore stated in this judgment.*

The Superior Court of Buncombe County is hereby ordered to modify the judgment here in accordance with this opinion, and with this modification of the judgment below we find in the trial

No error.

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W. L. WOOD v. LECY MASSINGILL AND THELMA DAVIS.

(Filed 29 February, 1956.)

**Trusts § 4c—**

Evidence in this case that plaintiff furnished the entire consideration for the deed executed to one defendant, who thereafter transferred without consideration a one-half interest to the other defendant, *held* sufficient to support the verdict that defendants held the property in trust for plaintiff.

APPEAL by defendants from *Pless, J.*, October Term, 1955, of TRANSYLVANIA.

This is an action instituted for the purpose of establishing a resulting or constructive trust.

The evidence tends to show that, on 26 July, 1954, the plaintiff furnished and paid the entire purchase price of $2,200.00 in cash to Sanford McCrary for six acres of land with a house on it in the Cedar Mountain area of Transylvania County. The title was taken in the name of the defendant Lecy Massingill. The plaintiff, a man 75 years of age, had been paying court to Lecy Massingill, who had represented to him that she was single; that she was to receive $15,000.00 in October 1954, and that they planned to get married as soon as she received the money. The plaintiff later learned that Lecy Massingill was married to her fourth husband at the time the plaintiff was courting her; that she had no intention of marrying him; that she was not expecting to get any money, and, without the knowledge of the plaintiff, within three weeks of the time the property was conveyed to her, she conveyed

a one-half undivided interest in the property to defendant Thelma Davis, her daughter by a previous marriage (now Thelma McCrary), who was at the time of the trial married to the original grantor, Sanford McCrary. It is admitted that the daughter paid no consideration for the conveyance of the one-half undivided interest in the property. That, when plaintiff made demand on Lecy Massingill to convey the property to him, she said to him in the presence of Bruce Gillespie, a carpenter, who was making repairs to the house in controversy, "she had the deed for the place and that was all she wanted" and for him "to get the hell out of there."

Other evidence was introduced tending to show that the defendant Lecy Massingill had agreed to pay the plaintiff for the property when she got her expected money or if they did not get married. The defendant Lecy Massingill denied having made any such promise and insisted the plaintiff gave her the property. Therefore, the case was tried below on this question: Did the defendants hold the property in trust for the plaintiff or was it conveyed to Lecy Massingill as an outright gift?

The jury found, upon appropriate issues, that the defendants held title to the property described in the complaint as trustees for the plaintiff and that the plaintiff is the owner of the land. From the judgment entered on the verdict, the defendants appeal, assigning error.

*Thomas R. Eller, Jr., for plaintiff.*

*Potts & Ramsey and Monroe M. Redden for defendants.*

PER CURIAM. The sole question presented for us to determine is whether or not the evidence adduced in the trial below is sufficient to support the verdict. We have concluded that it is sufficient to do so. *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289. Moreover, all the evidence points unerringly to the fact that the verdict is in accord with equity and justice. The result will be upheld.

No error.

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LYDIA S. McPHERSON v. MARY FRANCES MORRISETTE AND LUCIAN MORRISETTE, DEFENDANTS, AND F. T. HORNER, ADMINISTRATOR OF THE ESTATE OF O. E. McPHERSON, INTERVENOR.

(Filed 29 February, 1956.)

**Appeal and Error § 2—**

Appeal from the order in this case allowing a party to intervene dismissed as premature.

BYRD *v.* HAMPTON.

APPEAL by defendants from *Morris, J.*, at December 1955 Term, of PASQUOTANK.

Civil action by plaintiff, widow of O. E. McPherson, deceased, for judgment for money in certain sum and for the possession of certain securities in possession of defendants and for an accounting for rents received.

*Feme* defendant, daughter of O. E. McPherson, deceased, and her husband and co-defendant, filed answer, setting forth in substance a denial of the allegations of the complaint, and pray that they go hence without day, etc.

Thereafter F. T. Horner, Administrator of the estate of O. E. McPherson, deceased, petitioning the court, prayed permission to intervene in the action for the protection of the estate,—setting forth, upon information and belief, that a large portion of the property involved in this action is rightfully the property of the estate of O. E. McPherson, to which petitioner as administrator is entitled.

The court allowed the petition and granted petitioner time in which to file "such pleading, or pleadings," as he may be advised.

Defendants excepted to the order and appeal to Supreme Court and assign error.

*John H. Hall for Intervenor Appellee.*
*LeRoy & Goodrich for Defendants, Appellants.*

PER CURIAM. This appeal, as in the case of *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231, falls under the ban of "the general rule that ordinarily an order allowing a motion for the joinder of an additional party is not appealable." In consequence, it must be dismissed.

Appeal dismissed.

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WATSON E. BYRD AND PAULINE G. BYRD, TRADING AS TOWN 'N COUNTRY CLEANERS, v. JAMES DEWEY HAMPTON AND FEDERAL INSURANCE COMPANY.

(Filed 29 February, 1956.)

**Appeal and Error § 40b—**

Where the trial court sets aside the verdict in the exercise of its discretion, there is no final judgment from which an appeal will lie, and all interlocutory rulings, including those relating to the sufficiency of the evidence, must be set aside without prejudice and a *venire de novo* ordered.

APPEAL by defendant Hampton from *Nettles, J.*, September Term, 1955, BUNCOMBE.

Civil action to recover damages resulting from the collision of plaintiff's jeep station wagon and defendant's automobile in which the defendant pleaded a cross action or counterclaim.

At the conclusion of the evidence, plaintiff moved for judgment of nonsuit on defendant Hampton's cross action. The motion was allowed, but no judgment of nonsuit of said cross action was entered. Likewise, defendant insurance company moved for judgment of nonsuit as to it. Said motion was allowed, but the ruling was not reduced to judgment. Proper issues were submitted to the jury, and the issues of negligence and of contributory negligence were both answered in the affirmative. The court promptly, in the exercise of its discretion, set the verdict of the jury aside and ordered a new trial. The defendant excepted and appealed.

*Cogburn & Cogburn for plaintiff appellees.*
*Williams & Williams for defendant Hampton.*
*Meekins, Packer & Roberts for defendant Insurance Company.*

PER CURIAM. There were, as stated, a number of interlocutory rulings made during the progress of the trial. However, no final judgment was entered from which an appeal could be prosecuted, and the court, in the exercise of its discretion, set the verdict aside. *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373. Hence the record as it now appears before us contains no final judgment from which appeal will lie. In view of this condition of the record, it is necessary to vacate, without prejudice, all interlocutory rulings made during the progress of the trial, and to remand the cause for a trial *de novo* as to all parties and as to all questions raised by the pleadings. It is so ordered.

*Venire de novo.*

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## STATE v. OLIVER HICKS KOONE, JR.

(Filed 29 February, 1956.)

**Criminal Law § 67b—**

Where prayer for judgment is continued for a specified term upon conditions stipulated, there is no final judgment, and an appeal must be dismissed as premature.

APPEAL by defendant from *Pless, J.,* November Term 1955, Superior Court, RUTHERFORD.

This criminal prosecution originated in the Recorder's Court of Rutherford County upon a warrant charging the defendant with the

unlawful and willful abandonment of his infant daughter and with failure and refusal to pay hospital bills incident to her birth, "and has further failed to provide adequate support for the said infant." From a verdict of guilty and judgment thereon, the defendant appealed to the Superior Court. A jury trial in the Superior Court resulted in a verdict of guilty. The disposition in the Superior Court was as follows:

"With the consent of the defendant, prayer for judgment is continued from term to term for a period of five years upon the following conditions:

"1. (Provides for payment of $20.00 per week for the first year and $15.00 per week thereafter for support of the child.)

"2. (Provides that the defendant may visit the child at reasonable intervals.)

"The court reserves the authority to pronounce judgment or to change the amounts required to be paid for the support of said child if and when the condition of the parties shall materially change."

The defendant excepted and appealed.

*William B. Rodman, Jr., Attorney General, and Harry W. McGalliard, Asst. Attorney General, for the State.*

*Hamrick & Hamrick for defendant, appellant.*

PER CURIAM. The right of appeal to this Court does not arise until judgment has been pronounced in the Superior Court. Judgment has not been pronounced in this case. While this appeal is premature and must be dismissed, we have, nevertheless, examined the record. No reversible error appears.

Appeal dismissed.

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WILLIAM SEWELL SOREY v. W. L. NORTHERN.

(Filed 29 February, 1956.)

APPEAL by defendant from *Morris, J.*, at December 1955 Term, of PASQUOTANK.

Civil action instituted 11 July, 1951, to recover for injury to person, and damage to property arising out of collision on 22 August, 1948, between motor vehicles, allegedly resulting proximately from acts of negligence of defendant.

By consent of all parties hearing was had initially in term time before judge of Superior Court in lieu of the clerk of Superior Court, upon

motions of defendant filed on 7 November, 1951, 10 January, 1952, 3 September, 1952, and 4 September, 1952, to dismiss the action for defect in the chain of process allegedly effecting discontinuance of the action.

The trial judge made thirty-nine findings of fact beginning with the issuance of summons to sheriff of Currituck County on 11 July, 1951, and the filing of complaint on the same date, and the return of the sheriff that defendant was not to be found in Currituck County, and concluding with service of *pluries* summons and complaint upon defendant by sheriff of Dare County on 5 August, 1952,—and finding "that there has been a continuous chain of *alias* and *pluries* summonses issued within 90 days of the preceding summons, *alias* or *pluries*, dating back to the original summons on July 11, 1951." The motions of defendant in respect to findings of fact as to form and procedure pertaining to the several links in the chain were denied, and to the judgment in accordance therewith defendant excepts and appeals to Supreme Court and assigns error.

*Wilson & Wilson for Plaintiff Appellee.*

*LeRoy & Goodwin for Defendants, Appellants.*

PER CURIAM. While defendant challenges the findings of fact made by the trial judge as to the several links in the chain of process, concluding as above set forth, such findings are supported by the record and are in keeping with well established principles of law and procedure effective in this State. A detailed narrative of events would serve no useful purpose. The judgment signed follows the facts found as a matter of law.

Affirmed.

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STATE v. AUTRY LEE HADDOCK.

(Filed 29 February, 1956.)

APPEAL by defendant from *Bundy, J.*, November Term 1955, Superior Court, PITT County.

Criminal prosecution upon two bills of indictment, Nos. 5713 and 5714, returned at the October Term 1955, Superior Court, Pitt County. The bill in No. 5713 charged a felonious assault on Gene Lewis with intent to kill, inflicting serious injury not resulting in death. The first count in No. 5714 charged the felonious breaking and entering an occupied dwelling house in the nighttime for the purpose of committing a

felony. The second count charged the malicious injury to certain personal property in the house. The third count charged the unlawful use of profane, vulgar and indecent language in the hearing of two or more persons.

The two cases were consolidated and tried together before a jury upon the indictments and the defendant's pleas of not guilty thereto. At the conclusion of the State's evidence the court dismissed all charges except that of assault with a deadly weapon and of breaking and entering without intent to commit a felony. The jury returned a verdict of guilty of simple assault and with breaking and entering without intent to commit a felony. From judgment on the verdicts, the defendant appealed, assigning errors.

*William B. Rodman, Jr., Attorney General, and Harry W. McGalliard, Asst. Attorney General, for the State.*

*Jones, Reed & Griffin for defendant, appellant.*

PER CURIAM. The State offered parol evidence of ownership and possession of the premises upon which the offenses charged in the indictments are alleged to have occurred. The court admitted the evidence over objection. However, substantially the same evidence was later admitted without objection—part of it brought out by defendant's cross-examination. The objection, even if valid, was waived. The evidence was sufficient to carry the cases to the jury. Debatable questions of law are not raised by the assignments of error and discussion is not required. Examination of the record reveals

No error.

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CATHERINE S. BLANTON, ADMINISTRATRIX OF THE ESTATE OF C. G. BLANTON, DECEASED, v. DOUBLE COLA BOTTLING COMPANY, INC., A CORPORATION.

(Filed 29 February, 1956.)

APPEAL by plaintiff from *Pless, J.*, September Term, 1955, RUTHERFORD. Affirmed.

Civil action for wrongful death growing out of an automobile-truck collision.

Plaintiff's intestate, her husband, was operating his automobile when it collided with a truck being operated by an employee of defendant company. Each party alleges that as the automobiles approached each other, going in opposite directions, the other failed to turn reasonably

to the right of his side of the road, and a head-on collision resulted. Plaintiff's intestate died as a result thereof. Issues of negligence and contributory negligence were submitted to the jury, and both were answered in the affirmative. From judgment on the verdict the plaintiff appealed.

*Ray S. Farris and James B. Ledford for plaintiff appellant.*

*J. Paul Head, J. Nat Hamrick, and Mullen, Holland & Cooke for defendant appellee.*

PER CURIAM. The trial in the court below was fairly and impartially conducted in substantial accord with the decisions of this Court. Appropriate issues were submitted to the jury and answered by it adversely to plaintiff. The record fails to disclose any exception of sufficient merit to require discussion. Hence the judgment entered must be

Affirmed.

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F. W. LAWRENCE, JR., AND LUMBERMEN'S MUTUAL CASUALTY COMPANY v. SOLOMON C. BETHEA.

(Filed 7 March, 1956.)

**1. Automobiles §§ 41b, 43—Evidence of excessive speed held for jury on question of proximate cause.**

There was some evidence that defendant was traveling 45 miles per hour in a 35-mile per hour speed zone, that a truck, traveling in the same direction at excessive speed, sideswiped defendant's car on its left in attempting to overtake and pass it, causing defendant to lose control of his automobile, so that it ran off the highway and struck plaintiff's cars which were parked in a private drive. *Held:* Whether defendant was guilty of negligence and, if so, whether his negligence was a proximate cause of the damage or was insulated by the intervening negligence of the truck driver, are questions for the jury, and nonsuit is erroneous.

**2. Trial § 22c—**

Discrepancies and contradictions in the plaintiff's evidence are for the jury and not for the court.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at October Term, 1955, of PASQUOTANK.

*McMullan & Aydlett and Gerald F. White for plaintiffs, appellants.*

*LeRoy & Goodwin for defendant, appellee.*

JOHNSON, J. Civil action in tort by plaintiffs to recover for collision-damage to automobiles, allegedly caused by the negligence of the defendant.

At the close of the plaintiffs' evidence the trial court allowed the defendant's motion for judgment as of nonsuit. The single question presented for decision is whether this ruling was correct.

Highway No. 158 runs north and south along the beach from Nags Head through the town of Kill Devil Hills, in Dare County. The paved portion of the highway is 20 feet wide, with soft sand shoulders on each side. Cottages are located between the highway and the beach. The collision occurred a few minutes after midnight, 24 July, 1955, near the juncture of the driveway leading from the highway to a private cottage on the beach where the plaintiff Lawrence and family were staying.

Earlier that night, the plaintiff Lawrence had parked his 1953 Dodge and his 1951 Plymouth automobiles side by side on the concrete driveway between the cottage and the highway. Both cars were headed toward the highway, and the nearest one was about 21 feet from the highway. The plaintiff Lawrence was "awakened by an unusually loud crash." He looked out the window and "saw a cloud of dust," and upon investigation found that his automobiles had been struck by a Chevrolet car driven by the defendant. The Chevrolet was jammed in between "the two parked cars."

Other evidence on which the plaintiffs rely tends to show that heavy tire marks were traced behind the defendant's Chevrolet from the point of impact in the driveway back through the sand alongside the highway, "over various other driveways," a distance of more than 180 feet southwardly, to the point where the Chevrolet left the highway.

Other evidence discloses that immediately before the collision, the defendant was driving his Chevrolet northwardly along the highway; that a pick-up truck belonging to Twiford's Funeral Home approached from the rear, overtook, and passed the defendant, and in doing so struck "a slight portion of the left rear bumper" of the Chevrolet and sideswiped its left rear fender and left side. Whereupon the defendant's Chevrolet left the surfaced portion of the highway and veered off into the sand on its right immediately beyond the point of impact, where debris was found on the highway, and from there "made a diagonal course . . . through the sand . . . passing over intervening driveways until it came to a halt against the two cars of Mr. Lawrence," an over-all distance of 189 feet.

"The weather . . . was dry, clear, and not raining. . . . in fact had been dry for some time. The sand was soft. . . . Sand in the condition in which it was in . . . the early morning of July 24th is not easily traversed by automobile."

It was stipulated that the collision occurred in a 35-mile per hour speed zone.

The "Lawrence cars received considerable damage as a result of the impact." The Dodge was pushed through some posts and through a 6-foot section of sand. The Plymouth was demolished to the extent it was reduced to salvage value. The plaintiff Lawrence was paid $1,225 for its loss by the plaintiff insurance company. The damage to the Dodge, according to the testimony of one witness, reduced its value $950. The insurance company paid Lawrence $651.58 under its collision policy on the Dodge. Plaintiff Lawrence had a $50 deductible policy on each car. In the trunk of the Dodge were an Exide battery, a propeller for an electric trolling motor, and a new can full of gasoline. All these items were smashed and rendered worthless.

Other phases of the evidence (parts of which are more favorable to the defendant than to the plaintiffs) tend to show that before the defendant's Chevrolet ran off the highway it was struck from the rear and side "a terrific blow" by the Funeral Home pick-up truck as the latter overtook and passed the Chevrolet; that the pick-up struck the Chevrolet "on the rear left bumper and the left rear fender on down the side"; that the pick-up, after striking the defendant's car, traveled a distance of 423 feet—part of which was through soft sand on the left shoulder—struck and tore down a telephone pole, turned over and killed its driver. Over the defendant's objection, Patrolman Meiggs gave as his opinion, based on his experience in working on Highway 158 along the Dare beach and his knowledge of the condition of the sand at and near the place of collision, that the defendant's car was traveling about 45 miles per hour when it left the highway and as much as 35 miles per hour at "the point of impact of the two cars that were parked." CROSS-EXAMINATION: "I asked Bethea how fast he was going and he said 35 miles and I put it in my report. The way my report reads is: 'Estimated speed at moment of accident 35 miles.' . . . It is possible from the evidence I saw and the experience that I have had that the impact from the truck would have increased the speed of the Bethea car as much as 10 miles an hour."

Our analysis and appraisal of the evidence leaves the impression it is sufficient to carry the case to the jury on the issue of actionable negligence. The evidence, when viewed in its light most favorable to the plaintiffs, as is the rule on motion for nonsuit, is susceptible of the inference that the defendant's negligence, based on excessive speed in a 35-mile per hour speed zone, was one of the proximate causes of the collision. It may be conceded that certain phases of the evidence are susceptible of counter inferences (1) that the defendant was free of negligence, or (2) that any negligence attributable to him was insulated

or superseded by the intervening negligence of the driver of the Funeral Home truck. But on this record, whether either of these permissive inferences shall be drawn is a matter to be determined by the jury in resolving the crucial questions of negligence and of proximate cause. Discrepancies and contradictions in the plaintiff's evidence are for the jury and not for the court. *Childress v. Lawrence,* 220 N.C. 195, 16 S.E. 2d 442; *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327. Decision here is controlled by the principles explained and applied in *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197, and *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331.

For the reasons stated, the judgment below is

Reversed.

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SINCLAIR REFINING COMPANY, INC., v. JOHN O. (JACK) SHUFORD AND WIFE, ELLEN HOLLAND SHUFORD.

(Filed 7 March, 1956.)

APPEAL by plaintiff from *Froneberger, J.,* September Term, 1955, of LINCOLN.

This is a civil action instituted by the plaintiff against the defendants for the recovery of damages to the property of the plaintiff, which property adjoined the property of the defendants, said damages being caused by the alleged negligence of the defendants, their agents and employees, by setting fire to trash and rubbish on the property of the defendants without properly guarding the same, which fire burned the property of the plaintiff.

At the close of plaintiff's evidence, motion for judgment as of nonsuit was interposed on behalf of both defendants. The motion was overruled as to defendant John O. (Jack) Shuford but allowed as to defendant Ellen Holland Shuford.

The jury answered the first issue as to negligence in favor of the defendant. From the judgment entered on the verdict the plaintiff appeals, assigning error.

*Childs & Childs for appellant.*

*M. T. Leatherman for appellee.*

PER CURIAM. A careful examination of the assignments of error brought forward by the appellant and argued in its brief, in our opinion, present no prejudicial error of sufficient merit to justify an order for a new trial.

No error.

W. P. SHUFORD v. ASHEVILLE OIL COMPANY.

(Filed 21 March, 1956.)

**1. Deeds § 16b—**

Where the grantor's deed to one lot out of a tract of land owned by him stipulates that the restrictive covenants therein contained should not impose any restrictions on the grantor's other property adjacent to the lot conveyed or in its vicinity, the deed negatives a general scheme of development, and only the grantor therein is entitled to enforce the restrictions.

**2. Same—Plaintiff held estopped by subsequent agreement from enforcing residential restrictions in deed.**

Plaintiff, owning land within and adjacent to a residential subdivision, entered into an agreement with an owner of other lots within the subdivision and other lands adjacent thereto, stipulating that the lots within the subdivision should be subject to residential restrictions, and further stipulating, for the benefit of the owners of lots in the subdivision, that the lands adjacent to the subdivision shown on the plat should be used for residential and neighborhood business purposes, with specific limitations as to height and distance from the street of buildings used for neighborhood business purposes, and providing that the covenants should run with the land. Defendant's predecessors in title, who had purchased land adjacent to the subdivision by deed containing residential restrictions, which land was described in the agreement and shown on the plat referred to, joined in the agreement. *Held:* Plaintiff, by acquiescing in the agreement and accepting benefits thereunder, waived his right to enforce the residential restrictions against defendant, nor may plaintiff maintain that the agreement was executed solely to place restrictions on lots within the subdivision in the face of its specific reference and provisions as to lands shown on the plat outside the subdivision.

**3. Estoppel § 6a—**

A party will not be allowed to accept the benefits arising from certain terms of a contract and at the same time deny the effect of other terms of the same agreement.

**4. Same: Deeds § 16b—Subsequent deed to other lands held not to affect modification of restrictions in original deed.**

Plaintiff conveyed land to defendant's predecessors in title by deed containing residential restrictions. Thereafter, the residential restrictions were modified by agreement permitting use of the property for neighborhood business purposes. Subsequent to the agreement, plaintiff conveyed to defendant's predecessors in title a small strip of land lying to the rear of the lots first conveyed purporting to make such strip of land subject to the restrictions set out in the original deed. *Held:* Since the second deed does not purport to convey to defendant's predecessors in title any portion of the property conveyed by the original deed, the second deed is not a reaffirmance of the restrictions contained in the original deed. Further, change in the character of the neighborhood for the purpose of invoking the equitable right to have the restrictions declared unenforceable will be

considered from the date of the original deed in regard to the land therein conveyed.

**5. Deeds § 16b—**

Restrictive covenants are to be strictly construed against the covenantee.

**6. Same—**

Where the growth of a city and the change in the character of the neighborhood renders land conveyed by deed containing residential restrictions no longer suitable for residential purposes, so that it would be oppressive and inequitable to give effect to such restrictions, equity will no longer enforce them.

**7. Same—**

A valid restriction upon the use of property is not superseded or nullified by the enactment of a zoning ordinance, but such ordinance may be considered with other competent evidence in determining whether or not there has been a fundamental change in the character of the neighborhood.

**8. Same—**

Evidence in this case *held* to support the court's finding that there had been such fundamental change in the character of the neighborhood as to render the enforcement of residential restrictions in the deed in question oppressive and inequitable.

**9. Injunctions § 8—**

Where, upon the hearing of a motion to show cause why a temporary restraining order should not be continued to the hearing, the evidence supports the court's conclusion that plaintiff is not entitled to the ultimate equity sought, the court, in its discretion, may dissolve the temporary restraining order.

APPEAL by plaintiff from *Nettles, J.*, August Term, 1955, of BUNCOMBE.

This is an action instituted by the plaintiff to enforce certain restrictions inserted in a deed from the plaintiff to the grantors of the defendant, which restrictions the plaintiff alleges are still in full force and effect.

On the hearing below to show cause, if any, why the temporary restraining order entered on 19 August, 1955, should not be continued to the hearing, this cause was heard upon the complaint and answer, used as affidavits, and certain documentary evidence introduced by the respective parties.

The essential facts found by the court below are as follows:

"1. That on the 16th day of September 1949 the plaintiff executed and delivered to Harold C. Wilburn, Chester Brown, Jr. and Jack H. Brown, a deed of conveyance which was recorded in the office of the Register of Deeds of Buncombe County, State of North Carolina in Book of Deeds No. 681, at page 81, . . . (The description of the lot

conveyed and the restrictions contained in the above deed are in the following language):

"BEGINNING at a point in the North right-of-way line of the new 150-foot wide State Highway, as the same is presently located, said point being north 53 deg. 58′ east two hundred (200) feet from the intersection of said present north right-of-way line of the new State Highway with the east edge or margin of Johnston Boulevard, and runs north 36 deg. 02′ west one hundred thirty (130) feet to a point; thence north 28 deg. 10′ east two hundred and thirty-five (235) feet to a point; thence south 79 deg. 15′ east one hundred and fifty (150) feet to a point; thence south 52 deg. 00′ east fifty (50) feet to a point; thence south 36 deg. 02′ east seventy (70) feet to a point in the present north right-of-way line of the aforementioned new State Highway; thence with the present north right-of-way of said new State Highway South 53 deg. 58′ west three hundred and twenty-five feet to the BEGINNING.

"The grantees, as a part of the consideration for this conveyance, covenant and agree for themselves, their heirs, and assigns that the above described real estate shall be used for residential purposes only, and that no portion thereof, or any buildings or building erected thereon, shall be used or permitted to be used for commercial purposes. It is understood between the parties hereto that the term 'residential' shall include single or multiple dwellings and apartment houses. This covenant shall be a covenant running with the land and shall be kept by the parties of the second part, their heirs and assigns forever. The grantor, his heirs and assigns, hereby expressly retains the right to modify, at any time in the future, the restrictions imposed upon the lands herein described, and nothing herein contained shall be construed as imposing any covenants and restrictions on any property of the grantor adjacent to or in the vicinity of the land herein described. . . .

"2. That thereafter, on the 19th day of December 1949, the aforementioned Harold C. Wilburn and wife, Marcene Y. Wilburn, W. P. Shuford, Jack H. Brown and wife, Hope Brown, and Chester Brown, Jr. and wife, Martha Brown, executed a certain contract which is recorded in the office of the Register of Deeds of Buncombe County, State of North Carolina, in Book of Deeds No. 687, at page 323, which, among other things, contained the following recitals:

"THAT WHEREAS, Harold C. Wilburn is the owner of Lots 1 to 24, inclusive, and W. P. Shuford is the owner of Lots 25 through 33, and Lots 43, 44 and 45 of a plat of Section 1 of Wilshire Park, which plat is recorded in Buncombe County Register's Office in plat book 24, at page 61, and

"WHEREAS, Wilburn and Shuford desire for the benefit of their property and for the benefit of future purchasers and owners of the land

shown on said plat that the same shall be developed and used exclusively as hereinafter set out."

The foregoing agreement "placed certain restrictions on the lots in Wilshire Park above-mentioned, and thereinafter recited that Wilburn and Brown owned the property involved in this action 'which is adjacent to such subdivision,' and thereinafter contained the following recitals:

"AND WHEREAS, it is desired for the benefit of the present and future owners of said particularly described property, and for the benefit of present and future owners of the lots in the above referred to subdivision that the following restrictions shall be placed on said particularly described property. (Being the property now in controversy.) . . .

"1. No structure of any kind whatsoever shall be erected or maintained on said particularly described property, except dwellings conforming to all the covenants above set forth (being the restrictions placed on the lots in Wilshire Park) and/or retail stores, filling stations, theatres, beauty shops, barber shops, dry-cleaning and laundry plants (which dry-cleaning and laundry plants shall not employ more than five persons), studios, offices, and any other legitimate business establishments that may be desirable to a retail shopping center.

"2. No building shall be located nearer than thirty-five feet to the northern margin of the right of way of the new State Highway, except the pumps of a filling station may be located within twenty-five (25) feet of the northern margin of such right of way.

"3. No building shall exceed one story or twenty-five feet in height, except cupolas and towers. No store, shop or theatre or any other building above set forth shall have a sign affixed at right angles to the structure, or which extends above the cornice of the roof. No free standing sign or billboard shall be erected or maintained on the above particularly described land.

"Nothing herein contained shall be construed as imposing any covenants and restrictions on any property of the parties hereto other than those properties to which these restrictive covenants specifically apply.

"These covenants are to be covenants running with the land and shall be binding on all of the parties hereto and on all persons, firms or corporations claiming by, through or under them until January 1, 1985, at which time said covenants shall be automatically extended for successive periods of ten years, unless by vote of a majority of the then owners of the lots in the subdivision it is agreed to change said covenants in whole or in part.

"IT IS UNDERSTOOD AND AGREED that W. P. Shuford joins in the execution of this instrument solely and only for the purpose of placing subdivision restrictions on the above referred to subdivided lots in

Wilshire Park and for no other purpose whatsoever; and thereinafter all of the parties above mentioned, including the plaintiff, executed, acknowledged and delivered, and caused to be registered, the said contract.

"3. That thereafter, on the 15th day of February 1951 the above-mentioned W. P. Shuford, as party of the first part, and the above-mentioned Harold C. Wilburn and wife, Marcene Y. Wilburn, Chester Brown, Jr. and wife, Martha Brown, Jack H. Brown and wife, Hope Brown, as parties of the second part, together with Wilshire Homes, Inc., as party of the third part, executed a deed of conveyance (which is duly recorded in Book No. 704, at page 121) which corrected certain lines between the property involved herein and lots owned by the other parties to said conveyance, and which contained (among other things) the following language: . . .

"FIRST: The party of the first part hereby conveys to the party of the second part that strip of land which is located between the southern and southwestern margins of Lots 25, 26, 27, 28 and 16 of the above referred to plat, and the eastern and southeastern margins of the property conveyed to the parties of the second part by the above referred to deed recorded in book 681, at page 87, which property is conveyed and accepted subject to the same restrictions set forth in said deed, which restrictions shall be covenants running with the land. . . .

"4. That thereafter, on the 24th day of April 1951, Wilshire Homes, Inc. and W. P. Shuford, the plaintiff, entered into a supplemental agreement which was recorded in the office of the Register of Deeds of Buncombe County, State of North Carolina in Book 705, at page 547, in which the contract hereinbefore referred to and recorded in deed book 687, at page 323, was referred to and recognized, and Wilshire Homes, Inc. and the plaintiff agreed that certain lots owned by Wilshire Homes, Inc. and also by the plaintiff should be subjected to the same restrictions as were contained in the contract recorded in Book 687, at page 323, as applied to the numbered lots in said Wilshire Park.

"5. That at the time of the execution of the contract referred to in paragraph 2 hereof, the said W. P. Shuford owned lots 25 through 33 and lots 43, 44 and 45 of a plat of Section 1 of Wilshire Park, recorded in the office of the Register of Deeds of Buncombe County, State of North Carolina in Plat Book 24, at page 61; that on the said date, the said Harold C. Wilburn owned lots 1 to 24 inclusive in said development; that the said W. P. Shuford also owned a lot at the northeast corner of new Patton Avenue and Johnston Boulevard, and adjoining the lot involved in this action, and Harold C. Wilburn and wife, Jack H. Brown and wife, and Chester Brown and wife, owned the lot in controversy in this action; that said lot in controversy in this action

was not at any time incorporated as a part of the Wilshire Park development.

"6. That since the execution of the contract set forth in paragraph 2 hereof, the said W. P. Shuford has sold all of his lots in the Wilshire Park development, but still owns the lot at the northeast corner of new Patton Avenue and Johnston Boulevard, and also owns another lot on the corner directly across Patton Avenue from the lot owned by him last above-mentioned.

"7. That on the 29th day of October 1954, the aforementioned Harold C. Wilburn and wife, Marcene Y. Wilburn, Chester Brown, Jr. and wife, Martha Brown, and Jack H. Brown and wife, Hope Brown, executed and delivered to the defendant a deed of conveyance for the property involved in this controversy, which said deed of conveyance is recorded in the office of the Register of Deeds of Buncombe County, State of North Carolina, in Book of Deeds No. 751, at page 21, with full covenants and warranty, but containing the following language: 'This conveyance is made subject to restrictions of record, if any, affecting the above described property.'

"8. That at the time of the execution of the deed of conveyance referred to in Finding of Fact No. 1, there was no open street extending from the lower end of Patton Avenue on the east side of the French Broad River across said river and connecting with Haywood Road west of the property involved herein, and that all of said section later traversed by new Patton Avenue was exclusively a residential and undeveloped rural section, with no business houses of consequence in said territory.

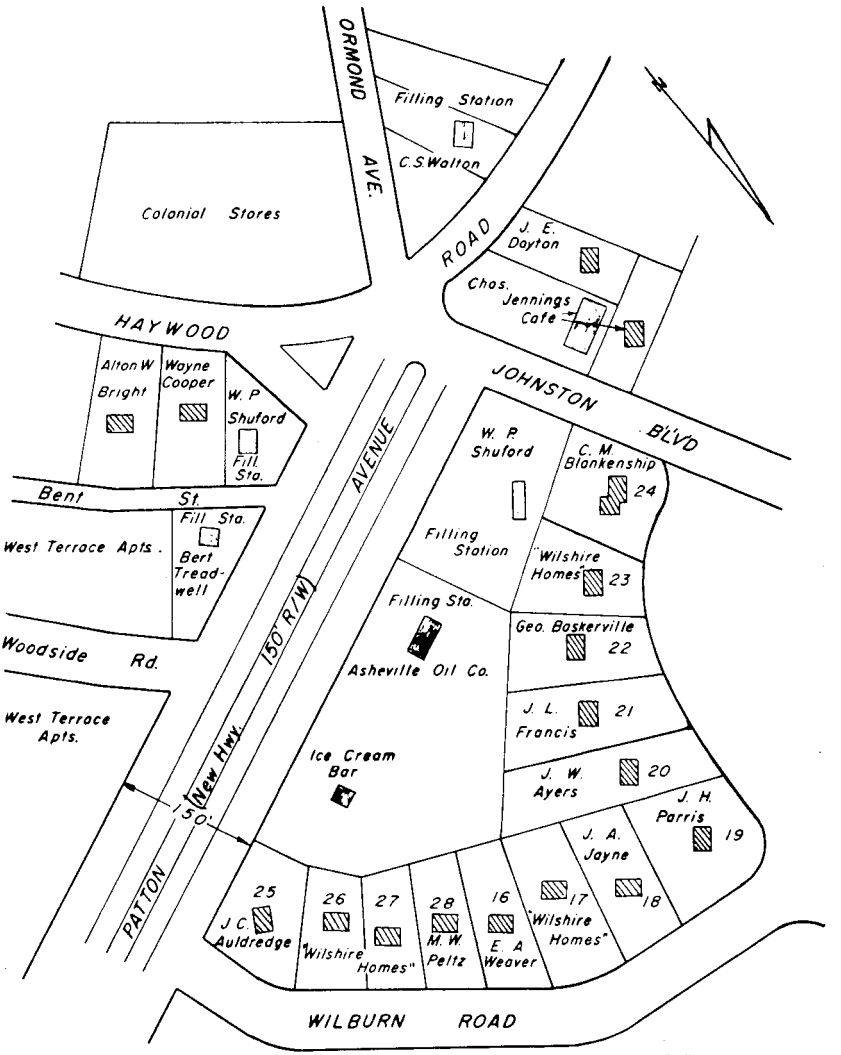
"9. That subsequent to the execution and delivery of the deed of conveyance referred to in paragraph 1 hereof, a new bridge was completed across the French Broad River, and a new main thoroughfare opened and paved and extended through said undeveloped territory from the lower end of Patton Avenue on the east side of the French Broad River to a junction of Haywood Road in the west section of West Asheville, and that upon the opening of said thoroughfare there was a very rapid development of business houses along said thoroughfare, and that as a result thereof the character of the community in which the lot in controversy is located, and in fact, all of the new portion of Patton Avenue, has been changed by the expansion and spread of business to such an extent as to result in a substantial subversion and fundamental change in the essential character of the property, and that many business enterprises have been erected along said street and in the neighborhood of the property involved herein, so that it has become a heavily used business section; that many filling stations have been erected along said thoroughfare, and also many restaurants,

retail establishments, wholesale distributing centers, and that new and additional shopping centers are in the process of construction. That the plaintiff has contributed to the above-mentioned fundamental change in conditions—among other things—erecting two filling stations on said new street—one on the northeast corner of Patton Avenue and Johnston Boulevard, and immediately adjacent to the lot involved herein—and another on the corner of said Patton Avenue directly opposite the filling station above-mentioned. That subsequent to the deed above-mentioned the lot on said Patton Avenue immediately opposite the lot in controversy, which was zoned as a residential lot at the time of the execution of said deed of conveyance, was re-zoned by the authorities of the City of Asheville on December 3, 1953, and a filling station erected thereon. That on or near the southwest corner, and diagonally opposite from the first mentioned W. P. Shuford filling station, there has been erected, subsequent to said deed of conveyance, another filling station on property which was restricted to residential purposes, and that since the execution of said deed practically all of that portion of new Patton Avenue lying in the limits of the City of Asheville, has been re-zoned or recommended for re-zoning, from residential property to neighborhood trading areas, and that on the 30th day of June 1955, the City of Asheville re-zoned the property involved herein and changed it from a residential section to a neighborhood trading area. . . .

"10. That the character of the community has changed to such an extent as to result in a substantial subversion and fundamental change in the essential character of the property herein referred to; that the changed condition resulted from the opening up of said street and the growth of business along the same, and in the community in which the said property is located, and in close proximity thereto, is of such character as to render the property involved herein undesirable for the purpose for which it was restricted, if there were any restrictions, and to such an extent that it would be inequitable and unjust to require the enforcement of the restrictions referred to in paragraph 1 hereof, if they ever were valid, and that it would be detrimental and injurious to the market value of the property and would retard the advancement and up-building of the property for the purposes for which it can best be used, and would retard the advancement and up-building of the community generally.

"11. That in the Fall of 1954 and immediately, or shortly after the purchase of said property as herein set forth by the defendant, the said defendant excavated and levelled off said property for the purpose of erecting business buildings thereon, and the plaintiff was informed of the purpose of the defendant shortly after the purchase of said property, and thereafter the defendant applied to have the property re-zoned for

a neighborhood trading area as hereinbefore set forth, and there was a hearing on said application by the Zoning Commission, after public notice, and thereafter the Council of the City of Asheville had a public




MAP SHOWING LOCATION OF STRUCTURES-HAYWOOD ROAD PATTON AVE. & JOHNSTON BLVD. ASHEVILLE N. C. AUG. 22, 1955 - SCALE = 1" = 100'

R. J. MARTIN, Reg. Surveyor

EXHIBIT "B"
Numbered Lots are in Section 1 of Wilshire Park

hearing thereon, after due advertisement thereof, and the said property involved was duly re-zoned as a neighborhood trading area, and thereafter the defendant's lessee completed the erection of one business house, which has been leased for business purposes, and had done considerable work and expended considerable funds on the erection of a gasoline service station before he was notified by the plaintiff of any intention to attempt to prevent such use and before this suit was instituted.

"12. That the plaintiff acquiesced in the agreement referred to in Finding of Fact No. 2 hereof, and also acknowledged receipt of benefits under said contract, and actually did receive benefits under said contract.

"13. That an enforcement of the restrictions set forth in paragraph 1, if the same were ever valid, would retard general business development and the establishment of commercial enterprises and industries.

"14. That the inconvenience and damage that would result to the defendant and to the community would be much greater than the benefit that would accrue to the plaintiff from the issuance of an injunction at this time.

"15. . . .

"16. That attached hereto is a map which is a map of the property in controversy and the other property adjacent or in close proximity to the property involved in this suit, which is marked EXHIBIT B.

"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 continuance of the temporary injunction be and the same is hereby denied, and that the temporary injunction hitherto issued in this case be and the same is hereby dissolved."

From the foregoing judgment the plaintiff appeals, assigning error.

*Harkins, Van Winkle, Walton & Buck for plaintiff.*
*Williams & Williams for defendant.*

DENNY, J. The court below, in refusing to continue the temporary restraining order until the final hearing, rested its decision on two grounds: (1) On the acquiescence of plaintiff in the changes made in the restrictions in the deed executed by him on 16 September, 1949, to Harold C. Wilburn, Chester Brown, Jr., and Jack H. Brown, the grantors of the defendant, by the contract entered into by and between the grantor and the grantees in said deed on 19 December, 1949; and (2) on the finding of fact to the effect that the character of the com-

munity has changed to such an extent since the execution of the above deed that it would be inequitable and unjust to require the enforcement of the restrictions referred to in said deed, if they are otherwise valid.

The restrictions in the original deed from W. P. Shuford to Harold C. Wilburn, Chester Brown, Jr., and Jack H. Brown, dated 16 September, 1949, did not contain a stipulation to the effect that such restrictions were inserted for the benefit of other land to be sold by the grantor, or for the benefit of the grantees therein. On the contrary, the grantor reserved to himself, his heirs and assigns, the right to modify, at any time in the future, the restrictions imposed upon the lot conveyed, and further set forth in said deed that nothing contained therein should be construed as imposing any covenants and restrictions on any property of the grantor adjacent to or in the vicinity of the land conveyed. These provisions clearly negative the idea of a general plan for the development of a residential area in which restrictions were to be applied alike to the grantees and other purchasers of property from the grantor. *Maples v. Horton,* 239 N.C. 394, 80 S.E. 2d 38; *Craven County v. Trust Co.,* 237 N.C. 502, 75 S.E. 2d 620; *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.

It follows, therefore, that upon the facts disclosed by the record on this appeal, the plaintiff is the only person who is entitled to an order restraining the defendant from violating the restrictions set out in the above deed, if such restrictions are in effect at this time and are enforceable in equity. *Maples v. Horton, supra; Phillips v. Wearn, supra; Thomas v. Rogers,* 191 N.C. 736, 133 S.E. 18.

In our opinion, however, if it be conceded that the restrictions contained in the deed executed by the plaintiff on 16 September, 1949, were valid, the plaintiff has waived his right to enforce them by acquiescing in the changes made in said restrictions in the contract entered into by and between him and Harold C. Wilburn, Chester Brown, Jr., and Jack H. Brown on 19 December, 1949, which contract expressly permits the construction of filling stations and other enumerated structures on the premises in controversy. Thompson on Real Property (Perm. Ed.), Vol. 7, section 3647, page 137; 14 Am. Jur., Covenants, Conditions and Restrictions, section 295, page 644; *Bigham v. Winnick,* 288 Mich. 620, 286 N.W. 102; *Ballard v. Kitchen,* 128 W. Va. 276, 36 S.E. 2d 390. *Cf. Hamburger v. Kramp,* 268 Mich. 611, 256 N.W. 566.

The plaintiff takes the position that he signed the above contract solely and exclusively for the purpose of placing subdivision restrictions on the lots owned by him in Wilshire Park, and for no other purpose whatsoever. We are not unmindful of the statement in the contract purporting to limit the purpose of his signature thereto. Even

so, such attempt to limit the purpose for which he executed the contract, serves to emphasize the fact that he was familiar with the contents of the agreement and knew that the other parties thereto had, by the terms of the contract, modified or changed the restrictions applicable to said lot in material respect. Therefore, his execution of the contract is sufficient to estop him from denying knowledge of its provisions. 19 Am. Jur., Estoppel, section 21, page 619.

The contract states, "Whereas, Wilburn and Shuford desire for the benefit of their property and for the benefit of future purchasers and owners of the land shown on said plat that the same shall be developed and used exclusively as hereinafter set out." The plat referred to is a plat of Section 1 of Wilshire Park, recorded in Book 24, at page 61, in the office of the Register of Deeds of Buncombe County. The lot now in controversy is shown on the map of Section 1 of the Wilshire Park as accurately by metes and bounds as are the lots within the subdivision. And it will be noted that the benefits to be derived from the restrictions thereinafter set out were not limited to the lots in Wilshire Park owned by Wilburn and Shuford, but applied "to the land shown on said plat," which shows 45 lots in the proposed residential development, the lot now in controversy, which has a frontage of 325 feet on the north side of the right of way of the then proposed highway and which is now an extension of Patton Avenue, and the lot still owned by the plaintiff adjacent to the lot owned by the defendant, which has a frontage of 200 feet on Patton Avenue.

Furthermore, this contract, with respect to the restrictions imposed, also states, "These covenants are covenants running with the land and shall be binding on all of the parties hereto and on all persons, firms or corporations claiming by, through or under them," etc. Here again, Shuford, the plaintiff, did not undertake to limit the covenants and restrictions set out in the agreement to the lots in the subdivision only. "These covenants" embrace all the covenants and restrictions set out in the instrument and purport to bind the parties thereto until January 1, 1985, at which time a majority of the owners of the lots in the subdivision may agree to change the covenants in whole or in part. Chester Brown, Jr., and Jack H. Brown never owned any lots in Wilshire Park. They joined in the execution of this instrument in order to get the restrictions modified with respect to the lot now in controversy. Otherwise, there was no reason whatever for them to join in the execution of the contract.

In light of the provisions of the foregoing contract, we hold that Finding of Fact No. 12, to the effect that the plaintiff acquiesced in the above agreement and acknowledged receipt of benefits thereunder, and that he actually did receive benefits thereunder, is supported by com-

petent evidence. Consequently, we hold that the plaintiff is now estopped from challenging the validity of the restrictions contained in such agreement.

As to the second question posed, the appellant contends that the grantors of the defendant, by accepting the deed executed on 15 February, 1951, reaffirmed the restrictions as being applicable to the land described in the original deed as well as to the additional land conveyed thereby. We do not so hold. It is true that the second deed conveyed to the defendant's grantors a small strip of land lying between the rear of the lots referred to in the deed and the lot previously conveyed to defendant's grantors, and purports to make such strip of land subject to the restrictions set out in the original deed. But the second deed does not purport to convey to the defendant's predecessors in title any portion of the property described and conveyed by the deed executed on 16 September, 1949. Hence, the above contention will not be upheld as to the land described in the original deed.

The appellant also contends that any change in the character of the neighborhood that occurred prior to the execution of the second deed to the defendant's grantors on 15 February, 1951, may not be considered in determining whether or not the neighborhood has undergone such fundamental changes that it would be inequitable and unjust to require the enforcement of the restrictions contained in the original deed, if they are otherwise in full force and effect, citing *Reilly v. Otto,* 108 Mich. 330, 66 N.W. 228; *Rice v. Brehm,* 158 Misc. 672, 287 N.Y.S. 648; *Starmount v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134, 25 A.L.R. 2d 898. We do not concur in this view. Neither are the above cases controlling on the facts in the present case. The court below properly took into consideration all changes occurring in the character of the neighborhood since 16 September, 1949.

Usually, cases involving alleged violations of building restrictions present such wide difference in facts it is difficult in equity to lay out specific rules that can be applied generally. Ordinarily, each case must be determined on its own facts. *Archambault v. Sprouse,* 215 S.C. 336, 55 S.E. 2d 70, 12 A.L.R. 2d 388. However, in considering restrictive covenants, we adhere to the rule that such covenants being in derogation of the free and unfettered use of the land are to be strictly construed in favor of the unrestricted use of the property. *Craven County v. Trust Co., supra; Edney v. Powers,* 224 N.C. 441, 31 S.E. 2d 372; *Davis v. Robinson, supra;* and cases cited. Furthermore, when it is evident that the purpose of inserting restrictions in a deed is to make the locality a suitable one for residential purposes, but owing to the general growth of the city this purpose can no longer be accomplished, even though such restrictions should be rigidly enforced, it would be oppressive and

inequitable to give effect to such restrictions were they otherwise in full force and effect. *Bass v. Hunter,* 216 N.C. 505, 5 S.E. 2d 558; *Elrod v. Phillips,* 214 N.C. 472, 199 S.E. 722; *Oldham v. McPheeters,* 203 N.C. 141, 164 S.E. 731; *Stroupe v. Truesdell,* 196 N.C. 303, 145 S.E. 925; *Higgins v. Hough,* 195 N.C. 652, 143 S.E. 212; *Starkey v. Gardner,* 194 N.C. 74, 138 S.E. 408, 54 A.L.R. 806; 26 C.J.S., Deeds, section 171 (c), page 574; 14 Am. Jur., Covenants, Conditions and Restrictions, section 302, page 646.

A valid restriction upon the use of property is not superseded or nullified by the enactment of a zoning ordinance. However, such ordinance may be considered with other competent evidence in determining whether or not there has been a fundamental change in the restricted subdivision, 26 C.J.S., Deeds, section 171, page 577, or in the neighborhood where the property, as in the present case, is not a part of a restricted subdivision. *Bass v. Hunter, supra, Elrod v. Phillips, supra. Cf. Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471.

We have carefully considered the findings of the court below with respect to the fundamental changes that have taken place in the area adjacent to and in the immediate neighborhood in which the lot in controversy is located, and have come to the conclusion that the pertinent findings of the court in respect thereto are supported by competent evidence and that such findings support the judgment. Hence, the judgment, in which the court below, in its discretion, denied a continuance of the restraining order theretofore issued until the hearing, but on the contrary dissolved the same, will be upheld. *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319, and cited cases.

The judgment below is

Affirmed.

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WILSON REALTY COMPANY, INC., v. THE CITY AND COUNTY PLANNING BOARD FOR THE CITY OF WINSTON-SALEM AND FORSYTH COUNTY; B. CLYDE SHORE; J. ERNEST YARBROUGH; R. N. MARSHALL; MARSHALL C. KURFEES; EARL J. SLICK; M. A. HESTER; KENNETH E. GREENFIELD; W. B. SIMPSON; CHARLES E. NORFLEET.

(Filed 21 March, 1956.)

**1. Appeal and Error § 1—**

Whether an act under which an administrative board was created sufficiently prescribes the standards to guide such agency, whether the agency exceeded its authority in adopting rules for its guidance, and whether the act exceeded constitutional limitations in prescribing penalties for failing to comply with the agency's rulings, will not be considered on appeal when

these questions are not raised by the pleadings nor ruled upon by the lower court.

**2. Mandamus § 1—**

The function of *mandamus* is to compel inferior tribunals, officers, or administrative boards to perform duties imposed upon them by law, which writ is issued in the exercise of the court's original, as distinguished from appellate, jurisdiction, and the writ may not be used to serve the purpose of a writ of error or appeal, or to correct action, however erroneous it may have been.

**3. Appeal and Error § 13a—**

The function of *certiorari*, as an independent remedy, is to review judicial or *quasi* judicial proceedings of inferior boards or tribunals.

**4. Same—**

In *certiorari*, evidence *dehors* the record is not permitted in the absence of statutory authority.

**5. Same—**

*Certiorari* may be used as an ancillary writ in a *mandamus* action for the purpose of bringing up from the inferior tribunal or board records deemed necessary for use in the trial of the case on its merits.

**6. Mandamus § 1—**

In *mandamus* proceedings, the general rules governing trials of actions at law and suits in equity control, in so far as applicable, in respect to the right (1) to a hearing, (2) to present evidence, and (3) to object to rulings on questions of reception and exclusion of evidence.

**7. Mandamus § 4—**

Where the pleadings in an action for *mandamus* raise an issue of fact, either party is entitled to a jury trial, G.S. 1-513, but if neither party moves for jury trial, it then becomes incumbent upon the trial judge to find the facts and enter judgment thereon.

**8. Same: Administrative Law § 4—**

Where, in an action for *mandamus*, the court considers records and documents which were neither offered in evidence nor brought up by the writ of *certiorari* to defendant board, under the misapprehension that the court was reviewing the correctness of the order of the administrative board, the cause must be remanded.

**9. Appeal and Error § 50—**

When it appears that the case was heard in the lower court under a misapprehension of the pertinent principles of law, the cause ordinarily will be remanded for another hearing.

PARKER, J., dissents.

APPEAL by petitioner from *Johnston, J.*, 19 September Term, 1955, of FORSYTH.

This appeal is by the petitioner from a judgment denying relief in a *mandamus* action brought to compel the City and County Planning Board for the City of Winston-Salem and Forsyth County to approve a proposed subdivision plat.

The respondent City and County Planning Board was established by joint action of the Board of Aldermen of the City of Winston-Salem and the Board of Commissioners of Forsyth County, pursuant to Chapter 677, Session Laws of 1947. The respondent Henry C. Moore is the Director of Planning of the Planning Board. The other respondents are members of the Board.

The petitioner owns a 70-acre tract of land contiguous to, but just outside, the western limits of the City of Winston-Salem. It is bounded on the east by Silas Creek. The petitioner for some time has been desirous of subdividing the land into streets and lots for sale as high class residential property.

The enabling act under which the respondent City and County Planning Board was established provides that no subdivision plat of land located within three miles of the corporate limits of Winston-Salem may be accepted for filing in the Public Registry of Forsyth County unless and until it be first approved by the Planning Board.

By preliminary conference between Burke E. Wilson, President of the petitioner corporation, and Henry C. Moore, Director of Planning, Mr. Moore insisted that the land be subdivided in such manner as to reserve through it a right of way for a proposed belt line thoroughfare around the western outskirts of the City of Winston-Salem to run northwardly from Hawthorne Road Extension and connect with the main entrance to the new location of Wake Forest College, on Reynolda Road. It is contemplated by the Planning Board that the thoroughfare shall be constructed as a divided 4-lane highway, to be known as Silas Creek Parkway, and located so as to be split by Silas Creek, with two traffic lanes on each side of the creek. A plat was prepared showing subdivision of the 70-acre tract into streets and lots in accordance with specifications which conformed to the requirements as outlined by Mr. Moore. This plat is dated 10 March, 1955. It will be referred to hereinafter as the March 10 plat. It shows a right of way reservation through the property for the proposed parkway. The reservation as indicated on the plat follows the meanders of Silas Creek through the property and varies in width from 240 feet on the north side along Robin Hood Road to 110 feet on the south side of the tract. The proposed reservation embraces a total area of 6 acres.

The March 10 plat was given preliminary approval by the Planning Board on 8 April, 1955. However, the petitioner, being unwilling to reserve the 6-acre tract of land along Silas Creek for the parkway,

would not agree to subdivide the property in accordance with the plan as delineated on the March 10 plat. And on 18 April, 1955, the petitioner submitted to the Planning Board a counter proposal in the form of a plat dated 14 April, 1955, hereinafter referred to as the April 14 plat. This plat does not reserve any portion of the land for the proposed Silas Creek Parkway. The 6-acre strip of land along Silas Creek, indicated on the March 10 plat as reserved for the parkway, is shown on the April 14 plat as being fully developed into lots.

The April 14 plat was disapproved by the Planning Board. The petitioner was given final notice of such disapproval by letter of the Planning Board dated 11 May, 1955.

On 8 June, 1955, the petitioner instituted this action to compel the Planning Board to approve the April 14 plat.

The petitioner alleges in gist: (1) that the counter proposal submitted to the Planning Board in the form of the April 14 plat makes provision for streets and other public ways of sufficient width and properly located to accommodate prospective traffic and composes a residential subdivision suitably coordinated with the surrounding area. (2) That the proposed Silas Creek Parkway has not been approved by the State Highway and Public Works Commission or by the Board of Aldermen of the City of Winston-Salem. (3) That when, "if ever, the proposed parkway will be developed is completely indefinite and intangible." (4) That the action of the Planning Board in declining to approve the plat of April 14, 1955, and in seeking to force the petitioner to reserve a right of way for the proposed parkway prevents subdivision and sale of the property along Silas Creek. (5) That such action on the part of the Planning Board "is arbitrary, . . . constitutes . . . usurpation of authority not granted to it under the laws of the State of North Carolina, . . . and amounts, in legal effect, to a taking of a large part of the petitioner's land for public use without compensation."

The petitioner prays relief that "the court issue its writ of *mandamus* requiring the Planning Board to approve the plat dated April 14, 1955, . . ."

The respondents filed answer admitting approval of the March 10 plat and disapproval of the April 14 plat. The respondents further allege that the subdivision plan as shown on the later plat is "in direct conflict with that portion of the City and County general development plan known as the proposed Silas Creek Parkway," which "is deemed to be an important proposed parkway in the general development plan for the City and County to accommodate prospective traffic to, from and through the area in question." The respondents further allege that the petitioner's proposed development plan as shown on the April 14 plat "fails to make reasonable provision for a street or highway of

sufficient width and suitably located to accommodate prospective traffic to, from and through the proposed development, and is not coordinated with plans for other areas so as to compose a convenient and economical system."

This action was instituted by summons and verified petition, as required in *mandamus* proceedings. G.S. 1-511. *Certiorari* was used by the petitioner for the ancillary purpose of bringing up to the Superior Court certain records of the Planning Board for use at the hearing on petitioner's application for writ of *mandamus*. Additional records and documents also were sent up by consent order of the court.

When the cause came on for hearing in the court below, the petitioner introduced in evidence various portions of, but not all, the records and documents filed with the court pursuant to the writ of *certiorari* and consent order. The petitioner's evidence includes:

1. The March 10 plat, which was approved by the Planning Board, and also the April 14 plat, which was disapproved by the Board. The only substantial difference between these plats is that the first contains a reservation for the proposed parkway along the west side of Silas Creek; whereas the latter plat makes no reservation for the parkway.

2. For the purpose of attack, the map of Forsyth County, referred to in the respondents' answer as the General Plan of Development as adopted by the Planning Board in 1948.

3. Affidavits showing (a) that streets and walkways shown on the April 14 plat constitute 15.8% of the total area of the 70-acre tract; that should the parkway reservation be added, the figure would be 24.3%; (b) that all streets as shown on the April 14 plat "will harmonize with streets in adjacent developments." (c) That Silas Creek Parkway as now proposed by the Planning Board and as shown in part on the March 10 plat, with two lanes on the west side of Silas Creek on petitioner's property and two lanes on the east side of Silas Creek on other property, "has never been located on any map, . . . general plan or special plan approved by the Board of Aldermen, the City and County Planning Board, or by any other governmental agency"; that the Silas Creek Parkway as shown on the map of the general development plan as adopted by the Planning Board "is located only by a series of dots" leading from the site of the new location of Wake Forest College to the end of Hawthorne Road Extended, where it dead-ends into the Louisville Road; that the proposed Silas Creek Parkway as shown on the general plan map is located entirely off the petitioner's land, on the opposite side of Silas Creek, and about 400 feet east of the development project at the closest point.

4. Letter written by the Planning Board to the petitioner dated 11 May, 1955, notifying the petitioner that its plat of April 14 had been

disapproved. This letter supports the inference that the Planning Board conceded that to require the petitioner to dedicate the 6-acre right of way for the parkway, in addition to the ordinary subdivisional streets in the development, would be beyond the pale of its lawful power to regulate street widths in land subdivisions wherein the divisional streets are dedicated by the developer; and that, accordingly, the Planning Board's requirement was, not that the petitioner dedicate the 6-acre right of way, but rather that it reserve the right of way until such time as some other agency of government, vested with proper power, should lay out and establish the parkway over the area reserved and pay the petitioner for such reserved area. The letter of notification gives as "the reason" for disapproval of the revised plat of April 14 that it "does not conform to the plan for the Silas Creek Parkway as shown in substance on the Winston-Salem Metropolitan Area Plan," in that "it would tend to block the ultimate construction of the west lane of the . . . Parkway." The letter closes by advising the petitioner as follows: "At such time as the citizens of Forsyth County and Winston-Salem can arouse interest in the actual construction of this parkway, the city or the state, as the case may be, will negotiate with you for the purchase of the land that you reserve for this highway. . . ."

5. Affidavit showing (a) that the Planning Board has no funds with which to construct streets or highways, and (b) that neither the Board of Aldermen of the City of Winston-Salem nor the State Highway and Public Works Commission has authorized or approved the Silas Creek Parkway, and no funds have been appropriated or are available for acquiring the right of way or for construction.

At the close of the petitioner's evidence, the respondents moved to dismiss the action. The record discloses that the "respondents offered no evidence, but contended that the court should consider all the records, documents, and maps filed by them pursuant to the writ of *certiorari*" and supplemental order.

The court found facts, made conclusions of law, and entered judgment allowing the respondents' motion and dismissing the action. The judgment recites that in making its findings and conclusions the court gave consideration not only to the evidence offered by the petitioner but also to all records, documents and maps filed with the court by the respondents.

The judgment includes findings of fact and conclusions as follows:

1. That the City and County Planning Board, pursuant to authority of law, "adopted a general development plan for Winston-Salem and Forsyth County showing the general location of proposed streets, roads, schools, parks, and other public property. This plan showed, among other things, a proposed thoroughfare following generally the course of

Silas Creek and connecting Hawthorne Road Extension with the main entrance to Wake Forest College on Reynolda Road (US Highway 421). Although this plan shows the location of the proposed thoroughfare south of Robin Hood Road to be on the east side of Silas Creek, and petitioner's property lies on the west side of said creek, this purports to be a general location only; it does not purport to show the exact or final location of the proposed thoroughfare and the right-of-way therefor. It appears from the minutes and records of the Planning Board, and arguments of counsel, that present plans for the proposed thoroughfare locate it along both sides of Silas Creek as it passes petitioner's property."

2. "On or about March 10, 1955, petitioner submitted a proposed plat of Robinhood Trails to the Planning Board. This . . . plat . . . took into account the proposed thoroughfare or parkway along Silas Creek and showed no proposed lots which would interfere with the construction of a roadway along the west side of Silas Creek. The Planning Board . . . approved this plat map on or about April 8, 1955."

3. "On or about April 18, 1955, petitioner filed with the Planning Board a revised proposed plat of the eastern portion of Robinhood Trails, dated 4-14-55, so drawn as to show the complete development into lots of the property along and adjacent to Silas Creek. . . ., that this latest proposal designed the subdivision in such a way as to put 16 building sites in the proposed Parkway right-of-way." This plat was disapproved by the Planning Board and final notice was given the petitioner on 11 May, 1955.

4. "The Planning Board, in disapproving the plat map filed by the petitioner April 18, 1955, did not act capriciously, unreasonably, arbitrarily or otherwise than in the lawful exercise of the police power conferred upon it by statute."

5. "Petitioner is not entitled to an Order of Mandamus requiring the respondents to approve the particular plat filed with the Board April 18, 1955, or to any of the relief sought in this proceeding."

From the judgment entered by the court dismissing the action, the petitioner appeals.

*Deal, Hutchins & Minor for Petitioner, appellant.*
*Womble, Carlyle, Sandridge & Rice for Respondents, appellees.*

JOHNSON, J. The petitioner in its petition does not challenge the validity or constitutionality of the enabling act under which the City and County Planning Board was established, Chapter 677, Session Laws of 1947. The cause of action alleged in the petition presupposes

a legally constituted planning board, created under a valid act of the General Assembly, with power to make discretionary decisions within the framework of the enabling act. Therefore we lay aside as not being pertinent to decision the contentions *pro* and *con*, discussed in the briefs and debated upon the argument, with reference to these questions: (1) whether the act meets minimum constitutional requirements in prescribing standards to guide the Planning Board in the exercise of the discretionary powers conferred upon it; (2) whether the Planning Board exceeded its authority in adopting rules for its guidance in regulating the subdivision of land into streets and lots; and (3) whether the enabling act exceeds constitutional limitations in prescribing penalties for failure to comply with rulings of the Planning Board. See *Motsinger v. Perryman*, 218 N.C. 15, 9 S.E. 2d 511; *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310. These questions, not having been raised by the pleadings nor ruled upon below, are beyond the scope of review here. *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242; *Bank v. Caudle*, 239 N.C. 270, 79 S.E. 2d 723.

The petitioner by exceptions duly noted and brought forward on appeal challenges the action of the court below in considering, and in basing its findings and conclusions in part upon, records and documents not offered in evidence at the hearing. These exceptions and the assignments of error based thereon seem to be well taken. The trial court appears to have misapprehended the fundamental nature of this proceeding. The court seems to have assumed that the proceeding was one for review in its appellate capacity of action of the Planning Board on writ of *certiorari* used as a substitute for appeal. However, the proceeding was commenced and prosecuted below as an ordinary civil action wherein relief by way of *mandamus* was sought in the exercise of the court's original, as distinguished from appellate, jurisdiction. The "issuance of a writ of *mandamus* is an exercise of original and not appellate jurisdiction." *Pue v. Hood, Comr. of Banks*, 222 N.C. 310, 312, 22 S.E. 2d 896. The writ of *mandamus* is employed to compel inferior tribunals, officers, or administrative boards to perform duties imposed upon them by law. *Hospital v. Joint Committee*, 234 N.C. 673, 68 S.E. 2d 862; *Person v. Doughton*, 186 N.C. 723, 120 S.E. 481. *Mandamus* is not used to correct action, however erroneous it may be; hence it is not used to serve the purpose of a writ of error or appeal. *Pue v. Hood, Comr. of Banks, supra;* 34 Am. Jur., Mandamus, Sections 8 and 9.

The function of a writ of *certiorari* as an independent remedy is quite different from that of *mandamus*. *Certiorari*, as an independent remedy, is designed to review and examine into proceedings of lower tribunals and to ascertain their validity and correct errors therein. The

writ issues to review proceedings of inferior boards and tribunals which are judicial or *quasi* judicial in nature. *Pue v Hood, Comr. of Banks, supra;* 10 Am. Jur., Certiorari, Section 11, p. 535. In short, *certiorari* differs from *mandamus* in that *mandamus* compels an unperformed clear legal duty; *certiorari* reviews a performed judicial duty. 10 Am. Jur., Certiorari, Section 4. In *certiorari,* evidence *dehors* the record is not permitted in the absence of statutory authority. *Brooks v. Morgan,* 27 N.C. 481; *Pue v. Hood, Comr. of Banks, supra;* 10 Am. Jur., Certiorari, Sections 5 and 19.

*Certiorari* may be used, however, as an ancillary writ in a *mandamus* action for the purpose of bringing up from the inferior tribunal or board records deemed necessary for use in the trial of the case on its merits. 10 Am. Jur., Certiorari, Section 5, p. 529; Annotation 12 Am. Dec. 537; *S. v. Johnson,* 103 Wis. 591, 79 N.W. 1081.

In *mandamus* proceedings, the general rules governing trials of actions at law and suits in equity control, in so far as applicable, in respect to the right (1) to a hearing, (2) to present evidence, and (3) to object to rulings on questions of reception and exclusion of evidence. And where an issue of fact is raised by the pleadings, either party, by virtue of G.S. 1-513, is entitled to a jury trial. However, if neither party moves for jury trial, it then becomes incumbent upon the trial judge to find the facts and enter judgment based thereon. *Cannon v. Wiscassett Mills Co.,* 195 N.C. 119, 125, 141 S.E. 344. See also *In re Housing Authority,* 235 N.C. 463, 70 S.E. 2d 500.

Here, the action was commenced by summons and verified petition, as is expressly required by statute in *mandamus* proceedings, G.S. 1-511. *Certiorari* was used only for the ancillary purpose of bringing up from the Planning Board records and documents for use at the hearing.

At the hearing below, the petitioner offered evidence in support of its allegations bearing on the issues of fact raised by the pleadings. While some of the evidence offered by the petitioner consists of records and documents sent up by the Planning Board to the court under the ancillary writ of *certiorari,* nevertheless much of its evidence is in the form of affidavits *dehors* the records of the Planning Board and contradictory thereof. It thus appears that in the trial below the petitioner developed its case in accordance with the principles governing trial procedure in *mandamus* proceedings. The respondents offered no evidence. Therefore the court in finding the facts upon which judgment was based should have limited itself to consideration of the facts in evidence. Instead, the court appears to have given consideration to all the records, documents and maps sent up in bulk to the court by representatives of the Planning Board. Some of these documents appear to

be without semblance of authentication as reflecting official action of the Planning Board. Also, it is noted that the court's findings appear to be based in part on "arguments of counsel."

It thus appears that the case was heard below under a misapprehension of the pertinent principles of law. When this occurs, the usual practice with us is to remand the case for another hearing. *Griffith v. Griffith*, 240 N.C. 271, 280, 81 S.E. 2d 918; *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324. See also *Coley v. Dalrymple*, 225 N.C. 67, 71, 33 S.E. 2d 477; *Credit Co. v. Saunders*, 235 N.C. 369, 373, 70 S.E. 2d 176. It is so ordered here. Therefore, to the end that the parties may have the case heard and determined under application of the pertinent principles of law, the judgment is ordered stricken out, with direction that the cause be remanded for rehearing.

In this view of the case and since on retrial the facts may be different from those here shown, we withhold our opinion on the question whether the City and County Planning Board has legal authority to require as a condition precedent to approval of the petitioner's subdivision plan that petitioner reserve a right of way along Silas Creek as shown on the March 10 plat, when, as here, it is made to appear: (1) that the proposed right of way will embrace a strip of land from 110 feet to 240 feet wide, comprising about six acres, for which concededly the petitioner is entitled to compensation; (2) that neither the Board of Aldermen of the City of Winston-Salem nor the State Highway and Public Works Commission has authorized or approved the proposed Silas Creek Parkway; (3) that the Planning Board has no authority under the enabling act to construct streets or highways; and (4) that no funds have been made available to any responsible governmental agency for acquiring and paying for the right of way. Suffice it to say, on these facts the authorities relied on by the petitioner appear to be more nearly controlling than those cited by the respondents. The cases of *Ridgefield Land Co. v. Detroit*, 241 Mich. 468, 217 N.W. 58, and *Ayers v. Los Angeles*, (Cal.) 191 P. 2d 546, and other decisions cited by the respondents seem to be distinguishable on the facts here disclosed. See also 11 Am. Jur., Constitutional Law, Sections 260 and 266; 12 Am. Jur., Constitutional Law, Section 651; Annotation 11 A.L.R. 524; 62 C.J.S., Municipal Corporations, Section 83.

New trial.

PARKER, J., dissents.

CHADBOURN WHITFIELD AND WIFE, ROSA WHITFIELD, v. CAROLINA HOUSING & MORTGAGE CORPORATION, JEFFERSON E. OWENS, TRUSTEE, AND CONSOLIDATED ROOFING COMPANY.

(Filed 21 March, 1956.)

**1. Cancellation and Rescission of Instruments § 12—Evidence that execution of note and deed of trust was procured by fraud held sufficient for jury.**

Plaintiffs' evidence tended to show that a representative of defendant roofing company induced plaintiffs to execute a contract for repairs to the roof, that immediately after the execution of the contract the representative presented to plaintiffs two other papers folded up like an envelope, that the male plaintiff could read his own name, but could not read fine print, that the papers were not read to plaintiffs, nor did plaintiffs read them, and that defendant's representative stated that the papers were not a mortgage "or anything like that," told plaintiffs not to pay any attention, just sign, snatched the papers back immediately plaintiffs had signed them, and that plaintiffs signed the papers not knowing that they had signed a promissory note and a deed of trust upon their home until threatened with foreclosure. *Held:* There was plenary evidence that plaintiffs' signatures to the instruments were procured by fraud.

**2. Bills and Notes § 32—**

Where, in an action on a note, it is alleged that the makers' signatures to the note were procured by fraud, and supporting evidence is introduced or fraud is admitted, the burden is on plaintiff holder to prove that he or some person under whom he claims acquired title to the note as a holder in due course. G.S. 25-65.

**3. Bills and Notes § 34—**

Evidence that the representative of a roofing company procured plaintiffs' signatures to a note and deed of trust by fraudulent misrepresentation, that the note and deed of trust were filled out on forms of a mortgage company, that the note was payable to the order of the roofing company at the office of the mortgage company, and that the trustee named in the deed of trust was an officer of the mortgage company, raises a permissible inference that the mortgage company is not a holder in due course for value and without notice of the fraud, and requires the submission of the issue to the jury.

APPEAL by defendants Carolina Housing & Mortgage Corporation and Jefferson E. Owens, Trustee, from *Moore, J.*, September Civil Term 1955 of NEW HANOVER.

Civil action to have declared null and void and to cancel a note and deed of trust, securing the same, upon the alleged ground that the two instruments were procured by fraud, and to restrain permanently a foreclosure of the deed of trust.

The issues submitted to the jury, and their answers thereto are as follows:

"1. Did the Consolidated Roofing Company, Inc. obtain by fraud the note, dated March 7, 1953, and signed by the plaintiffs, Chadbourn Whitfield and wife, Rosa Whitfield?

Answer: Yes.

"2. If so, is the defendant Carolina Housing & Mortgage Corporation, a holder in due course of said Note?

Answer: No."

From a judgment declaring that the note and deed of trust securing the same are null and void, as the note was procured by fraud; that this judgment serves as a cancellation of the note and deed of trust, and a duplicate original of the judgment shall be recorded in the Office of the Register of Deeds of New Hanover County; and that the defendants be enjoined permanently from foreclosing the deed of trust, the defendants Carolina Housing & Mortgage Corporation, and Jefferson E. Owens, Trustee in the Deed of Trust, except, and appeal.

*Solomon B. Sternberger and Hewlett & Williams for Plaintiffs, Appellees.*

*Carr & Swails for Defendants, Appellants.*

PARKER, J. The defendant Consolidated Roofing Company did not appeal.

The brief of the appellants has no reference anywhere to any ground of exception or any assignment of error. This brief states two questions are involved: One, was there sufficient evidence of non-negotiability of the promissory note involved in this action to justify submission of the issues to the jury? Two, was there sufficient evidence to support the verdict? The brief concludes with this language: "The inquiry should have been terminated upon this appellant's motion for judgment as of nonsuit, and that no competent evidence of bad faith actual or implied on the part of this appellant was adduced to support the verdict." It would seem that the appellants are relying solely upon their assignment of error as to the denial by the court of their motion for judgment of nonsuit renewed at the close of all the evidence.

The appellants make no contention that the complaint does not sufficiently allege that fraud, imposition or artifice was practiced upon the plaintiffs, who signed the note and deed of trust securing it, by the Consolidated Roofing Company, by means of which their signatures to these instruments were procured. The appellants plead as a further answer and defense that the Carolina Housing & Mortgage Corporation is an innocent purchaser for value of the note executed by the plaintiffs to the Consolidated Roofing Company, and that neither it nor Jefferson

E. Owens, Trustee, had any knowledge or notice of any fraud in the procurement of the execution of the note by plaintiffs, if such fraud be shown to exist.

The plaintiffs' evidence tends to show the following facts. The plaintiffs, husband and wife, owned a home in New Hanover County about four miles out of the City of Wilmington. On the night of 4 March 1953 Al Oberman, in company with a Mr. Whitfield, came to their home. According to the evidence of the appellants, Sam Oberman was President of the Consolidated Roofing Company. Oberman told them he was going through the county fixing up houses, and he would like to fix up their home. Chadbourn Whitfield asked him if there was any mortgage, or anything like that, and Oberman replied No. Chadbourn Whitfield said he had too many children to mortgage his home. Oberman replied he did not expect a mortgage or deed of trust, and if he came to the home to collect for the work and Whitfield did not have the money, he would come again. The plaintiffs and Oberman agreed on a contract for the repair of the house, and all three signed it. At the same time Oberman presented to the plaintiffs two other papers to sign. These papers were folded up like an envelope. Chadbourn Whitfield asked what these papers were. Oberman replied, "this is nothing, just don't pay any attention, just sign it." The papers had a lot of fine print. Whitfield can't read fine print: he can read his own name. These two papers were not read to the plaintiffs, nor did they read them. Whitfield asked, what do you call these papers. Oberman replied, they are just for you to sign: they are no mortgage. Whitfield said it is no mortgage. Oberman replied, "it is no mortgage, just sign it up here." The plaintiffs signed these two papers. Oberman grabbed the papers out of Whitfield's hand, and put them back in his little sack. The plaintiffs did not know that they had signed a promissory note and a deed of trust upon their home securing it, until they received a letter from Jefferson E. Owens, Trustee, on 17 February 1954 saying something about a foreclosure of a deed of trust on their home.

These two papers—not the contract which was the first paper signed —were a promissory note and a deed of trust upon plaintiff's home securing the note, and were introduced in evidence by the Carolina Housing & Mortgage Corporation. The note is dated 7 March 1953, is in the amount of $1,050.84, and is payable to the order of Consolidated Roofing Company, Inc., at the office of the appellant Carolina Housing & Mortgage Corporation, Hickory, North Carolina, in 36 consecutive monthly installments. This note was endorsed: "Without recourse. Consolidated Roofing Company, Inc., (Dealer) (s) Sam Oberman, Title, Pres." Beneath this endorsement is another: "Without recourse. Carolina Housing & Mortgage Corporation (s) Jefferson E. Owens, President."

The deed of trust upon plaintiffs' home is dated 7 March 1953, and is of record in Book 513, page 165, in the Public Registry of New Hanover County. In the deed of trust the plaintiffs are the parties of the first part, Jefferson E. Owens of Catawba County is the party of the second part, and the holder of plaintiffs' note therein described is the party of the third part. Murray L. Weiss of Mecklenburg County appears in the instrument as Notary Public, and he certifies that the plaintiffs personally appeared before him on 7 March 1953, and acknowledged the due execution of the foregoing instrument for the purposes therein expressed.

The only time the plaintiffs signed any papers in respect to this transaction was in their home on the night of 4 March 1953. Weiss was not in their home. They don't know him. They have never been in Mecklenburg County. They have never acknowledged any papers before him.

Plaintiffs' evidence tended to show the inferior character of the workmanship performed by the Consolidated Roofing Company.

This action was instituted by plaintiffs in March 1954, after the receipt of a letter from Jefferson E. Owens, Trustee, in reference to a foreclosure of a deed of trust on their home.

It is significant that the Consolidated Roofing Company offered no evidence, though it filed an answer, was represented in court by counsel who participated in the trial, and though Sam Oberman, its president, was sitting in court during the trial.

The only witness offered by the appellants was Jack C. Anderson, a Vice-President of the Carolina Housing & Mortgage Corporation. He testified that the note and deed of trust here have the name of his company on their backs. These two papers were filled out on forms of his company furnished to the Consolidated Roofing Company. His company purchased this note from the Consolidated Roofing Company, and had purchased similar notes from it before and after this transaction. At the time of the purchase of plaintiffs' note his company was not aware of any defenses the plaintiff might have; it purchased the note relying upon its regularity on its face. When this note was purchased, Jefferson E. Owens was Vice-President and Treasurer of his company.

There is plenary evidence tending to show that there were misrepresentations as to the contents of the note and the deed of trust. Al Oberman repeatedly said these papers were not a mortgage. The note and deed of trust were not read to plaintiffs. Chadbourn Whitfield can read his own signature, but not fine print. If the plaintiffs could read the note and deed of trust, there is simple evidence to show that they were induced not to do so by the positive fraud or false representations

made by Al Oberman, and relied on by them. After the note and deed of trust were signed, Oberman grabbed them out of Chadbourn Whitfield's hand, and put them "back in his little sack." The appellants in their brief make no contention that no fraud was practiced upon the plaintiffs by the Consolidated Roofing Company by means of which their signatures to the note and deed of trust were procured. There is ample evidence to support the first issue. *Leonard v. Power Co.*, 155 N.C. 10, 70 S.E. 1061; *Parker v. Thomas*, 192 N.C. 798, 136 S.E. 118; *Edney v. Motor Service & Sales*, 210 N.C. 569, 187 S.E. 758.

The appellants' argument in their brief is that the evidence is "barren of any matter that would reflect upon the status of the defendant appellant as a holder in due course." All citation of authority by them is on that point.

The charge of the court has not been brought forward. It is apparent from the issues submitted to the jury, and the argument in the briefs, that the case was tried in the Superior Court upon the theory of fraud in the treaty. As to the difference between fraud in the *factum* and fraud in the treaty, see: *Parker v. Thomas, supra; Medlin v. Buford*, 115 N.C. 260, 20 S.E. 463.

It is thoroughly established law with us that when fraud in the origin or transfer of a promissory note is pleaded, and evidence is introduced to that effect or fraud is admitted, "the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." G.S. 25-65; *Hancammon v. Carr*, 229 N.C. 52, 47 S.E. 2d 614; *McCoy v. Trust Co.*, 204 N.C. 721, 169 S.E. 644; *Clark v. Laurel Park Estates*, 196 N.C. 624, 146 S.E. 584; *Whitman v. York*, 192 N.C. 87, 133 S.E. 427; *Discount Co. v. Baker*, 176 N.C. 546, 97 S.E. 495; *Bank v. Fountain*, 148 N.C. 590, 62 S.E. 738; 11 C.J.S., Bills and Notes, pp. 58-60, where many more of our cases to the same effect are cited in note 5; Anno. 18 A.L.R. 25, *et seq.*

The rationale for the rule given in the English cases is that, if the notes were proved to have been obtained by fraud, that afforded a presumption that he who is guilty of the fraud will part with the instrument for the purpose of enabling some third party to sue upon it, and such presumption operates against the holder, and it devolves upon the third party to show that he is a holder in due course. *Bailey v. Bidwell*, 13 Mees. & Wels., 73, 153 English Reports, Full Reprint, 30; approved in *Smith v. Braine*, 3 Eng. L. & Eq. 379, 117 English Reports, Full Reprint, 872; and in *Harvey v. Towers*, 4 Eng. L. & Eq. 531, 155 English Reports, Full Reprint, 706. A just rule, because the third party must best know what consideration he gave for the note, if any.

The note and deed of trust here were filled out on the forms of the Carolina Housing & Mortgage Corporation. The note was payable to

the order of Consolidated Roofing Company at the office of Carolina Housing & Mortgage Corporation. The trustee named in the deed of trust was a principal officer of Carolina Housing & Mortgage Corporation. The date of the assignment without recourse of the note by the payee does not appear. The plaintiffs' evidence tends to show, and the jury so found, that a gross fraud was perpetrated upon the plaintiffs in procuring their signatures to these two instruments. When all the facts attendant upon the transaction are considered, it cannot be successfully contended, in our opinion, that no fair or reasonable inference is permissible from the evidence that the Carolina Housing & Mortgage Corporation is not a holder in due course for value and without notice of the infirmity of the note.

The court below properly overruled the motion for judgment of nonsuit. The second issue, and the creditability of the material evidence relevant to the inquiry on that question, were for the jury, and it would have constituted reversible error for the court to have decided the question and to have withdrawn its consideration from the jury.

In the trial below we find

No error.

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JOHN M. COULBOURN v. MARY LOUIS ARMSTRONG.

(Filed 21 March, 1956.)

**1. Appeal and Error § 21—**

An exception to the judgment presents the question whether any error appears on the face of the record, including whether the facts found and admitted are sufficient to support the judgment.

**2. Trial § 36—**

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. G.S. 1-200. This rule applies to new matter alleged in the answer.

**3. Trial § 39—**

A verdict should be certain and import a definite meaning free from ambiguity and be sufficient in form and substance to support a judgment which is definite in terms and capable of execution. G.S. 1-200.

**4. Detinue § 2—**

In an action for possession of personal property, verdicts that plaintiff is the owner and entitled to possession of such articles of personal property "set out in the complaint as are now in the possession of defendant," are too vague, uncertain, and ambiguous to support a judgment.

**5. Same—**

In an action to recover possession of personalty, defendant's denial of the allegation that she is in the wrongful possession raises an issue for the jury, since even though plaintiff be owner of the property, it does not follow that defendant is in the wrongful possession thereof.

**6. Husband and Wife § 12d (4)—**

Where, in the husband's action for possession of certain articles of personalty, the wife testifies that certain items of the property was conveyed to her by separation agreement duly executed by the parties, and denies the husband's allegation that the parties became reconciled after the execution of the agreement, an issue of fact is raised for the determination of the jury.

**7. Sales § 11—**

In the husband's action to recover possession of certain items of personalty, the wife alleged that he had executed a bill of sale to her for certain of the items and testified that he had surreptitiously removed the bill of sale from her lock box and destroyed same, and offered in evidence what she testified was a duplicate original signed by him. The husband denied that he had signed the original of the copy produced by the wife. *Held:* An issue of fact was raised for the jury.

**8. Tenants in Common § 4—**

One tenant in common may not maintain an action against a cotenant to recover possession of specific personal property. The remedy is by action for partition or for sale for partition.

**9. Property § 4—**

In an action to recover possession of specific items of personalty the question of the value of the personalty does not arise until plaintiff has recovered judgment and the property is not recovered upon execution or is recovered in a damaged condition.

APPEAL by defendant from *Parker (Joseph W.), J.*, August Term 1955, BERTIE.

Civil action to recover possession of personal property.

Plaintiff and defendant were husband and wife. They separated and thereafter he procured a divorce in the State of Pennsylvania.

Plaintiff alleges in paragraph 5 of his complaint that he is the owner and entitled to possession of various articles of household furniture, bric-a-brac, and other personal property usually kept in a home. He alleges and testifies that a large number of these articles are antiques and heirlooms which have been in the possession of his family for many years. He alleges in paragraph 6 of his complaint that he is the owner of certain other articles of personal property listed therein which were stored in a warehouse in Windsor and removed therefrom by, and are now in the possession of, the defendant. In paragraph 7 he alleged that his mother devised to him and the defendant as man and wife

certain articles of jewelry and other personal property listed therein which, by virtue of the decree of divorce, are now owned by plaintiff and defendant as co-owners. He alleges that the total value of the articles described in the complaint is $10,000. He further alleges that all of the described items of personal property are now wrongfully detained by the defendant.

In paragraph 3 of his complaint he alleges that he and the defendant entered into a separation agreement in 1952, which agreement is duly recorded in Bertie County, and that thereafter there was a reconciliation between him and the defendant, and they lived together as man and wife for about ten days when they again separated.

In her answer defendant denies that the plaintiff is the owner and entitled to the possession of any part of the property described in paragraphs 5, 6, and 7 of plaintiff's complaint. She further alleges that she and plaintiff were owners as tenants in common of the property described in paragraph 7 but that plaintiff gave to her, while they were living together, that and a part of the other property described in the complaint. She further admits the deed of separation but denies any reconciliation thereafter and alleges affirmatively that the remainder of the property was conveyed to her in the contract of separation, and that the property plaintiff seeks to recover is "her sole and separate property."

The issues submitted to the jury are in part as follows:

"1. Is the plaintiff the owner of and entitled to the possession *of such articles of personal property* set out in paragraph 5 of the Complaint *as are now in the possession of the defendant?*" (Italics supplied.)

"3. Is the plaintiff the owner of and entitled to the possession *of such articles of personal property* set out in paragraph 6 of the Complaint *as are now in the possession of the defendant?*" (Italics supplied.)

"5. Is the plaintiff the owner of and entitled to a one-half undivided interest *in such articles of personal property* set out in paragraph 7 of the Complaint *as are now in the possession of the defendant?*" (Italics supplied.)

Issues 2, 4, and 6 relate to the value of the property. The jury answered issues 1, 3, and 5 "yes" and judgment was entered "that the plaintiff is the owner of and entitled to recover of the defendant the immediate possession of such articles of personal property set out in paragraph five and paragraph six of the Complaint, as are now in the possession of the defendant, and that plaintiff is the owner of and entitled to a one-half undivided interest in such articles of personal property set out in paragraph seven of the Complaint as are now in the possession of the defendant." It was further adjudged that if immediate possession of such property cannot be had, then that the plaintiff

recover the value thereof as assessed by the jury. Defendant excepted and appealed.

*Herbert B. Edens, Stuart A. Curtis, and Gerald F. White for plaintiff appellee.*

*Pritchett & Cooke for defendant appellant.*

BARNHILL, C. J. The defendant excepts to the judgment entered and assigns the same as error. This and related assignments of error must be sustained.

An exception to a judgment raises the question whether any error appears on the face of the record. *Surety Corp. v. Sharpe,* 233 N.C. 642, 65 S.E. 2d 138; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609. This includes the question whether the facts found and admitted are sufficient to support the judgment. *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20, and cases cited.

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings, and they, together with the answers thereto, must be sufficient to support a judgment disposing of the whole case. G.S. 1-200; *Griffin v. Insurance Co.,* 225 N.C. 684, 36 S.E. 2d 225, and cases cited; *Carland v. Allison,* 221 N.C. 120, 19 S.E. 2d 245; *Cathey v. Shope,* 238 N.C. 345, 78 S.E. 2d 135; *Wheeler v. Wheeler,* 239 N.C. 646, 80 S.E. 2d 755.

This rule applies to new matter alleged in the answer. *Griffin v. Insurance Co., supra,* and cases cited.

Furthermore, a verdict should be certain and import a definite meaning free from ambiguity and sufficient in form and substance to support a judgment which is definite in terms and capable of execution. G.S. 1-200; *Gibson v. Insurance Co.,* 232 N.C. 712, 62 S.E. 2d 320; *Edge v. Feldspar Corp.,* 212 N.C. 246, 193 S.E. 2.

When the verdicts on the first, third, and fifth issues are considered in the light of these requirements, it is quite apparent that they are too vague, uncertain, and ambiguous to support a valid and enforceable judgment. It is equally clear that the judgment entered is so indefinite and uncertain that it will not support an enforceable execution. The facts which gave rise to the controversy between the parties are as undetermined and unsettled as they were before any verdict had been rendered except as to the fact defendant has in her possession some article or articles of personal property—uncertain in number and kind—described in the complaint and claimed by the plaintiff.

Plaintiff alleges that the property described in the complaint is wrongfully detained by the defendant. This the defendant denies.

*Non constat* the plaintiff is the owner of the property as alleged, it does not necessarily follow that the defendant is in the wrongful possession thereof. Yet there was no issue submitted to the jury in respect thereto and the jury has not found that the defendant is in the wrongful possession of any part of the property in controversy.

Likewise, plaintiff alleges that on 2 December 1952 he and the defendant entered into a separation agreement which is duly recorded in the Bertie County Registry, but that on 18 December 1952 they became reconciled and lived together as man and wife for about ten days. The defendant admits the separation agreement, but denies that she and plaintiff ever were thereafter reconciled or lived together as man and wife, and she testified that the property in controversy was conveyed to her in the separation agreement. These allegations and this evidence raise a serious issue as to the right of the plaintiff to recover herein. Yet no issue was submitted in respect thereto.

Furthermore, the defendant in her answer alleges that the plaintiff executed a bill of sale to her for the first twenty items and the last three items listed in section 5 of the complaint, and she testified that the plaintiff thereafter procured the keys to her lock box, surreptitiously removed the bill of sale and wrongfully destroyed the same. She produced what she testified was a copy or duplicate original of the bill of sale signed by the plaintiff. The plaintiff admitted that he signed a paper writing other than the separation agreement but positively denied that it was the original of the copy produced by the defendant. No issue was submitted to settle this part of the controversy.

It is well for us to note here that this action may not be maintained in any event as to the property described in paragraph 7 of the complaint. One cotenant is as much entitled to the possession of the common property as the other, and the law will not take from the one so as to give the other property owned in common. The proper remedy is by a special proceeding to divide or to sell for division. "It is the well established principle of law in this State that a tenant in common cannot maintain an action against a cotenant to recover specific personal property. His remedy is partition. (Authorities cited.)" *Winborne, J.*, in *Dubose v. Harpe*, 239 N.C. 672, 80 S.E. 2d 454.

While we do not care to attempt to chart the course of a retrial of this cause, it is not amiss to call attention to the fact that this action is purely possessory in nature. The question of value has not arisen and will not arise until after plaintiff has recovered judgment and issued execution thereon. Should the property recovered by him be returned in a damaged condition or if the sheriff should fail to find the property or some part thereof for which plaintiff had recovered judgment, then the question of the amount of damages to the property returned and

the value of the property not seized will arise. The cause should be retained for that purpose.

In short, the verdict rendered is so ambiguous and inconclusive it will not support a valid judgment, and the judgment entered thereon will not support a valid execution. Therefore, it is necessary for us to vacate the verdict and judgment and order a

New trial.

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EUGENE RIDDLE v. PERCY JAMES ARTIS, HARRY LEE MORRIS, JR., MRS. HARRY LEE MORRIS AND RAYMOND McMILLAN.

(Filed 21 March, 1956.)

**1. Negligence § 6—**

Negligence originating from separate or distinct sources or agencies operating independently of each other may concur in proximately causing injury, and in such event, the author of each negligent act or omission may be held liable by the injured party severally or together as joint tort-feasors.

**2. Negligence § 7—**

In order for the intervening negligence of an independent agency to relieve the original wrongdoer of liability, such intervening negligence must constitute an independent force which breaks the chain of causation and turns aside the natural sequence of events set in motion by the original wrongdoer and be reasonably unforeseeable on the part of the original actor.

**3. Negligence § 9—**

Foreseeability, as an element of proximate cause, does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred, but only that he could have foreseen, in the exercise of due care, that consequences of a generally injurious nature would likely result from his act or omission.

**4. Automobiles §§ 13, 14, 35—Complaint held to state concurrent negligence on part of defendants proximately causing injuries to plaintiff.**

Plaintiff's allegations were to the effect that he was driving south on a highway, that one defendant, driving north, failed to keep a proper lookout, drove at an unlawful rate of speed, with slick tires, on a highway damp from recent rains, and skidded into plaintiff's lane of travel, causing the cars to collide, that the other defendant, driving a third car, followed plaintiff on the highway more closely and at a greater speed than was reasonable or prudent under the circumstances, that he failed to keep a proper lookout, and collided with the rear of plaintiff's car, notwithstanding that he saw or could have seen, in the exercise of due care, that the car of the first defendant was skidding and that a collision was likely to occur, and that plaintiff's injuries were the proximate result of the con-

current negligence of defendants. *Held:* The complaint alleges concurrent negligence, and demurrer of the second defendant on the ground that the complaint disclosed upon its face that his negligence was insulated by the negligence alleged against the first defendant, should have been overruled.

BARNHILL, C. J., concurs in result.

APPEAL by plaintiff from *Parker (J. W.), J.*, at November Special Term, 1955, of NORTHAMPTON.

Civil action in tort to recover damages for personal injuries and damage to property sustained by plaintiff in a three-car collision, allegedly caused by the joint and concurrent negligence of the drivers of two of the vehicles, heard below on demurrer to the complaint.

The plaintiff's allegations may be summarized as follows:

1. The collision occurred on 25 December, 1953, at about 2:15 o'clock in the afternoon, on U. S. Highway No. 117, about a mile south of the city limits of Goldsboro. Immediately before the collision the plaintiff was operating a Ford automobile south on the highway. The defendant Artis was driving a Pontiac car north, meeting the plaintiff. The defendant Harry Lee Morris, Jr., as agent of the defendant Mrs. Harry Lee Morris, was operating a Chevrolet car south, following the plaintiff.

2. The collision occurred in this manner: As the two cars driven by the plaintiff and the defendant Artis were about to meet and pass, the Artis car skidded upon the highway and "came across the center line . . . in front of plaintiff's car." The front of plaintiff's car struck the right side of the defendant Artis' car in plaintiff's southbound lane of travel. Immediately thereafter, the front of the defendant Morris' car struck the rear of the plaintiff's car.

3. That the defendant Artis was negligent in that he was operating his car (a) without keeping a proper lookout, (b) at a high and unlawful rate of speed, with slick tires, on a highway damp from recent rains, and (c) to his left of the center line of the highway when meeting other traffic.

4. That the defendant Morris was negligent in these particulars: (a) he was operating his automobile "by following the car that plaintiff was driving more closely than was reasonable or prudent and without regard for the safety of others"; (b) he was operating his car "at a greater speed than was safe and prudent under the circumstances"; (c) "he failed to keep a proper lookout and use due care under the circumstances at a time when he saw, or by the exercise of due care, could have seen, that the Highway was damp from recent rains, and that the defendant Artis' car was skidding in front of him and the car that plaintiff was driving, and that a collision was likely to occur."

5. "That the negligence of defendant Artis, set into sequence a chain of events which concurrently with the negligence of defendant Morris resulted in the collision herein complained of."

6. "That immediately following the collision between the front of plaintiff's car with the right side of defendant Artis' car and while plaintiff was in a seriously injured condition and unable to extricate himself, the defendant Morris negligently ran into the rear of plaintiff's car and successively and concurrently with the negligence of defendant Artis inflicted serious injury to the plaintiff, which negligence on the part of defendant Artis and defendant Morris resulted proximately in the injuries herein complained of."

7. "That at the time of said collision defendants were successively, jointly and concurrently negligent in proximately causing the injuries to plaintiff."

8. That as a result of the collision the "plaintiff was seriously, painfully and permanently injured" and "suffered property losses" for which he is entitled to recover of the defendants, jointly and severally, damages in a specified sum.

The defendants Mrs. Harry Lee Morris and Harry Lee Morris, Jr., demurred *ore tenus* to the complaint on the ground that the complaint fails to state a cause of action against them, for that "the facts alleged disclose that the negligence of the defendant Percy James Artis was the sole proximate cause of the collision and the injuries and damage sustained by the plaintiff . . ."

The trial court entered judgment sustaining the demurrer and granting the plaintiff leave to amend.

From the judgment so entered, the plaintiff appeals.

*Allsbrook & Benton for plaintiff, appellant.*

*Kelly Jenkins and Eric Norfleet for defendants Mrs. Harry Lee Morris and Harry Lee Morris, Jr., appellees.*

JOHNSON, J. Does it affirmatively appear upon the face of the complaint, as contended by the defendants Morris, that the negligence alleged against them by the plaintiff was superseded and completely insulated by the intervening negligence of the defendant Artis? We think not. This works a reversal of the judgment below.

It is elemental that 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 may be held liable for the injuries inflicted, and an action may be main-

tained against any one of the wrongdoers or against all of them as joint tortfeasors. *Tillman v. Bellamy,* 242 N.C. 201, 87 S.E. 2d 253.

The doctrine of intervening negligence is well established in our law. Its essential elements and governing principles are well defined and elaborately explained in former decisions of this Court. Further elaboration here is unnecessary. *Balcum v. Johnson,* 177 N.C. 213, 98 S.E. 532; *Kiser v. Carolina Power & Light Co.,* 216 N.C. 698, 6 S.E. 2d 713; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63. These decisions emphasize the principle that an intervening cause which will relieve the original wrongdoer of liability must be a new cause intervening between the original negligent act or omission and the injury ultimately suffered, which breaks the chain of causation set in motion by the original wrongdoer and becomes itself solely responsible for the injuries. It must be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer "and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated." *Hall v. Coble Dairies, supra* (234 N.C. at p. 211, 67 S.E. 2d at p. 67).

It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it. *Balcum v. Johnson, supra.*

"The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808. See also *Beach v. Patton,* 208 N.C. 134, 179 S.E. 882.

In 38 Am. Jur., Negligence, Sec. 67, pp. 722 and 723, the principle is stated this way: "In order to be effective as a cause superseding prior negligence, the new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result; a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that reasonably might not have been anticipated."

"If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation so as to relieve the original wrongdoer from responsibility for the injury. 38 A.J. 723. A superseding cause cannot be predicated on acts which do not affect the final

result of negligence otherwise than to divert the effect of the negligence temporarily, or of circumstances which merely accelerate such result (citing authority).

" 'The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' " *Riggs v. Motor Lines,* 233 N.C. 160, at p. 165, 63 S.E. 2d 197, at p. 201.

Ordinarily, "the connection is not actually broken if the intervening event is one which might in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation." Shearman and Redfield on Negligence, Revised Ed., Vol. 1, Sec. 38, p. 101.

The test of foreseeability as an element of proximate cause does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' " *Hart v. Curry,* 238 N.C. 448, 78 S.E. 2d 170.

Our examination of the complaint impels the conclusion that the elements of negligence separately averred against the defendants Morris and Artis are alleged in such manner as to imply actionable negligence on the part of the defendants Harry Lee Morris, Jr., and Percy James Artis, on the theory of concurrent negligence, under application of the principles explained in *Tillman v. Bellamy, supra,* and the decisions cited in *Bumgardner v. Allison,* 238 N.C. 621, top p. 626, 78 S.E. 2d 752, mid. p. 756. See also *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Insurance Co. v. Motors, Inc.,* 241 N.C. 67, 84 S.E. 2d 301; *Lawrence v. Bethea, ante,* 632. Necessarily, then, the complaint does not disclose upon its face that the negligence alleged against the defendants Morris was insulated by that alleged against the defendant Artis. *Riggs v. Motor Lines, supra; Hall v. Coble Dairies, supra.* See also *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690.

The decisions cited and relied on by the appellees, including *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, are factually distinguishable.

The judgment below is

Reversed.

BARNHILL, C. J., concurs in result.

STATE v. JENNESS RUSSELL OWENS.

(Filed 21 March, 1956.)

**1. Criminal Law § 12g—**

Chapter 482, Session Laws of 1951, providing that upon defendant's demand for a jury trial in a criminal prosecution in the Recorder's Court of the county, the cause should be transferred to the Superior Court of the county, *is held* constitutional, since the act does not require trial in the Superior Court upon the original warrant.

**2. Constitutional Law § 32: Indictment and Warrant § 13—**

Upon defendant's demand for a jury trial in a prosecution upon a warrant in the Recorder's Court, the cause was transferred to the Superior Court and an indictment returned by the grand jury. *Held:* The court's unequivocal finding, upon defendant's motion to quash, that the defendant was being tried upon the indictment, is conclusive, notwithstanding a *lapsus linguae* in the charge that defendant was being tried upon a warrant.

**3. Automobiles § 72—**

Testimony of State's witnesses to the effect that they smelled the odor of an intoxicant on the breath of defendant immediately after eccentric operation of an automobile by defendant, that defendant was staggering and appeared to be intoxicated, with testimony of some of the State's witnesses that defendant was drunk, *held* to take the issue to the jury on the charge of operating a motor vehicle while under the influence of intoxicating beverages or narcotic drugs, notwithstanding defendant's conflicting evidence that he was not drunk but was suffering from a disease which caused him to lose his equilibrium and balance.

APPEAL by defendant from *Bone, J.*, October Term, 1955, of EDGECOMBE.

This is a criminal action. The defendant was arrested upon a warrant charging that on the 10th day of April, 1954, he unlawfully operated a motor vehicle upon the streets of Tarboro while under the influence of "intoxicating beverages or narcotic drugs."

The warrant was signed by Otley Leary, Chief of Police of the Town of Tarboro, pursuant to the authority contained in Section 4½ of Chapter 13 of the Session Laws of 1953. The warrant was made returnable before the Trial Justice's Court of the Town of Tarboro. A hearing was held on 19 May, 1954. The defendant made a special appearance and moved to quash the warrant for that it was issued by Otley Leary, Chief of Police, and therefore was in violation of Article XIV, Section 7, of the Constitution of North Carolina, Otley Leary not being a judicial officer. The motion was denied and probable cause found and the case sent to the Recorder's Court of Edgecombe County. In

the latter court the defendant again made a special appearance and moved to quash the warrant upon the grounds previously stated. The motion was denied and the defendant demanded a jury trial, whereupon, the case was transferred to the Superior Court of Edgecombe County as provided in Chapter 482 of the Session Laws of 1951.

At the September Term, 1954, of the Superior Court of Edgecombe County, the grand jury returned a true bill against the defendant, charging that on 10 April, 1954, in the County aforesaid, the defendant "did operate a motor vehicle upon the public highway while under the influence of intoxicating beverages or narcotic drugs," etc.

The record states, "The defendant comes into court and pleads not guilty." Thereafter, the following appears in the record:

"Upon the reading of the warrant the defendant entered a plea of not guilty. After the plea was entered, the court, in its discretion, permitted the defendant to lodge a motion to quash.

"After hearing argument of counsel on the motion to quash, the Court ruled:

"The Court is of the opinion that the motion to quash the warrant is not pertinent to the case for the reason that the defendant has not been put to trial on the warrant, but has been put to trial upon a bill of indictment returned by the grand jury and, therefore, the Court declines to pass upon the constitutionality of the statute under attack. The said motion to quash is denied."

The jury returned a verdict of guilty, and from the judgment pronounced upon the verdict, the defendant appeals to the Supreme Court, assigning error.

*Attorney-General Rodman and Assistant Attorney-General Love for the State.*

*Weeks & Muse for the defendant.*

DENNY, J. The defendant insists (1) that the warrant signed by the Chief of Police of the Town of Tarboro is void and in support of this view he relies upon the case of *S. v. McGowan, ante*, 431, 90 S.E. 2d 703; and (2) if it be conceded that the warrant is valid he could not be tried upon it in the Superior Court, and this conclusion is supported by our decision in *S. v. Thomas*, 236 N.C. 454, 73 S.E. 2d 283.

The defendant contends in his brief that he was tried upon the warrant in the Superior Court and that such trial was a nullity. *S. v. Thomas, supra.*

In our opinion, the case of *S. v. Norman*, 237 N.C. 205, 74 S.E. 2d 602, is controlling on the question as to the procedure in transferring this case from the Recorder's Court to the Superior Court rather than

*S. v. Thomas, supra,* as contended by the defendant. In *S. v. Thomas, supra,* we held Chapter 435 of the Session Laws of 1951 unconstitutional because it provided that whenever a demand for jury trial was made in any criminal case in the County Court of Greene County, the judge should transfer the case to the Superior Court of said county, to be heard in the Superior Court upon the warrant in such case. But, in the instant case, Chapter 482 of the Session Laws of 1951 provides that in the trial of any criminal action in the Recorder's Court of Edgecombe County, upon demand for a jury trial by the defendant, the judge of the Recorder's Court shall transfer the case to the Superior Court of Edgecombe County.

We held a similar act, Chapter 589 of the Session Laws of 1951, applicable to the Recorder's Court of Washington County, to be valid in the case of *S. v. Norman, supra.* It will be noted that these acts, unlike the one held unconstitutional in *S. v. Thomas, supra,* do not require trial in the Superior Court upon the original warrants in such cases. Therefore, the pertinent question here is whether the defendant was tried on the indictment in the trial below or upon the original warrant.

The only statement in conflict with the ruling of the court below in refusing to consider the constitutionality of the statute under attack, to wit: Section 4½ of Chapter 13 of the Session Laws of 1953, appears in the statement made by the trial judge in his charge to the jury in which he said: "The defendant, Jenness Russell Owens, is being tried upon a warrant which charges him with operating a motor vehicle on a public highway or street while under the influence of intoxicating liquors."

In view of the unequivocal finding by the court below after the plea of not guilty had been entered, "that the defendant has not been put to trial on the warrant, but has been put to trial upon a bill of indictment returned by the grand jury," we hold that the use of the word "warrant" instead of "indictment" in the charge was a mere *lapsus linguae,* or slip of the tongue, and is insufficient to overrule the explicit finding that the defendant was put to trial on the bill of indictment. The appeal will be disposed of accordingly. Consequently, we do not reach for decision the question of the constitutionality of Section 4½ of Chapter 13 of the Session Laws of 1953.

The defendant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. This assignment of error is without merit. Five witnesses testified that in their opinion the defendant was under the influence of an intoxicating beverage at the time he was arrested.

The evidence tends to show that about 12:15 a.m. on the night of 10 April, 1954, the defendant drove his car from his home to the Snack Bar, which is located on North Main Street in the Town of Tarboro. That when he got out of his car to go into the Snack Bar, he was staggering and appeared to be intoxicated. After coming out of the Snack Bar, he seemed to have some trouble in opening the door of his car, and in backing out into the street he scraped the fender of an automobile parked to his right, and thereafter while undertaking to turn his car in the street, he backed it entirely across the street and hit another automobile.

The defendant testified that he was not under the influence of an intoxicant or narcotic drug, but was suffering from an attack caused by Meneries Disease; that he had been taking medicine for this disease for several years. His physician testified that he had been treating him for the disease and that he had prescribed for him the use of Dramamine or Bonamine, neither of which is a narcotic but a sedative. He also testified that an attack of Meneries Disease would cause him to lose his equilibrium and balance. The defendant admitted that he did take a drink around 7:30 or 8:00 o'clock at a party he and Mr. Larry Eagles gave for some of their employees at the Country Club on the night of 10 April; that later in the evening, around 9:30, he sipped on another drink for some thirty or forty minutes and drank possibly one-half of it.

The jury was confronted with this situation. The State offered evidence by its witnesses to the effect that they smelled the odor of an intoxicant on the breath of the defendant and that in their opinion he was under the influence of an intoxicating beverage. Some of the State's witnesses testified that he was drunk. The defendant testified as set forth above, and offered other witnesses who testified that he was not under the influence of an intoxicant or narcotic drugs immediately before or immediately after his arrest. Numerous highly respected citizens came into court and testified to the defendant's good character. Even so, it was a case for the jury and the jury accepted the State's version under a charge free from prejudicial error.

It would be difficult to conceive how counsel for the defendant could have been more zealous in their efforts to get a nonsuit in this case or secure a new trial for their client. However, we have carefully examined all the exceptions and assignments of error and no error is shown which in our opinion is sufficiently prejudicial to justify us in disturbing the verdict below.

No error.

EDNA C. BAXLEY v. A. A. CAVENAUGH AND JAMES M. CAVENAUGH.

(Filed 21 March, 1956.)

**1. Appeal and Error §§ 24, 42—**

Inadvertence in the charge in submitting to the jury material facts going to the crux of the issue which are not supported by any evidence must be *held* for prejudicial error, notwithstanding appellant's failure to call the error to the trial court's attention in apt time.

**2. Same—**

An instruction which states a contention presenting an erroneous view of the law or an incorrect application of it upon a material point must be *held* for prejudicial error, notwithstanding the failure of appellant to bring the matter to the attention of the trial judge before the case was submitted to the jury.

**3. Automobiles § 46—Instruction held for error in presenting facts not supported by evidence.**

Defendant's car ran off the highway at a curve into plaintiff's yard and struck plaintiff's car which was parked some 30 feet from the hard-surface. Defendant's evidence was to the effect that he leaned up against the door of his car, that the door flew open when the car hit the edge of the yard, and that defendant fell out of the car. Defendant testified, "I must not have slammed the door, because it wasn't shut when I came around the curve." *Held:* An instruction to the effect that defendant testified that the door had not been so that it would not lock before the accident and that defendant contended that the door had not theretofore been so that it would fly open, and that the occurrence was a pure accident for which defendant should not be held liable, constitutes reversible error.

**4. Automobiles § 21—**

A collision resulting after the door of the car flew open on a curve and the driver fell from the automobile is not necessarily the result of an accident, even though the door had not flown open theretofore, since if the driver was negligent in failing to exercise due care in failing properly to shut the door, or in leaning against it when he came around the curve, and such negligence was a proximate cause of the injury, the result would not be due to unavoidable accident.

**5. Negligence § 1—**

An unavoidable accident can occur only in the absence of causal negligence.

APPEAL by plaintiff from *Stevens, J.*, September, 1955, Term, DUPLIN.

Civil action to recover for property damage, alleged to have been caused by the negligence of defendants.

On this appeal, we are not concerned with the liability of defendant A. A. Cavenaugh for the negligence, if any, of his son, James M. Cavenaugh, the operator of the Ford car that struck and damaged plaintiff's

Plymouth automobile. The jury answered the first issue, "No," thereby failing to find that plaintiff's damages were caused by the negligence of James M. Cavenaugh. The appeal concerns errors, if any, in the conduct of the trial, as related to the first issue. Hence, the word "defendant," as used herein, refers only to James M. Cavenaugh.

All the evidence tends to show that on 9 June, 1954, about 10:00 p.m., plaintiff's automobile was parked in her private driveway some 30 feet from (hard-surfaced) Highway #41; and that the Ford car, operated by defendant, ran off the highway, crossed into plaintiff's yard and crashed into her parked car.

Plaintiff's evidence tends to show: Plaintiff and her husband had gone to bed, upstairs. The noise caused by the crash aroused them. When they came down to their yard, defendant and John Wilson, plaintiff's companion in the Ford car, were in the yard, between the Ford car and the house. The Ford car then was approximately 100-120 feet from where it had left the highway. Plaintiff's residence and her parked car were to defendant's right as he traveled along the highway. There was a bad curve where defendant's car left the highway. Defendant was traveling, in second gear, at a speed of 40 miles per hour. A State Highway Patrolman testified: "The skid marks from the Cavenaugh car began on the left side of the highway at a curve and continued for a distance of 108 feet. The car then left the road and traveled 120 feet across the yard where it struck the Plymouth."

Defendant's evidence tends to show: Shortly before the collision, the Ford car would not crank. It was "pulled" or "pushed" off to get it started. Defendant then drove it down the highway and turned around. This was some 200 yards from where the collision occurred. Defendant then drove along the highway, in second gear, at a speed of 40 miles per hour. Vernon Scholer, defendant's witness, testified that defendant had a "Hollywood muffler" on his car which "cries out and can be heard for a considerable distance." Scholer was in his house, some 300 feet from where plaintiff's car was parked. He testified: "As he (defendant) came by I looked out the door and saw him pass. About that time I heard tires squall and I heard the collision." Defendant testified that his car left the road at a sharp curve. He testified that he did not apply his brakes. Both defendant and Wilson, on cross-examination, testified that they would not deny that there were skid marks as testified by the State Highway Patrolman.

The testimony was conflicting as to whether there was any odor of alcohol on defendant's breath shortly after the collision.

Defendant's sole explanation of the cause of the collision is in these words: "I must not have slammed the door, because it wasn't shut when I came around the curve. I leaned up against it and it came open

and as the car hit the bank in the yard I fell out into the plaintiff's yard." Wilson testified: "The door flew open and James fell out when it hit the edge of the yard."

Defendant was indicted for careless and reckless driving. He pleaded guilty. It was his second offense. He lost his license. He had wrecked his car twice. He so testified.

Plaintiff alleged that defendant was negligent in these particulars: (1) excessive speed; (2) failure to keep a proper lookout; and (3) failure to keep his car under proper control.

As to all allegations, except as to residence of the parties, the answer says simply that they are denied.

Upon the verdict, it was adjudged that plaintiff recover nothing and that she pay the costs. Plaintiff excepted and appealed, assigning errors.

*Roland C. Braswell and Calvin B. Bryant for plaintiff, appellant.*
*Grady Mercer for defendants, appellees.*

BOBBITT, J. The court, in reviewing defendant's testimony, stated to the jury: "He testified . . ., (and that the left-hand door that had not been so that it would not lock before the wreck, came open,) . . ."

The court, in reviewing defendant's contentions, stated to the jury: "The defendant . . . says and contends . . . that he was driving with prudence and care and with due care, (but that a door that had not theretofore been so that it would fly open, on this occasion, because he leaned against it, flew open and caused him to fall out of this car onto the roadway and by so doing it got out of control and went into the yard upon which the Baxley house was situated.)"

The court, in further reviewing defendant's contentions, stated to the jury: "(He says that that was not negligence on his part, that this was a pure accident for which he should not be held in negligence just because the door fell open and he fell out the door, and that he was not at fault, and therefore he says and contends you ought to answer the first issue in his favor.)"

The statements in parentheses are the bases for plaintiff's exceptive assignments of error.

Defendant's complete loss of control of the Ford car is established by his own testimony. All the evidence is to that effect. Consequently, the only question for decision was whether such loss of control was caused in whole or in part by defendant's failure to exercise due care to keep the Ford car under proper control.

We find no testimony in the record "that the left-hand door . . . had not been so that it would not lock," or that the left-hand door "had not

theretofore been so that it would fly open." Defendant's complete testimony on this subject is quoted above.

The prejudicial effect of the court's inadvertent misstatement of the evidence relating to this crucial matter is emphasized by the court's recital in behalf of defendant of a contention to the effect that the collision was *"a pure accident* for which he should not be held in negligence *just because* the door fell open . . ." (Italics added.)

The court's statement of a material fact not in evidence, and the further statement predicated thereon of a contention in behalf of defendant that his loss of control of the Ford car was "a pure accident," considered together, constitute prejudicial error. Two lines of authority, which converge here, underlie decision. (1) It is prejudicial error to submit to the jury for consideration facts material to the issue of which there is no evidence. *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Darden v. Leemaster,* 238 N.C. 573, 78 S.E. 2d 448; *S. v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921; *S. v. Pillow,* 234 N.C. 146, 66 S.E. 2d 657; *In re Will of Atkinson,* 225 N.C. 526, 35 S.E. 2d 638; and cases cited therein. (2) Even though stated as a contention, an instruction that presents an erroneous view of the law or an incorrect application of it, if prejudicial, is ground for a new trial, notwithstanding failure to bring the matter to the attention of the trial judge before the case is submitted to the jury. *Harris v. Construction Co.,* 240 N.C. 556, 82 S.E. 2d 689, and cases cited therein.

The evidence and the charge, considered in its entirety, accentuate the prejudicial effect of the error. Defendant's only explanation and contention as to his admitted loss of control of the Ford car was that the left-hand door came open when he leaned against it. In the charge, there is no application or mention of the law bearing on the subject of unavoidable accident. Indeed, the word *accident* does not appear in the entire charge relating to the first issue except in the challenged (quoted) instruction. Under these circumstances, the instruction, while couched in the language of a review of contentions, implied that if the door flew open, particularly if it had not done so theretofore, of which there was no evidence, this would be "a pure accident" requiring that the jury answer the negligence issue, "No."

Such is not the law. If defendant did not properly shut the door, as he surmised, and such conduct was a failure to exercise due care, or if, under the circumstances, he failed to exercise due care when he leaned against it when he came around the curve, and such failure to exercise due care caused the door to fly open, defendant's loss of control of the Ford car under such circumstances would be attributable to negligence on his part. These questions were not submitted for jury determination.

An unavoidable accident, as understood in the law of torts, can occur only in the absence of causal negligence. Plaintiff is entitled to recover if defendant's loss of control of the Ford car and the resulting damage would not have occurred *but for* his own negligent act or omission. *Ferebee v. R. R.*, 163 N.C. 351, 79 S.E. 685; *Luttrell v. Hardin*, 193 N.C. 266, 136 S.E. 726; *Gillis v. Transit Corp.*, 193 N.C. 346, 137 S.E. 153.

It is noted that the errors in the charge go directly to the crux of the case, not to a subordinate or incidental feature thereof.

The circumstances here take this case out of the well established rule that "an error in stating the contentions of a party, or in recapitulating the evidence, should be called to the court's attention in time to afford an opportunity of correction, otherwise it may be regarded as waived or as a harmless inadvertence." *S. v. McNair*, 226 N.C. 462, 38 S.E. 2d 514. See *In re Will of McGowan*, 235 N.C. 404, 70 S.E. 2d 189, and cases cited therein.

For the reasons stated, plaintiff is entitled to a

New trial.

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JOHN S. JONES v. W. T. TURLINGTON AND WIFE, CHELLIE TURLINGTON; J. HEDRICK AMAN AND WIFE, SALLIE H. AMAN; FRANK A. SMITH AND WIFE, PEARL SMITH, AND ELBERT GUTHRIE.

(Filed 21 March, 1956.)

**1. Deeds § 13a—**

Conveyance of a lot, without reservation, according to a map showing the lateral lines extending across the full width of a street on the front of the lot carries the fee in the land covered by the street, subject to the easement of the street.

**2. Waters and Watercourses § 1—**

The grantee of a lot, including the fee subject to an easement for a street across the end of the lot fronting on navigable water, is entitled, as littoral or riparian owner, to land gradually built up through forces of nature or processes of accretion from the water.

**3. Ejectment §§ 15, 17—**

In an action to recover possession of land, the burden is upon plaintiff to make out his title, and where he fails to show title in himself, nonsuit is proper.

APPEAL by plaintiff from *Bundy, J.*, at October 1955 Civil Term, of CARTERET.

Civil action for recovery of land together with all rights and privileges incident thereto, and for injunctive relief, and for damages for trespass thereon.

Plaintiff alleges in his complaint that "he is the owner of certain tract or parcel of land in White Oak Township, Carteret County, lying between the southern boundary or edge of Front Street and the waters of Inland Waterway . . . together with all riparian rights incident thereto."

Defendants, answering the complaint, deny the title of plaintiff to the lands above described.

Upon trial in Superior Court it was stipulated and agreed: "1. . . . that in June, 1936, the plaintiff was the owner in fee of all the lands described in that certain map of Philip K. Ball, Engineer, now of record in the office of the Register of Deeds of Carteret County in Map Book 1, page 113, and which map or plat is referred to as John S. Jones property known as "Cedar Point."

"2. . . . that by deed of August 28, 1936, of record in the office of the Register of Deeds of Carteret County in Book 81, page 325, the plaintiff John S. Jones and his wife, May F. Jones, conveyed to one B. F. Humphrey certain lands in the John Jones subdivision referred to, including among others, that designated in the conveyance as Lot 188 of the aforesaid subdivision according to the referred to map or plat in said Book 1, page 113.

"3. . . . that the aforesaid map or plat by Philip K. Ball, Engineer, appearing in Book 1, page 113, be made a part of the record, and for such purpose was introduced in evidence, and marked as plaintiff's Exhibit 1."

Reference to the map, Exhibit 1, above, discloses these facts: (1) That the southern boundary line of the land embraced therein borders on what is shown on the map to be the north side of "U. S. Intra-Coastal Waterway"; (2) that along said southern boundary of the land embraced in the map and designated as subdivisions or lots 180 to 190, both inclusive, there appears the lines of a street designated as Front Street 50 feet in width,—the southern line being co-terminous with the northern edge of the U. S. Intra-Coastal Waterway, as aforesaid; and (3) that the lateral lines of lots 180 to 190, including lot No. 188, as aforesaid, on east and west extend in general north-south direction across the lines of the street referred to in preceding paragraph and terminate in the said northern edge of U. S. Intra-Coastal Waterway,—thus lot No. 188 appears to front on said waterway.

These further facts appear upon the face of the map: There are two legends: (1) Reading: "All lots that border on the water of the ordinary highwater mark extend out to the edge of the various channels

and waterways and include all adjoining marshes, islands, and made-up land in front of the respective lots, and the lots carry full riparian rights"; and (2) reading: "Note: Farms 180 to 190 distances are figured to ordinary highwater mark, but 50 feet street is excepted from acreage."

And in reference to all lots, including No. 188, the lateral lines bear indicia of course and distance, and the larger lots or subdivisional parts show acreage figures—lot No. 188 being "17.53 Ac."

(The land now in controversy, as plaintiff contends, is land lying between the land, lot No. 188, conveyed by plaintiff to his grantee, B. F. Humphrey, on August 28, 1936, as aforesaid, and the waters of U. S. Intra-Coastal Waterway, which he contends is land that has gradually built up through forces of nature or processes of accretion.)

At the close of plaintiff's evidence motion of defendants for judgment as of nonsuit was allowed, to which plaintiff excepted and from judgment in accordance therewith appeals to Supreme Court, and assigns error.

*Luther Hamilton and Luther Hamilton, Jr., for plaintiff, appellant.*
*Albert Ellis and C. R. Wheatley, Jr., for defendants, appellees.*

WINBORNE, J. This is pivotal question on this appeal: Bearing in mind that the lateral lines of lot No. 188, as shown on the map, and as indicated by the legends appearing on the map, extend across the full width of Front Street to the ordinary highwater mark of U. S. Intra-Coastal Waterway, does the conveyance of the lot according to the map, without reservation, carry the fee in the land covered by the street? The answer is "Yes," subject to the easement of the street. Thus the conveyance by plaintiff, without reservation, vested in his grantee ownership of land bordering on the waterway, with littoral or riparian rights incident to such ownership.

For as stated by this Court in *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688, quoting from *Bond v. Wool*, 107 N.C. 139, 12 S.E. 281, "In the absence of any special legislation on the subject a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers and navigable waters." See G.S. 146-6. And, again, in same case, at page 149, it is said: "This qualified property, that,

according to well settled principles, as interpreted in nearly all the highest courts in the United States, is necessarily incident to riparian ownership, extends to the submerged lands bounded by the water front of a particular proprietor, the navigable water and two parallel lines projected from each side of his front to navigable water." See also *Gaither v. Hospital,* 235 N.C. 431, 70 S.E. 2d 680.

Indeed the principle of accretion is based upon littoral or riparian ownership of water frontage. "Generally, accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand or sediment, so as to cause that to become dry land which was before covered by water." 56 Am. Jur. 891, Waters, Sec. 476. And "it is a general rule that where the location of the margin or bed of a stream or other body of water which constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, and margin, or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of the riparian land thus acquires title to all additions thereto or extensions thereof by such means and in such manner, and loses title to such portions as are so worn or washed away or encroached upon by the water, in the absence of any provisions or agreement to the contrary." 56 Am. Jur. 892, Waters, Sec. 477.

It follows from the foregoing that in order to establish title to accretions, the claimant must show that they are formed by deposits against upland owned by him or his grantors. The principle was applied by this Court in the case of *Murry v. Sermon,* 8 N.C. 56, in which the headnote in pertinent part reads: "If a lake recede gradually and insensibly, the derelict land belongs to the riparious proprietor . . ."

There are other exceptions taken in the course of the trial and covered by assignments of error, but in view of the decision reached they are deemed immaterial. The burden was upon plaintiff to make out his title, and he must rely upon the strength of it. *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673. And having failed to show title in himself, the judgment from which appeal is taken is

Affirmed.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND THE ALEXANDER RAILROAD COMPANY ET AL. V. STATE OF NORTH CAROLINA; THE DEPARTMENT OF AGRICULTURE OF THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE GRANGE; THE FARMERS COOPERATIVE COUNCIL; THE FARMERS COOPERATIVE EXCHANGE, AND THE NORTH CAROLINA FARM BUREAU FEDERATION.

(Filed 21 March, 1956.)

**Utilities Commission § 3—**

Decision affirming an order of the Superior Court reversing an order of the Utilities Commission allowing an increase in rates, on the ground that the Commission failed to follow the standards prescribed by G.S. 62-124, does not estop petitioner from filing another petition requesting that an order be entered affirming the increase *nunc pro tunc*, if petitioner is so advised, the question of whether the increase is reasonable or unreasonable being an open question for determination by the Commission upon evidence contemplated by the statute.

ON rehearing.

*W. T. Joyner, A. J. Dixon, and H. J. Karison for petitioners.*

BARNHILL, C. J. The opinion on the original appeal herein was filed 2 November 1955, *Utilities Commission v. State, ante,* 12, to which reference is had for a statement of the facts. The petition to rehear was allowed "for the sole purpose of making an additional statement concerning the precise scope of the decision." We still adhere to the original decision. The question there decided is not now before us for review.

The Commission found and concluded that it was necessary for the petitioners to raise their intrastate freight rates by nine per cent in order to provide just and reasonable compensation for the service rendered by them. The Superior Court reversed. We affirmed the judgment of the Superior Court for the reason that the Commission, in making its findings and conclusions of fact and entering its order allowing an increase in the freight tariffs theretofore charged by the petitioners, did not follow the standards provided by the pertinent law of this State. Our decision rested exclusively on that conclusion. We did not discuss or decide whether the increase allowed was just or unjust, reasonable or unreasonable. That is still an open question as to the period the Utilities Commission order was in effect.

The former opinion in this case constitutes no estoppel against the petitioners which prevents them from filing a petition at this time requesting that an order be entered affirming the increase *nunc pro tunc.*

However, should the petitioners elect to pursue the matter further, the Commission must determine what increase, if any, was necessary during the period its order was in force to afford the petitioners a fair return on their property used and useful in connection with their intrastate business under the standard prescribed by our statute, G.S. Ch. 62, art. 7, as construed by this Court. *Utilities Commission v. Telephone Co.*, 239 N.C. 333, 80 S.E. 2d 133. In determining the merits of a petition, due regard must be had in particular for the provisions of G.S. 62-124.

It was stated or "stipulated" by counsel for petitioners during the original hearings that the petitioners did not have available and could not offer evidence under the provisions of G.S. 62-124. We assume counsel meant such evidence was not then available to them. Be that as it may, they are now at liberty to attempt to meet the requirements of that statute if they so desire, unaffected by the original opinion, except as herein noted.

This Court fully realizes that the value of the properties owned by the several petitioners used and useful for their intrastate traffic cannot be determined with mathematical exactitude. But they can no doubt approximate the rateable proportion of their property devoted to intrastate traffic and offer evidence of other facts and circumstances in respect thereto sufficient in probative force to enable the Commission to make findings of fact under our statute, and issue such order as it determines the facts found may warrant. In any event, this Court knows of no statute or rule of law which denies the petitioners the right to attempt to do so if they are now so advised.

Subject to the explanatory comments herein made, the petition to rehear is denied.

Petition denied.

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STATE v. WILLIAM BARRETT.

(Filed 21 March, 1956.)

**1. Criminal Law § 11—**

The violation of a municipal ordinance is a misdemeanor. G.S. 14-4.

**2. Criminal Law § 62f—**

The violation of a municipal ordinance is a violation of a condition of a suspended judgment that defendant violate no penal law of the State.

**3. Same—**

Whether a defendant has wilfully violated the conditions upon which sentence of imprisonment was suspended is for the determination of the court.

**4. Same—**

Evidence sufficient to sustain the findings of the court that defendant had wilfully violated conditions upon which execution of sentence of imprisonment had been suspended supports the court's order revoking probation and activating the sentence, rendering immaterial whether there was sufficient competent evidence to support the finding that defendant had violated a third condition.

APPEAL by defendant from *Bundy, J.*, December Term 1955, PITT.

Criminal prosecution on an indictment charging the defendant with the unlawful possession of alcoholic beverages upon which the taxes imposed by the laws of Congress of the United States and by the laws of this State had not been paid, a violation of G.S. 18-48, heard on a motion to put into effect a suspended sentence.

At the September Term 1955 of Pitt County Superior Court the defendant was convicted by a jury on the charge set forth in the above indictment. Judge Bundy, presiding at said term, pronounced judgment of imprisonment for a term of 12 months, which was suspended, and the defendant was placed on probation for a term of 3 years, on certain conditions specified in the judgment.

At the December Term 1955 of said court the defendant was brought before the court upon a report of the probation officer that he had violated the conditions upon which sentence of imprisonment was suspended. Judge Bundy heard evidence for the State and the defendant, and found as facts that the defendant had violated the condition of the probation and suspended sentence that he violate no penal law of the State, in that on 3 October 1955 he had been convicted in the Municipal Recorder's Court of the City of Greenville of conducting an unauthorized dance in violation of Section 8, Ch. 15, of the city code of Greenville; that during the period of probation he had violated the condition of the suspended sentence that he avoid persons or places of disreputable or harmful character by maintaining and operating a place of business where drunken persons congregated at all hours of the day and night, and from which drunken persons have been removed, arrested and convicted for public drunkenness; and that he had violated the condition of the suspended sentence to work faithfully at suitable employment as far as possible. Whereupon Judge Bundy ordered that the suspended sentence and probation be revoked, and the 12 months road sentence be put into effect.

The defendant excepted to the Judge's findings of fact and to the order of revocation, and petitioned this Court for a Writ of *Certiorari*, which we allowed.

*William B. Rodman, Jr., Attorney General, and Claude L. Love, Assistant Attorney General, for the State.*

*Albion Dunn for Defendant, Appellant.*

PER CURIAM. The violation of the ordinance of the City of Greenville is a violation of a penal law of the State of North Carolina, because G.S. 14-4 provides that "if any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor." *Board of Education v. Henderson,* 126 N.C. 689, 36 S.E. 158; *S. v. Taylor,* 133 N.C. 755, 46 S.E. 5; *S. v. Wilkes,* 233 N.C. 645, 65 S.E. 2d 129.

The validity of Judge Bundy's judgment suspending execution of the sentence of imprisonment on certain conditions is not challenged on appeal. *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678; *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143.

Whether the defendant had wilfully violated the conditions upon which the sentence of imprisonment was suspended presents questions of fact for the judge, and not issues of fact for a jury. *S. v. Johnson,* 169 N.C. 311, 84 S.E. 767; *S. v. Hardin,* 183 N.C. 815, 112 S.E. 593; *S. v. Millner,* 240 N.C. 602, 83 S.E. 2d 546.

A reading of the record shows that there was sufficient competent evidence before Judge Bundy to support his findings of fact that the defendant during the period of probation had wilfully violated a penal law of this State, and had wilfully failed to avoid persons or places of disreputable or harmful character, both conditions to be observed by the defendant to avoid serving the sentence of imprisonment. Such findings are sufficient to support the Judge's order revoking probation, and activating the sentence of imprisonment. That being true, it is immaterial whether there is sufficient competent evidence to support the finding that the defendant had failed to work faithfully at suitable employment, as far as possible.

Affirmed.

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STATE v. THOMAS WALTER TAYLOR.

(Filed 21 March, 1956.)

**Criminal Law § 50d—**

New trial awarded in this case for impeaching question asked defendant by the court upon the trial.

APPEAL by defendant from *Rudisill, J.,* 9 January Regular Criminal Term, MECKLENBURG Superior Court.

Criminal prosecution upon indictment charging the defendant with murder in the first degree in the killing of T. A. Parker. Upon arraignment the defendant entered a plea of not guilty. The evidence on the part of the State tended to support the charge.

The defendant testified as a witness in his own defense. His testimony tended to show mitigation or excuse. He testified that suspecting his wife of infidelity, he concealed himself in the trunk of her car parked near the cafe where she was employed as a waitress. Upon leaving the cafe about midnight, she drove the car in which the defendant was concealed to a point near a parking lot where she sounded the horn, which was answered by another horn nearby. She entered the parking lot and another car parked near. The wife and someone said "hello" to each other and she said, "Get in." The man got in her car. They talked about beer and whiskey and the defendant recognized the man's voice as the same voice that he had heard over the telephone calling for defendant's wife. The defendant then testified they "set there and hugged awhile and kissed and he was trying to get her to have sexual relations with him, but she wouldn't do it." Upon objection being interposed, the following occurred:

"The Court: Wait a minute, now. Now, son, it's an evident fact that you couldn't have seen them hugging there, if you were in the trunk of the car, could you?

"A. Well, I heard their lips smacking.

"Court: Well, they might have been smacking without hugging. What I want you to do is tell what you know of your own knowledge.

"A. Don't many people kiss unless they do hug.

"Court: Well, they may have a different system about it, you know. What I want to do, I'm trying to give you a chance to get your evidence in there, but there is a rule that you have to go by. Now, just tell what you know and then it's up to the jury to say whether or not there was any hugging going on, if you didn't see them if you heard some kissing, then say what you heard."

The defendant objected to the court's questions and comment. The objection is brought forward as Exception No. 6.

The defendant was convicted of murder in the second degree. From the judgment that he be confined in the State's Prison for 30 years, he appealed, assigning errors.

*William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.*

*Marvin Lee Ritch, T. O. Stennett, Ray S. Farris, and James B. Ledford for defendant, appellant.*

PER CURIAM. The questions and comment by the court tended to impeach or discredit the defendant. Counsel may cross-examine. The court cannot. Regardless of how unreasonable or improbable the defendant's story, the court must maintain the "cold neutrality of an impartial judge." Though not intended, the trial court's questions may well have influenced the jury against the defendant. The danger is too great to permit the verdict to stand. The record discloses other assignments of error not without merit.

On the authority of *S. v. Smith,* 240 N.C. 99, 81 S.E. 2d 263, and cases there cited, a new trial is ordered.

New trial.

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DONALD WILLIAM KIMSEY, BY NEXT FRIEND, BETTY JANE KIMSEY, v. CARL E. REAVES AND BERTIE G. REAVES.

(Filed 21 March, 1956.)

**Appeal and Error § 42—**

Exceptions to disconnected portions of the charge will not be sustained when no prejudicial error is made to appear upon a contextual reading of the charge in the light of the allegations and evidence.

APPEAL by plaintiff from *Clarkson, J., at* 14 November, 1955 Regular Civil Term, of MECKLENBURG. (Former appeal 242 N.C. 721, 89 S.E. 2d 386.)

Civil action to recover for personal injury sustained by plaintiff, about 2:30 p.m. on 27 November, 1953, in collision of an automobile driven by Trady Johnston, Jr., in which plaintiff was riding as a passenger, and an automobile owned by male defendant for family purposes, operated by *feme* defendant, allegedly resulting from actionable negligence of defendants in manner specifically set forth in the complaint.

Defendants, answering, deny such allegations of negligence, and aver that the collision and consequent injury of which plaintiff complains were proximately caused by the negligent operation by Trady Johnston, Jr., of his automobile in manner specifically set forth.

The collision occurred on a four-lane highway, two lanes for northbound traffic, and two for southbound. Both cars involved were traveling north,—that of defendant some distance ahead of and at a lower rate of speed than the Johnston car.

Plaintiff contended that car of defendants was traveling in the right-hand lane, and the Johnston car in the left-hand lane, preparing to pass

the car of defendants, when the latter was turned suddenly and without signal across the left lane directly in front of the Johnston car, and momentarily came to a stop, causing the collision.

On the other hand, defendants contend that their car had been standing in left lane waiting for southbound traffic to pass, when the Johnston car ran into it from the rear.

Both parties offered evidence tending to support their respective contentions. The case was submitted to the jury upon two issues, the first of which is: "Was the minor plaintiff injured by the negligence of the defendants, as alleged in the complaint?", and the second as to damages. The jury for its verdict answered the first issue "No," and to judgment for defendants in accordance therewith plaintiff excepted and appeals to Supreme Court, and assigns error.

*William H. Booe and Henry L. Strickland for Plaintiff, Appellant.*
*John H. Small for Defendants, Appellees.*

PER CURIAM. The only assignments of error, other than formal ones, brought up for consideration are based upon exceptions to various portions of the charge as given to the jury. The charge, as set forth in the case on appeal, covers forty-eight printed pages, and when read disconnectedly there are portions which are not free from error. However, when read contextually in the light of the allegations in the pleadings, and of evidence offered by the respective parties, the Court holds that prejudicial error is not made to appear.

Hence, in the judgment below there is

No error.

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MAGGIE C. MEDLIN v. J. F. CURRAN, DANA DICKENS AND W. D. HARDEN, CONSTITUTING THE BOARD OF ELECTIONS OF HALIFAX COUNTY.

(Filed 21 March, 1956.)

**Appeal and Error § 6—**

Where an act sought to be restrained has been done pending the appeal, the appeal from the order dissolving the temporary restraining order presents an academic question and will be dismissed.

APPEAL by plaintiff from *Parker (Joseph W.), J.*, at 28 December, 1955 Term, of HALIFAX.

Civil action to restrain and prohibit defendants as Board of Elections of Halifax County from canvassing the returns from the alleged election

on question of legalized sale of wine, held on 13 December, 1955, in rural Brinkleyville Township, and declaring the results of the same, and that said election be declared illegal and contrary to law and therefore void. A temporary order was signed as prayed and requiring defendants to show cause on 28 December, 1955, why the order so made should not be continued until the final judgment in the action. Upon hearing on the order to show cause, the court by order duly signed vacated and dissolved the temporary restraining order as aforesaid, and authorized and directed the Board of Elections of Halifax County, North Carolina, to proceed with the canvassing of the returns of said election in Brinkleyville Township and judicially declare the results and make return thereof in the form and manner provided by law.

Plaintiff excepted, and appeals to Supreme Court, and assigns error.

*Gay & Midyette and Geo. C. Green for Plaintiff, Appellant.*

*Allsbrook & Benton and Joseph Branch for Defendants, Appellees.*

PER CURIAM. On hearing of appeal in this Court, it was not controverted that the Board of Elections aforesaid has proceeded as authorized, so that now the matter is a fact accomplished, that is, *fait accompli.* Decisions of this Court uniformly hold that where pending an appeal to this Court from an order dissolving a temporary restraining order, the act sought to be restrained has been consummated, question as to whether defendants should have been restrained pending final hearing becomes academic, and the appeal will be dismissed. So, be it, here! See *Austin v. Dare County,* 240 N.C. 662, 83 S.E. 2d 702.

Appeal dismissed.

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BEULAH G. SMITH AND ROYAL INDEMNITY COMPANY v. ROBERT L. FREEMAN.

(Filed 21 March, 1956.)

APPEAL by plaintiffs from *Bone, J.,* December, 1955, Civil Term, of WILSON.

Civil action growing out of automobile collision that occurred 15 June, 1954, in a residential district of Elm City, North Carolina.

Plaintiff Smith was driving her Chrysler car east on Main Street. Defendant was driving his Ford car south on Anderson Street. Their cars collided within the intersection of these streets. Both cars were

damaged and each driver sustained personal injuries. Each alleged that the collision was caused by the negligence of the other.

Royal Indemnity Company was made a party plaintiff because of a payment made by it to plaintiff Smith under a collision insurance policy on the Chrysler car.

Issues of negligence, contributory negligence and damages, arising on the pleadings, were submitted to the jury, as to plaintiffs' action and separately as to defendant's cross action. In respect of each set of issues, the jury answered both the negligence issue and the contributory negligence issue, "Yes," and did not answer the issues relating to damages.

Judgment was entered, (1) that plaintiffs recover nothing on their action, (2) that defendant recover nothing on his cross action, and (3) that plaintiffs pay the costs. Plaintiffs excepted and appealed, assigning as error (1) the denial of plaintiff Smith's motion for judgment of nonsuit as to defendant's cross action, and (2) designated portions of the charge.

*Talmadge L. Narron for plaintiffs, appellants.*
*Dupree, Weaver & Montgomery for defendant, appellee.*

PER CURIAM. We concur in Judge Bone's denial of plaintiff Smith's motion for judgment of nonsuit as to defendant's cross action. The jury's finding that negligence on the part of plaintiff Smith concurred with the negligence of defendant in proximately causing the collision is supported by competent evidence; and careful consideration of the charge fails to disclose prejudicial error. Hence, the verdict and judgment will not be disturbed.

No error.

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MRS. MARGARET SKINNER DAVIS v. M. B. BLANKENSHIP AND BEN M. BLANKENSHIP AND OTHERS, T/DBA BLANKENSHIP BROTHERS, AND OTIS GOODING, ORIGINAL DEFENDANTS, AND EDWARD C. DAVIS, JR., ADDITIONAL DEFENDANT.

(Filed 21 March, 1956.)

APPEAL by the original defendants from *Campbell, J.*, November Term, 1955, of MECKLENBURG.

This is a civil action instituted on 13 October, 1954, by Mrs. Margaret Skinner Davis against M. B. Blankenship and Ben M. Blankenship, partners, trading and doing business as Blankenship Brothers, and Otis

Gooding, to recover damages for injuries sustained in a truck collision on 12 April, 1954, at the intersection of Independence Boulevard, Eastway Drive and Commonwealth Avenue in the City of Charlotte, resulting from the alleged negligence of the original defendants.

At the time of the accident the plaintiff was riding in a pick-up truck owned and driven by her son, Edward C. Davis, Jr., which had been traveling in an easterly direction on Independence Boulevard and was making a left turn in a northerly direction at the aforesaid intersection. The tractor-trailer of the original defendants was traveling west on Independence Boulevard.

The original defendants filed an answer denying negligence, pleading contributory negligence and setting up a cross-action against the additional defendant, Edward C. Davis, Jr., who was made an additional party defendant.

The additional defendant filed answer to the cross-action of the original defendants, denying any negligence on his part.

Otis Gooding, one of the original defendants, died intestate in Mecklenburg County after answer was filed by him and before the trial of the cause. His administrator, Thomas G. Lane, Jr., was duly made a party defendant and adopted as his answer the answer filed by Otis Gooding.

The jury answered the first issue as to the negligence of the original defendants in the affirmative, and the second issue as to the negligence of the additional defendant in the negative, and assessed damages.

From the judgment entered on the verdict the original defendants appeal, assigning error.

*Helms & Mulliss, William H. Bobbitt, Jr., and John D. Hicks for original defendants.*

*Kennedy, Kennedy & Hickman for additional defendant.*

PER CURIAM. A careful consideration of the exceptions and assignments of error brought forward and discussed in the appellants' brief leads us to the conclusion that no error sufficiently prejudicial to justify a new trial has been shown. Hence, in the trial below we find

No error.

ALVAH EARLY v. ALVIN J. ELEY, IRA C. AINSLEY, BANNER NUT COMPANY, A CORPORATION, ALVIN J. ELEY, IRA C. AINSLEY, WILLIAM R. RAYNOR, B. Z. BROWN, AND COY BROWN, PARTNERS TRADING AS BANNER NUT COMPANY, AND INDIVIDUALLY.

(Filed 28 March, 1956.)

**1. Pleadings § 1—**

The court's denial of defendant's motion to dismiss for failure of plaintiff to file the complaint in due time will not be disturbed, since the court in its discretion has authority to enlarge the time for pleading, G.S. 1-152, and the exercise of such discretion is not reviewable.

**2. Fraud § 1—**

In order to recover for fraud, plaintiff must show (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) intended to deceive; (4) does in fact deceive; (5) resulting in damage.

**3. Fraud § 3—**

In the sale of stock, statements, "the stock is gilt edged"; "nothing better can be bought," etc., are expressions of commendation or opinion which cannot constitute fraud.

**4. Fraud § 4—**

The failure of the presiding officer at a stockholders' meeting to challenge the statement of an auditor, not directed to anyone in particular, though more applicable to the person who had made a prior audit, to the effect that the stock was watered and that the books showed a 12 per cent profit "when you know you have not made it," cannot be *held* an admission by such presiding officer of the truth of the statement so as to fix him with *scienter* in an action against him for fraud, it having been his duty to keep the debate within proper bounds rather than to take part in it.

**5. Appeal and Error § 51—**

Evidence erroneously admitted will nevertheless be considered on appeal in passing upon the sufficiency of plaintiff's evidence to overrule nonsuit, since the admission of such evidence may have caused plaintiff to omit competent evidence of the same import.

**6. Fraud § 4—**

Subsequent acts and conduct of persons charged with fraud may be competent on the issue of original intent and purpose.

**7. Fraud § 12—Evidence of fraud held insufficient to be submitted to the jury.**

Plaintiff alleged he was induced to purchase stock in a corporation by the fraudulent representation of the individual defendant that the corporation had made a 12 per cent profit during the preceding year. Plaintiff's evidence failed to show that defendant corporation was insolvent at the time it was organized, that the individual defendant knew that the corporation had not made a 12 per cent profit as represented, but tended to show

reason for belief that the corporation had in fact made such profit. The evidence further disclosed that the other stockholders, including the individual defendant, thereafter bought stock, and there was no evidence that they had ever received any money in dividends. *Held:* The evidence is insufficient to show *scienter* on the part of the individual defendant in making the representation, or that he made such representation in reckless disregard of its truth or falsity, and judgment of nonsuit should have been entered.

**8. Fraud § 4—**

Proof of *scienter* is necessary in an action for deceit.

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

APPEAL by Alvin J. Eley and Banner Nut Company from *Joseph W. Parker, J.*, September Term 1955, HERTFORD Superior Court.

Civil action in tort instituted 27 March 1950 by the plaintiff for the recovery of $1,000 paid by him for capital stock in the corporate defendant which he alleges he was induced to purchase by fraud. At the time summons was issued an order was obtained for the adverse examination of the individual defendants to enable the plaintiff to file his complaint. The examination was begun but for various reasons was never actually completed.

On 16 March 1953, the plaintiff filed his complaint. The defendants moved to dismiss the action for failure to file the complaint in due time. After a hearing on 23 April 1954, Judge Bone found as a fact that the plaintiff was not guilty of laches, denied the motion to dismiss and allowed time to answer.

The material allegations of the complaint, disregarding its numbered paragraphs, are:

1. Prior to April, 1947, the individual defendants and J. P. Nowell were the owners of a partnership business—the Banner Nut Company.

2. About 7 April 1947, the Banner Nut Company, a corporation, was organized by the individuals comprising the partnership. All the assets of the partnership were conveyed to the corporation, in return for which the corporation assumed the liabilities of the partnership and issued capital stock to the individual defendants.

3. The stock issued was based upon an excessive valuation of the partnership assets conveyed to the corporation and a "fantastic" valuation placed upon Good Will.

4. The corporation was insolvent at the time of its organization and at all times thereafter, and known to be so by the defendants, its organizers, and that its stock was worthless.

5. Notwithstanding the insolvency of the corporation, the individual defendants, including Alvin J. Eley, its president, "planned to sell for cash additional capital stock—knowing it was worthless."

6. Pursuant to the plan to sell additional stock, Alvin J. Eley, president, with the authority of his codefendants, solicited the plaintiff to purchase stock by falsely and fraudulently representing that the partnership had made a net profit of 12 per cent during the preceding year; that said corporation was then doing a highly profitable business, and that investment in its capital stock was "as strong as the Rock of Gibraltar."

7. The representations were false and fraudulent, were intended to and did deceive the plaintiff; "that all such was said and done by the said Eley . . . under the authority and with the knowledge of his codefendants pursuant to the common scheme."

8. The plaintiff on 29 April 1947, relying on the representations made to him by Eley, purchased 10 shares of stock in Banner Nut Company for $1,000. The stock turned out to be worthless to the plaintiff's damage in the sum of $1,000.

The cause was tried before a jury in September, 1955. At the close of the plaintiff's evidence judgment of nonsuit was entered as to all defendants except Alvin J. Eley and the corporation. Motions for nonsuit were overruled as to them. The jury returned a verdict for the plaintiff on the issue of fraud and assessed his damages at $1,000. From a judgment on the verdict the defendants appealed, assigning errors.

*W. D. Boone and E. R. Tyler for plaintiff, appellee.*

*Jones, Jones & Jones, John R. Jenkins, Jr., and Gay & Midyette for defendants, appellants.*

HIGGINS, J. The defendants contend they were entitled to have the action dismissed as a matter of right for failure on the part of the plaintiff to file his complaint in due time. The contention cannot be sustained. G.S. 1-152 authorizes the judge, in his discretion, to enlarge time for pleading. *Alexander v. Brown*, 236 N.C. 212, 72 S.E. 2d 522; *Aldridge v. Ins. Co.*, 194 N.C. 683, 140 S.E. 706. The exercise of the court's discretion is not subject to review. *Smith v. Ins. Co.*, 208 N.C. 99, 179 S.E. 457; *Brown v. Hillsboro*, 185 N.C. 368, 117 S.E. 41.

At the close of the plaintiff's evidence the court entered judgment of nonsuit against all defendants except Alvin J. Eley and the corporation; and from that judgment the plaintiff did not appeal. The defendants other than Eley and the corporation having been discharged of liability, leaves for consideration here the acts and conduct of Eley alone.

In this case no fiduciary or confidential relationship is alleged. In order to sustain a recovery on the ground of fraud the evidence, therefore, must establish the following: (1) A false representation or con-

cealment of a material fact; (2) reasonably calculated to deceive; (3) intended to deceive; (4) does in fact deceive; (5) resulting in damage. *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *Harding v. Ins. Co.,* 218 N.C. 129, 10 S.E. 2d 599.

According to the plaintiff the following statements made by Eley induced him to purchase stock in the corporation: " 'I have something for you and I want to sell you some stock in Banner Nut Company. We made 12½ per cent last year . . . here it is on the paper here . . . I am letting you in on the ground floor as a favor. It is gilt edged. You cannot buy anything better.' I bought the stock on account of Mr. Nowell being manager and on my reliance on Mr. Eley that they were making money . . . bought on representations made to me that the stock was better than Government Bonds . . . I don't know whether Banner Nut Company was insolvent or solvent at the time I bought my stock. I have never seen the books and of my own knowledge I cannot say the partnership or the corporation never made any money. I can only tell what the auditor said." (The plaintiff had reference to a statement made at a stockholders meeting in August, 1948, by Mr. Moran who had audited the books for five months ending 31 December 1947. Mr. Moran's statements will be quoted and discussed later.) The statements, "the stock is gilt edged"; "that nothing better can be bought," are expressions of opinion and cannot support a finding of fraud. *Cash Register Co. v. Townsend,* 137 N.C. 652, 50 S.E. 306; *Williamson v. Holt,* 147 N.C. 515, 61 S.E. 384; *Harding v. Ins. Co., supra.* In the *Cash Register Company case* this Court said: "All the authorities are to the effect that when the false representation is an expression of commendation or is simply a matter of opinion, the courts will not interfere to correct errors of judgment."

Mr. J. P. Nowell was called as a witness for the plaintiff. In the beginning of his examination he testified: "To the best of my knowledge the first six months we were in production we lost about $3,000; for the next six months I believe the books will show we made $3,600." There is no evidence he passed this information on to the defendant Eley. Mr. Nowell was one of the six owners and partners in Banner Nut Company and one of the six original stockholders in the corporation. He was the manager of the partnership throughout its existence. In the course of his testimony he made this significant statement: "As managing partner of the partnership I worked with Mr. Thedick, the auditor, when there making audits for the partnership. *The other partners had only such information as I furnished to them and from Mr. Thedick's audits.*" In speaking of the amount of loss and profit, the witness was speaking from memory. His testimony, therefore, was qualified by later statements when confronted with the books and

records. There was no evidence to indicate the defendant Eley knew about the losses. On the contrary, the following information came from the witness, summarized in part and quoted in part:

Mr. Thedick's audit of 31 January 1947, showed fixed assets of the partnership at cost as follows: Land, $2,011.70; buildings, $16,418.89; machinery and equipment, $22,653.32; furniture and fixtures, $741; automobiles, $2,217.55; total, $42,030.76. From the above was deducted $2,373.66 for depreciation. The total of cash on hand, accounts receivable, inventories and supplies (at the lower of cost or market), $52,013.28. Total assets of the partnership, $96,150.27. Total liabilities shown by the audit were $45,189.23. As of the date of the audit the net worth of the partnership was, therefore, $51,600. All this property was conveyed to the corporation which was capitalized at exactly that amount. Each of the six incorporators was issued 86 shares of stock. "So that the corporation started business with a net worth of approximately $51,000." The partnership had been in business a little less than a year and a half. It began with an investment of $6,500 by each of the six partners, totaling $39,000. It conveyed property worth net $51,000. The $12,000 difference represented profit. "I think we set up this amount as profit at first and were advised by our auditor that if we set it up as profit we would have to pay income tax . . . He advised that it be put in as Good Will." Mr. Moran audited the corporation's books for the period ending December 31, 1947. He complained about the item of Good Will, and in January, 1948, each of the original six stockholders surrendered his 86 shares of stock and received in lieu thereof 65 shares, eliminating all the stock based on good will. "At first I was not agreeable to the reissuance of stock because I thought it was correct—thought the issuance of stock for $8,600 to each of us based on the original statement of the corporation and based on Good Will was correct. I later agreed to accept less stock than I originally had."

The minutes of 4 September 1946, of the partnership show for the month of August, 1946, a profit of $3,400. "I think I explained to my associates that the figure represented gross, not net profits . . . The minutes do not show whether gross or net profits. I signed those minutes. The minutes of October 1, 1946, were read and approved and signed by me and the other partners. I reported amount of profit for the month of September of $4,952.04. No statement whether gross or net profits. Minutes of November 5, 1946, were read and approved and signed by me and the other partners. I reported amount of profit for month of October $4,500. No statement whether gross or net profits." Mr. Thedick's audit for the period ending 31 January 1946 showed gross profits for the preceding six months as $13,222.13; and for eight months

ending 31 March 1947, a gross profit of $15,440.95; and after deducting operating expenses and $1,065 for discarded peanut bags, $1,209.24 for interest, and about $400 for donations, accounts written off and discount allowed, the net income was $3,466.99, "which was the last information the other incorporators had before the motion was made to sell additional stock."

Departing from Mr. Nowell's testimony for a moment, it may be observed that interest withdrawn from the partnership profits in the amount of $1,209.24 and paid on partnership obligations, if added back to the income for the period covered by the audit (eight months), would indicate a profit for that period of slightly more than 12 per cent. If the figures made by Mr. Nowell in the operation of the partnership business did not correctly reflect the state of that business, there is neither evidence in the partnership records nor in the testimony of Mr. Nowell, or of Mr. Early, to indicate the individual defendant had knowledge of that fact. The plaintiff seeks to charge the defendant Eley with such knowledge by reason of his failure to reply to a statement made by Auditor Moran in a stockholders meeting in August, 1948. According to the evidence of the plaintiff, Moran said: "Listen here, you fellows cannot do this. You have revalued your property, watered your stock and show you made 12 per cent when you know you have not made a cent . . . You fellows ought to take this off your books (referring to Good Will) you have shown a profit when you know you have not made it."

At the time of the foregoing statements the defendant was the presiding officer at the meeting. As such it was his duty to preserve orderly procedure in the meeting. It would appear to be his duty to keep the debate within proper bounds rather than to take part in it. Moran's remarks were not directed at anyone in particular, though apparently more applicable to Mr. Nowell than any other stockholder. He had made the records which "show you made 12 per cent and you ought to take this out of your books (referring to Good Will)." It appears Good Will had been eliminated more than eight months previously by the recall of the stock based thereon.

Can we say it was the duty of the defendant to challenge and deny Moran's statements or that his failure to do so may be considered an admission of their truth? The statements he made in the meeting were hearsay and represented his conclusions from the entries in the books of the partnership kept by Mr. Nowell. Under the rules of evidence the statements were inadmissible and should have been excluded. Though erroneously admitted, nevertheless, we must consider them as a part of the plaintiff's case on the question of nonsuit for the reason that their admission may have caused the plaintiff to omit competent evidence of

the same import. *Cherry v. Warehouse,* 237 N.C. 362, 75 S.E. 2d 124; *Supply Co. v. Ice Co.,* 232 N.C. 684, 61 S.E. 2d 895; *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Gibbs v. Russ,* 223 N.C. 349, 26 S.E. 2d 909; *Brown v. Montgomery Ward,* 217 N.C. 368, 8 S.E. 2d 199; *Midgett v. Nelson,* 212 N.C. 41, 192 S.E. 854.

Evidence from the plaintiff's witness (Nowell) shows the individual defendant bought 10 shares of stock on each of three separate occasions (the last on 14 June 1948); that his brother, Dr. Eley, bought 50 shares, the last on 30 January 1948; and other original stockholders (except Nowell) and their families made comparable purchases. The evidence fails to show that any defendant received from the corporation one cent in dividends. Such is hardly the conduct of men seeking to defraud. Subsequent acts and conduct are competent on the issue of original intent and purpose. *Braddy v. Elliott,* 146 N.C. 578, 60 S.E. 507.

Proof is lacking that the corporation was insolvent at the time it was organized and *a fortiori* the individual defendant knew of such insolvency. There is also failure of proof the individual defendant made any false statement knowingly or with reckless disregard as to whether true or false. Proof of *scienter* is necessary in an action for deceit. *Harding v. Ins. Co., supra; Cash Register Co. v. Townsend, supra.*

This case is easily distinguishable from the case of *Zager v. Setzer,* 242 N.C. 493, 88 S.E. 2d 94. In the *Setzer case* the plaintiff, as a part of the negotiations, represented to the defendant that the previous operator of the theatre had a weekly gross income between $600 and $700. Under defendant's management, the income ranged from a high of $478 to a low of $222, averaging $320 per week. The former operator testified his highest gross weekly income was $443, and his average was $343. Evidence was lacking to show the plaintiff actually knew his statements were false, but was sufficient to support the inference that the representations were recklessly made when he was ignorant as to their truth or falsity. The statements so made are an adequate substitute for *scienter.* (Citing cases.) In the instant case, the evidence shows the defendant had ample ground to believe the partnership had made 12 per cent profit and that the corporation was solvent when organized.

The motion for judgment as of nonsuit, both as to the individual defendant and the corporation, should have been allowed.

Reversed.

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

GRACE N. WEDDINGTON v. CLAUDE M. WEDDINGTON.

(Filed 28 March, 1956.)

**1. Divorce and Alimony § 17: Habeas Corpus § 3—**

Decree awarding custody of the children of the marriage as between the parents living in a state of separation was entered in *habeas corpus* proceedings. G.S. 17-39. *Held:* Upon the later institution by the wife of an action for divorce, the jurisdiction of the court entering the decree in *habeas corpus* was ousted, and the court in which the divorce proceeding is instituted acquires and retains jurisdiction over the custody of the children until the death of one of the parties or the youngest child reaches maturity, whichever event shall first occur. G.S. 50-13.

**2. Attorney and Client § 3—**

The relation of the attorney of record to an action, nothing else appearing, continues so long as the opposing party has the right by statute or otherwise to enter a motion in the action or to apply to the court for further relief, and while the attorney's name continues to appear of record, the adverse party has the right to treat him as the authorized attorney so that service of notice of a motion in the cause upon the attorney is service on the party himself.

**3. Divorce and Alimony § 17—**

While the adverse party in a divorce action has the right to notice of a motion for the custody of the children of the marriage, G.S. 50-13, such notice served on the attorney of record of the adverse party is valid even though the party be a nonresident, certainly when the notice is also served on him by a process server of the state of his residence.

**4. Same—**

Decree of divorce was entered by a court of this State having jurisdiction of both the parties. Thereafter notice of motion in the cause for custody of a child of the marriage was validly served on the nonresident defendant. *Held:* The court had jurisdiction of the person of defendant, and therefore, its order awarding the custody of one of the children to the resident plaintiff is binding upon the nonresident defendant personally, rendering him subject to the exercise of the coercive jurisdiction of the court to enforce the order, but the child not being within the State, the order is unenforceable as to it.

**5. Infants § 21—**

A court is without power to make a valid order awarding the custody of a child when the child is not within the State, since the court must have jurisdiction before it may enter a valid and enforceable order.

**6. Divorce and Alimony § 20—**

When the court enters or continues an order permitting a child, the subject of its custody decree in a divorce action, to visit its nonresident parent, the court may require the defendant to give bond for the safe return of the infant or impose other pertinent provision before the defendant may be allowed to take the child out of the jurisdiction of the court.

APPEAL by defendant from *Clarkson, J.*, October Term, 1955, MECKLENBURG.

Plaintiff and defendant intermarried, and two children were born of the marriage. They separated in September 1952. There was a *habeas corpus* proceeding, and on 4 September 1953 the custody of the first child was awarded to defendant, and the custody of the second child was awarded to the plaintiff mother with the right of visitation as to each. In January 1955 plaintiff instituted an action for divorce. The complaint contains allegations as follows:

"4. That there were born to this marriage two children, to wit: Janis Ann Weddington, now age 11 years, and Grace Ellen Weddington, now age 6 years; that the custody of said minor children has heretofore been determined by the court."

A decree of divorce was rendered, but there was no order as to the custody of the children incorporated in the judgment of divorce thereafter rendered 23 February 1955.

In June 1955 plaintiff delivered the second child, Grace Ellen, to the defendant for visitation as provided in the *habeas corpus* proceeding. Defendant, who in the meantime had gone to South Carolina, did not return the child. Plaintiff went to South Carolina, took the child out of school, and carried it back to her home. On 9 September 1955 she filed a motion in the divorce action for an order awarding her custody of Grace Ellen. On 13 September 1955 notice of the motion was served on defendant's counsel of record, and later it was served on defendant by an officer of South Carolina. On 16 September 1955 defendant surreptitiously took the child and carried it to his home in South Carolina.

On 24 October 1955 the defendant, through his counsel of record, made a special appearance and moved to dismiss the proceeding on the grounds that the court had not properly acquired jurisdiction over the person of the defendant or Grace Ellen, who was then in South Carolina. On 27 October 1955 Clarkson, J., entered an order: (1) awarding custody of Grace Ellen to plaintiff; (2) dismissing the special appearance and motion to strike; and (3) directing that Grace Ellen be returned immediately to the plaintiff. Thereupon the cause was continued for further hearing on 21 November 1955. Defendant excepted and appealed.

*C. M. Llewellyn and Ann Llewellyn Greene for plaintiff appellee.*
*John Hugh Williams for defendant appellant.*

BARNHILL, C. J. In the original action for divorce the plaintiff complied with the requirements of G.S. 50-13 (3rd par.) by alleging that two children were born to the marriage, together with their names and

ages, but she did not at that time pray any custodial or other order in respect to the said children. Perhaps she refrained from so doing on the well-founded assumption that the custodial order entered in the *habeas corpus* proceeding remained in full force and effect until modified by an order entered in this cause. In any event, such is the case.

"So soon as the 'state of separation' between husband and wife resolves itself into, brings about, or is followed by an action for divorce in which a complaint has been filed, the jurisdiction of the court acquired under a writ of *habeas corpus* as provided by G.S. 17-39 is ousted and authority to provide for the custody of the children of the marriage vests in the court in which the divorce proceeding is pending. (Cases cited.) Jurisdiction rests in this court so long as the action is pending and it is pending for this purpose until the death of one of the parties," or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur. *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906; *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641; *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798; *In re Blake,* 184 N.C. 278, 114 S.E. 294; *Robbins v. Robbins,* 229 N.C. 430, 50 S.E. 2d 183; G.S. 50-13.

The relation of an attorney to an action in which he has made an authorized appearance does not cease, in any case, until the judgment in the court where the cause is pending is consummated, that is, made permanently effectual for its purpose as contemplated by law. The relation of the attorney of record to the action, nothing else appearing, continues so long as the opposing party has the right by statute or otherwise to enter a motion therein or to apply to the court for further relief. *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227, and cases cited.

An attorney once appearing continues to appear for all purposes until the judgment is satisfied, unless he retires in the meantime by leave of the court, and so long as his name continues to appear there, the adverse party has the right to treat him as the authorized attorney. *Ladd v. Teague,* 126 N.C. 544. Service of notice on him is as valid as if served on the party himself. *Ladd v. Teague, supra; In re Gibson,* 222 N.C. 350, 23 S.E. 2d 50.

In this connection it is to be noted that the court acquired jurisdiction of the person of the defendant before he left the State, by service of summons in this action and by voluntary appearance herein. But this is a motion in the cause made after the divorce decree was entered. Of this motion defendant is entitled to notice. G.S. 50-13 (1st par.). This notice was served on counsel of record. It was likewise served on the defendant by a process server of South Carolina. Hence as to him the court had jurisdiction to proceed to hear the motion, and the cus-

todial order entered is valid, as against the defendant personally. *McRary v. McRary,* 228 N.C. 714, 47 S.E. 2d 27.

We have repeatedly held, however, that any proceeding involving the custody of an infant child is in the nature of an *in rem* proceeding, and the "custody of the child" is the *res, Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228, over which the court must have jurisdiction before it may enter a valid and enforceable order affecting the person of the infant, other than in the exercise of its coercive jurisdiction. *Coble v. Coble, supra,* and cases cited; *McRary v. McRary, supra; In re DeFord,* 226 N.C. 189, 37 S.E. 2d 516.

"If both parents are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction. *McRary v. McRary, supra.*" *Coble v. Coble, supra.*

On the other hand, if the child is not within the jurisdiction of the court, the court is without power to make an order awarding the child's custody. *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313, and cases cited. It follows that the court below was without authority to enter any valid order affecting the custody of the infant who was at the time in the State of South Carolina. *Sadler v. Sadler,* 234 N.C. 49, 65 S.E. 2d 345; *Coble v. Coble, supra.* The child must be present in the State and within the jurisdiction of a court of competent jurisdiction before such court may render a valid decree awarding its custody. *Richter v. Harmon, ante,* 373, and cases cited. If the custody of the child is the issue, the child must be within the bounds of the State. *Coble v. Coble, supra.*

The court must have jurisdiction before it may enter a valid and enforceable order. And the presence of the subject matter of an action within the jurisdiction of the court is a requisite of jurisdiction.

We have been informally advised that since the order herein, which is the subject matter of this appeal, was entered, the defendant has delivered custody of the child to the plaintiff, and that it is now in the jurisdiction of the court below. If this be a fact, the plaintiff is at liberty to seek an order herein incorporating in this action the custodial order entered in the *habeas corpus* proceeding or pray any modification thereof as she may desire. Furthermore, if the provision for visitation is continued, the court below may enter an order requiring the defendant to give bond for the safe return of said infant or imposed any other pertinent provision before the defendant may be allowed again to take the child out of the jurisdiction of the court.

The order entered will be modified so as to accord with this opinion. As so modified it is affirmed.

Modified and affirmed.

STATE v. SAM TILLERY.

(Filed 28 March, 1956.)

**1. Intoxicating Liquor § 2—**

When the warrant or indictment charges the unlawful possession and unlawful transportation of nontax-paid liquor, defendant may be convicted, as the evidence may warrant, either under the Alcoholic Beverage Control Act, G.S. 18, Article 3, or the Turlington Act, G.S. 18, Article 1, the statutes being construed *in pari materia.*

**2. Intoxicating Liquor § 9a—**

Where the warrant charges illegal possession and transportation of nontax-paid liquor, the State is limited to the charges therein set out and must prove that the liquor was nontax-paid.

**3. Intoxicating Liquor § 9d—**

Where, in a prosecution upon a warrant charging unlawful possession and transportation of nontax-paid liquor, the State introduces no evidence that the container or containers did not bear a revenue stamp of the federal government or stamp of any of the county boards of North Carolina, G.S. 18-8, but the only testimony describing the liquor is that it was "bootleg whiskey," defendant's motion for judgment of nonsuit should have been allowed.

**4. Evidence § 5—**

"Bootleg whiskey" implies illicit whiskey in the sense that the possession, possession for sale, transportation, etc., thereof, under the circumstances, is unlawful, whether taxpaid or nontax-paid, and therefore, the court cannot take judicial notice that "bootleg whiskey" is "non-tax-paid liquor."

APPEAL by defendant from *Burgwyn, Emergency Judge,* October Special Term, 1955, of EDGECOMBE.

Criminal prosecution on warrant charging that defendant, on or about 3 April, 1955, "did unlawfully and wilfully have in his possession and did transport on his 1948 Chevrolet automobile 6 gallons of nontax-paid liquor, . . ."

Upon appeal from the Recorder's Court of Edgecombe County, defendant was tried, on the warrant, in the Superior Court. Upon the jury's verdict of guilty, judgment was pronounced. Defendant excepted and appealed, assigning errors.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Weeks & Muse for defendant, appellant.*

BOBBITT, J. When a warrant or bill of indictment, which charges the unlawful possession and unlawful transportation of intoxicating liquor, describes the liquor as "non-tax-paid," conviction may be had, as the evidence may warrant, either under the Alcoholic Beverage Control Act, G.S. Ch. 18, Article 3, or under the Turlington Act, G.S. Ch. 18, Article 1. These statutes are construed *in pari materia*. *S. v. Hill,* 236 N.C. 704, 73 S.E. 2d 894; *S. v. Gibbs,* 238 N.C. 258, 77 S.E. 2d 779.

Even so, when the warrant or bill of indictment describes the liquor as "non-tax-paid liquor," these descriptive words identify the liquor referred to therein. *S. v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804. Here the State limited the accusation to "non-tax-paid" liquor. Thus, the defendant in effect was furnished a bill of particulars. G.S. 15-143. This limited the evidence to the matters and things stated therein. *S. v. Beal,* 199 N.C. 278, 154 S.E. 604.

The testimony of the State's witness, by way of describing the liquor found when a search was made of defendant's car on defendant's premises, consists solely of his statement that "we opened the trunk of the car and there were six gallons of bootleg whiskey . . ." The witness testified that defendant stated "that the whiskey was his."

There was no testimony that the container or containers did not "bear either a revenue stamp of the federal government or a stamp of any of the county boards of the State of North Carolina." Had there been such testimony, it would have constituted *prima facie* evidence of the violation of G.S. 18-48. The General Assembly provided this rule of evidence to facilitate criminal prosecutions in which it is necessary to prove that the liquor is "non-tax-paid."

Thus, the question posed is whether "bootleg whiskey" is sufficient to identify the liquor as "non-tax-paid." We are constrained to hold that it is not. While "bootleg whiskey" implies illicit whiskey, it does so in the sense that the possession, possession for sale, transportation, etc., thereof, under the circumstances, is unlawful, whether taxpaid or nontax-paid. The descriptive terms are not synonymous. Hence, the court cannot take judicial notice that "bootleg whiskey" is "non-tax-paid liquor."

The question posed is similar to that passed upon in *S. v. Wolf,* 230 N.C. 267, 52 S.E. 2d 920, in which this Court held that the expression "white liquor" was insufficient to identify "illegal nontax-paid liquors."

The result is that defendant's motion for judgment of nonsuit should have been allowed. Hence, other assignments of error need not be discussed.

Reversed.

MILTON C. BRADHAM v. McLEAN TRUCKING COMPANY, A CORPORATION, AND EVERETTE H. KALB.

(Filed 28 March, 1956.)

**1. Automobiles § 7—**

The presence of fog is a hazard requiring motorists to exercise increased caution.

**2. Automobiles § 8—**

The requirements of G.S. 20-154a that a motorist, before turning across traffic lanes, must first see that such movement can be made in safety and must give signal of his intention to make such movement, plainly visible to the operators of other vehicles which his movement may affect, are for safety upon the highway, and the violation of its provisions constitutes negligence or contributory negligence *per se*, as the case may be, if such violation is a proximate cause of the injury.

**3. Negligence § 19c—**

If plaintiff's evidence establishes contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom, the defendant is entitled to have his motion for judgment of nonsuit sustained.

**4. Automobiles § 42h—**

Plaintiff's evidence tended to show that he was traveling east on a four-lane highway and was turning left into an intersection across two traffic lanes immediately after the stop signal at the intersection had turned green for traffic along the four-lane highway, and collided with defendant's truck, which was traveling west, and which he did not or could not see until it was 8 or 10 feet away because of fog. *Held:* Plaintiff's evidence discloses contributory negligence on his part as a matter of law.

**5. Trial § 21—**

Defendant's motion for judgment of nonsuit is equivalent to a voluntary nonsuit on its counterclaim.

APPEAL by plaintiff from *Clarkson, J.*, August 1955 "B" Civil Term, MECKLENBURG Superior Court.

Civil action instituted 4 August, 1954, in which the plaintiff sought to recover for personal injury and for property damage on account of a collision between his automobile and a tractor-trailer truck of the corporate defendant operated by the individual defendant. The plaintiff alleges the truck driver was negligent and that his negligence proximately caused the injury and damage. The defendants filed separate answers denying negligence, and alleging contributory negligence on the part of the plaintiff. The corporate defendant set up a counterclaim for damage to the truck, alleging plaintiff's negligence was the proximate cause of such damage.

The defendants' motion for judgment of nonsuit, renewed at the conclusion of all the evidence, was allowed, and the plaintiff excepted and appealed.

*Richard M. Welling for plaintiff, appellant.*
*Kennedy, Kennedy & Hickman,*
*By: P. Dalton Kennedy, Jr., for defendants, appellees.*

HIGGINS, J. Decisive of this appeal is the question whether the evidence shows contributory negligence on the part of the plaintiff as a matter of law. If the evidence in the light most favorable to the plaintiff shows he was negligent and that his negligence was the proximate cause, or one of the proximate causes of the accident in which he was injured, he cannot recover, notwithstanding defendants' negligence also was one of the proximate and participating causes.

The evidence discloses the collision occurred on 26 June, 1954, at about five o'clock in the morning, at an intersection between Wilkinson Boulevard and Ashley Road in the suburbs of Charlotte. From the intersection, Wilkinson Boulevard extends east into the City of Charlotte and west to Gastonia. It is a paved arterial highway, 36 feet wide, marked in four separate traffic lanes, the two north lanes for westbound traffic toward Gastonia, and the two south lanes for eastbound traffic into Charlotte. Ashley Road forms a T-intersection on the north side of Wilkinson Boulevard. It is of asphalt construction, 30 feet wide. At the time of collision, electrically operated traffic control devices were installed and were in operation at the intersection.

Immediately before the accident a truck operated by the Health Department entered Wilkinson Boulevard a short distance east of Ashley Road. It traveled west along the north lane toward Gastonia and turned to the right up Ashley Road. This truck was engaged in spraying DDT, creating a rather dense fog which, according to plaintiff's evidence, covered the north lane of traffic. As this truck turned north on Ashley Road, it continued to emit fog which covered about one-third of Ashley Road. At about 30 minutes before sunrise the plaintiff, traveling east on Wilkinson Boulevard, arrived at the signal light at the intersection which was red for continued traffic on the Boulevard. He intended to make a left turn across the two north traffic lanes and enter Ashley Road. Following is the substance of the plaintiff's evidence directly relating to the accident:

He was traveling east on Wilkinson Boulevard about 30 minutes before sunrise. While he was about 200 yards from the intersection the DDT truck turned up Ashley Road. When he came to the intersection the traffic light was red for traffic on the Boulevard. He waited for the

light to change and then gave a hand signal for a left turn. There was no traffic approaching from his rear and no traffic approaching on the inside lane for westbound traffic in so far as he could see, which was a distance of about 150 feet. The fog covered the outside lane for westbound traffic; some might have drifted onto the inside lane, but not much. He could see into the fog a distance of about 50 or 60 feet, but observed nothing approaching from the east. He made a left turn, intending to cross both traffic lanes (for westbound traffic) and enter Ashley Road. He was traveling four or five miles per hour. His car was about two or three feet from the line dividing the two lanes for westbound traffic when he saw the McLean tractor-trailer. It bolted out of the fogbank, eight or 10 feet from him. Between the time he first saw the tractor-trailer until the collision, his car did not move over six feet. The left front of the tractor-trailer struck his right front fender, knocked his car about 18 or 20 feet. The truck had lights on when he first saw it, eight or 10 feet away. There was no reason for his not seeing it 50 or 60 feet away unless it was on account of the fog.

The fog was an increased, though temporary, hazard to travelers upon the highway and, therefore, called for increased caution on their part. *Chesson v. Teer Co.,* 236 N.C. 203, 72 S.E. 2d 407. The rule applied both to the plaintiff and to the defendant. Conceding, but not deciding the defendants were negligent in moving at all into the fog, nevertheless, does not the plaintiff's story make him guilty of negligence as a matter of law? He was making a left turn, crossing two marked and separate lanes for westbound traffic on a green light for such traffic.

G.S. 20-154a imposed upon the plaintiff the following duties before he could lawfully make the turn and cross the traffic lanes: (1) He must first see that such movement can be made in safety; and (2) he must give a signal of his intention to make such movement plainly visible to the operators of other vehicles which his movement may affect. This Court has uniformly held that the above provisions are enacted for the promotion of safety upon the highway, and that violating them is negligence *per se. Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538; *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115; *Bechtler v. Bracken,* 218 N.C. 515, 11 S.E. 2d 721. The negligence is actionable if such violation proximately causes injury to another. Likewise, if contributory negligence is set up as a defense against plaintiff's cause of action, a violation of the above safety provisions will defeat a recovery on the part of the plaintiff if the violation is the proximate cause, or one of the proximate causes of the injury. *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357. If contributory negligence appears as a matter of law, that is, if the plaintiff's evidence establishes such negli-

gence so clearly that no other conclusion may be reasonably drawn therefrom, the defendant is entitled to have his motion for judgment of nonsuit sustained. *Edwards v. Vaughn,* 238 N.C. 89, 76 S.E. 2d 359; *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730; *Morrisette v. Boone Co.,* 235 N.C. 162, 69 S.E. 2d 239; *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Hinshaw v. Pepper,* 210 N.C. 573, 187 S.E. 786.

The plaintiff either did not see or could not see the approach of the tractor-trailer until it was not more than eight or 10 feet away. He trusted neither to observation nor to knowledge that there was no approaching traffic on the outside lane going west, but rather to speculation and guess there would be none. A few moments delay until the fog lifted would have enabled him to see his movement could be made in safety and his signal for the turn could have been seen by approaching motorists. It was his duty to wait in a place of safety until he could see with reasonable certainty that his movement could be made in safety. *Dennis v. Albemarle, ante,* 221, 90 S.E. 2d 532; *Sibbitt v. Transit Co.,* 220 N.C. 702, 18 S.E. 2d 203. Contributory negligence in failure to observe the traffic regulations appears as a matter of law. The defendants' motion for judgment of nonsuit was equivalent to a voluntary nonsuit on the corporate defendant's counterclaim. *Bourne v. R. R.,* 224 N.C. 444, 31 S.E. 2d 382.

The judgment of the Superior Court of Mecklenburg County is Affirmed.

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L. A. CHILDERS v. CARLIES E. POWELL AND WIFE, FLORENCE POWELL.

(Filed 28 March, 1956.)

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

In an action to establish and enforce a lien for labor on defendants' land, the holders of a mortgage on the land, asserted as a prior lien, are not necessary parties to a complete determination of the controversy between plaintiff and defendants, but are only proper parties.

**2. Parties § 7—**

While ordinarily it is within the discretion of the court to permit proper parties to intervene, G.S. 1-73, where defendants file no answer and whatever judgment may be entered will be by default and will not affect the rights of such third parties, they may not be allowed to intervene and thus engraft a new and live controversy on a moribund action, but must litigate their rights as between themselves and plaintiff by independent action.

**3. Appeal and Error § 3—**

While ordinarily an appeal will not lie from an interlocutory order unless it deprives appellant of a substantial right which he might lose if

the order is not reviewed before final judgment, where there is no subsisting controversy as between plaintiff and defendants, an order permitting intervention by parties who may litigate their claim against plaintiff by independent action, will be reversed.

APPEAL by plaintiff from *Patton, Special Judge,* heard during 4 October, 1955, Term of Burke Superior Court, from CATAWBA.

Civil action commenced 23 June, 1955, to recover $2,295.00 for labor performed in the construction of a building for defendants, and to establish and enforce a specific lien therefor on defendants' land on which the building is situated. It is alleged that the work began 8 March, 1954, and was completed 26 November, 1954.

Defendants filed no answer.

On 15 August, 1955, Earl B. Searcy, Sr., Edward Lowman and L. A. Miller filed a petition for leave to intervene and answer the complaint. Their petition sets forth, in substance, the following: (1) that they hold a mortgage (no details given) on said land, recorded 10 August, 1954, which, if plaintiff's allegations are true, would be, at least in part, a lien prior to plaintiff's alleged lien; (2) that plaintiff was given a $2,295.00 note and deed of trust, which were accepted in satisfaction of his original claim and lien rights; and (3) "that a complete determination of the controversy cannot be made without your petitioner's being a party hereto."

Plaintiff, answering, denies the material allegations of the petition. In addition, he alleges new matter to the effect that the intervenors have no lien on said land.

On 4 October, 1955, at the conclusion of the hearing, the court, after reciting, "and it appearing to the Court that said Earl B. Searcy, Sr., Edward Lowman and L. A. Miller have an interest in the subject matter of this action which may be materially affected by a judgment rendered herein and that a complete determination of the controversy cannot be made without their being made a party," ordered that said intervenors "be, and they are hereby, made party defendants in this action, and that they be allowed to file an answer herein within 30 days after the date of this order."

Plaintiff excepted and appealed, the sole assignment of error being that the court erred in the making and entry of said order.

*John H. McMurray for plaintiff, appellant.*
*W. Harold Mitchell for petitioners, appellees.*

BOBBITT, J. G.S. 1-73 provides, in part, that "when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in."

The intervenors were not necessary parties to a complete determination of the controversy, if any, as between plaintiff and defendants; and, if not parties, no right or interest they have will be adversely affected by an adjudication of such controversy. *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390. It appears from the quoted recital that the court treated the intervenors as necessary parties. If so, the court's action was erroneous.

The intervenors were proper parties; and, ordinarily, whether to permit them to intervene would be determinable by the court in its discretion. G.S. 1-73; *Assurance Society v. Basnight, supra.*

Here defendants failed to file answer, thus ignoring the action. There is no issue or controversy subsisting as between plaintiff and defendants. Whatever judgment may be entered will be by default, unaffected by any allegations the intervenors may make. It will be determinative only as between the plaintiff and defendants.

In short, there is no controversy in which appellees may intervene. Under the circumstances disclosed, the controversy as between intervenors and plaintiff should be litigated in and determined by independent action between these parties rather than by attempting to engraft a new and live controversy on a moribund action.

Appellees' brief advises us that surplus funds arising from the foreclosure of a prior deed of trust have been deposited with the Clerk of the Superior Court, presumably in accordance with G.S. 45-21.31(b)(4). If such be the case, G.S. 45-21.32 would seem to prescribe the appropriate remedy for the determination of the respective rights of plaintiff and intervenors in said funds. Decision here does not preclude the intervenors from establishing in such special proceeding or by other appropriate independent action all rights they seek to establish by intervention here.

Ordinarily, an appeal does not lie to the Supreme Court from an interlocutory order, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. 1-277; *Raleigh v. Edwards,* 234 N.C. 528, 67 S.E. 2d 669; *Shelby v. Lackey,* 235 N.C. 343, 69 S.E. 2d 607. Unless intervenors are permitted to come in by pleadings necessary and appropriate to an independent action, there is no subsisting controversy herein. Hence, the stated salutary rule, the primary purpose of which is to eliminate interlocutory appeals that do not involve final disposition of the entire cause, has no application under the peculiar circumstances here disclosed.

The order of the court below is

Reversed.

IN THE MATTER OF THE INQUISITION OF THE COMPETENCY OF ROSE DAY LEFEVRE.

(Filed 28 March, 1956.)

**Abatement and Revival § 9—**

Inquisition proceedings to have a person declared incompetent abate upon the death of such person.

APPEAL by petitioner from *Huskins, J.*, November Term, 1955, YANCEY.

Inquisition proceedings instituted before the Clerk of the Superior Court of Yancey County.

The respondent is a former resident of Yancey County, but she has been living in a nursing home in Lancaster, Pa., since 1 July 1955. On 17 September 1955, petitioner filed a petition before the Clerk of the Superior Court of Yancey County to have the respondent, Rose Day LeFevre, declared incompetent for the want of understanding to manage her own affairs. There has been no personal service of process. The respondent, through counsel, moved to dismiss for want of jurisdiction. The clerk overruled the motion, and the court below reversed. Petitioner appealed.

Since the appeal was docketed in this Court, the death of the respondent has been suggested to this Court.

*R. W. Wilson for petitioner appellant.*

*Fouts & Watson for respondent appellee.*

PER CURIAM. It having been suggested to the Court that the respondent has died since appeal herein was docketed in this Court, the action stands abated and the appeal must be dismissed. It is so ordered.

Action abated.

Appeal dismissed.

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IN THE MATTER OF THE APPLICATION AND APPEAL OF W. B. O'NEAL AND ALICE O'NEAL COOK, BEFORE THE BOARD OF ADJUSTMENT OF THE ZONING ORDINANCE OF THE CITY OF CHARLOTTE, NORTH CAROLINA.

(Filed 11 April, 1956.)

**1. Constitutional Law § 13—**

The original zoning power reposes in the General Assembly.

**2. Constitutional Law § 8c: Municipal Corporations § 36—**

The General Assembly has delegated its police power to enact zoning regulations to municipal corporations. G.S. 160-172.

**3. Municipal Corporations § 37—**

In order to be valid, a zoning regulation must bear a substantial relation to the public health, safety, morals or general welfare.

**4. Same—**

The zoning power of a municipality is limited by the enabling act, and the "legislative body" of a municipality cannot delegate such power to a board of adjustment or to a zoning commission. Therefore a board of adjustment may not permit a type of business or building prohibited by ordinance.

**5. Municipal Corporations § 36—**

The rules applicable to the construction of statutes apply equally to the construction of an ordinance adopted by the "legislative body" of a municipality.

**6. Statutes § 3: Municipal Corporations § 37—**

The 1936 North Carolina Building Code has the force of law by reason of its ratification and adoption by Chapter 280, Public Laws of 1941.

**7. Municipal Corporations § 37—**

Misapprehension as to the applicability of the 1936 North Carolina Building Code and delay in its enforcement do not bar later enforcement.

**8. Same—**

Where an ordinance deals solely with zoning, a provision thereof relating to the continuance of lawful uses relates to uses lawful in respect to zoning regulations, and a use lawful under zoning regulations in force at the time of the adoption of the ordinance comes within the exception, notwithstanding that the building, at the time of the beginning of its use for a nursing home, violated pertinent provisions of the Building Code.

**9. Same—**

Zoning regulations must be interpreted to achieve a fair balance between the purpose of preserving the true character of a neighborhood by excluding new uses and structures prejudicial to the restricted purposes of the area, and the purpose of protecting an owner's property from impairment which would result from enforced accommodation to new restrictions.

**10. Same—**

Zoning ordinances are in derogation of the right of private property, and exemptions should be liberally construed in favor of the property owner.

**11. Same—Under facts of this case owner was entitled to construct building to conform to Building Code in order to continue use permitted at time of adoption of zoning ordinance.**

Petitioners were operating a nursing home at the time of the enactment of a zoning ordinance limiting use of land in the area to residential pur-

poses. Thereafter they were advised that they would not be allowed to continue operations unless they complied with fireproof provisions of the North Carolina Building Code relating to institutional buildings. Application for permit to erect a fireproof building so that the operation of the nursing home might be continued was denied on the ground that provision of the ordinance permitting the continuance of non-conforming uses stipulated that buildings for non-conforming uses could not be enlarged or extended. *Held:* Under the facts of this case, petitioners have the legal right to construct or reconstruct a fireproof building on their land, subject to the limitation that the scale of operations may not be substantially increased.

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

APPEAL by petitioners from *Campbell, J.*, 23 January, 1956, Regular "B" Civil Term, of MECKLENBURG.

The hearing below was to review, on *certiorari,* the action of the Board of Adjustment, with reference to petitioners' application for a building and occupancy permit for the erection of a new, one-story, fireproof building, for use in the continued operation by petitioners of Hillcrest Manor Nursing Home. Petitioners had appealed to the Board of Adjustment from the refusal of the City Building Inspector to grant their said application.

The factual situation, as presented to the Board of Adjustment, was substantially as follows:

1. Petitioners, W. B. O'Neal and his mother, Mrs. Alice O'Neal Cook, had operated the Hillcrest Manor Nursing Home at its present location, now designated #2435 Sharon Road, continuously since 1938.

2. Petitioners own a tract of land containing approximately 3 acres, fronting 200 feet on Sharon Road and running through the entire block to a frontage of 143 feet on Tanglewood Lane, with an average depth of 739 feet. They purchased first what is called Lot 1, which fronts 200 feet on Sharon Road and runs back to an average depth of 344 feet, *being the portion of their property on which the present building is located and on which the proposed new building would be erected.* Lot 2 fronts 143 feet on Tanglewood Lane, runs back to a common rear line with Lot 1, with an average depth of 395 feet. Lot 2 is a wooded, vacant lot. It is restricted to residential uses by deed restrictions. There are not now, and never have been, any deed restrictions on Lot 1.

3. The first comprehensive zoning ordinance of the City of Charlotte was adopted by the City Council in January, 1947. It covered all property then within the corporate limits. (The 1947 ordinance and zone map were before this Court in *James v. Sutton,* 229 N.C. 515, 50 S.E. 2d 300.) At that time, the site of Hillcrest Manor Nursing Home was

outside the corporate limits. Subsequently the corporate limits were extended; and this site was within the corporate limits in April, 1951, when a new comprehensive zoning ordinance was adopted. Under the 1951 ordinance, petitioners' property is in a Residence 1 District, the most restricted or highest classification.

4. From time to time 27 patients have resided simultaneously in Hillcrest Manor Nursing Home, this being its maximum capacity. At the time of the hearing, 20 patients resided therein. If the proposed fireproof building is erected, the maximum capacity of the establishment, so petitioners represented at the hearing, will be 24 patients. There has been no change in the manner of operation of Hillcrest Manor Nursing Home from its establishment in 1938 until the present time.

5. Hillcrest Manor Nursing Home was inspected regularly by city fire and health officials. Prior to 14 June, 1955, no objection was made. On that date, petitioners were notified by the Building Inspector of the City of Charlotte that they would not be allowed to continue operation. On 30 June, 1955, the Commissioner of Public Welfare (G.S. 108-3 (15)) notified petitioners that their license, upon expiration on 30 June, 1956, would not be renewed unless petitioners complied with provisions requiring fireproof facilities. The basis for each notice was that petitioners' building, a two-story, frame building with asbestos shingle weatherboarding, did not comply with requirements of the North Carolina Building Code in respect of fireproof facilities for a nursing home.

6. Section 2.1(b) of the 1936 North Carolina Building Code contains this definition: "Section 2.1(b) 'Institutional building' means a building in which persons are harbored to receive medical, charitable, or other care or treatment, or in which persons are held or detained by reason of public or civic duty, or for correctional purposes; including among others, hospitals, asylums, sanatariums, fire houses, police stations, jails." Section 4.24 of said Building Code provides: "Section 4.24. Institutional Buildings. For institutional buildings semi-fireproof construction shall not exceed seventy-five feet; ordinary and heavy timber construction shall not exceed two stories nor forty feet; and frame construction shall not exceed one story nor thirty-five feet." A 1953 amendment to said Building Code included "homes for the aged" in the list of specifically designated institutional buildings. Enforcement of these provisions as to nursing homes, including Hillcrest Manor Nursing Home, began in 1955.

7. Petitioners must discontinue the operation of Hillcrest Manor Nursing Home in their present building; and they must discontinue operation altogether on the present site, to wit, said Lot 1, where it has been operated since 1938, unless they can obtain a permit to erect a fireproof building for occupancy and use for such purpose.

8. The only evidence before the Board of Adjustment bearing upon the subject was to the effect that: (1) there was a great need for such facilities for the care of elderly people; (2) it was difficult for elderly people to adjust themselves upon removal from one such institution to another; and (3) the management of Hillcrest Manor Nursing Home and its care for its patients resident therein are worthy of high commendation.

9. A large number of owners of property along Sharon Road and Tanglewood Lane opposed the granting of the application. Charles Saunders and Harry Bangle join with the City of Charlotte as appellees herein. Appellee Saunders resides at 2508 Tanglewood Lane. Appellee Bangle owns property adjoining and immediately south of said Lot 1. The record indicates that the owner of the property immediately adjoining and north of said Lot 1, and the owner of the property west of and across Sharon Road from said Lot 1, interpose no objection.

Three members of the Board of Adjustment favored granting the permit on (unspecified) conditions. Two members were of opinion that the Board of Adjustment had no legal authority to grant the permit. Thereupon, ". . . The Board voted to deny the request on the grounds that the Board was without power to grant the request."

The court affirmed this ruling of the Board of Adjustment. The reasons underlying the court's decision, incorporated in the judgment, are as follows:

"This court further finds (a) at the time of the adoption of the Zoning Ordinance of the City of Charlotte in the year 1947 the petitioners' use of the premises was unlawful for the reason that such use was in violation of the North Carolina Building Code and the provisions of Section IX of the Zoning Ordinance are not applicable to the facts of this case, (b) the building of an additional building upon the premises for the purpose of operating a nursing home therein would constitute an enlargement or extension of a non-conforming use, and therefore the petitioners are not entitled to a Building Permit and Occupancy Certificate to construct the proposed building and occupy the same for the purpose of continuing the operation of a nursing home."

Petitioners excepted to and appealed from the judgment, their exceptive assignments of error being directed to each of the court's findings or rulings, to wit, (a) and (b), on which the judgment is predicated.

*David Craig, Jr., for petitioners, appellants.*
*John D. Shaw for respondents, appellees.*

BOBBITT, J. The original zoning power of the State reposes in the General Assembly. *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880.

It has delegated this power to the "legislative body" of municipal corporations. G.S. 160-172 *et seq.* Within the limits of the power so delegated, the municipality exercises the police power of the State. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897. Zoning ordinances are upheld when, but only when, they bear a "substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; *Nectow v. Cambridge,* 277 U.S. 183, 72 L. Ed. 842, 48 S. Ct. 447; *Washington v. Roberge,* 278 U.S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A.L.R. 654.

The power to zone, conferred upon the "legislative body" of a municipality, is subject to the limitations of the enabling act. *Marren v. Gamble, supra; S. v. Owen,* 242 N.C. 525, 88 S.E. 2d 832. The "legislative body" of a municipality cannot delegate such power to a board of adjustment or to a zoning commission. *James v. Sutton,* 229 N.C. 515, 40 S.E. 2d 300; *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128; *Harrington & Co. v. Renner,* 236 N.C. 321, 72 S.E. 2d 838. Hence, a board of adjustment may not "permit a type of business or building prohibited by the ordinance, for to do so would be an amendment of the law and not a variance of its regulations." *Lee v. Board of Adjustment, supra,* and cases cited.

The 1951 zoning ordinance of the City of Charlotte, hereafter called the 1951 ordinance, specifies the Uses Permitted in each of the several districts or zones. Any use not permitted, expressly or impliedly, is a violation thereof; and such violation is a misdemeanor. By express provision, a nursing home is a permitted use in a Residence 2 District. It is not a permitted use in a Residence 1 District.

Petitioners' property, located in a Residence 1 District, has been operated as a nursing home in violation of the zoning ordinance *unless* they were lawfully entitled to continue such non-conforming use by reason of the exemption set forth in the 1951 ordinance under the caption, "Section IX—Non-Conforming Uses," which provides:

"The lawful use of any building or land existing at the time of the adoption of this ordinance may be continued, but not enlarged or extended although the use of such building or land does not conform to the regulations of the district in which such use is maintained. An existing non-conforming use of a building or premises may be changed to another non-conforming use of the same or higher classification, but may not at any time be changed to use of a lower classification.

"No non-conforming use may be reestablished in any building or on any premises where such non-conforming use has been discontinued for a period of one year.

"Any non-conforming building or structure damaged by fire, explosion, flood, riot or act of God may be reconstructed and used as before

any such calamity, provided such reconstruction takes place within one year of the calamity."

Our task is to construe the quoted provisions of the 1951 ordinance as applied to the factual situation here presented. Our chief concern is to ascertain the legislative intent. *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292. The rules applicable to statutes apply equally to the construction and interpretation of an ordinance adopted by the "legislative body" of a municipality. Yokley, Zoning Law and Practice, Second Edition, sec. 184.

Unpopularity, harshness and doubtful constitutionality of an ordinance, absent such provision, ordinarily prompt the inclusion of some provision in such ordinances permitting the continuance of a non-conforming use. Yokley, *op. cit.,* sec. 50.

We agree with the contention of appellees that the two-story frame building when operated by petitioners as the Hillcrest Manor Nursing Home must be considered an institutional building and that when so considered it does not comply with the requirements of the 1936 North Carolina Building Code. It is noted that the 1936 North Carolina Building Code, by reason of its ratification and adoption by Ch. 280, Public Laws of 1941, has the force of law. See opinion of *Parker, J.,* in *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333. Moreover, misapprehension as to the applicability of the 1936 North Carolina Building Code and delay in its enforcement does not bar enforcement of its requirements now. See *Raleigh v. Fisher, supra.* Indeed, the fact that the said building code provisions can be enforced now is the cause of petitioners' dilemma. If this were not so, petitioners could continue operation of Hillcrest Manor Nursing Home as in the past.

Even so, we are inclined to the view that the City Council, by the words "lawful use" in Section IX of the 1951 ordinance, had reference only to the provisions of the prior zoning ordinance or ordinances of the City of Charlotte.

The subject matter of the 1951 ordinance is zoning, nothing else. Section IX, dealing with Non-Conforming Uses, concerns non-conforming uses in respect of zoning, not in respect of provisions of a building code, State or local. If the use of the building or land was or is unlawful as violative of any statute or ordinance dealing with a different subject matter, such use may be prohibited under the terms of such other statute or ordinance.

Section IX of the 1951 ordinance, as we construe it, applies if, at the time of the adoption of said ordinance, the use then being made of the building or land was non-conforming in respect of the zoning regulations then enacted but lawful in respect of zoning regulations, if any,

theretofore in force. Hence, petitioners are entitled to the rights under Section IX of the 1951 ordinance of those whose non-conforming use of buildings or lands was lawful *in respect of zoning regulations* at the time of the adoption of said ordinance. (See *Raleigh v. Fisher, supra,* where the 1944 ordinance provision permitting "continuance of any use of land or buildings which now legally exists" afforded no protection to property owners then using their property in violation of the provisions of the prior zoning ordinance.)

Under Section IX of the 1951 ordinance, petitioners' use of their building and land "may be continued, but not enlarged or extended although the use . . . does not conform to the regulations of the district in which such use is maintained." Appellees contend that Section IX does not permit new construction. Thus, the argument runs, since petitioners cannot comply with the requirements of the 1936 North Carolina Building Code without new construction, either by way of reconstructing the present building or by constructing a new building, the benefits of Section IX are not available to them. We are inclined to the view that, as applied to the factual situation here presented, this interpretation goes beyond the intention of the lawmaking body.

"We believe it may best be said that zoning serves a two-fold purpose—one, to preserve the true character of a neighborhood by excluding new uses and structures prejudicial to the restricted purposes of the area, and gradual elimination of such existing structures and uses; and, second, to protect an owner's property or existing residence, business or industry from impairment which would result from enforced accommodation to new restrictions." Yokley, *op. cit.*, sec. 11. It would seem that reasonable interpretation requires that we seek to achieve a fair balance between these two somewhat conflicting purposes.

Appellees cite *Goodrich v. Selligman*, 298 Ky. 863, 183 S.W. 2d 625; *Colati v. Jirout*, 186 Md. 652, 47 A. 2d 613; *Cole v. Battle Creek*, 298 Mich. 98, 298 N.W. 466; *State ex rel. Miller v. Cain*, 40 Wash. 2d 216, 242 P. 2d 505.

In the *Goodrich case*, the ordinance provision as to the continuance of non-conforming use prohibited *structural* alterations; and the applicant was denied the right to tear down old structures and erect entirely new ones. In the *Colati case*, the applicant was denied the right to raze and remove his buildings and build anew on a much larger scale. In the *Cole case*, decision turned on the ordinance provision as to non-conforming use which, as in the *Goodrich case*, prohibited *structural* alterations. In *State v. Cain*, the ordinance provision as to the continuance of non-conforming use prohibited *structural* alterations; and the applicant was denied the right to construct new and larger non-conforming buildings in the place of an existing non-conforming building.

Cases noted below point in a different direction.

In *Bruning Bros. v. Mayor & City Council of Baltimore,* 199 Md. 602, 87 A. 2d 589, the decision is stated accurately in this headnote: "Where corporation had begun construction of a paint factory as non-conforming use at time zoning ordinance was passed restricting area to residential uses, subsequent proposal of corporation to build an additional two story building to its factory would merely constitute a change in a non-conforming use and not an extension thereof and was therefore permissible."

In *A. L. Carrithers & Son v. City of Louisville,* 250 Ky. 462, 63 S.W. 2d 493, the decision is stated accurately in the headnote as follows: "Enlargement of milk plant in four-family zoning district to inclose space for relocating can-washing and by-products rooms to comply with health ordinance, not being a vital change of the building in its fundamental purpose, *held* not within zoning ordinance prohibiting 'structural alterations.' "

In *In re Gilfillan's Permit,* 291 Pa. 358, 140 A. 136, the line separating the residential and business districts ran through applicant's lot. Applicant's lumber plant was located in the business district. The portion of the land in the residential district was vacant and used solely as a space in which to pile lumber. It was held that he was entitled to a permit to build a cement block storage building on the vacant land then in the residential district, such additional construction not being detrimental to the public welfare, safety and health.

It is noted that, in the *Colati case,* the Court of Appeals of Maryland took the view that the non-conforming use provision of the Baltimore ordinance was to be strictly construed against the extension of non-conforming uses. This Court, in opinion by *Brogden, J.,* when dealing with an exemptive clause in a zoning ordinance, said: "Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner." *In re Appeal of Supply Co.,* 202 N.C. 496, 163 S.E. 462.

Suffice it to say that decisions in other jurisdictions, which depend largely on the wording of the particular statutes and ordinances then under consideration, reach divergent conclusions and are not controlling. Decisions are many and varied, often limited to the particular set of facts immediately before the Court. See Annotation: "Zoning: changes, after adoption of zoning regulations, in respect of nonconforming existing use." 147 A.L.R. 167, and supplemental decisions. Some ordinances, in respect of the non-conforming use provision, fix definite time limits for the absolute termination of such non-conforming use. *City of Los Angeles v. Gage,* 127 Cal. App. 2d 442, 274 P. 2d

34; *State v. McDonald,* 168 La. 172, 121 So. 613, *certiorari* denied 280 U.S. 556, 74 L. Ed. 612, 50 S. Ct. 16. Others, as indicated above, expressly prohibit *structural alterations.* Of the cases cited above, only the *Carrithers case* deals with additional construction made necessary in order to comply with the requirements of a separate and distinct ordinance.

We must keep in mind that we are here concerned with the meaning of this particular ordinance provision, to wit, Section IX, not with general and divergent views as to what such exemptive provisions as to non-conforming uses in zoning ordinances should contain. Our function is to interpret Section IX, not to legislate.

It is noted first that no time limit is placed upon the continuance of the non-conforming use. It is noted further that there is no express prohibition as to *structural alterations.* It seems clear that the words, "continued," "enlarged," "extended," were intended to refer primarily, although not exclusively, *to the purpose* for which the building and land were then being used. Obviously, the words "enlarged" or "extended" do not refer to the land itself; and the identical language is used in relation to any "building or land." This interpretation has support in the succeeding sentence, which provides: "An existing non-conforming use of a building or premises may be changed to another non-conforming use of the same or higher classification, but may not at any time be changed to use of a lower classification." A further provision of Section IX provides: "Any non-conforming building or structure damaged by fire, explosion, flood, riot or act of God may be reconstructed and used as before any such calamity . . ."

Even so, as applied to the facts before us, we think Section IX must be construed to confine the non-conforming use to its then scale of operation. Obviously, it was not contemplated that petitioners, then operating a nursing home for the accommodation of 27 patients or less, would be permitted to construct a large institutional building for the accommodation of 200 patients or more. Thus, the size of the new facility and the scale of its operation would have to conform substantially to the non-conforming use existent when the 1951 ordinance was adopted.

It is noted further that the new construction proposed by petitioners is not by reason of their choice or voluntary act, but is necessary to meet the requirements of the 1936 North Carolina Building Code. Hence, decision here need not extend beyond such a factual situation.

So far as the nursing home ban in a Residence 1 District is concerned, we conclude that petitioners have the legal right to construct or reconstruct a fireproof building where their present frame building is situated, or in lieu thereof to construct a fireproof building elsewhere on

said Lot 1, subject to the limitation that the reconstructed or new building in respect of the accommodations provided will provide facilities for the operation of a nursing home on substantially the same scale as that heretofore operated by petitioners.

Neither the application for permit nor the findings of fact certified by the Board of Adjustment disclose in detail petitioners' plans with reference to the proposed new building. A plat attached to the application shows only the location of the proposed building on said Lot 1. It appears therefrom that the proposed building would be located to the rear of the present two-story frame building, that is, farther from Sharon Lane.

When questioned at the hearing before the Board of Adjustment, Mr. O'Neal stated petitioners' plans, to the extent they had been formulated, as follows:

"I am planning to build a fireproof building of 5700 square feet. Have not planned the exact interior arrangement of the building. Have planned 12 to 14 bedrooms to accommodate around 24 patients. I propose a kitchen. The present kitchen will not be used. Have made no definite plans. The laundry will remain in the old building. We propose to use the old building for porches, sitting rooms, T.V. and other recreation facilities. We have ten bedrooms in the old building and propose 12 to 14 in the new building. We do not propose to use the old building for overflow. The only recreation factors planned are not in the old building. I have a big sitting room planned. The proposed building will be about 100 feet long. The exact dimensions are shown by the plat. I rented this piece of land for several years and bought it in 1941. I have been operating at this location since 1938. The building is a two-story frame building sitting back about 80 or 100 feet from Sharon Road.

"I have no plans for tearing down the old building. Cannot use it for my present operation. My plan is to continue to use the old building in connection with the new building in the daytime only. There will be a breezeway connecting the two buildings. I have actually laid out the interior of the building only to the architect. The plat attached to the application is the only thing I have in the way of a drawing describing the building and it is the only drawing submitted to the Building Inspection Department in the nature of a description of what we propose to build. The drawing shows a breezeway with a roof between the old and new buildings. The 24-room addition is shown only by four lines on the paper. I do not have any plans here with me."

If, upon submission of detailed plans and specifications, it appears that the new fireproof building will be a facility, comparable in size for the operation of a nursing home on substantially the same scale as

that in operation when the ordinance was adopted, the permit for the construction and occupation thereof within such limitations should be granted as a matter of right. If this should occur, the question may then arise as to whether the present two-story frame building must be used for residential purposes only in conformity with Residence 1 District restrictions, or whether the facts presented are such that the Board of Adjustment, in its discretion, will permit limited use thereof by patients resident in the new building for some or all of the purposes indicated in Mr. O'Neal's statement. In such case, it will be for the Board of Adjustment to determine whether, in its discretion, it will so exercise the power conferred upon it by Section XI of the 1951 ordinance, to wit:

"5. To vary or modify upon appeal any of the regulations or provisions of this ordinance relating to the use, construction or alteration of buildings or structures or the use of land, where in a specific case owing to special conditions a literal enforcement of the strict letter of the ordinance would result in unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done."

Thus, whether petitioners will be permitted to construct a fireproof building to be used as a nursing home in lieu of the present two-story frame building will depend solely upon their legal right to do so under Section IX as interpreted herein. As to this, there is no need or occasion for a variance permit. A variance permit is another matter. Application for a variance permit invokes the discretionary power of the Board of Adjustment. *Lee v. Board of Adjustment, supra; National Lumber Products Co. v. Ponzio,* 133 N.J.L. 95, 42 A. 2d 753. *Quaere:* Do the provisions in the 1951 ordinance (Section XI—Board of Adjustment) and in G.S. 160-178, which require the concurring vote of four members of the Board to reverse any order, requirement, decision or determination of the administrative official, *e.g.,* the Building Inspector, relate solely to matters within the discretionary power of the Board?

For the reasons stated, the judgment of the court below is vacated; and the cause is remanded so that further proceedings may be had, if petitioners are so advised, in relation to an amended application setting forth in detail their plans and specifications for the proposed new building to the end that such amended application may be considered in relation to the law as stated herein.

Error and remanded.

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

ANNA W. TAYLOR, ROBERT L. TAYLOR, B. BRUCE TAYLOR AND PAUL H. TAYLOR v. PATRICIA ANN TAYLOR, DONALD BRUCE TAYLOR, PAUL H. TAYLOR, JR., KAY LOWERY TAYLOR AND LON OTIS TAYLOR, MINORS, AND SUCH UNBORN CHILDREN OF ROBERT L. TAYLOR, B. BRUCE TAYLOR AND PAUL H. TAYLOR, OR EITHER OF THEM, AS MAY BE HEREAFTER BORN TO ROBERT L. TAYLOR, B. BRUCE TAYLOR AND PAUL H. TAYLOR, AND ANY CHILD OR CHILDREN OF ROBERT L. TAYLOR, B. BRUCE TAYLOR AND PAUL H. TAYLOR IN ESSE AT THE DEATH OF ROBERT L. TAYLOR, B. BRUCE TAYLOR AND PAUL H. TAYLOR.

(Filed 11 April, 1956.)

**1. Wills § 44—**

The doctrine of election does not apply unless testator's intent to put the beneficiary to an election clearly appears from the will; therefore, where it clearly appears from the will that testator, who predeceased his wife, attempted to devise lands held by them by the entireties under the mistaken belief that he owned the lands individually, the widow is not put to her election and may claim sole ownership to the lands held by entireties, and at the same time claim as legatee and devisee under the will.

**2. Wills § 43—**

Testator devised a life estate in three tracts of land to his wife with remainder in each tract, respectively, to each of his three sons for life, remainder to their lawful children. The devises of the remainder after the widow's life estate were ineffectual as to two of the tracts. *Held:* The will is not void because incapable of execution according to the intent of testator, but the devise of the life estate to the wife and the valid devise of the remainder of one of the tracts will be given effect. G.S. 31-40.

**3. Partition § 7½—**

One tenant in common cannot make a valid partition binding on the other by assuming to convey or devise either half of the lands specifically.

**4. Wills § 43—**

Testator owned a one-half undivided interest in certain lands. He devised, under the mistaken belief that he owned the entire interest in the tract, a life estate therein to his wife and attempted to devise the remainder in the entire tract, by metes and bounds, one-half to each of two sons for life, remainder to their lawful children. *Held:* The devise of the life estate to the widow is valid, but the devises of the remainder thereafter are void for uncertainty, and as thereto testator died intestate and such interest descends to his heirs at law.

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

APPEAL by defendants from *Frizzelle, J.*, in Chambers at Snow Hill, N. C., 24 December, 1955, of JONES.

Civil action instituted 7 April, 1954, under provisions of Article 26, Sec. 1-253, *et seq.*, of General Statutes of North Carolina, entitled

"Declaratory Judgments" for construction of provisions of the last will and testament of B. O. Taylor, deceased, late of Jones County, North Carolina.

The parties waived jury trial and stipulated and agreed, subject to the right of each party to offer such additional evidence as may be deemed necessary, that the admissions in the pleadings, and the following shall constitute the agreed statement of facts upon which findings of fact and judgment in this cause may be entered:

1. That each defendant has been served properly with summons and complaint, and is properly represented by guardian *ad litem,* and is now properly before the court and represented by counsel; and the guardian *ad litem* of defendants, both *in esse* and *in posse,* filed answer in apt time; and that a controversy exists between plaintiffs and defendants, and that they are the only parties who have or claim to have an interest therein.

2. That these are the agreed facts:

"8. That B. O. Taylor, a citizen and resident of Jones County, North Carolina, died on the 11th day of January, 1952, leaving surviving him his widow, Anna W. Taylor, and three sons, his sole heirs at law, viz.: Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor, all of whom are plaintiffs in this cause of action.

"9. That the said B. O. Taylor . . . died . . . leaving a last will and testament, which . . . was admitted to probate by the Clerk of the Superior Court of Jones County . . . on the 31st day of January, 1952 . . . attached to the complaint as Exhibit A thereto and is made a part hereof by reference as if herein set out word for word in full."

10 and 13. That at the time of his death . . . the only real estate of which B. O. Taylor was seized and possessed was, as a tenant in common, of a one-half undivided interest in a certain tract of land located in the counties of Jones and Lenoir, known as the "Home Place" . . . particularly described . . . as two tracts, containing 112 acres more or less, and one acre more or less, respectively-acquired by him as elsewhere described in the agreed facts.

11 and 12. That immediately preceding his death the said B. O. Taylor and his wife Anna W. Taylor . . . were seized and possessed, as tenants by the entireties (1) of a one-half undivided interest in the tract of land known as the "Home Place" . . . particularly described in the next preceding paragraph; and (2) of a tract of land known as "Tracts Nos. 3 and 4 of the Quill Hill Farm," particularly described as there set forth.

"14. That Item Three of the Last Will and Testament of the said B. O. Taylor reads as follows: 'I will and devise all of my real property

of every kind, sort, and description wherever situate to my wife, Anna W. Taylor, for and during her natural life.'

"15. That Item Four of the last will and testament of the said B. O. Taylor purports to devise to his son, Robert L. Taylor, subject to a life estate of Anna W. Taylor, a life estate in certain real property, and further purports to devise said real property therein described to the lawful children of Robert L. Taylor in fee simple, subject to the life estates of Anna W. Taylor and Robert L. Taylor; that the real property purportedly devised . . . is the tract of land known as 'Tracts Nos. 3 and 4 of the Quill Hill Farm,' hereinbefore described . . .

"16. That Item Five of the last will and testament of the said B. O. Taylor purports to devise to his son, B. Bruce Taylor, subject to a life estate of Anna W. Taylor, a life estate in certain real property, and further purports to devise said real property therein described to the lawful children of B. Bruce Taylor in fee simple, subject to the life estates of Anna W. Taylor and B. Bruce Taylor . . . the real property purportedly devised . . . is one-half of the tract of land known as the 'Home Place' hereinbefore described . . .

"17. That Item Six of the last will and testament of the said B. O. Taylor purports to devise to his son, Paul H. Taylor, subject to a life estate of Anna W. Taylor, a life estate in certain real property, and further purports to devise said real property therein described to the lawful children of Paul H. Taylor in fee simple, subject to the life estates of Anna W. Taylor and Paul H. Taylor . . . real property purportedly devised . . . is one-half of the tract of land known as the 'Home Place,' hereinbefore described . . ."

"21. That Anna W. Taylor, widow of B. O. Taylor . . . made application and qualified as Executrix under the last will and testament of B. O. Taylor on the 2nd day of February, 1952, and letters testamentary were issued" to her on same date; that she filed final account as such executrix, and same was approved by the Clerk of Superior Court on December 30, 1953.

"22. That Anna W. Taylor, widow of B. O. Taylor and one of the plaintiffs herein, did not acquire full knowledge of the facts concerning her rights to the said land mentioned in the Will of B. O. Taylor, deceased, until more than six months after she qualified as Executrix under said will; that no formal dissent from said will was filed by her under G.S. 30-1. That with due diligence and as soon as practicable after learning the facts and being advised as to her rights, the said Anna W. Taylor instituted this action seeking to enforce her rights.

"23. That at the time the will of B. O. Taylor was probated and at the time Anna W. Taylor qualified as Executrix of the Estate of the said B. O. Taylor, the said Anna W. Taylor was not fully advised as to

the value of the personal property of the said B. O. Taylor, nor of the extent of the indebtedness of the estate of the said B. O. Taylor.

"24. That the said Anna W. Taylor has at all times from the date she was advised that a portion of the lands purportedly devised by the said B. O. Taylor were owned by them as tenants by the entireties and of the legal effect of such fact, claimed the full and complete ownership of said real property under the deeds to her and B. O. Taylor as tenants by the entireties and that she consulted and employed counsel to represent her in this action for the purpose of asserting and establishing her right to said land, notwithstanding the provisions of said will from which she dissents.

"25. That the said B. O. Taylor was erroneously of the opinion that the title to all of the said lands described in the complaint and purportedly devised by him under Items Four, Five and Six of his Last Will and Testament was owned by him individually and in fee simple.

"26. That the personal property of the estate of the said B. O. Taylor had a value of $13,217.11 and the claims against the estate of the said B. O. Taylor, without any allowance to the Executrix, amounted to $3,562.77, leaving a balance of $9,654.34.

"27. That at the date of the death of B. O. Taylor, Anna M. Taylor was then 67 years of age and had a life expectancy of approximately ten years.

"28. That under a dissent from the will of B. O. Taylor, the plaintiff, Anna W. Taylor, would have received more than if she had taken under the provisions of the last will and testament of B. O. Taylor.

"29. That the plaintiffs, Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor, are desirous of having the plaintiff, Anna Taylor, declared to be the owner of the property held by the said Anna W. Taylor and B. O. Taylor as tenants by the entireties.

"30. That the plaintiff, Anna W. Taylor, in filing her final account with the Clerk of the Superior Court of Jones County, acknowledged receipt of the personal property remaining in the estate after payment of all debts. That upon receiving legal advice as to her rights, the said Anna W. Taylor distributed to Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor the same distributive share of the estate of B. O. Taylor that they would have received in case of intestacy. That inheritance taxes were paid to the State of North Carolina by the plaintiffs upon the distributive share actually received by them, which said distributive shares received by them were the same they would have received in case of intestacy.

"31. That should the court decree the plaintiff, Anna W. Taylor, to be the owner in fee simple of a one-half undivided interest in the 'Home Place' and the owner in fee simple of Tracts 3 and 4 of the Quill Hill

Farm, the intention of B. O. Taylor, deceased that his three sons, namely, Robert L. Taylor, B. Bruce Taylor, and Paul H. Taylor, share alike under his will, could not be carried out, and that it would be inequitable to attempt to carry out any of the provisions of Items 4, 5 and 6 of the Last Will and Testament of the said B. O. Taylor, deceased."

And the parties agreed that the court may find the facts, and render, and sign judgment in the cause at any time, out of term, out of the County, and out of the district,—the foregoing facts being agreed to.

The cause being heard the trial court recited the facts substantially as agreed, and thereupon made the following conclusions of law:

"1. That B. O. Taylor and wife, Anna W. Taylor, became the owners as tenants by the entireties of a one-half undivided interest in the land described in the complaint as the 'Home Place' under deed from A. P. Worley and wife, Rosa Worley, recorded in Book 88, page 546, Jones County Registry, dated October 8, 1928, and registered October 10, 1928.

"2. That B. O. Taylor and wife, Anna W. Taylor, became the owners as tenants by the entireties of the land described in the complaint as 'Tracts 3 and 4 of the Quill Hill Farm,' under deed from W. C. Harris and wife Elizabeth W. Harris, recorded in Book 96, page 94, Jones County Registry, dated November 23, 1937, and registered December 4, 1937.

"3. That at all times since October 8, 1928 and since November 23, 1937 the plaintiff, Anna W. Taylor, has been the owner of an estate in fee simple in (1) a one-half undivided interest in the land described in the complaint as the 'Home Place,' and (2) in all the land described in the complaint as 'Tracts 3 and 4 of the Quill Hill Farm,' respectively, as a tenant by the entirety; that immediately upon the death of B. O. Taylor and before his will was admitted to probate, the plaintiff, Anna W. Taylor, as surviving tenant by the entirety, became the absolute owner in fee simple of such interests in said land, by operation of the law; that said land at no time comprised any part of the estate of B. O. Taylor, deceased, and he having predeceased the said Anna W. Taylor, said land could not pass under the last will and testament of the said B. O. Taylor, deceased.

"4. That no intention to put the plaintiff, Anna W. Taylor, to an election appears from the terms of the last will and testament of B. O. Taylor, deceased; that the testator, B. O. Taylor, erroneously considered the property devised in Items 4, 5 and 6 of his said Will to be his own property, whereas he actually owned only a small portion thereof; that upon the facts of this case, the doctrine of election is not applicable.

"5. That the plaintiff, Anna W. Taylor, is not estopped from asserting her rights as owner in fee simple of her one-half undivided interest in the land described in the complaint as the Home Place and as owner in fee simple of the entire estate in the lands described as 'Tracts 3 and 4 of the Quill Hill Farm,' by reason of the fact that she qualified as Executrix under the last will and testament of B. O. Taylor, deceased, or by reason of the fact that she filed a final accounting of her handling of receipts and disbursements, or by reason of the fact that she filed no written dissent to said will within six months from the date of probate of said will.

"6. That the plaintiff, Anna W. Taylor, has asserted her rights within a reasonable time and has acted with due diligence upon being advised of her rights.

"7. That by reason of the fact that the testator, B. O. Taylor, was erroneously of the opinion that all the land he undertook to devise in Items 3, 4, 5 and 6 of his said will was his own, whereas he actually was the owner of only a one-half undivided interest in the land described in the complaint as the 'Home Place,' the intention of the testator cannot be carried out, the testator actually being the owner of insufficient land to effectuate his plan and intent, and therefore Items 3, 4, 5 and 6 of said will are invalid.

"8. That the plaintiff, Anna W. Taylor, having asserted her rights to the land owned by her and having renounced the benefits provided her under Items 2 and 3 of the will of B. O. Taylor, deceased, and having accounted to and paid over to the distributees of B. O. Taylor, deceased, the benefits provided for her in Item 2 of said will as in case of intestacy, Item 2 of said will is of no effect.

"9. That the last will and testament of B. O. Taylor, deceased, is incapable of execution according to the intent of said testator, and said estate has been fully administered and settled as if the said B. O. Taylor had died intestate."

And, pursuant to such conclusions of law, the court "Considered, Ordered, Adjudged and Decreed:

"1. That Anna W. Taylor is the owner in fee simple and entitled to possession of the following described land: (a) A one-half undivided interest in the . . . land known as the 'Home Place' (description set forth); (b) the entire or whole interest in the following described tract of land known as 'Tracts 3 and 4 of the Quill Hill Farm' (description set forth).

"2. That Items Two, Three, Four, Five and Six of the Last Will and Testament of B. O. Taylor, deceased, be and they are and each of them is hereby adjudged void and of no effect.

"3. That Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor are the owners in fee as tenants in common of a one-half undivided interest in and to the tracts of land described . . . known as the 'Home Place.'

"4. That the defendants, Patricia Ann Taylor, Donald Bruce Taylor, Paul H. Taylor, Jr., Kay Lowery Taylor and Lon Otis Taylor, Minors, and such unborn children of Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor, or either of them, as may be hereafter born to Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor, and any child or children of Robert L. Taylor, B. Bruce Taylor and Paul H. Taylor *in esse* at the death of Robert L. Taylor, B. Bruce Taylor, and Paul H. Taylor, nor any nor either of them has any interest in the land described in the complaint and in the Last Will and Testament of B. O. Taylor, deceased.

"5. That no further administration upon the estate of B. O. Taylor, deceased, is necessary."

"6." That the costs be taxed as indicated.

To the foregoing judgment and to the signing thereof, defendants object and except and appeal therefrom to Supreme Court, and assign error.

*White & Aycock for plaintiffs, appellees.*
*John D. Larkins, Jr., for defendants, appellants.*

WINBORNE, J. Fundamentally decision on this appeal rests upon question as to whether the doctrine of election applies in respect to plaintiff, Anna W. Taylor.

The trial court, upon facts agreed, was of opinion and held that it does not apply.

In this connection, "the doctrine of election" as stated in the case of *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29, opinion by *Seawell, J.,* "as applied to wills, is based on the principle that a person cannot take benefits under the will and at the same time reject its adverse or onerous provisions,—cannot, at the same time, hold under the will and against it." And it is stated further that "the intent to put the beneficiary to an election must clearly appear from the will," and that "the propriety of this rule especially appears where, in derogation of a property right, the will purports to dispose of property belonging to the beneficiary and, inferentially, to bequeath or devise other property in lieu of it."

The principle as thus stated is in keeping with uniform decisions of this Court. And in the *Lamb case, Seawell, J.,* in qualification of the rule, aptly declared: "Our train of reasoning is not complete without adding that if, upon a fair and reasonable construction of the will, the

testator, in a purported disposal of the beneficiary's property, has mistaken it to be his own, the law will not imply the necessity of election," and that "that result follows as a corollary to the principles already laid down."

While in this connection it may be doubted that the guardian *ad litem* herein appointed to represent children born, and unborn, had authority to stipulate as to what the testator had in mind, it appears affirmatively from the provisions of the will, upon a fair and reasonable construction, *Lamb v. Lamb, supra,* that the testator, B. O. Taylor, was erroneously of the opinion that the title to all of the lands described in the complaint and purportedly devised by him under Items Four, Five and Six of his last will and testament were owned by him individually and in fee simple, and hence that he had no intention to put Anna W. Taylor, his wife, to an election. See *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598, where in opinion of *Bobbitt, J.,* this Court said: "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 . . . Even so, if it appears that the testator erroneously considered the specific property so devised to be his own, no election is required . . . An election is required only when the will confronts a beneficiary with a choice between two benefits which are inconsistent with each other."

In this respect it is noted that in Item Three the testator wills and devises: "All of my real property of every kind, sort, and description wherever situate to my wife, Anna W. Taylor, for and during her natural life." And, then, expressly "subject to the life estate" of his wife, "as set out in Item Three," he devises the remainder in Tracts 3 and 4 of the Quill Hill Farm (Item Four), and the remainders in described portions of the Home Place (Items Five and Six) as set forth in the statement of facts. And in view of the principle of law that as to real property, title to which is held by the husband and wife as an estate by the entirety, the husband, during coverture, and between him and his wife, "has absolute and exclusive right to the control, use, possession, rents, issues and profits" of such property (*Lewis v. Pate,* 212 N.C. 253, 193 S.E. 20; *Nesbitt v. Fairview Farms, Inc.,* 239 N.C. 481, 80 S.E. 2d 472, and numerous other cases), it is reasonable that the husband in the instant case had the erroneous impression that the property belonged to him. Thus it is manifest that all of these lands in which he purported to devise estates in remainder are included within the description "all of my real property of every kind, sort, and description wherever situate" used in Item Three in devising a life estate to his wife as above set forth.

Indeed, as stated in *Byrd v. Patterson*, 229 N.C. 156, 48 S.E. 2d 45, opinion by *Barnhill, C. J.*, quoted with approval in the *Honeycutt case, supra*, 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." Hence this Court concurs in the ruling of the trial court that the doctrine of election does not apply in this case.

Nevertheless it does not follow as a matter of law that Items Two, Three, Four, Five and Six of the will of B. O. Taylor, deceased, are void, and of no effect. "Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator . . ." G.S. 31-40. Certainly, therefore, the testator, B. O. Taylor, had the right to bequeath his personal property, or to devise real property he owned. Hence this Court holds that to such extent as these Items of his will relate to disposal of *his* personal property, and *his* real property, they are valid.

Now particularizing:

Item 2: As to the personal property the testator bequeathed to his wife (Item Two), she, having elected to distribute it just as if her husband, the testator, had died intestate, her action in so doing is a closed transaction which requires no further adjudication.

Item 3: It being admitted as a fact that the only real estate owned by B. O. Taylor was an undivided one-half interest in the "Home Place," the devise of a life estate in all his real property (Item Three) is valid, and sufficient to vest in her such an estate in this undivided one-half interest.

Item 4: However, it appearing that Anna W. Taylor, the wife, by right of survivorship, she having survived her husband, acquired the fee in tracts 3 and 4 of the Quill Hill Farm, the purported devise thereof to Robert L. Taylor for life, with remainder to his lawful children is void, and the devisees thereof take nothing.

Items 5 and 6: It appearing that at the time of the death of B. O. Taylor, he individually and he and his wife Anna W. Taylor as tenants by the entirety were tenants in common of the "Home Place," he owning an undivided one-half interest therein, and they an undivided one-half interest therein, the question arises as to whether he, by attempting to devise particular parts thereof, vested in his devisees any right thereto. We find no comparable case in reported cases in this State, and none is cited by counsel for either party. However, we find it stated in 68 C.J.S. 16, Partition Sec. 9 (c), that "where there are two tenants in common, each owning an undivided half of land, neither can make a partition that will be binding on the other by assuming to

convey either half specifically." The case *Eaton v. Tallmadge* (1869), 24 Wis. 217, cited supports the text.

Tenants in common are such as hold property by several and distinct titles, but by unity of possession. Each tenant owns an interest in every inch of the property, and cannot know where that fraction is until a division has been made. 86 C.J.S. 361—Tenancy in Common, Sections 1, 2, 3 and 4, citing among other cases *Gaylord v. Millard,* 118 N.Y. 244, 250, 23 N.E. 376-77, 6 L.R.A. 667. See also *Allen v. McMillan,* 191 N.C. 517, 132 S.E. 276. Hence a purported devise of a specific portion of the whole by metes and bounds would seem to be too indefinite to constitute a valid devise. Therefore, this Court holds that the attempted devises of specific portions of the Home Place fails to vest title in the devisees therein named, and that the undivided interest of the testator in the Home Place, except as to the life estate of Anna W. Taylor is undevised, and descended to the testator's heirs at law, namely his three sons.

As so modified, the judgment from which appeal is taken is affirmed.

Modified and affirmed.

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

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JASPER HYMRICK HARRELL v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES.

(Filed 11 April, 1956.)

**1. Appeal and Error § 21—**

A sole assignment of error to the judgment presents for review only whether the facts found support the judgment and whether any fatal error of law appears upon the face of the record.

**2. Automobiles § 1—**

Revocation of license under the provisions of G.S. 20, Article 2, is an exercise of the police power in furtherance of the safety of the users of the State's highways.

**3. Same—**

The power to issue, suspend, and revoke licenses to operate motor vehicles is vested exclusively in the Department of Motor Vehicles, and revocation or suspension of license is not a part of, nor within the limits of, punishment to be fixed by the court wherein the offender is tried.

**4. Automobiles § 2: Criminal Law § 62h—Warrant need not charge second offense in order to support three year revocation of license therefor.**

While a prior conviction must be alleged in the indictment or warrant for the second offense in order for the court to inflict the heavier punishment for a second offense, G.S. 20-179, where during the period of revocation of his driver's license by the Department of Motor Vehicles for conviction of driving while under the influence of intoxicating liquor, defendant pleads guilty to another such offense upon warrant not charging a second offense, the Department of Motor Vehicles, upon receipt of report of the later judgment, must revoke defendant's driver's license for three years pursuant to the mandatory provisions of G.S. 20-17 (2); G.S. 20-19 (d), the revocation of license not being any part of the punishment.

**5. Criminal Law § 17b—**

A plea of guilty is equivalent to conviction.

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

APPEAL by defendant from *Bone, J.*, December Civil Term 1955 of WILSON.

Civil action for writ of *mandamus* to compel Edward Scheidt, in his capacity as Commissioner of Motor Vehicles of North Carolina, to reissue to plaintiff a license to operate a motor vehicle within the State.

On 15 December 1947 the plaintiff was convicted in the Superior Court of Edgecombe County of driving a motor vehicle upon the highways within the State, while under the influence of intoxicating liquor. This conviction was reported to the Department of Motor Vehicles, which, pursuant to the mandatory provisions of G.S. 20-17 (2) and G.S. 20-19 (c), revoked his operator's license for one year.

On 22 October 1954 in the Mayor's Court for the Town of Farmville, plaintiff entered a plea of guilty to a warrant charging him on 19 October 1954, within the city limits of the Town of Farmville, with unlawfully and wilfully operating a motor vehicle upon the highways within the State, while under the influence of intoxicating liquor or narcotic drugs. The warrant did not charge that it was a second offense. Judgment was suspended, provided he pay a $100.00 fine and costs. The defendant, upon receipt of a report of the record of the trial in the Mayor's Court for the Town of Farmville, pursuant to the mandatory provisions of G.S. 20-17 (2) and G.S. 20-19 (d), revoked the operator's license of plaintiff for three years.

One year after 22 October 1954 plaintiff complied with the requirements for reinstatement of his operator's license, and demanded that the defendant reissue to him his operator's license. The defendant refused to do so. Whereupon, plaintiff instituted this action.

Judge Bone concluded as a matter of law, "that the provisions of G.S. 20-17 and G.S. 20-19 (d) authorize the Commissioner of Motor

Vehicles to revoke a license for a period of three years on the grounds of a second conviction for drunk driving only when the warrant or indictment in the second case charges or sets out that the defendant in that case is being tried for the 'second offense' of driving while under the influence of intoxicating beverages or narcotic drugs; and the court further concludes, as a matter of law, that the defendant Commissioner of Motor Vehicles possessed authority in this case to revoke the driver's license of the plaintiff for one year only, commencing October 22nd, 1954." Whereupon, Judge Bone entered judgment ordering and decreeing that the order of revocation of the driver's license of plaintiff for three years was void, and that the defendant "restore the driving privileges of the plaintiff upon the plaintiff's compliance with the usual financial responsibility requirements and examinations, as are required of those whose licenses have been lawfully revoked for a period of one year."

From the judgment entered the defendant appeals, assigning error.

*Talmadge L. Narron for Plaintiff, Appellee.*

*William B. Rodman, Jr., Attorney General, and Robert E. Giles, Assistant Attorney General, for Defendant, Appellant.*

PARKER, J. G.S. 20-138 provides that "it shall be unlawful and punishable, as provided in G.S. 20-179, for any person . . . who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within the State."

G.S. 20-179 provides that for the first offense of violating the provisions of G.S. 20-138 the punishment shall be a fine of not less than $100.00 or imprisonment for not less than 30 days, or both, in the discretion of the court; for the second violation of the same offense the punishment shall be a fine of not less than $200.00 or imprisonment for not less than six months, or both, in the discretion of the court; and for a third or subsequent conviction of the same offense the punishment shall be a fine of not less than $500.00 or by both fine and imprisonment in the court's discretion.

The relevant part of G.S. 20-24 (a) reads: "Whenever any person is convicted of any offense for which this article" (Article 2. Uniform Driver's License Act) "makes mandatory the revocation of the operator's or chauffeur's license of such person by the Department, the court in which such conviction is had shall require the surrender to it of all operators' and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward the same, together with a record of such conviction, to the Department." The Department referred to is the Department of Motor Vehicles.

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

G.S. 20-19 is captioned "PERIOD OF SUSPENSION OR REVOCATION," and the pertinent part thereof reads: "(d) When a license is revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug, the period of revocation shall be three years."

The facts we have stated are those found by Judge Bone. As to the facts of the case there seems to have been no dispute, for neither party has excepted to his findings.

The defendant's only assignment of error is to the judgment. That brings here for review two questions: one, do the facts found support the judgment, and two, does any fatal error of law appear upon the face of the record? *Bailey v. Bailey, ante,* 412, 90 S.E. 2d 696; *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53.

We have presented for determination the sole question, whether the revocation of the operator's license of the plaintiff for three years, is, under the mandatory provisions of G.S. 20-17(2) and G.S. 20-19(d), a part of the punishment for the crime charged in the warrant issued by the Mayor's Court for the Town of Farmville.

The enactment of the North Carolina Uniform Driver's License Act, G.S., Ch. 20, Article 2, was designed under the police power of the State to safeguard the use of our highways from those who are not qualified to operate motor vehicles, from those guilty of certain violations of our statutes regulating the use of motor vehicles, *e.g.* manslaughter resulting from the criminally negligent operation of an automobile, drunken driving, etc., to exercise some measure of control over such operators, and generally to make uniform, so far as practicable, the granting or withholding of this privilege to operate a motor vehicle in furtherance of the safety of the users of the State's highways.

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

In *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793, it is said: "The Legislature has full authority to prescribe the conditions upon which it" (a driver's license) "will be issued and to designate the court or agency through which and the conditions upon which it will be revoked."

G.S. Ch. 20, Art. 2, Uniform Driver's License Act, vests exclusively in the State Department of Motor Vehicles the issuance, suspension and revocation of licenses to operate motor vehicles. *Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 84 S.E. 2d 259; *S. v. Warren,* 230 N.C. 299, 52 S.E. 2d 879. Therefore, the courts have no authority to issue, suspend or revoke a driver's license to operate a motor vehicle. *S. v. McDaniels, supra; S. v. Cooper,* 224 N.C. 100, 29 S.E. 2d 18; *S. v. Warren, supra; S. v. Cole,* 241 N.C. 576, 86 S.E. 2d 203.

"A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute." *In re Revocation of License of Wright,* 228 N.C. 584, 589, 46 S.E. 2d 696. In this case the Court also said: "No right accrues to a licensee who petitions for a review of the order of the department when it acts under the terms of G.S. 20-17, for then its action is mandatory. The court is granted authority to review only suspensions and revocations by the department in the exercise of its discretionary power. G.S. 20-25."

Under our decisions the revocation of a license to operate a motor vehicle is not a part of, nor within the limits of punishment to be fixed by the court, wherein the offender is tried. When the conviction has become final, the revocation of a driver's license by the Department of Motor Vehicles is a measure flowing from the police power of the State designed to protect users of the State's highways. G.S. 20-179, which provides the punishment for driving while under the influence of intoxicating liquor or narcotic drugs, appears under Art. 3, Part 12—Penalties—of G.S. Ch. 20, Motor Vehicles, and G.S. 20-17—Mandatory Revocation of License by Department—and G.S. 20-19—Period of Suspension or Revocation—appear under Art. 2—Uniform Driver's License Act—of the same chapter of G.S.

In *Prichard v. Battle,* 178 Va. 455, 17 S.E. 2d 393, it was held that the revocation of an automobile driver's license following a conviction on a charge of leaving the scene of an accident in violation of the State statute, was not part of the penalty for the criminal offense. In holding that a pardon did not restore or revive the revoked license the Court said:

> "The revocation is no part of the punishment fixed by the jury or by the court wherein the offender is tried. *Commonwealth v.*

*Ellett, supra,* 174 Va. at page 411, 4 S.E. 2d at page 765. Nor is it, in our opinion, an added punishment for the offense committed. It is civil and not criminal in its nature. *Commonwealth v. Funk,* 323 Pa. 390, 186 A. 65, 69, 70; *Steele v. State Road Commission,* 116 W. Va. 227, 179 S.E. 810.

"The question as to whether the revocation of a license because of an act for which the licensee has been convicted or because of the conviction itself is an added punishment has frequently been before the courts. The universal holding is that such a revocation is not an added punishment, but is a finding that by reason of the commission of the act or the conviction of the licensee, the latter is no longer a fit person to hold and enjoy the privilege which the State had theretofore granted to him under its police power. The authorities agree that the purpose of the revocation is to protect the public and not to punish the licensee.

"In *Davis v. Commonwealth,* 75 Va. 944, 946, this court held that the revocation of a license to sell intoxicating liquors because of an offense for which the licensee had been convicted was not a punishment for the offense, but was simply the withdrawal of the privilege which the State had granted the licensee to carry on a legitimate business. See, also, *Cherry v. Commonwealth,* 78 Va. 375.

"In *Hawker v. New York,* 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002, it was held that the denial or revocation of a license to practice medicine to one who had been convicted of a felony was not added punishment for the offense. See, also, *Mandel v. Board of Regents of University,* 250 N.Y. 173, 164 N.E. 895, 896.

"In *State v. Harris,* 50 Minn. 128, 52 N.W. 387, 388, in holding that the revocation of a liquor license was not a punishment for the offense committed, the court said: 'While the revocation by the court follows the conviction as a consequence of the violation of the ordinance, it has no more the purpose or effect of punishment than if the license were revoked by the mayor or city council, neither of whom would have the power to impose punishment for the offense. There is a plain distinction between such a withdrawal of a special privilege which has been abused, the termination of a mere license, and the penalty which the law imposes as a punishment for crime.'

"The courts have uniformly held that the purpose of a disbarment proceeding is not to punish the offending attorney but to protect the public and to remove from the rolls of the court one who has

been proved to be unfit to exercise the privilege granted to him. *Norfolk & Portsmouth Bar Ass'n v. Drewry,* 161 Va. 833, 837, 172 S.E. 282, and authorities there cited; *People v. Culkin,* 248 N.Y. 465, 162 N.E. 487, 489, 60 A.L.R. 851, opinion by *Cardozo, J.*

"The same reasoning applies to the revocation of a license to operate a motor vehicle. Its purpose is not to punish the offender but to remove from the highways an operator who is a potential danger to other users.

"The precise question was recently before the highest court of Kentucky in *Commonwealth v. Harris,* 278 Ky. 218, 128 S.W. 2d 579, in which it was held that suspension of the driving license of one convicted of operating an automobile while intoxicated is not a part of the penalty for such offense, nor added punishment, but is merely the forfeiture of a conditional temporary permit for the licensee's failure to observe the conditions under which the license was issued. See, also, *People v. O'Rourke,* 124 Cal. App. 752, 13 P. 2d 989, 992.

"Having reached the conclusion that neither the revocation of the petitioner's license nor the conditions placed upon him by the statute in order that he might obtain its reissuance are penalties or a part of the punishment within the meaning of section 73 of the Constitution of Virginia and Code, sec. 2569, as amended, it follows that such revocation and conditions have not been affected by the pardon which has been granted to him."

See also *Prawdzik v. City of Grand Rapids,* 313 Mich. 376, 21 N.W. 2d 168, where is quoted the same part of the opinion in *Prichard v. Battle, supra,* that we have quoted: see, also, *Parker v. State Highway Department,* 224 S.C. 263, 78 S.E. 2d 382.

*Commonwealth v. Ellett, supra,* is directly in point. On 21 September 1935, Ellett was convicted in the Police Court of the City of Richmond of operating a motor vehicle upon the highways of the State while intoxicated. He was fined $100.00 and costs. Upon receiving a report of this conviction the Director of the Division of Motor Vehicles entered an order, pursuant to the Virginia Code 1936, section 4722, revoking for one year the operator's license of Ellett. On 8 May 1936, within a year of the former conviction, and in the same court, Ellett was again convicted of a similar offense, committed after 21 September 1935. The conviction carried a penalty of one month in jail and a fine of $100.00 and costs. Although the penalty imposed was applicable to either a first or second offense, no reference was made to the prior con-

viction in the second warrant, or in the judgment of conviction thereon. Upon receiving a report of the conviction of 8 May 1936, the Director of the Division of Motor Vehicles entered another order revoking Ellett's operator's license for a period of three years from the date of the last conviction, 8 May 1936. On 17 December 1938, less than three years after the last conviction, Ellett applied to the Director in writing for a new operator's license. The Director denied the application on 20 December 1938, on the sole ground that two convictions of driving under the influence of intoxicants automatically revoked the offender's license for three years from the date of the last conviction, regardless of whether or not the offender had been charged with a second offense upon his trial for the latter offense. In the Hustings Court of the City of Richmond the Director's decision was reversed. To that judgment the Supreme Court of Appeals of Virginia awarded a writ of error. Ellett contended, as the plaintiff here contends, that his last conviction was a conviction for a first offense since the warrant did not allege the last offense to be a second offense, and conviction thereof deprived him merely of the right to secure a permit to operate a motor vehicle for a period of one year from the date of conviction. The two judgments of conviction of Ellett and of the plaintiff are final, and are now matters of record. Within the limits prescribed by law, the trial court fixed the measure of punishment in Ellett's two cases and in plaintiff's two cases. The penalty of Ellett and of the plaintiff of being deprived of the right to operate a motor vehicle is not a part of, nor within the limits of the punishment to be fixed by a court. The Virginia Court said: "We are not dealing with the degree of gravity of the accused's guilt upon either conviction, but with the effect of the two separate and distinct conviction upon his rights as a citizen." Farther on in the opinion the Court said:

> "The provisions of the Code, section 4722, evidence two principal purposes. One purpose is to enable the court or jury to impose a heavier punishment when the accused is tried for and convicted of an offense charged as a second or subsequent offense. To effect this purpose, the prior offense must be charged and proven. The other purpose is to deprive the convicted person of the right to secure a permit to operate a vehicle for a specified time, after he has been convicted once or more than once. To effect this purpose the provision is made self-operative. The notice of each conviction supplied the Director of Motor Vehicles informs him of the effect upon the rights of an applicant for a driver's permit, when the applicant has been convicted of drunken driving once or more than once.

"Let us suppose a case where one has been convicted three successive times for drunken driving. The first conviction was in the Circuit Court of Wythe County; a second or subsequent conviction, in point of time, was in Arlington county; and a third conviction in the trial justice's court of Accomack county for the violation of an ordinance of the town of Onancock. No notice of conviction is required to be sent to the Commonwealth attorneys of the several counties. They cannot, therefore, allege a prior conviction in indictments for subsequent offenses tried in their respective courts when they have no knowledge of former convictions. Consequently, they cannot ask for the punishment prescribed for a second or subsequent offense.

"The situation is different as it affects the position of the Director of Motor Vehicles, who has been furnished with the report of each conviction. Since it is his duty to issue permits to drive only to those who are entitled thereto, it is manifest that the purpose of the record furnished to him is to keep him informed as to the rights of the applicant. The report of conviction is required to show only the fact thereof, the name, address and license plate number of the vehicle operated by the offender. It does not matter to the Director whether a subsequent conviction, in point of time, shall be called a 'second conviction,' or a 'second conviction' shall be called a 'subsequent conviction.' It only matters to him that there has been more than one conviction of a similar offense. It is not the measure of proof or the extent of the punishment of a later or subsequent conviction that is the essence of the provision relating to the right of the offender to secure a new permit to operate a vehicle. The essence of the provision denying that right relates to the number of times the offender has been convicted. The duty of the Director is distinctly separate from the duty of the court or jury. If the record filed with the former shows that there has been only one conviction, he cannot issue to the offender a new permit for one year. If the record shows that the offender has been convicted two or more times, he is not entitled to secure a new permit until the end of three years from the date of the last judgment of conviction."

To make a person subject to the infliction of the heavier punishment to be imposed *by the court* for a second offense of driving while under the influence of intoxicating liquor or narcotic drugs, pursuant to G.S. 20-179, it is necessary that a prior conviction be alleged in the indictment or warrant for the second offense. *S. v. Cole, supra.* The object

of the allegation is to put the accused on notice that proof of his prior conviction will be introduced, not for proving the offense subsequent in point of time, but for the purpose of imposing a heavier punishment by the court, if the later or following offense is proved. Such a rule permits the accused to be informed of the charges against him, and allows evidence to go before the jury showing the gravity of a repeated offense. *Keeney v. Commonwealth,* 147 Va. 678, 684, 137 S.E. 478. This rule, of course, can be effective only when the prosecuting attorney for the State has knowledge of the prior conviction.

That rule of law has no application to the instant case for G.S. 20-138 and G.S. 20-179 nowhere provide that the court as a part of the punishment can revoke an operator's license to operate a motor vehicle. The provisions of G.S. 20-17, Mandatory revocation of license by Department, become effective only after judgments of conviction have become final. Equally mandatory is the provision of G.S. 20-19 (d): "When a license is revoked because of a second conviction for driving under the influence of intoxicating liquor or a narcotic drug, the period of revocation *shall be three years.*" (Italics added.) These statutes, G.S. 20-17 and G.S. 20-19 (d) emphasize the effect of a conviction, and the result following the imposition of punishment fixed by the court in the judgment on the conviction. No action or order of the court is required to put the revocation of license into effect. It is not dependent on evidence to convict. The record of a conviction, which has become final, suffices to invoke the ministerial duty of performing the mandatory requirements of the statutes by the Department.

A plea of guilty is "equivalent to a conviction." *S. v. Brinkley,* 193 N.C. 747, 138 S.E. 138. In *S. v. Robinson,* 224 N.C. 412, 30 S.E. 2d 320, this Court, quoting 14 Am. Jur., Criminal Law, par. 272, p. 952, said: "A plea of guilty, accepted and entered by the court, is a conviction or the equivalent of a conviction of the highest order."

The case of *Cedergren v. Clarke,* ..... N.H. ....., 112 A. 2d 882, is distinguishable. The New Hampshire statute differs from ours. As the New Hampshire Supreme Court said in its opinion: "The provisions both for the heavier penalties and for ineligibility for a license for three years are contained in the same sentence of the statute."

It is said in Annotation 10 A.L.R. 2d, page 842: "Statutes not requiring or not providing for notice and hearing before revocation or suspension of a license to operate a motor vehicle have been generally sustained as against various constitutional objections."

The facts found do not support the conclusions of law and the judgment. For the foregoing reasons the judgment complained will be reversed, and all the facts being before this Court, a final judgment

will be entered in the court below dismissing plaintiff's action with the costs to be taxed against him.

Reversed and remanded for final judgment.

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

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JESSE J. GREEN AND MRS. ALMA GRUBB v. THURMAN BRIGGS, CHAIRMAN; FLETCHER H. WALL, MEMBER; PAUL HARRIS, MEMBER, OF THE COUNTY BOARD OF ELECTIONS OF DAVIDSON COUNTY.

(Filed 11 April, 1956.)

**1. Appeal and Error § 6—**

Where an election sought to be restrained has been held pending the appeal, whether the lower court erroneously refused to restrain the election is moot and will not be considered.

**2. Elections § 6½—**

The performance of certain acts within a particular time or in a particular manner in accordance with statutory provision is essential to the validity of an election when the statute so provides, but when the statute does not so provide, such provisions will usually be deemed directory, and technical failure to observe them will be treated as a mere irregularity not essential to the validity of the election when such failure has no bearing whatever on the outcome of the election and is not prejudicial to anyone.

**3. Elections § 9—**

The failure of the Board of Elections to give statutory notice of its release of petition forms for the calling of a beer and wine election, G.S. 18-124, when the release of such forms is promptly given wide publicity by press and radio, will not invalidate the election, there being a substantial compliance with the requirement of the statute, and the failure of statutory notice not being prejudicial.

**4. Same—**

The statutory requirement that a beer and wine election should be called within thirty days of the date of the return of the petitions, G.S. 18-124, is for the benefit of the proponents of such election, and when there is valid reason for delay and such delay does not prejudice the rights of anyone or affect the outcome of the election, opponents of the election may not complain thereof.

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

APPEAL by plaintiffs from *Johnston, J.*, in Chambers, at Winston-Salem, on 13 January, 1956. From DAVIDSON.

Civil action instituted for the purpose of restraining a Beer and Wine election.

In June 1955, parties who were interested in the calling of a Beer and Wine election in Davidson County, in accordance with G.S. 18-124, requested the defendant Board of Elections to prepare and deliver to them forms to be used in securing the signatures of qualified voters in Davidson County requesting the calling of such an election. The defendant Board thereupon granted the request and caused forms to be printed for this purpose. The petition forms were dated 20 June, 1955, and were actually delivered to the proponents of the election on 6 July, 1955, at which time the defendant Board of Elections gave notice thereof through the public press but not in the form of a legal advertisement. Wide publicity was given to the delivery of the petition forms through all the newspapers, radio and other public media in Davidson County.

About 2:30 p.m. on 17 September, 1955, a large number of the petition forms were returned to the Board of Elections, which forms bore the signatures of 5,683 persons. At a later hour on the same day, and on succeeding days, additional petition forms were returned to the Board carrying the signatures of 338 persons.

At the time the above petition forms were delivered to the Board there was then pending a bond election in Davidson County which was held on 18 October, 1955. On 22 September, 1955, the registration books were delivered by the Board to the local registrars for the purpose of having a registration on the bond election.

On 20 October, 1955, the registration books were returned by the local registrars to the Board. It was impossible for the Board to check the signatures on the petitions against the registration until after the books were returned to it following the bond election, but as soon as the books were returned, the Board began a careful check of the signatures on the petitions against the registration. This check was completed on 17 November, 1955, and revealed that the number of valid signatures on the petitions submitted to the Board at 2:30 p.m. on 17 September, 1955, exceeded fifteen per cent of the number of persons who had voted in Davidson County, North Carolina, for Governor in the last preceding election. The Board thereupon, on 17 November, 1955, called for a Beer and Wine election to be held in Davidson County on 28 February, 1956. Proper legal notice calling the election was given by the Board.

The plaintiffs, citizens and taxpayers of Davidson County, instituted this action on 14 December, 1955, and obtained an order directing the defendants to appear before the judge holding the courts of the Twenty-second Judicial District, in Chambers, at the courthouse in Winston-

Salem, North Carolina, on 13 January, 1956, at 10:00 a.m., to show cause, if any, why they should not be enjoined and restrained from holding the Beer and Wine election called for 28 February, 1956.

When the cause came on for hearing, the defendants demurred to the complaint, challenging the sufficiency thereof to support an order for the relief sought. The findings were based on the allegations of the complaint, the answer, and the affidavits submitted by the respective parties. From the facts found, the court concluded as a matter of law that the plaintiffs were not entitled to a restraining order and denied the motion therefor, sustained the demurrer and dismissed the action. Plaintiffs appeal, assigning error.

*Wade H. Phillips and T. H. Suddarth, Jr., for plaintiff appellants.*

*Paul R. Ervin and Beamer H. Barnes for defendant appellees.*

DENNY, J. The election held on 28 February, 1956, resulted in the prohibition of the sale of beer and wine in Davidson County by a vote of more than three to one. Therefore, the question involved in this appeal with respect to the refusal of the court to enjoin the defendants from holding the election is now moot and will not be considered. *Austin v. Dare County,* 240 N.C. 662, 83 S.E. 2d 702; *Surety Corp. v. Sharpe,* 233 N.C. 644, 65 S.E. 2d 137; *Saunders v. Bulla,* 232 N.C. 578, 61 S.E. 2d 607; *Penland v. Gowan,* 229 N.C. 449, 50 S.E. 2d 182; *Nance v. Winston-Salem,* 229 N.C. 732, 51 S.E. 2d 185; *Eller v. Wall,* 229 N.C. 359, 49 S.E. 2d 758.

The plaintiffs alleged in their complaint that if the election should be held and the legal sale of beer and wine prohibited as a result of such election, these "plaintiffs and other citizens and taxpayers of Davidson County lawfully engaged in the sale of beer and wine would be caused to suffer large and irreparable property and monetary loss and damage for which they would have no adequate remedy at law." This we do not concede. *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; 18 Am. Jur., Elections, section 117, page 255. However, the plaintiffs further allege the election is null and void for that the defendants failed to comply with the provisions of G.S. 18-124 in the following respects: (1) That the defendant Board failed to give public notice of the fact that the petitions for a Beer and Wine election were being circulated; and (2) that the Board failed to call the election within thirty days from the date the petitions for the election were returned to the defendant Board, citing *Ferguson v. Riddle,* 233 N.C. 54, 62 S.E. 2d 525.

It is provided in subsection (a) of G.S. 18-124, "For the purpose of determining whether or not wine or beer or both shall be sold . . .

within . . . any county . . . an election shall be called when, and only when, the conditions of this article are complied with."

It is the general rule in this jurisdiction where a statute expressly declares any particular act is essential to the validity of an election, or that its omission shall render the election void, the provisions of the statute will be enforced. But where the statute simply provides that certain acts or things shall be done, within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, such provisions will be deemed as directory only and will not affect the merits of the election. *Hill v. Skinner*, 169 N.C. 405, 86 S.E. 351.

We construe the provisions of subsection (a) of G.S. 18-124 to mean that all conditions contained in Article 11 of Chapter 18 of the General Statutes of North Carolina, which are essential to the conduct of a fair and impartial election, must be observed. But the failure to observe the strict letter of a provision in an act authorizing the calling of an election, which failure is not alleged to have been prejudicial to anyone, nor to have had any bearing whatever on the outcome of the election, will be treated as a mere irregularity and such election will not be invalidated thereby. *DeBerry v. Nicholson*, 102 N.C. 465, 9 S.E. 545, 11 Am. St. Rep. 767; 10 A. & E. Enc., 2nd Ed., Elections, page 766; 18 Am. Jur., Elections, section 110, page 248, *et seq.*

The requirement that public notice be given by the Board of Elections upon the release of the petition forms could serve no useful purpose, save that of notifying all interested citizens in the county that petitions were going to be circulated in an effort to have an election called to determine whether or not the legal sale of beer and wine would be continued in the county. We cannot conceive, in light of the evidence disclosed by the record, how it would have been possible for this fact to have been more widely publicized in Davidson County than it was immediately after the release of the petition forms. Simultaneously with the release of the petition forms, the Board gave a news release of its action to a representative of the *Lexington Dispatch*, which paper carried in its issue of 6 July, 1955, a two-column story about the release of the petitions, with headlines pertaining thereto across its front page. The next day, the *Thomasville Tribune* carried a two-column story on its front page, announcing that the petitions had been delivered to the representatives of the Davidson County Ministerial Association and were ready to be signed. Wide publicity of the release of the petition forms was given in every newspaper in the county and over the radio. We hold that the Board's action in this respect was a substantial compliance with the requirement of the statute. Furthermore, we cannot conceive how anyone could have been prejudiced in his rights by the

failure to give this notice in the form of a legal advertisement. To hold that the election held on 28 February, 1956, is null and void for failure to give public notice in the form of a legal advertisement of the release of the petition forms, in view of the general publicity given such release, could not be justified either legally or morally. This view is in accord with numerous decisions of this Court. *Forester v. N. Wilkesboro,* 206 N.C. 347, 174 S.E. 112; *Penland v. Bryson City,* 199 N.C. 140, 154 S.E. 88; *Glenn v. Culbreth,* 197 N.C. 675, 150 S.E. 332; *Monteith v. Com'rs. of Jackson,* 195 N.C. 71, 141 S.E. 481; *Flake v. Com'rs.,* 192 N.C. 590, 135 S.E. 467; *Plott v. Com'rs.,* 187 N.C. 125, 121 S.E. 190; *Miller v. School District,* 184 N.C. 197, 113 S.E. 786; *Hammond v. McRae,* 182 N.C. 747, 110 S.E. 102; *Riddle v. Cumberland,* 180 N.C. 321, 104 S.E. 662; *Com'rs. v. Malone,* 179 N.C. 604, 103 S.E. 134; *Com'rs. v. Malone,* 179 N.C. 10, 101 S.E. 500; *Hardee v. Henderson,* 170 N.C. 572, 87 S.E. 498; *Hill v. Skinner, supra.*

As to the failure of the Board to call the election within thirty days of the date of the return of the petitions, we hold that this provision was inserted in the law for the benefit of the proponents of the election. Had there been no valid reason for the delay in calling the election, the proponents might have moved for a *mandamus* after the expiration of the thirty days. However, the reason for the delay was a valid one. Moreover, it is not alleged in the complaint that any citizen or voter in Davidson County was prejudiced in his rights by the delay in calling the election or that the outcome of the election was affected in any way whatsoever by reason thereof.

The ruling of the court below in sustaining the demurrer will be upheld and the judgment entered

Affirmed.

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

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ALPHA LAMMONDS v. ALEO MANUFACTURING COMPANY, A CORPORATION.

(Filed 11 April, 1956.)

**1. Contracts § 19—**

As a general rule, a third person may sue to enforce a binding contract made for his benefit even though he is a stranger both to the contract and to the consideration.

**2. Master and Servant § 2d—**

As a general rule, an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions.

**3. Same—**

Plaintiff employee alleged the existence of a collective labor contract between defendant and a labor union, that plaintiff was required to work under an increased work load assignment in violation of the contract, and that such violation entitled plaintiff to back pay under the terms of the contract. *Held:* The complaint states a cause of action in plaintiff's favor as a third party beneficiary. G.S. 1-57.

**4. Same: Arbitration and Award § 1—**

Statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies.

**5. Master and Servant § 2d: Arbitration and Award § 7—Common law arbitration held not to preclude action to recover benefits due employee under collective labor contract.**

Plaintiff employee alleged a collective labor contract entered into by a labor union and defendant employer, that plaintiff was a third party beneficiary of the contract, that pursuant to the contract and by consent of the parties thereto, grievances under the contract were arbitrated, resulting in decision of the arbitrator that employees of plaintiff's group were entitled to increase of compensation, that defendant had refused to comply with the arbitrator's decision, and that plaintiff was entitled to retroactive compensation under the contract. *Held:* The arbitration agreement is governed by the common law, and neither the Uniform Arbitration Act, G.S. 1-544, nor the statutory arbitration, G.S. 95-36.1, precludes maintenance of the action by plaintiff.

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

APPEAL by defendant from *McKeithen, Special Judge,* at 7 February Term, 1955, of RICHMOND.

Civil action for accounting arising out of a collective labor contract, heard below on demurrer to the complaint.

These in summary are the controlling allegations of the complaint:

1. That on or about 9 June, 1952, a collective labor contract was entered into by Local Union #603, U.T.W.A., A. F. of L., and Aleo Manufacturing Company, covering wages, hours, and working conditions of the employees of the Manufacturing Company. The contract by reference is incorporated in the complaint.

2. "That at the time of the signing of the . . . contract, and since, Plaintiff was employed at the Aleo Manufacturing Company and was personally entitled to the benefit of the terms and conditions of the . . . contract . . ."

3. That the Manufacturing Company "during the Summer of 1953, for 30 days trial, in accordance with Article 6 of the . . . contract, increased the work load of the spinners and after the end of the 30 days continued the said increased work load or stretch out to which . . . Plaintiff and the other spinners were assigned."

4. Pursuant to the terms of the contract, grievances respecting the increased work load, or stretch out, were filed with the Company; that pursuant to the terms of the contract, and by consent of the parties, Maxwell Copelof was selected to arbitrate the grievances.

5. On or about 9 March, 1954, the arbitrator heard the matter submitted to him, and on or about 20 May, 1954, handed down his decision on the grievances. The report is by reference made a part of the complaint. It provides in substance as follows: "That the increased work load as installed by the defendant Corporation did not provide for sufficient fatigue allowance as called for in the aforesaid contract, and further set forth therein the basis for establishing the work load and rate of pay therefor, and further provided that the spinners are to be paid retroactively to the date the assignments were increased."

6. That thereafter, on or about 3 July, 1954, the "arbitrator handed down a clarification of his previous decision . . . under which the Plaintiff is entitled to an adjustment of the work load to provide for sufficient fatigue allowance as called for in the contract, and for the adjustment of the basic hourly rates as provided in the contract, and for retroactive pay to the time of the assignment."

7. "That, notwithstanding Plaintiff's request to Defendant Company for compliance with the terms and provisions of the aforesaid contract and the arbitrator's decision thereunder, the Defendant has failed and refused to comply with the said arbitrator's decision."

8. "That the plaintiff has worked in the spinning department of the Defendant Corporation since the Summer of 1953 under a work load assignment, or stretch out, which is in violation of the aforesaid collective bargaining contract and of the arbitrator's decision thereunder relating to work load and work assignments, and therefore is entitled to an adjustment of the said work load and work assignments and to pay and back pay retroactive to (the time of) the companies increase in work load assignment, as provided by the said contract and the arbitrator's decision thereunder."

The plaintiff prays for an accounting to determine the amount due her by the defendant corporation.

The defendant demurred to the complaint on the ground that "there is a defect of party plaintiff and that the complaint does not state facts sufficient to constitute a cause of action against the defendant, in that the plaintiff has no interest, title or right in law in the proceedings and

matters and things alleged in her complaint, and cannot as a matter of law maintain said action."

From judgment overruling the demurrer, the defendant appeals.

*Wm. H. Abernathy for plaintiff, appellee.*

*Brooks, McLendon, Brim & Holderness and Hubert Humphrey for defendant, appellant.*

JOHNSON, J. Decision here turns on whether the plaintiff is the real party in interest, within the purview of G.S. 1-57, and as such has the right to maintain this action.

The defendant insists that since the plaintiff is not a party to the collective labor contract or to the arbitration, she may not maintain the action. The defendant further contends that if any action of this type is appropriate, it must be brought by the labor union. On the other hand, the plaintiff insists that she as a third party beneficiary is entitled to sue into the contract for back pay and other benefits due her under the terms of the contract. These contentions were resolved in favor of the plaintiff by the court below, and our study of the complaint leaves the impression that the ruling is correct.

The third party beneficiary doctrine is well established in our law. Stated in general terms, and leaving out of consideration certain limitations and exceptions (12 Am. Jur., Contracts, Sections 279 to 284), the rule is 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. *Trust Co. v. Processing Co.*, 242 N.C. 370, 371, 88 S.E. 2d 233; *Canestrino v. Powell*, 231 N.C. 190, 56 S.E. 2d 566, and cases cited. For valuable analysis of third party beneficiary decisions of this Court, see 13 N. C. Law Review, p. 94 *et seq.* See also 12 Am. Jur., Contracts, Section 277; 39 Am. Jur., Parties, Section 21; Annotation: 81 A.L.R. 1271, 1281.

A comprehensive annotation on the subject of "Right of Individual Employee to Enforce Collective Bargaining Agreement against Employer," appears in 18 A.L.R. 2d p. 352 *et seq.* This treatise, embracing collation of cases from various jurisdictions, discloses that by what appears to be the decided weight of authority it is generally held that an employee may maintain an action to enforce a collective labor contract made between the labor union and the employer, in respect to provisions inserted in the contract for the benefit of the employee. This is particularly so with respect to wage provisions. See Annotation 18 A.L.R. 2d 352, 365. See also Annotation 95 A.L.R. 10, 41; 31 Am. Jur., Labor, Section 119 (1955 Supp.); 56 C.J.S., Master and Servant, Section 28 (83)b., p. 270, and 1955 Supp. The rule is supported in

principle by what is said in these decisions of this Court: *James v. Dry Cleaning Co.*, 208 N.C. 412, 181 S.E. 341; *Coley v. A. C. L. R. R.*, 221 N.C. 66, 19 S.E. 2d 124.

In *James v. Dry Cleaning Co., supra,* the plaintiff sued for back salary due under the President's Re-employment Agreement, made pursuant to the National Industrial Recovery Act. *Stacy, C. J.,* speaking for the Court, said: "That the plaintiff is entitled to sue upon the 'President's Re-employment Agreement,' voluntarily signed by the defendant, either in equity, under the doctrine of subrogation, or at law, as upon a contract made for the benefit of a third person, is fully established and supported by the decisions in this jurisdiction."

In the case at hand the complaint alleges these crucial facts: (1) the existence of a collective labor contract between the defendant and the labor union, under which the plaintiff as an employee was entitled to contract benefits, and (2) that the plaintiff was required to work under an increased work load assignment, or stretch out, in violation of the contract, and for which violation the plaintiff is entitled to back pay under the terms of the contract. These allegations and others of a supporting nature, when taken as true, as is the rule on demurrer, are sufficient to support the inference that the defendant violated contractual provisions inserted in the contract for the benefit of the plaintiff, for the alleged breach of which she is entitled to recover.

It necessarily follows that the demurrer was properly overruled. The plaintiff is entitled to an opportunity to offer her evidence and see if she can make good the allegations of her complaint.

The fact that disputed provisions of the contract have been arbitrated under the procedure outlined in the contract does not make the question here presented one of arbitration and award under our Uniform Arbitration Act. G.S. 1-544 *et seq.* Nor does our statutory procedure for the voluntary arbitration of labor disputes as contained in Chapter 95, Article 4 (a), of the General Statutes (G.S. 95-36.1 *et seq.*), preclude maintenance of this action by the plaintiff. These statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. See *Thomasville Chair Co. v. United Furniture Workers of America,* 233 N.C. 46, 62 S.E. 2d 535; *Skinner v. Gaither Corp.*, 234 N.C. 385, 67 S.E. 2d 267; *Brown v. Moore,* 229 N.C. 406, 50 S.E. 2d 5.

Here the arbitration agreement is governed by the common law. The complaint alleges that the grievances of the workers in respect to the increased work load, or stretch out, have been arbitrated under the agreement; that the arbitrator's decision determines that the defendant has violated the terms of the contract, and that by reason thereof the plaintiff is entitled to an adjustment of wages and back pay; that the

defendant has failed to comply with the arbitrator's decision and has refused to make the adjustment due the plaintiff in accordance with the terms of the contract. These allegations in nowise preclude the plaintiff, a third party beneficiary, from recovering for an alleged breach of contract. On the contrary, when taken as true on demurrer, the allegations tend to make the plaintiff's right to recover more definite and certain.

The decisions cited and relied on by the defendant are either factually distinguishable or are not considered controlling with us.

The judgment below is

Affirmed.

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

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STATE v. EDNA SHUFORD DAVIS.

(Filed 11 April, 1956.)

**1. Criminal Law § 73e: Appeal and Error § 28—**

Defendant is entitled to a hearing on the record proper even in the absence of case on appeal.

**2. Criminal Law § 81h—**

Where, upon hearing *de novo* on appeal to the Superior Court from an order activating a suspended sentence, the Superior Court fails to find wherein the defendant had violated the conditions of suspension, defendant is entitled to have the cause remanded for a specific finding in regard thereto, since only by such finding may defendant test the validity of the condition for violation of which the suspended execution was activated.

**3. Criminal Law § 62f—**

The violation of condition of suspended execution that defendant not permit people to congregate or remain at her home after the hours of darkness does not justify putting the sentence into effect in the absence of a finding, supported by evidence, that defendant allowed people to congregate and remain in her home after the hours of darkness with such frequence and in such numbers as to raise an inference that she was violating the law in some respect.

**4. Criminal Law § 81h: Appeal and Error § 49—**

Where the findings of fact are insufficient to support the judgment, the cause will be remanded.

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

STATE *v.* DAVIS.

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

The defendant was arrested and tried on two warrants in the Municipal Court of the City of Hickory on 27 May, 1955. One warrant charged the defendant with telling fortunes without a license, and the other with abetting prostitution. The defendant entered a plea of *nolo contendere* to both charges.

The cases were consolidated for judgment and a sentence of two years imposed but suspended for three years upon the following conditions: (1) That the defendant not violate any law of the State of North Carolina; (2) that she not permit or allow people to congregate or remain at her home after the hours of darkness; and (3) that she pay the costs in each case and pay a fine of $600.00. The fine and costs were paid.

On 11 November, 1955, the judge of the Municipal Court of the City of Hickory found that the defendant had violated the second condition of the suspended sentence and ordered the sentence into effect. The defendant appealed to the Superior Court of Catawba County where the matter was heard *de novo*. The State offered evidence. The defendant offered no evidence. The order of the court is in the following language: "The Court finds by the evidence that the defendant (Edna Shuford Davis) has violated the terms and conditions of the judgment in Hickory Municipal Court entered on May 27, 1955 and directs that capias and commitment issue to put the prison sentence into effect."

From the foregoing order the defendant appeals, assigning error.

*Attorney-General Rodman and Assistant Attorney-General McGalliard for the State.*

*Deal, Hutchins & Minor for defendant.*

DENNY, J. No case on appeal setting out the evidence introduced in the hearing below was served within the time allowed by the court. However, it is our understanding that the attorneys for the defendant are not responsible for the failure to serve a case on appeal. Even so, the defendant is entitled to a hearing on the record proper. *Bell v. Nivens*, 225 N.C. 35, 33 S.E. 2d 66; *Lawrence v. Lawrence*, 226 N.C. 221, 37 S.E. 2d 496; *Hall v. Robinson*, 228 N.C. 44, 44 S.E. 2d 345; *S. v. Williams*, 235 N.C. 429, 70 S.E. 2d 1; *Little v. Sheets*, 239 N.C. 430, 80 S.E. 2d 44.

The record discloses that the judge of the Municipal Court of the City of Hickory found that the defendant had violated the second condition of the suspended sentence. But, when the defendant appealed to the Superior Court, the matter was heard *de novo*, G.S. 15-200.1,

and the court did not find wherein the defendant had violated the conditions upon which the judgment was suspended.

Ordinarily, in hearings of this character, the findings of fact and the judgment entered thereupon are matters to be determined in the sound discretion of the court, and the exercise of that discretion in the absence of gross abuse cannot be reviewed here. *S. v. Marsh,* 225 N.C. 648, 36 S.E. 2d 244; *S. v. Pelley,* 221 N.C. 487, 20 S.E. 2d 850; *S. v. Greer,* 173 N.C. 759, 92 S.E. 147; *S. v. Everitt,* 164 N.C. 399, 79 S.E. 274, 47 L.R.A. (N.S.) 848. But, where the finding of the court does not state wherein a defendant has violated the conditions and there is a question as to the validity of one or more of the conditions imposed, the defendant is entitled to have the cause remanded for a specific finding as to wherein he has violated the conditions upon which the sentence was suspended. It is only by such a finding that a defendant may be able to test the validity of a condition he believes to be illegal and void in the event the purported violation is based on such condition.

In the absence of some unusual or peculiar circumstance, it is not unlawful or unreasonable to allow people to congregate or remain in one's home after the hours of darkness. Therefore, in our opinion, a finding that the defendant had violated the second condition in the judgment suspending the sentence, would not be sufficient to justify putting the prison sentence into effect unless it was shown by the evidence or found as a fact that the defendant allowed people to congregate or remain in her home with such frequency and in such numbers as to raise an inference that she was engaged in fortune telling or aiding in prostitution, or violating the law in some other respect.

We think the ends of justice require that this cause be remanded for further hearing in accord with the views expressed herein. Let the judgment entered below be vacated but the cause retained for further hearing.

Remanded.

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

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STATE v. COLLIS CECIL WILBORN.

(Filed 11 April, 1956.)

**Criminal Law § 52a (3)—**

Circumstantial evidence tending to identify defendant as the perpetrator of the offenses charged, including footprints, and the circumstance that the

car in which the stolen goods were found had been lent to defendant several hours before the offenses were committed, *held* sufficient to sustain conviction.

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

APPEAL by defendant from *Johnston, J.*, 7 November, 1955 Criminal Term, FORSYTH Superior Court.

Criminal prosecutions upon indictment charging house breaking, larceny and receiving, and upon warrants charging (1) reckless driving, and (2) failure to stop at the scene of an accident. The evidence disclosed that a storage house located on 4½th Street in Winston-Salem, in which Jack Martin kept automobile tires, was broken into on the night of 13-14 October, 1955, and 18 new tires of the value of $474 were stolen. The defendant at one time had worked for the owner who sold Esso products, including Atlas tires. The defendant was seen at about 2:20 a.m., about two blocks from the storage house. He was wearing an Esso uniform (although he no longer worked for Martin) and was driving a two-tone blue Ford coupe.

At about 3:30 a.m. two police officers on patrol saw a two-tone Ford club coupe traveling at about 70 miles per hour in the outskirts of Winston-Salem. The lid to the trunk was open and a number of new automobile tires were visible. The officers gave chase, at times running 100 miles per hour. During the chase the cars collided and the officers' car was damaged to the extent that it stalled near a roadblock in Rowan County which had been set up in response to radio messages from the pursuing officers. The Ford was found abandoned with 16 tires still on it and men's tracks in the mud at the car. Two tires fell out of the car during the chase.

The defendant was arrested in Salisbury about 45 minutes after the car was found. His shoes fitted the tracks at the car. One of the officers testified that in his opinion the man driving the car was the defendant, though he had not previously known him. The description he gave by radio enabled the officers in Salisbury to make the arrest. The defendant had on an Esso uniform at the time of his arrest. The car on which the tires were found belonged to the defendant's sister-in-law who had lent it to him about 6:00 p.m. on the 13th. The tires were identified as having been taken from Martin's storage house. Other evidence of a corroborative nature was offered by the State; also evidence supporting the charges contained in the warrants.

From verdicts of guilty and judgments thereon, the defendant appealed, assigning errors.

*William B. Rodman, Jr., Attorney General, and Claude L. Love, Assistant Attorney General, for the State.*

*E. J. Parrish for defendant, appellant.*

PER CURIAM. The defendant contends the evidence was insufficient to go to the jury and that his motion for judgment as of nonsuit should have been allowed. The evidence was amply sufficient to sustain the verdict. The assignments of error do not present questions of law which require discussion.

No error.

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

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NORTH CAROLINA STATE HIGHWAY AND PUBLIC WORKS COMMISSION, PETITIONER, v. SARAH JANE BRANN, WIDOW; COUNTY OF FORSYTH, AND CITY OF WINSTON-SALEM, RESPONDENTS.

(Filed 11 April, 1956.)

**1. Appeal and Error §§ 19, 22—**

Sufficiently specific exceptions to the findings of fact which are not entered until after filing of case on appeal, come too late and must be disregarded, and cannot aid broadside exceptions contained in the entries of appeal.

**2. Eminent Domain § 17—**

Evidence sustaining findings of the court that petitioner voluntarily paid the amount of compensation for land condemned as fixed by the Commissioners, which payment was immediately accepted by the landowner, supports the court's conclusion that petitioner had waived its exceptions to the order confirming the Commissioners' report.

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

APPEAL by petitioner from *Johnston, J.*, September Term, 1955, FORSYTH. Affirmed.

Special proceeding under G.S. 136-19 to condemn land for public use as a highway right of way.

It is conceded that the proceeding was in all respects regular. The petitioner excepted to the order confirming the report of the commissioners and appealed from an adverse ruling thereon. Thereafter the petitioner delivered to the clerk a voucher in the sum of $14,500 (the appraised value of the land) bearing the notation "In payment of the

award . . .;" an order for immediate possession; and a letter stating that the motion for immediate possession was made "pursuant to the provisions of G.S. 40-19 . . ." Upon learning that the clerk had received the voucher, the *feme* defendant "immediately" accepted the same.

When the cause came on for hearing in the court below on the exceptions filed, the judge found the facts, including a finding that the payment made was voluntary, and concluded that such payment constituted a new offer to purchase which had been accepted, thereby constituting a completed agreement of purchase and sale, and petitioner had thereby waived its exceptions. Judgment was entered accordingly and petitioner appealed.

*R. Brookes Peters and McKeithen, Graves & Robinson for petitioner, appellant.*

*Hoyle C. Ripple for respondent, appellee.*

PER CURIAM. The exceptions contained in the entries of appeal are broadside in nature and therefore present no question of law for this Court to decide. The exceptions to specific findings of fact and conclusions of law made by the court below were not entered until the petitioner filed its case on appeal. They came too late and must be disregarded. No error appears on the face of the record.

Conceding—but not deciding—that the judge below might have reached a contrary conclusion, we are constrained to hold that the findings of fact and conclusions of law are supported by competent evidence. Hence decision here is controlled by the line of cases represented by *Highway Commission v. Pardington,* 242 N.C. 482, 88 S.E. 2d 102. Therefore, the judgment entered is affirmed on authority of the well-reasoned opinion by *Winborne, J.,* in the *Pardington case.*

Affirmed.

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

OLLIN SKINNER v. PERRY EVANS, W. R. PRIDGEN AND J. W. THOMPSON.

(Filed 18 April, 1956.)

**1. Pleadings § 15—**

Upon demurrer, the allegations of fact, as well as relevant inferences of fact necessarily deducible therefrom, will be taken as true, but a demurrer does not admit conclusions of law.

**2. Automobiles § 9—**

The act of the driver of a car in temporarily stopping upon the right side of a highway to speak to a pedestrian does not violate G.S. 20-161(a) as amended.

**3. Automobiles § 33—**

A deputy sheriff who stops his car on the right side of the highway and calls to a pedestrian standing on the shoulder opposite him does not assume any obligation for himself or for his superior to protect the pedestrian from dangers of other traffic on the highway, since the relationship of passenger and carrier does not then exist between the pedestrian and the deputy, and further the deputy is not under duty to anticipate negligence on the part of drivers of other vehicles.

**4. Automobiles § 35—**

Plaintiff alleged that defendant deputy sheriff, traveling in a northerly direction, stopped his car on the hardsurface on his right side of the highway to speak to plaintiff, who was standing on the west shoulder, saw that plaintiff was intoxicated, and called to him to get into his car, that in response thereto plaintiff began walking toward the deputy's car and was struck by an automobile which was traveling north and had turned to its left side of the highway to pass the stationary vehicle. *Held:* Demurrers of the sheriff and deputy sheriff were properly allowed, since the allegations state no negligence on the part of the deputy proximately causing plaintiff's injuries.

**5. Same: Automobiles § 33—**

Plaintiff alleged that he was walking in a northerly direction on the western shoulder of the highway, that defendant, traveling north at an unlawful rate of speed under the circumstances and without keeping a proper lookout, turned to his left to pass a vehicle standing on the eastern side of the highway and struck plaintiff as plaintiff, in going to enter the stationary car, had reached about the center of the highway. *Held:* Defendant's demurrer to the complaint should have been overruled both in respect to negligence and contributory negligence.

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

APPEAL by plaintiff from *Fountain, J.*, at September-October 1955 Term, of WILSON.

Civil action to recover for personal injuries allegedly sustained by plaintiff as proximate result of concurrent negligence of defendants

when he, plaintiff, was stricken by an automobile owned and operated by defendant Evans, heard upon separate demurrers of defendant Evans and defendants W. R. Pridgen and J. W. Thompson, respectively.

These are substantially the allegations of the complaint, disregarding paragraphical numbers:

The occurrence took place about 10 o'clock a.m., on 16 September, 1954, about three miles south of Wilson, North Carolina, on the Old Black Creek Road, a rural black-top or secondary road, which runs generally in a north-south direction. From the point of impact of which complaint is made the road is straight, both to the north and to the south for a distance of approximately one-third of a mile. The residence of defendant Evans is located about one-half mile south of the point of impact,—and at that point there is a sharp curve in the road.

At the time, place and occasion the 1949 Ford owned and operated by defendant Evans was traveling in a northerly direction, as was the 1953 Plymouth automobile, owned by defendant J. W. Thompson, and operated by defendant W. R. Pridgen, a duly qualified and acting deputy sheriff for defendant J. W. Thompson, the sheriff of Wilson County, on a mission in the performance of his duties as deputy sheriff, and as such was acting as the agent, servant and employee of the sheriff.

The defendant Pridgen, after passing the residence of defendant Evans and rounding the curve, passed a loaded pick-up truck proceeding in the same direction. Shortly after passing the truck Pridgen observed a pedestrian, two or three hundred yards away, walking in a northerly direction toward Wilson on the westerly or left shoulder of the road,—facing traffic. As he approached him Pridgen recognized the pedestrian to be the plaintiff Skinner, whom he had known for several years. Thereupon "Pridgen brought his vehicle to a stop on said highway with his right wheels on the edge of or just off the easterly side of the pavement at a point directly opposite the plaintiff who was then standing on the shoulder of the road on the west side." "Immediately the defendant Pridgen observed that the plaintiff was partially under the influence of some intoxicating beverage." And "at a time when his vehicle was partially blocking the main traveled portion of said highway and without looking to his rear or in his rear-view mirror to observe approaching traffic, Deputy Sheriff Pridgen called to the plaintiff to 'come on' to his car and 'let's go to town,' and 'in response thereto, the plaintiff began walking from the westerly shoulder of said highway directly toward the vehicle being operated by said deputy sheriff.' "

At the same time "defendant Evans was approaching this scene in his automobile . . . at an excessive and unlawful rate of speed." And

when more than 150 yards away Evans observed plaintiff "walking on the westerly shoulder of said highway . . . in a northerly direction with his back to the defendant Evans, who also observed the said pick-up truck proceeding ahead of him . . . between his vehicle and the vehicle of Deputy Sheriff Pridgen," and "observed that the pick-up truck was slowing considerably." Thereupon defendant Evans "pulled out into his left lane of travel and proceeded to pass the pick-up truck and the sheriff's vehicle." He observed plaintiff "when he stopped walking and when he turned and faced in an easterly direction toward the vehicle of the sheriff directly opposite from him," and "observed that at all times as he approached this plaintiff, the plaintiff was facing in a direction opposite from his approach and that the plaintiff never looked in the direction toward the defendant Evans."

Thereupon, defendant Evans, while so operating his vehicle, and so passing the pick-up truck, and the sheriff's vehicle, in the left lane of travel, "and without giving an audible warning of his approach and without reducing his speed as he approached plaintiff, drove his automobile at a speed in excess of 50 miles per hour . . ." and caused it to strike this plaintiff about the center of said highway.

The acts of negligence charged against Deputy Sheriff Pridgen, which constituted a joint and concurring cause, with the negligence of defendant Evans, are that:

"a. . . . he operated the said automobile without keeping a proper lookout for other traffic upon the highway and without due caution and circumspection for the safety of this plaintiff and traffic on said highway, under the circumstances then existing.

"b. . . . he stopped his automobile upon said highway (1) without due caution, prudence and circumspection and in a manner so as to create a hazard and danger to the safety of the plaintiff . . .," and

"c. . . . (2) without giving a signal of his intention to do so at a time when traffic was approaching from his rear in violation of G.S. 20-154.

"d. . . he stopped and left his vehicle standing upon the paved portion of said highway (1) without leaving a clear width of 15 feet of the main traveled portion opposite his standing vehicle in violation of G.S. 20-161.

"e. . . . (2) partially blocking the passage of other vehicles at a time when he knew that the plaintiff was standing on the shoulder of the highway opposite from him, partially incapacitated, and at a time when he knew, or by the exercise of due care would have known, that traffic was approaching from the rear and the safety of the plaintiff was endangered," and

"f. . . . he, a deputy sheriff, called to the plaintiff across the highway to his vehicle at a time when his car was partially blocking the paved portions thereof, and at a time when he knew that the plaintiff was partially incapacitated, and at a time when he knew, or in the exercise of due care should have known, that traffic was approaching from his rear."

The acts of negligence alleged against defendant Evans which joined and concurred with the negligence of the defendant Pridgen in proximately causing the severe injuries to the body of plaintiff are that

"(a) . . . he operated his automobile at a high, dangerous and unlawful rate of speed under the circumstances in violation of G.S. 20-141;

"(b) . . . he failed to exercise due care to avoid colliding with the plaintiff in violation of G.S. 20-174(e);

"(c) . . . he operated his automobile without keeping a proper lookout for other traffic and pedestrians on said road, and without precaution and circumspection required by law;

"(d) . . . operated his car at a high and excessive rate of speed and failed to reduce his speed, apply his brakes and keep his vehicle under the proper control required by law to avoid colliding with the plaintiff;

"(e) . . . he failed to reduce his speed and bring his vehicle to a stop at a time when he had observed the plaintiff upon the highway and knew or should have known that the plaintiff was not aware of his approach;

"(f) . . . he attempted to pass the pick-up truck and the sheriff's vehicle at a time when he knew or in the exercise of due care would have known that both vehicles were slowing or had stopped for the plaintiff and at a time when he knew that the pick-up truck and the sheriff's car were blocking the main traveled portion of the highway, and that to pass the vehicles under the circumstances would greatly endanger the plaintiff, and

"(g) . . . he failed to turn his vehicle to his left and thereby avoid striking the body of the plaintiff at a time when the plaintiff was about the center of the road" and when he "had ample space to pass the plaintiff by turning his vehicle to his left and traveling along a six-foot wide shoulder at said point."

Defendant Evans demurred to the complaint of plaintiff for that same does not state facts sufficient to constitute a cause of action against him in that it appears upon the face of the complaint:

"1. That this defendant was guilty of no act of negligence proximately causing injury to the plaintiff; and

"2. That even if this defendant were negligent in any respect, the plaintiff was guilty of contributory negligence which proximately caused

and contributed to his injury in that he failed and neglected to keep a proper lookout or to yield the right of way to defendant as he was by law required to do, but instead while in a semi-drunken condition walked across the highway directly in front of this defendant's automobile at a time when it was too close for defendant to avoid striking him."

Defendants W. R. Pridgen and J. W. Thompson demurred to the complaint of plaintiff on the grounds:

"1. . . . that the complaint does not allege facts sufficient to constitute or state a cause of action against these defendants.

"2. . . . that it affirmatively appears upon the face of the complaint (a) that the defendant, W. R. Pridgen, by no act of negligence on his part, proximately caused the alleged injury to the plaintiff.

"3. . . . (b) from the facts alleging the manner in which the plaintiff was struck by the automobile of the defendant Evans, that the striking of the plaintiff by said automobile was not proximately caused by any act of negligence on the part of the defendant W. R. Pridgen. On the contrary, the allegations as to the manner in which plaintiff was struck by said automobile completely negate the conclusions of negligence on the part of the defendant Pridgen, and

"4. . . . (c) that the plaintiff was guilty of contributory negligence as a matter of law; and that such negligence on part of plaintiff contributed to any injury he may have sustained by reason of having been struck by the automobile of the defendant Evans."

The court below sustained each demurrer, and, to each judgment in accordance therewith, plaintiffs excepted and appealed to Supreme Court, and assign error.

*Talmadge L. Narron for plaintiff, appellant.*

*Gardner, Connor & Lee for defendants Pridgen and Thompson, appellees.*

*Dupree, Weaver & Montgomery for defendant Evans, appellee.*

WINBORNE, J. Admitting the truth of the allegations of fact set forth in the complaint, as well as relevant inferences of fact necessarily deducible therefrom, but not conclusions of law, as is done in testing the sufficiency of a complaint to state a cause of action, when challenged by demurrer, *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761; *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783; *Alford v. Washington,* 238 N.C. 694, 78 S.E. 2d 915, and numerous other cases, does the complaint in the case in hand state facts constituting a cause of action (1) against defendants Pridgen and Thompson, or (2) against defendant Evans for actionable negligence?

First as to defendants Pridgen and Thompson: Stripping the complaint of allegations of conclusions of law the facts alleged fail to state any legal duty which these defendants owed the plaintiff, under the circumstances in which they were placed. The temporary stopping of the automobile upon the highway under the circumstances was not violative of the provisions of G.S. 20-161(a) as amended by Chapter 165 of 1951 Session Laws of North Carolina pertaining to stopping on a highway. See among other cases *Stallings v. Transport Co.*, 210 N.C. 201, 185 S.E. 643; *Peoples v. Fulk*, 220 N.C. 635, 18 S.E. 2d 147; *Leary v. Bus Corp.*, 220 N.C. 745, 18 S.E. 2d 426; *Pike v. Seymour*, 222 N.C. 42, 21 S.E. 2d 884; *Morgan v. Coach Co.*, 225 N.C. 668, 36 S.E. 2d 263; *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845.

Moreover, the facts alleged fail to state a relationship of passenger and carrier as between plaintiff and these defendants, *White v. Chappell*, 219 N.C. 652, 14 S.E. 2d 843, by which these defendants assumed any obligation to protect plaintiff from dangers upon the highway. Furthermore, the defendants Pridgen and Thompson were under no duty to anticipate negligence on the part of others upon the highway. See *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 239, which is cited in many later cases.

(2) But as to defendant Evans: The facts set forth in the complaint seem to present a situation both in respect to allegations of negligence on the part of defendant Evans and in respect to averments of contributory negligence on the part of plaintiff similar to that in the case of *Williams v. Henderson*, 230 N.C. 707, 55 S.E. 2d 462.

Hence, on the authority of that case (*Williams v. Henderson, supra*), this Court holds that the allegations, in both respects, are sufficient, if supported by evidence, to constitute a case for a jury under proper instructions of the trial judge.

Therefore, the judgment from which appeal is taken as to defendants Pridgen and Thompson is affirmed, and the judgment from which appeal is taken as to defendant Evans is reversed.

As to defendants Pridgen and Thompson—Affirmed.

As to defendant Evans—Reversed.

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

STATE v. DONALD M. FERGUSON.

(Filed 18 April, 1956.)

**1. Bastards §§ 1, 7—**

Judgment of nonsuit in a prosecution for willful failure to support an illegitimate child does not adjudicate the question of paternity and does not preclude a subsequent prosecution, since the offense is a continuing one. G.S. 49-2.

**2. Bastards § 4: Indictment and Warrant § 15—**

A warrant charging that defendant willfully refused to provide expenses of pregnancy of prosecutrix may not be amended by charging defendant with willful refusal to support his illegitimate child, since a warrant may not be amended to charge an offense committed, if at all, after the warrant was issued.

**3. Bastards § 1—**

Failure of defendant to provide medical care incident to pregnancy is no offense under G.S. 49-2, the offense being the willful failure and refusal of defendant to provide support for his illegitimate child.

**4. Constitutional Law § 32—**

In the absence of waiver, a person charged with the commission of a misdemeanor cannot be tried initially in the Superior Court except upon an indictment found by a grand jury.

**5. Criminal Law § 68a—**

The State may appeal in those cases specified by statute and none other. G.S. 15-179.

**6. Same—**

A final judgment unconditionally allowing defendant's plea of former jeopardy is not a special verdict in law, and the State has no right of appeal therefrom. Therefore, an attempted appeal from such judgment entered in an inferior court confers no jurisdiction on the Superior Court, and all subsequent proceedings are a nullity.

**7. Bastards § 7—**

Where judgment is entered unconditionally allowing defendant's plea of former jeopardy in a prosecution under G.S. 49-2, subsequent proceedings under such warrant are a nullity, but such judgment does not bar further prosecution for the offense if the State elects to proceed under a new criminal accusation and process.

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

APPEAL by defendant from *Bickett, J.*, November Criminal Term, 1955, of WAKE.

Criminal prosecution under G.S. 49-2 for defendant's willful failure and refusal to support his illegitimate child.

The trial at November Criminal Term, 1955, resulting in conviction and judgment, was on a warrant issued 17 January, 1955, out of the Domestic Relations Court of Wake County. Proceedings prior to this trial are set out below.

On 22 April, 1954, a warrant was issued out of the Domestic Relations Court charging that defendant "did willfully, maliciously and unlawfully beget upon the body of Seretha Sorrell, a child and has failed to provide medical care incident to pregnancy." Thereafter, on 5 June, 1954, the child was born. On 16 August, 1954, the cause was tried in the Domestic Relations Court, at which time the warrant was amended by adding these words: "or any support since its birth on June 5, 1954." Defendant was adjudged guilty. Judgment was pronounced and defendant appealed.

When the cause was tried, on such appeal, at December Criminal Term, 1954, of Wake Superior Court, before Judge Frizzelle, defendant's motion for judgment of nonsuit was allowed.

Thereafter, on 17 January, 1955, a second warrant was issued out of the Domestic Relations Court which charged that defendant "did beget upon the body of Seretha Sorrell a child, Donna Ferguson Sorrell, born June 5, 1954, and has willfully failed and refused to support said child since birth after due demand for said support has been made . . ." The record of the Domestic Relations Court shows: "Upon the trial of this case the defendant pleads former jeopardy and is ordered and adjudged that plea allowed. This the 10th day of February, 1955. J. L. Fountain, Judge." The agreed case on appeal shows that the prosecuting witness, through her counsel, then gave notice of appeal.

At March Criminal Term, 1955, of Wake Superior Court, the cause was heard by Judge Williams. The judgment of Williams, J., contains this finding: "On the 10th day of February, 1955, the Judge of the Wake County Domestic Court rendered a special verdict on defendant's plea of former jeopardy, as follows: 'Upon trial of this cause the defendant pleads former jeopardy and it is ordered and adjudged that plea allowed.' From this judgment the State gave notice of appeal to the Wake County Superior Court."

Judgment was entered by Judge Williams, predicated upon his ruling that defendant would not be placed in double jeopardy by standing trial on the warrant of 17 January, 1955, remanding the cause to the Domestic Relations Court with instructions to determine, first, whether defendant was the father of the named illegitimate child, and second, if so, whether defendant had willfully failed and refused to adequately provide for his said illegitimate child as alleged in the warrant of 17 January, 1955.

Defendant excepted to the judgment of Judge Williams, and gave notice of appeal to the Supreme Court. This appeal was not perfected; and at July Criminal Term, 1955, of Wake Superior Court, Judge George M. Fountain so adjudged and entered order remanding the cause to the Domestic Relations Court for compliance with said judgment of Judge Williams. The record shows no exception by defendant to this order.

The cause came on for trial in the Domestic Relations Court on 16 August, 1955, on the warrant of 17 January, 1955. Defendant pleaded the judgment of the Domestic Relations Court of 10 February, 1955, which allowed defendant's plea of former jeopardy, in bar of further prosecutions. In compliance with said judgment of Judge Williams, the Domestic Relations Court denied defendant's plea in bar; and, after hearing the evidence, found the defendant guilty and pronounced judgment. Defendant appealed.

When the cause came on for trial before Judge Bickett at November Criminal Term, 1955, of Wake Superior Court, "the defendant through counsel moved to dismiss same on the grounds that the proceedings was on warrant issued through the Domestic Relations Court, which court sustained a plea of twice jeopardy, and on an appeal by the State from such order." This motion was overruled. Defendant excepted.

Thereupon, defendant entered a plea of not guilty and the trial proceeded. The jury returned a verdict of guilty as charged. From judgment pronounced on the verdict, defendant excepted and appealed, assigning errors.

*Attorney-General Rodman and Assistant Attorney-General Bruton for the State.*

*I. Weisner Farmer and W. H. Yarborough, Jr., for defendant, appellant.*

BOBBITT, J. The judgment of nonsuit entered by Judge Frizzelle at December Criminal Term, 1954, of Wake Superior Court, when defendant was on trial on the warrant of 22 April, 1954, was not a bar to a subsequent prosecution of defendant for willfully failing and refusing to support his illegitimate child. *S. v. Robinson,* 236 N.C. 408, 72 S.E. 2d 857, opinion by *Winborne, J.,* is explicit to the effect that a judgment of nonsuit, nothing else appearing, does not constitute a negative finding on the issue of paternity; and, since G.S. 49-2 creates a continuing offense, a second or subsequent prosecution, relating to a later period, is not barred.

When the warrant of 22 April, 1954, was issued, no criminal offense had been committed. The purported amendment of this warrant on

16 August, 1954, related solely to events after 22 April, 1954, and after 5 June, 1954, the date the child was born. Where a similar amendment was attempted, *Denny, J.*, in *S. v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157, said: ". . . a warrant may not be amended so as to charge the defendant with an offense which was committed, if committed at all, after the warrant was issued."

It is further noted that the warrant of 22 April, 1954, when issued, referred only to defendant's failure to provide medical care incident to pregnancy. "The failure to provide for the mother and to pay expenses incident to the birth of the child are not criminal offenses. These are matters the court may provide for and require upon conviction." *Winborne, J.*, in *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728. And, both before and after the purported amendment of said warrant, the word "willfully" was used in relation to the begetting of the child rather than in relation to providing either medical care or support. *S. v. Clarke,* 220 N.C. 392, 17 S.E. 2d 468.

The conclusion reached is that the judgment of nonsuit was properly entered by Judge Frizzelle at December Criminal Term, 1954, of Wake Superior Court. Indeed, while the evidence heard by Judge Frizzelle is not before us, uncontradicted evidence in the trial before Judge Bickett was to the effect that the case was not tried out before Judge Frizzelle but was stopped and nonsuit entered so that a new warrant could be taken out.

Although the judgment of 10 February, 1955, of the Domestic Relations Court was erroneous and the view taken by Judge Williams was correct, as to the soundness of defendant's plea of former jeopardy, we are confronted by a fatal jurisdictional defect. The jurisdiction of the Superior Court, if any, as to the warrant of 17 January, 1955, rested solely on the State's appeal from the judgment of 10 February, 1955. If the State had no right to appeal therefrom, said judgment of 10 February, 1955, although erroneous, was a final judgment as to further prosecution *on the warrant of 17 January, 1955.* It is noted that the trial at November Criminal Term, 1955, was on the warrant of 17 January, 1955.

Whether the State could have prosecuted the defendant at that term on a bill of indictment is a question that does not arise on this record. In the absence of waiver thereof as provided by statute, a person charged with the commission of a misdemeanor cannot be tried initially in the Superior Court except upon an indictment found by a grand jury. *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602.

Our statute provides that an appeal to the Supreme Court or Superior Court may be taken by the State in the cases specified herein, and no

other. G.S. 15-179. And this Court, upon consideration of this statute, held directly in *S. v. Wilson,* 234 N.C. 552, 67 S.E. 2d 748, that the State had no right to appeal from a judgment allowing a plea of former jeopardy or acquittal.

According to the record, the judgment of 10 February, 1955, was a final judgment unconditionally allowing defendant's plea of former jeopardy. It was not a special verdict in law nor was it so denominated by the Domestic Relations Court. Hence, the State's attempted appeal therefrom did not confer jurisdiction on the Superior Court and such appeal should have been dismissed. It follows that, since the judgment of 10 February, 1955, made final disposition of the prosecution, so far as the warrant of 17 January, 1955, was concerned, all subsequent proceedings, both in the Superior Court and in the Domestic Relations Court, were void for lack of jurisdiction.

*Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513, and *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642, cited in the State's brief, are authority for the proposition that a defendant may waive a defect, even a constitutional right, relating to a mere matter of practice or procedure. These cases, however, have no bearing on the State's right of appeal, the question here presented; and such right of appeal, under the circumstances disclosed, was a prerequisite to the Superior Court's jurisdiction.

While the vicissitudes of this particular case up to now suggest that a final determination is desirable, such final determination must be deferred until it can be made in accordance with law.

While the prosecution on the warrant of 17 January, 1955, was terminated by said judgment of 10 February, 1955, and the judgment from which this appeal is taken must be vacated, decision here is not a bar to further prosecution of defendant for willfully failing and refusing to support his illegitimate child, if the State elects to proceed under a new criminal accusation and process.

Judgment vacated.

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

STATE v. JAMES McMILLIAM (McMILLER) AND BETTIE LEE McMILLIAM (McMILLER).

(Filed 18 April, 1956.)

**1. Criminal Law § 43—**

Where defendant moves to suppress the State's evidence on the ground that it was procured by an unlawful search, the court should rule upon the motion at the time and not defer the ruling until after the State's evidence has been introduced.

**2. Searches and Seizures § 1—**

A search warrant is required by officers seeking to enter a person's private dwelling for the purpose of search and seizure.

**3. Criminal Law § 43—**

Where the conditions require a search warrant, evidence obtained upon a search without a warrant or upon an invalid warrant is incompetent. G.S. 15-27.

**4. Same: Criminal Law § 77c: Searches and Seizures § 2—**

Where the conditions require a search warrant and evidence obtained by search is objected to in apt time by defendant, the State must produce the search warrant, or, if it is has been lost, must prove such fact and then introduce evidence to show its contents and regularity, and, in the absence of such proof or proof that the warrant was duly issued, the presumption of the regularity of acts of public officers does not obtain, since, even if it be conceded that the officer had a warrant, there is nothing to show that it was duly issued or that the premises to be searched and the things to be seized were sufficiently described. G.S. 18-13.

**5. Criminal Law § 81f—**

The Supreme Court will not grant a motion to nonsuit even though denial of the motion must be based on incompetent evidence erroneously admitted over objection, since had the evidence been excluded, the State might have sustained its case by competent evidence.

APPEAL by defendants from *Fountain, Special Judge,* October Term 1955 of GREENE.

Criminal prosecution upon a bill of indictment with two counts. The first count charges the unlawful possession of intoxicating beverages upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State have not been paid. The second count charges the unlawful possession of non-taxpaid whiskey for the purpose of sale. Verdict: Guilty as to the first count, not guilty as to the second count.

From the judgments imposed upon the verdict, the defendants appeal, assigning error.

*William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.*

*C. W. Beaman for Defendants, Appellants.*

PARKER, J. Upon the call of the case for trial, and before pleading to the indictment, the defendants made a motion to suppress the State's evidence, for the reason that the State's evidence was procured by an unlawful search warrant, or secured without a search warrant, and was, therefore, incompetent as evidence. The court stated that it would reserve its ruling on the motion, until after the State had rested its case. Whereupon, the defendants entered pleas of Not Guilty.

After the jury was impanelled the State offered its evidence, which tended to show these facts. On 12 May 1955 Wayne Lane, a Deputy Sheriff of Greene County, accompanied by Frank Pierce, a Policeman at the county seat, and William Sugg, a Constable in the county, went to the defendants' home. Lane had with him a search warrant issued by Fred Carraway, a Justice of the Peace in the county. Lane told the male defendant he had a search warrant and read it to him. The three officers entered the house, and searched it. In the kitchen were four or five people, including the defendants. In the kitchen there was an odor of whiskey, and next to the stove there was a 10 or 12 quart bucket, and in the bucket was a half-gallon jar turned upside down. Lane grabbed the jar, and when he did, the *feme* defendant took a pan containing water off the stove, and poured it into the bucket. Lane jerked the jar out of the bucket. He was asked: "What does this jar contain?" The defendant objected. The objection was overruled, and the defendant excepted, and assigns this as error. Lane answered: "Non-taxpaid whiskey and whatever was in the slop bucket." The solicitor stated he would like to offer this whiskey in evidence. The defendant objected. The objection was overruled, and the defendant excepted, and assigns this as error.

The State did not produce a search warrant. No search warrant is in the record or case on appeal. At the close of the State's evidence the court denied the motion to suppress the State's evidence, and the defendants excepted. When a motion like this to suppress the State's evidence is made, the court should rule upon it, and not defer its ruling until after the State's evidence has been introduced. 20 Am. Jur., Evidence, Sec. 396.

The North Carolina Constitution, Article I, section 15, provides: "General Warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is

not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."

G.S. 15-27 provides: "No facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action."

The search of defendants' home was "made under conditions requiring the issuance of a search warrant." *In re Walters,* 229 N.C. 111, 47 S.E. 2d 709.

Where the search is made under conditions requiring the issuance of a search warrant, and it is attempted, over objection, to justify the search and seizure by the possession of a valid search warrant in the hands of the searchers, the State must produce the search warrant, or, if it has been lost, the State must prove such fact and then introduce evidence to show its contents and regularity on its face, unless the production of the warrant is waived by the accused. To render admissible evidence obtained by a search made under conditions requiring the issuance of a search warrant, this legal foundation must be laid. *Acree v. Commonwealth,* 243 Ky. 216, 47 S.W. 2d 1051; *Eaves v. Commonwealth,* 241 Ky. 140, 43 S.W. 2d 528; *Conley v. Commonwealth,* 230 Ky. 391, 20 S.W. 2d 75; *Wilson v. Commonwealth,* 228 Ky. 517, 15 S.W. 2d 422; *Boyd v. State,* 164 Miss. 610, 145 So. 618; *Pickle v. State,* 151 Miss. 549, 118 So. 625; *King v. State,* 147 Miss. 31, 113 So. 173; *Nelson v. State,* 137 Miss. 170, 102 So. 166; *Wells v. State,* 135 Miss. 764, 100 So. 674; *Cuevas v. City of Gulfport,* 134 Miss. 644, 99 So. 503; *Johnson v. State,* 155 Tenn. 628, 299 S.W. 800; *Henderson v. State,* 108 Tex. Cr. 167, 1 S.W. 2d 300; *Skiles v. State* (Tex. Cr.), 2 S.W. 2d 436; *State v. Littleton,* 108 W. Va. 494, 151 S.E. 713; *State v. Joseph,* 100 W. Va. 213, 130 S.E. 451; *State v. Slat,* 98 W. Va. 448, 127 S.E. 191; 22 C.J.S., Criminal Law, pp. 1031 and 1032. This seems to represent the weight of authority on the subject.

Lane testified that he had a search warrant issued by a Justice of the Peace of the county. In the absence of the search warrant, and the complaint on which it was issued, we are left to surmise its contents. Were the premises to be searched the defendants' home? Were the premises to be searched and the things to be seized sufficiently described, as required by G.S. 18-13? We do not know. It might have been a general warrant, which is "dangerous to liberty."

The Supreme Court of Appeals of West Virginia said in *State v. Slat, supra:* "If, when a search warrant and affidavit are at hand, but are not produced, it can be presumed that there is a valid and lawful search warrant, there would be little necessity in preserving such papers; all that would be necessary for the officers to say in justification of their

search would be that they had a search warrant issued by a justice of the peace. Such holding would be an open door for all kinds of abuses, and the constitutional guarantee would be of little practical value in the protection of the home and person from unreasonable searches and seizures."

It is said in 47 Am. Jur., Searches and Seizures, sec. 31: "A search warrant must conform strictly to the constitutional and statutory provisions for its issuance. . . . However, under the rule that public officials are presumed to act legally in the performance of their duties, a duly issued search warrant is *prima facie* valid." However, the record here does not show that the search warrant was duly issued.

*S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311, relied upon by the State, is distinguishable. In that case the defendants did not move for a compulsory nonsuit, or object in any way to the proceedings in the Superior Court preceding the return of the verdict. In the instant case the State's evidence shows that the officers had a search warrant, and the defendants in apt time objected to the introduction in evidence of the jar containing whiskey and its contents, thereby challenging the validity of the search warrant. Under such conditions we would not be justified in indulging the presumption that the officers of the law performed their duties, and had a valid search warrant. *S. v. McGowan, ante,* 431, 90 S.E. 2d 703.

*S. v. Shermer,* 216 N.C. 719, 6 S.E. 2d 529, is distinguishable. There was no objection to the evidence. At the close of the State's case, a motion for nonsuit was made because the search was made pursuant to a defective search warrant.

The court committed prejudicial error in permitting the introduction in evidence, over the defendants' objection, of the jar containing whiskey, and of the contents of the jar, for the reason that the State had not produced in court a valid search warrant to search defendants' home.

The defendants assign as error the refusal to allow their motion for judgment of nonsuit. That motion cannot be sustained in this Court. Though the court below, in denying the motion for nonsuit, acted upon evidence, which we now hold to be incompetent, yet if this evidence had not been admitted, the State might have followed a different course, and produced in court a valid warrant to search defendants' home. *Cherry v. Warehouse Co.,* 237 N.C. 362, 75 S.E. 2d 124; *Supply v. Ice Cream Co.,* 232 N.C. 684, 61 S.E. 2d 825; *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316; *Gibbs v. Russ,* 223 N.C. 349, 26 S.E. 2d 909; *Caulder v. Motor Sales, Inc.,* 221 N.C. 437, 20 S.E. 2d 338; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199; *Midgett v. Nelson,*

212 N.C. 41, 192 S.E. 854; *Morgan v. Benefit Society,* 167 N.C. 262, 83 S.E. 479.

The defendants are entitled to a
New trial.

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STATE v. JAMES McMILLIAM (McMILLER).

(Filed 18 April, 1956.)

**1. Criminal Law § 77b—**

An appellate court may take judicial notice of and give effect to its own records in another, but interrelated, proceeding, particularly where the issues and parties are the same, or practically the same, and the interrelated case is specifically referred to in the case on appeal in the case under consideration.

**2. Same—**

Where the case on appeal from order activating a suspended judgment specifically states that the judge's finding of breach of condition was based upon evidence in a companion case and that the evidence in the companion case was omitted to avoid repetition, and both cases are argued at the same time, the Supreme Court may consider the record evidence in the companion case in deciding the appeal.

**3. Criminal Law § 78d (1)—**

Where ruling on defendant's motion to suppress the State's evidence on the ground that it was obtained without valid search warrant is erroneously deferred until after the introduction of the State's evidence, the fact that defendant objected to some, but not all, of the evidence procured by the search, under the misapprehension of the court and counsel that no objections were required to be made to the introduction of the evidence in view of the motion to suppress, and it appears that the motion to suppress should have been allowed, neither the evidence objected to nor the evidence unobjected to should be considered in passing on the sufficiency of the evidence to support a finding of fact.

**4. Criminal Law §§ 62f, 81h—**

Where only incompetent evidence supports the court's finding that defendant had breached the conditions of a suspended judgment by having in his possession or on his premises intoxicating liquor, the judgment activating the suspended sentence must be vacated and the cause remanded.

APPEAL by defendant from *Fountain, Special Judge,* October Term 1955 of GREENE.

Criminal prosecution on a warrant charging the unlawful possession for the purpose of sale and the sale of non-taxpaid whiskey—heard on a motion to put into effect a suspended sentence.

On 15 May 1951 the defendant was found guilty in the Recorder's Court of Greene County on both counts set forth in the warrant above mentioned. The warrant charges the offenses to have been committed on 21 April 1951. Judgment of the court on the first count: imprisonment for two years; no commitment to issue, provided, the defendant pay a $100.00 fine and the costs, and does not have in his possession, or on the premises occupied by him, any intoxicating liquor, and does not violate any of the laws of the State for five years. We have omitted the non-relevant conditions of the suspended sentence. Judgment on the second count: imprisonment for one year to run consecutively with the sentence on the first count; no commitment to issue, provided, the defendant abides by the provisions under which sentence of imprisonment on the first count is suspended.

The judgment of Judge Fountain states that this case came on to be heard before him upon the defendant's appeal from an order of 31 May 1955 in the Recorder's Court of Greene County, putting into effect a sentence which had heretofore been suspended on 15 May 1951 by the court for violation of the whiskey law, and it appears to the court that the defendant was sentenced by the Recorder's Court of Greene County on 15 May 1951 to two years in jail to be assigned to work the roads under the supervision of the State Highway and Public Works Commission, and that commitment was not to issue if the defendant paid a fine of $100.00 and the costs and upon condition that he have no intoxicating liquor in his possession for five years. Judge Fountain found as a fact in his judgment that the defendant on 12 May 1955 did have in his possession in his dwelling at least one quart of non-taxpaid whiskey; and the judge further found as a fact that at the same term of the Superior Court the defendant was convicted by a jury of the unlawful possession of non-taxpaid whiskey, and did unlawfully possess such non-taxpaid whiskey. Whereupon Judge Fountain adjudged that the defendant had violated the terms of the suspended sentence imposed in the Recorder's Court of Greene County on 15 May 1951, and put into effect the two-year suspended sentence on the first count in the warrant, and suspended the motion for judgment on the second count.

The judgment of the judge of the Recorder's Court putting the suspended sentence into effect has not been brought forward, nor have the appeal entries to such judgment.

The case on appeal was agreed to by counsel for the defendant and the solicitor for the State. This appears in the case on appeal: "This was a criminal action tried in the County Court of Greene County, before Honorable Walter G. Sheppard, on May 15, 1951, resulting in a verdict of Guilty and the sentence or judgment as hereinbefore set out. On May 31, 1955, an order was entered by the Recorder invoking

the sentence entered on May 15, 1951, and putting the same into effect. The defendant appealed from the order of the Recorder entered on May 31, 1955, to the Superior Court of Greene County." This also appears in the case on appeal: "STATE'S EVIDENCE OMITTED. The judgment as appears in the record imposing and putting into effect the terms of the suspended sentence of the Recorder's Court was based by Judge Fountain upon the evidence in the case of STATE *v.* JAMES McMILLIAM and BETTIE LEE McMILLIAM, the companion case to this one, and being No. 1080 in the Superior Court of Greene County. Therefore, we tried to avoid repetition by omitting the evidence from this case." The case referred to was argued before us the same day as the instant case: in fact they were argued together.

The defendant appeals, assigning error.

*William B. Rodman, Jr., Attorney General, and T. W. Bruton, Assistant Attorney General, for the State.*

*C. W. Beaman for Defendant, Appellant.*

PARKER, J. Although the defendant was convicted of two misdemeanors for which on each count the punishment could not exceed two years, the Recorder's Court had authority to suspend the judgment on the first count for five years. G.S. 15-200; *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440; *S. v. Gibson,* 233 N.C. 691, 698, 65 S.E. 2d 508; *S. v. McBride,* 240 N.C. 619, 83 S.E. 2d 488.

Ordinarily, a court, in deciding one case, will not take judicial notice of what may appear from its own records in another and distinct case, unless made part of the case under consideration, even though between the same parties or privies and in relation to the same subject matter. *Com. ex rel. Ferguson v. Ball,* 277 Pa. 301, 121 A. 191, 29 A.L.R. 626; *James v. Unknown Trustees, Etc.,* 203 Okla. 312, 220 P. 2d 831, 20 A.L.R. 2d 1077; *Murphy v. Citizens' Bank,* 82 Ark. 131, 100 S.W. 894, 12 Ann. Cas. 535, 11 L.R.A. (N.S.) 616; 20 Am. Jur., Evidence, sec. 87; 31 C.J.S., Evidence, sec. 50(c).

It was held in *Daniel v. Bellamy,* 91 N.C. 78, that in a proceeding against executors for an account that a Probate Court could not take judicial notice of the fact that the probate of the will naming defendants as executors had been revoked in another proceeding in the same court.

This is far from saying that an appellate court may not take judicial notice of, and give effect to its own records in another, but interrelated, proceeding, particularly where the issues and parties are the same, or practically the same, and the interrelated case is specifically referred to in the case on appeal in the case under consideration. *U. S. v. Pink,*

315 U.S. 203, 216, 86 L. Ed. 796, 810; *Dimmick v. Tompkins,* 194 U.S. 540, 48 L. Ed. 1110; *Bienville Water Supply Co. v. Mobile,* 186 U.S. 212, 46 L. Ed. 1132; *Freshman v. Atkins,* 269 U.S. 121, 124, 70 L. Ed. 193, 195; *West v. L. Bromm Baking Co.,* 166 Va. 530, 186 S.E. 291; 31 C.J.S., Evidence, pp. 625-626.

The case on appeal specifically states that Judge Fountain's judgment was based upon the evidence in the case of *S. v. James McMilliam and Bettie Lee McMilliam,* "the companion case to this one." The case of *S. v. James and Bettie Lee McMilliam* was argued before us on the same day as the instant case by the same counsel, and is before us for decision. The evidence in this case, according to the case on appeal, was omitted to avoid repetition, and no doubt to save costs for the appellants. The evidence in *S. v. James and Bettie Lee McMilliam* is before us in that case, and it seems clear that it was the plain intent of the counsel for the defense and the trial solicitor to make the evidence in that case a part of this case. We know of no reason why we should not take judicial notice of, and consider in the instant case the evidence in the interrelated case.

The evidence in the case of *State v. James and Bettie Lee McMilliam* shows the following. Upon the calling of the case for trial, and before pleading to the indictment, the defendants made a motion to suppress the State's evidence, for the reason that the State's evidence was procured by an unlawful search warrant, or secured without a search warrant, and was, therefore, incompetent as evidence. The court stated that it would reserve its ruling upon the motion, until after the State rested its case. Whereupon, the defendants entered pleas of Not Guilty.

After the jury was impanelled the State, without producing in court a valid warrant to search the home and premises of James and Bettie Lee McMilliam, offered evidence as to what was found by the search. Some of this evidence was objected to by the defendants: some was not.

When the State closed its case, the court denied the defendants' motion to suppress the State's evidence, and the defendants excepted.

The State's evidence admitted over objection was clearly incompetent, as held in *S. v. James and Bettie Lee McMilliam, ante,* 771, 92 S.E. 2d 202.

When the court denied the defendant's motion to suppress the State's evidence, there is nothing to indicate that he did so, because some of the State's evidence was not objected to. It would seem that the court acted under a misapprehension of law that when Lane testified he had a search warrant issued by a Justice of the Peace in the county, it did not have to be produced in court, and nothing else appearing, the evidence obtained by the search was competent. Apparently, the defendants' counsel, having challenged all the State's evidence by his motion to

suppress, and by reason of the court's reserving its ruling upon his motion to suppress, did not consider it necessary to object to each question asked by the prosecuting attorney on the ground of an unlawful search, and apparently, the court was of the same opinion by its rulings. Upon objection all of the State's evidence obtained by the search should have been excluded, because no valid search warrant was produced in court. Because of the misapprehension of the court and defendants' counsel that no objections were required to be made, this unobjected to evidence should not be considered on the question as to whether the defendant had wilfully violated the conditions of his suspended sentence. Excluding this evidence and the evidence objected to, there is no competent evidence to support the court's findings of fact that the defendant had wilfully breached the conditions of his suspended sentence.

The judgment putting the suspended sentence into effect will be vacated, and the case will be remanded for further proceedings. In the further proceedings it can be determined as to whether or not the officers had a valid warrant to search defendant's home, and, if so, whether or not evidence was found by the search showing that the defendant had wilfully violated any conditions of his suspended sentence.

Reversed and remanded.

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T. CURTIS ANDREWS AND WIFE, CATHERINE ANDREWS, v. T. B. ANDREWS.

(Filed 18 April, 1956.)

**Trial § 6—**

It is not unusual nor improper for a trial judge to ask questions of a witness to make clear his testimony on some point or to facilitate the taking of the testimony, and while frequent interruptions and prolonged questioning are not approved and will be held for prejudicial error when amounting to an expression of opinion by the court on the weight of the evidence or the credibility of the witnesses, the record in this case fails to show prejudice in this respect.

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

APPEAL by defendant from *Phillips, J.*, October Term, 1956, of RICHMOND.

This was an action to recover damages for the improper use of a private pond on defendant's land in such manner as to cause injury to plaintiffs' property adjoining. It was alleged that defendant by entic-

ing and harboring a large number of wild geese had created a private nuisance, and that the geese so enticed and harbored had caused special and substantial damage to plaintiffs' land and crops.

Issues were submitted to the jury and answered as follows:

"1. Is the pond of the defendant so located and used by the enticing and harboring of wild geese upon the same, as to constitute a nuisance as alleged in the complaint? Answer: Yes.

"2. If so, have the plaintiffs been damaged in a special and peculiar way by reason thereof? Answer: Yes.

"3. What amount of damage, if any, are plaintiffs entitled to recover of the defendant? Answer: $500.00."

From judgment on the verdict defendant appealed.

*Pittman & Webb for defendant, appellant.*

*M. C. McLeod and John T. Page, Jr., for plaintiffs, appellees.*

DEVIN, J. This case was here at Spring Term, 1955, on demurrer questioning the sufficiency of the facts alleged in the complaint to constitute a cause of action, and is reported in 242 N.C. 382, 88 S.E. 2d 88. In the opinion in that case the principles underlying an action for tort in the nature of a private nuisance causing special damage were held applicable to the facts here alleged, and the complaint was upheld.

In the ensuing trial on the issues raised there was verdict for the plaintiff, and from the judgment predicated thereon the defendant appealed, assigning errors in the rulings of the trial judge.

The defendant has brought forward in his assignments of error a number of exceptions noted to the court's rulings in the admission and rejection of evidence. We have examined these exceptions and are unable to perceive any prejudicial error materially affecting the result.

The defendant, however, calls attention to the action of the trial judge in propounding numerous questions to the witnesses during the taking of the testimony, and contends that the judge unconsciously gave the jury an impression favorable to the plaintiffs and detrimental to the defendant, and thus impliedly expressed opinion as to the credibility of witnesses and the value of the testimony. The defendant has pointed out in his brief the numerous instances in which he contends the court's questions were prejudicial to him.

While an examination of the record reveals a number of instances in which the judge asked questions of the witnesses, we are unable to perceive any substantial basis for the conclusion that intimation was thereby conveyed to the jury as to the credibility of a witness or the sufficiency of the proof of any material fact to the prejudice of the defendant. It is not unusual nor improper for a trial judge to ask ques-

tions of a witness to make clear his testimony on some point, and sometimes to facilitate the taking of the testimony, but frequent interruptions and prolonged questionings by the court are not approved and may be held for prejudicial error if this tends to create in the minds of the jurors the impression of judicial leaning to one side or the other.

This Court has frequently considered questions similar to that here presented, and awarded new trials when it was made to appear that the court's questioning or comments tended to create in the minds of the jurors the implication of an expression of opinion by the court. We cite some of the cases illustrating this Court's ruling on similar questions as they were presented: *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855; *S. v. Jones,* 181 N.C. 546, 106 S.E. 817; *S. v. Bean,* 211 N.C. 59, 188 S.E. 610; *Bailey v. Hayman,* 220 N.C. 402, 17 S.E. 2d 520; *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29; *S. v. Cantrell,* 230 N.C. 46, 51 S.E. 2d 887; *In re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482; *S. v. Perry,* 231 N.C. 467, 57 S.E. 2d 774; *S. v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264.

In the case of *In re Will of Bartlett, supra, Ervin, J.,* speaking for the Court stated the rule as follows: "A trial judge has undoubted power to interrogate a witness for the purpose of clarifying matters material to the issues. *S. v. Horne,* 171 N.C. 787, 88 S.E. 433; *Eekhout v. Cole,* 135 N.C. 583, 47 S.E. 655. He should exercise such power with caution, however, lest his questions, or his manner of asking them, reveal to the jury his opinion on the facts in evidence and thus throw the weight of his high office to the one side or the other."

And in *S. v. Perry, supra, Denny, J.,* pointed out the rule in this language: "It does not follow, however, that every ill-advised comment by the trial judge or question propounded by him which may tend to impeach the witness is of such harmful effect as to constitute reversible error. The comment made or the question propounded should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless."

The issues raised by the pleadings in this case seem to have been fairly presented to the jury. There was no exception to the charge. We think the result should not be disturbed.

No error.

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

THOMAS B. WOODY v. HUBERT H. BARNETT.

(Filed 18 April, 1956.)

**Judgments § 32—**

The judgment rolls in previous proceedings to have a segment of abandoned highway declared a neighborhood public road *held* not to support a plea of *res judicata* in plaintiff's action against the owner of land abutting the other side of the abandoned highway to have the plaintiff declared owner in fee and entitled to possession of that half of the abandoned road lying on his side of the center line. G.S. 136-67.

APPEAL by defendant from *Sink, J.*, at October Civil Term 1955, of PERSON.

Civil action to declare plaintiff "invested with the easement of right of way in and to" a certain abandoned segment of road along his property line, known as Payne's Tavern Road, and that he be declared the owner thereof as provided by G.S. 136-67.

Defendant, answering, sets up and pleads as *res judicata* judgments in previous actions and proceeding relating to a portion of the same segment of abandoned road, and his counsel upon argument on appeal to this Court declared orally that "plaintiff bases his whole defense on *res judicata.*"

Upon the trial in Superior Court plaintiff offered evidence tending to show that he owns land lying on the west side of Payne's Tavern Road, the road in question, and that the description in his deed calls for, and runs with the center line of said segment; that defendant owns land lying on the east side of a portion of said segment; that plaintiff and defendant claim title from a common source; that plaintiff and other interested parties sought in court actions and proceeding to establish the said segment as a neighborhood public road within the meaning of G.S. 136-67; and failing in that, he brings this action to recover the fee in one-half of the abandoned road along his property line.

Defendant offered in evidence the judgment rolls in the previous actions and proceeding instituted by plaintiff and others as above stated, and oral testimony on which he bases his plea of *res judicata.*

Motions of defendant, aptly made, for judgment as of nonsuit were denied. And the case was submitted to the jury upon a single issue as to whether plaintiff is the owner in fee and entitled to possession of the abandoned part of Payne's Tavern Road lying on the west side of the center line as alleged in the complaint, specifically described. The jury answered the issue "Yes." And to judgment in accordance therewith in favor of plaintiff, defendant excepted and appeals to Supreme Court, and assigns error.

*R. P. Reade, Redmond B. Dawes, Thomas B. Woody, Jr., and E. C. Bryson for Plaintiff Appellee.*

*Davis & Davis for Defendant Appellant.*

PER CURIAM. Upon a careful review and consideration of the judgment rolls in the previous actions and proceeding pertaining to the abandoned segment of road here involved, in the light of well established applicable principles of law, there is no sufficient evidence to support a plea of *res judicata*. And the case was properly submitted to the jury on the single issue. The assignments of error presented fail to show error for which the judgment should be disturbed.

No error.

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IN THE MATTER OF THE ESTATE OF MRS. L. D. THOMAS, DECEASED, CLYDE E. THOMAS, ADMINISTRATOR—MRS. GRACE THOMAS KOEHLER AND MRS. CAROLYN THOMAS DODSON, HEIRS-PETITIONERS.

(Filed 18 April, 1956.)

**1. Appeal and Error § 6—**

Where, pending claimants' appeal from a judgment adjudicating their right to recover less than the full amount asserted by them, it appears that claimants accepted the amounts adjudicated without objection, the questions raised by the appeal have become academic and the appeal will be dismissed.

**2. Appeal and Error § 35—**

The rule that the appeal is controlled by the record does not preclude consideration of matters *dehors* the record which disclose that the question sought to be presented has become moot or academic.

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

APPEAL by petitioners, Mrs. Grace Thomas Koehler and Mrs. Carolyn Thomas Dodson, from *Phillips, J.*, 15 December, 1955. From STANLY.

*Edward Jerome for Petitioners, appellants.*

*Brown & Mauney for Administrator, appellee.*

PER CURIAM. Exceptions to the final settlement of Clyde E. Thomas, administrator of the estate of Mrs. L. D. Thomas, were filed by Mrs. Grace Thomas Koehler and Mrs. Carolyn Thomas Dodson, beneficiaries of the estate. After hearing the matters raised by these exceptions,

the Clerk entered an order thereon, from which an appeal was taken to Judge Phillips, the resident Judge of the District.

Judge Phillips, after hearing all evidence and argument of counsel, found the facts and thereupon rendered judgment on all the controverted questions raised. The 7th and final section of the judgment was as follows:

"7. That the Clerk of the Superior Court for Stanly County disburse to Mrs. Grace Thomas Koehler and Mrs. Carolyn Thomas Dodson in equal proportions the funds paid into said Clerk's office by the Administrator, to wit: $1009.17 and $70.91, less the court costs and administration expenses accrued in this matter since September 1, 1954, in full settlement of all claims of said parties against the estate of Mrs. L. D. Thomas and the Administrator of said estate."

From this judgment the petitioners appealed to this Court.

Now comes the appellee, Clyde E. Thomas, administrator, and moves that the appeal be dismissed, for that it appears from the certificate of the Clerk of the Superior Court of Stanly County that after notice of appeal had been given, the present counsel for appellants requested the Clerk to pay the amounts adjudged and set out in section 7 of the judgment to Mrs. Koehler and Mrs. Dodson, and that the Clerk thereupon issued checks for the full amount so adjudged to the parties entitled thereto, less the court costs, in accordance with the judgment, and these checks were endorsed by the payees, Mrs. Koehler and Mrs. Dodson, and were paid by the bank on which they were drawn.

Hence it appears that the full amounts set out in the judgment appealed from have been accepted by the appellants without objection, and that the questions raised by the appeal have now become academic. *Cochran v. Rowe,* 225 N.C. 645, 36 S.E. 2d 75; *Savage v. Kinston,* 238 N.C. 551, 78 S.E. 2d 318.

"The rule that the appeal is controlled by the record does not preclude consideration of matters *dehors* the record which disclose that the question sought to be presented has become moot or academic." 6th headnote in *McGuinn v. High Point,* 217 N.C. 449, 8 S.E. 2d 462.

The motion to dismiss the appeal is allowed.

Appeal dismissed.

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

# APPENDIX.

## TO THE HONORABLE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

The following amendments to the Rules and Regulations of the Board of Law Examiners and of The North Carolina State Bar have been duly adopted by the Board of Law Examiners and recommended to the Council of The North Carolina State Bar and the Council of The North Carolina State Bar at a regular quarterly meeting did unanimously adopt the said Rules and the recommendation of the Board of Law Examiners regarding said Rules as follows:

(1) Amend the Rules governing admission to the practice of law in the State of North Carolina appearing 221 N. C. Reports, 608 through and including 615, and 239 N. C. Reports 718 (3) beginning with "(3)" through the remainder of said page 718 and down through and including the word "Court.", the last word under "(e)," page 719, by rewriting the same to read as follows:

## RULES OF BOARD OF LAW EXAMINERS, STATE OF NORTH CAROLINA.

1. *Compliance Necessary.* No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the State.

2. *Definitions.* The terms "board" and "secretary" as herein used refer, respectively, to the Board of Law Examiners of North Carolina and the Secretary of the same. Masculine pronouns shall be deemed to include the female.

3. *Applications.* Every person desiring to be admitted to the practice of law in North Carolina shall file an application with the Secretary not later than 90 days prior to the next bar examination. This application shall contain such information as is called for by the forms approved by the Board, and shall be accompanied by the fee required by Rule 17 (b), and by such evidence of good moral character, affidavits of general education, and other credentials as applicant relies upon to show compliance with these rules and such further information and evidence as the Board may require. All applications, proofs, and affidavits shall be made in such manner and upon blanks furnished by the Secretary. As soon as possible after filing of applications, the Secretary shall make public the list of applicants.

Affidavits of legal education as required by the Board shall be filed 30 days prior to the date of the examination.

4. *Citizenship, Character, Age, Residence.* Each applicant at the time of filing his application, must be a citizen of the United States,

a person of good moral character, and must have been, for the twelve months next preceding the date of the examination, a citizen and resident of North Carolina, or must have been a nonresident student, for one scholastic year next preceding the filing of his application in an approved North Carolina law school. Such nonresident student applicant shall notify the Secretary in writing before his examination of his intention in good faith to become a citizen and resident of North Carolina whereupon upon his satisfying the Board of that and in all other respects he has complied with these rules, license shall issue to him within six months of his examination.

5. *Moral Character of Applicant.* No applicant shall be licensed upon examination or by comity until and unless he has been found by the Board to be of good moral character. Each applicant shall furnish affidavits of good moral character from at least four responsible persons, at least two of whom shall be members of The North Carolina State Bar, practicing in the Supreme Court of North Carolina.

Any person whose application for admission to the practice of law, either by examination or comity, has been denied on account of failing to satisfy the Board as to good moral character shall be ineligible thereafter to take the examination or have his credentials considered for two years.

6. *Law Students to Register.* No one shall be permitted to take the examination unless he shall have previously registered with the Secretary as a law student. In determining whether or not an applicant to take an examination has complied with Rules 8, 9, and 10, no time spent in legal study prior to sixty days before the date of his registration will be counted. Registration shall be upon blanks prescribed by the Board and shall be accompanied by the affidavit of the dean of that approved law school in which the applicant has matriculated, or of that lawyer under whose instruction the applicant proposes to study (who at the time must have been a licensed practitioner in North Carolina for five years), corroborating the facts in the application of which such dean or lawyer has personal knowledge, and giving to the Board such information and such pledges of intention to be governed by these rules in the instruction of the applicant as the Board shall require. Registration papers shall be accompanied by the registration fee of three dollars required by Rule 17 (a). Upon receipt of the registration papers, corroborating affidavits, and the registration fee and such other information as the Board may require, the Secretary shall acknowledge the same and shall make entry upon his records to that effect. Whenever a registered law student changes his home address, or changes the school in which, or the lawyer under whom, he is studying, or whenever he shall abandon the study of law, he shall notify the Secretary of that

fact within sixty days thereafter. Where a person applying to take the examination shall have begun and pursued his legal studies and shall have failed to register as required above, deferred registration in exceptional and meritorious cases, may be permitted by the Board, and in such cases the applicant shall file a duly verified petition directed to the Board setting forth the grounds upon which he considers his failure to comply with this rule as being exceptional and meritorious and in such cases the petition and registration papers shall be accompanied by a fee in the amount of eight dollars as required by Rule 17 (a).

From time to time during the period of the student's study, the Board may require reports from him or the law school in which, or the lawyer under whom, he is studying concerning the kind and character of work he is doing and training he is receiving, and, if upon such investigation into these and other matters as to the general conduct of the applicant the Board is of the opinion that the work he is doing or the training he is receiving does not constitute a compliance with these rules, it may refuse to allow him credit for such work, or it may take such other action as seems to it appropriate.

7. *General Education.* Each applicant, to take the examination, prior to beginning the study of law, must have completed, at a standard college, an amount of academic work equal to one-half of the work required for a bachelor's degree at the university of the State in which the college is located. With his application he shall file an affidavit from such college furnishing all information that the Board shall require. If such applicant has not taken the above described amount of college work, or for any reason cannot furnish an affidavit of such work, he may request an examination upon his general education, whereupon the Board itself or through some agency designated by it, shall examine him. If upon such examination, the Board is satisfied that his general education is sufficient to qualify the applicant to take the examinations, the Board may find that he has met the requirements of this rule as to general education.

If a person applying to take the examination cannot qualify under the above-stated provisions of this rule, the Board shall allow him to take the examination if he has previously been accepted by an approved law school as a special student, if at such school he has complied with either Rule 8 (a) or (b) and if he presents an affidavit to that effect by the dean of that school and has complied with other rules of the Board.

Any person requesting examination as indicated in this rule shall file a duly verified petition containing all information pertinent to the request and setting forth contentions as to wherein the applicant considers that he has the equivalent of college training indicated in these rules, and shall file with the Board such cost of hearing and examina-

tion as may be required by the Board. Such cost, however, shall not exceed the amount found by the Board to be the actual cost of consideration and examination and apportioned to the applicant as reimbursement to the Board for cost expended in such consideration and examination of the applicant and his petition.

8. *Legal Education.* Each person applying to take the examination must have studied law for three years, all of which study must have been completed within a period of six years provided, however, that the period between the date of induction of the applicant into the armed services and the date of his discharge therefrom shall not be counted. During that period, he may either (a) have studied as a minimum requirement, all of the required subjects and any five of the optional subjects listed in Rule 12, or (b) he must have graduated from an approved law school.

A person shall be deemed to have complied with this rule if at the time of filing his application he presents the affidavit of the dean of an approved law school that he (the applicant) will complete the course of study required for graduation from that school during the current summer session conducted by that school. No license shall be issued, however, until the dean verifies that the applicant has satisfactorily completed that course of study and has graduated, provided that no review work in preparation for the bar examination shall have constituted any part of the summer's course of study.

A person shall be deemed to have graduated from an approved law school for the purposes of these rules, if he has complied with all of the requirements for graduation therefrom except those relating to pre-legal education and if he was admitted originally to the law school as a special student and not as a candidate for a law degree.

No credit will be given by the Board for any study done by correspondence or through radio or television.

9. *Evidence of Legal Education.* Compliance with Rule 8 must be evidenced (a) by the affidavit of the dean of an approved law school that the applicant has studied law in that school for three years and that he has passed examinations given by the faculty on all the required subjects and on five of the optional subjects listed in Rule 12, or that he has graduated from that law school; or (b) by the affidavit of a member of The North Carolina State Bar engaged in active practice of law, who has been a licensed practitioner in North Carolina for five years prior to the beginning of instruction, that the applicant has studied law under his personal instruction for three years and that he has passed written examinations given by him in the entire minimum course of study above prescribed, and on each subject contained therein; which affidavit shall be made on the forms prescribed by the Board

of Law Examiners, and the originals of which written examinations, and the answers thereto shall be attached to such affidavit; or (c) by a combination of such affidavits showing that the aggregate total of the applicant's study in an approved law school or schools and under a lawyer or lawyers has equalled three years, and that he has passed written examinations in the entire minimum course of study above prescribed, and on each subject contained therein; and no affidavit showing study outside of an approved law school for less than six consecutive months will be considered. Applicants who have studied law outside of North Carolina will not be allowed credit for the time spent in such study, except to the extent that the same has been pursued in an approved law school.

The Board may require the applicant or the dean of the law school or a practitioner giving the course of study to furnish to the Board affidavits as to the conduct and character of the applicant in and during his course of study, and the same may be required either from time to time during said course of study or at the completion thereof.

10. *Years of Study Defined.* A year of study, within the meaning of Rule 8, shall consist of a minimum of either (a) thirty weeks, excluding vacations but including examinations, embracing an average of twelve hours of classroom work each week, and an average of two hours' preparation required for each hour of recitation, spent in a law school approved by the Board; or (b) forty-five weeks, exclusive of vacations, embracing an aggregate of ten hundred and eighty hours during this period devoted to study, recitations, and examinations, and with final examinations in each subject of at least two hours' duration, spent under the personal instruction of a member of The North Carolina State Bar who, at the beginning of his instruction of the applicant, has been a licensed practitioner in North Carolina for five years.

Study in the summer session of any law school approved by the Board shall count for the same part as a year's study, within the meaning of this rule, as it is counted toward graduation under the regulations of that school.

11. *Approved Law School.* The law schools maintained by the University of North Carolina, Duke University, Wake Forest College and North Carolina College at Durham hereby are approved; other law schools will be approved if and when they satisfy the Board that their standards, work, and equipment are substantially the equivalent of those of one or the other of the above-mentioned law schools. The Board from time to time may withdraw approval from such schools or from law schools previously approved or hereafter approved if and when it determines that they do not conform to the requirements of the Board.

12. *Examinations.* Unless otherwise ordered and announced, there shall be held one examination each year of those applying to be admitted to the practice of law in North Carolina; it shall be held in the City of Raleigh and shall commence on the first Tuesday in August. No applicant other than one applying for admission by comity will be admitted to the practice of law unless he has been found by the Board duly to have passed an examination given in accordance with these rules. The Board hereby is vested with the authority to determine what shall constitute the passing of an examination. The examinations to be given until August, 1958, will deal with the following required and optional subjects: REQUIRED: Agency, Business Associations (including corporations, partnerships, joint stock companies and business trusts), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Equity, Evidence, Legal Ethics, Negotiable Instruments, Personal Property, Real Property, Security Transactions (including mortgages, security deeds of trust, trust receipts, pledges, conditional sales, guaranty and suretyship), Torts, and Wills and Administration. OPTIONAL: Administrative Law, Conflict of Laws, Debtor's Estates (including bankruptcy, receiverships, assignments for the benefit of creditors, compositions and state reorganization and insolvency statutes), Domestic Relations, Federal Jurisdiction and Procedure, Future Interests, Insurance, Labor Law, Municipal Corporations, Public Utilities, Quasi-Contracts, Sales, Taxation, Trade Regulation, and Trusts.

Applicants will be expected to answer all of the questions relating to the required subjects and those relating to any five of the optional subjects.

The examinations to be given in August, 1958, and thereafter will deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions (including suretyship, personal property security and real estate security), Taxation, Torts, Trusts, and Wills and Decedents' Estates.

13. *Protest.* Any person may protest the application of any applicant to be admitted to the practice of law either by examination or as a matter of comity. Such protest shall be made in writing, signed by the person making the protest, and bearing his home and business address, and shall be filed with the Secretary of the Board prior to the date on which the applicant is to be examined. The Secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may withdraw as a candidate for admission to the practice of law at that examination; but, in

case his withdrawal in writing is not received by the Secretary by noon of the Saturday preceding the examination, he shall not be allowed thereafter to withdraw, and the person making the protest and the applicant in question shall appear before the Board at 10 o'clock a.m. on the Monday preceding the examination, whereupon the Board shall proceed forthwith to hear the matter and to make such disposition thereof as in its judgment seems just and in accordance with these rules and with the laws of North Carolina. The protest shall not be made public until the final disposition of the matter has been determined adversely to the applicant, and unless the applicant perfects an appeal from the orders of the Board or requests in writing that the Board make public its final order.

14. *Affidavits Not Conclusive.* Affidavits and other material furnished by an applicant shall not be conclusive upon the Board as to the facts therein stated; it shall make such investigation as it sees fit into the character of an applicant and the facts relating to the question as to whether or not he has complied with these rules; and if it desires, it may require the applicant to appear in person before it, or before some member of the Board designated by it, or the Secretary, before, at, or after the time of the examination which the applicant is seeking to take, for the purpose of eliciting from him additional information. All information furnished to the Board by an applicant, and all answers and questions upon blanks furnished by the Board, shall be deemed material. Actions of the Board adverse to the applicant shall not be made public unless the applicant perfects an appeal from the orders of the Board or requests in writing that the Board make public its final order.

15. *Effect of Civil or Criminal Proceedings, Charges, Investigations or Disciplinary Proceedings.* No one who has been suspended or disbarred from practicing law in this or any other State, or by any Federal Court, and whose sentence of suspension has not expired or whose sentence of disbarment has not been rescinded, and whose license to practice has not been restored, or against whom there are pending in any State or Federal Court charges, or proceedings undisposed of relating to his professional conduct shall be allowed to stand any examination or admitted to practice law in this State by comity or otherwise. No one shall be admitted to practice law in this State by examination or comity who fails to disclose fully to the Board whether requested to do so or not, the facts relating to any disciplinary proceedings or charges, relating to his professional conduct, whether same have been terminated or not, in this or any other State, or any Federal Court or other jurisdiction, nor anyone who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil

or criminal proceedings, charges, or investigations, whether the same have been terminated or not, in this or any other State or in any of the Federal Courts or other jurisdictions.

16. *Comity.* Any person duly licensed to practice law in another State may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the State in which he was licensed, upon the applicant's furnishing to the Board a certificate from a member of the court of last resort of such State that he is duly licensed to practice law therein, and that immediately prior to filing application he has been actively and substantially engaged in the practice of law before the Courts of said State for five years or more, is in good professional standing, with no charges undisposed of against him as to professional conduct, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from at least two practicing attorneys of such State, practicing in the court of last resort, and at least two persons who are not attorneys, as to the applicant's good moral character, whose signature shall be attested by the clerk of the court; and upon the applicant's satisfying the Board that he has complied with the provisions of Rule 4 relating to citizenship and residence in North Carolina. Full-time teachers in an approved law school may submit to the Board records of 5 years of such teaching in their licensing State in lieu of five years practice and the Board may consider the same in its discretion. The Board may require certificates and affidavits from attorneys and other residents of this State and may make such inquiry and investigation as they may desire into the character, conduct, practice and qualifications of the applicant. An applicant under this rule for admission by comity shall be bound by the actions and decisions of the Board in connection with his applications under these rules and in such cases, they shall be in the sole discretion of the Board and their actions on such applications shall be final. No certificates, affidavits or other material furnished by the applicant shall be conclusive upon the Board as to the facts stated therein or as to other representations made thereby.

Applicants for admission to practice law under this rule shall be required to deposit with the Secretary of the Board the sum of $200.00 and if the Board finds it necessary to make investigations of the applicant, the cost of which shall exceed the sum of $50.00 then in such event actual cost in excess of such amount shall be paid by the applicant upon notice given to him by the Board. No license shall be issued to any applicant for admission under this rule except at the time of the annual examination of applicants after the filing of applications as required by Rule 3, and after determination of any protest that may

be filed under Rule 13, provided that the Board when in session at any other time may grant an interim permission to such applicant to practice law until license shall be issued or declined if such applicant previously complied with all the requirements of these rules. An applicant under this rule for admission by comity shall be bound by the decision of the Board. The decision shall be made in the discretion of the Board and such decision shall be final.

17. *Fees.* (a) Each person registering in accordance with Rule 6 shall pay, at the time of registering, to the Secretary $3.00; or in the case of petitions for deferred registration, the sum of $8.00.

(b) All applicants to take examinations of the Board shall pay to the Secretary at the time of filing application the sum of $60.00.

(c) The fee for comity applicants shall be as set forth in Rule 16; the cost for examinations as to pre-legal education shall be as set forth in Rule 7; and the costs of appeals by applicants shall be in accordance with Rule 19.

18. *Issuance of License.* Upon compliance with the rules of the Board, its orders entered therein and upon its instructions to the secretary of the Board, he shall issue certificate to practice law in North Carolina to such applicants as may be designated by the Board in the form and manner as may be prescribed by the Board and at such times as prescribed by the Board.

19. *Appeals.* (a) Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the bar examination. After an applicant has successfully passed the bar examination, he may appeal from any adverse ruling or determination withholding his license from him.

(b) Any appealing applicant, within ten days after notice of such ruling or determination, shall give notice of appeal in writing and file with the Secretary of the Board his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination.

(c) The record on appeal to the Superior Court shall consist of the following—

(1) The papers filed by the applicant with the Board under its rules.
(2) A certified copy of the evidence taken by the Board upon the question or questions appealed.
(3) The rulings and determinations of the Board.
(4) The notice of appeal.
(5) The exceptions.

Within sixty days of receipt of the exceptions filed by the applicant with the Board, the Secretary of the Board shall certify such record at the expense of the applicant.

(d) Such appeal shall lie to the Superior Court of Wake County and shall be heard by the Presiding Judge, without a jury. The findings of fact by the Board, when supported by evidence or reliable information, shall be conclusive and binding upon the Court. If the Court is of the opinion that the Board was in error, it shall so specify and remand the matter to the Board, which may appeal as hereinafter provided. Said appeal shall operate as a *supersedeas*. In case no appeal is taken by the Board, it shall proceed in accordance with the judgment of the Court.

(e) The said applicant, or the Board of Law Examiners, may appeal to the Supreme Court from any order or judgment of the Superior Court. If the said cause is remanded by the Supreme Court to the Superior Court, then the Superior Court shall remand the same to the Board of Law Examiners, to be proceeded with in accordance with the opinion of the Supreme Court.

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 14th day of February, 1956.

(Seal) EDWARD L. CANNON, *Secretary, The North Carolina State Bar.*

After examining the foregoing Rules of The Board of Law Examiners as adopted by the Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto—Chapter 84, General Statutes.

This the first day of March, 1956.

(Signed) M. V. BARNHILL, *Chief Justice.*

Upon the foregoing certificate, it is ordered that the foregoing Rules of The Board of Law Examiners and the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the first day of March, 1956.

(Signed) CARLISLE W. HIGGINS, *J.*, For the Court.

## TO THE HONORABLE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

The following Amendments to the Rules and Regulations of The North Carolina State Bar having been duly adopted at a regular quarterly meeting of the Council of The State Bar, the same are herewith certified to the Court together with the attached certificate of the Secretary:

(1) Amend Article 2, Section 2, appearing 221 N. C. Reports, 582, by striking out the first two paragraphs of said section and substituting in lieu thereof the following: "The Annual membership fee shall be in the amount fixed by statute and said membership fee shall be due and payable to the Secretary-Treasurer on the first day of January in each year and the same shall become delinquent if not paid on or before July 1 of each year."

(2) Amend Article 2, Section 2, appearing 221 N. C. Reports, 582, by striking out the last sentence of the fourth paragraph of said section beginning with the word "Upon" and ending with the word "residence."

(3) Amend Article 2, Section 3, #3, appearing 221 N. C. Reports, 583, by changing the period after the word "residence" to a comma and adding the following: "and duties performed during the period the applicant claims to be or have been inactive."

(4) Amend Article 5, Section 4, appearing 221 N. C. Reports, 584, by striking out the word "ten" in the second line of said section after the word "Bar," and before the word "per" and substituting in lieu thereof the word "five."

(5) Amend Article 6, Section 5a, appearing 221 N. C. Reports, 585, line one, by striking out the words "five councillors" and substituting in lieu thereof the words "not less than three councilors."

(6) Amend Article 6, Section 5b, appearing 221 N. C. Reports, 586, paragraph 1, lines 1 and 2, by striking out the words "five councillors" and substituting in lieu thereof the words "not less than three councilors."

(7) Amend Article 6, Section 5c, appearing 221 N. C. Reports, 586, line 1, by striking out the words "five councillors" and substituting in lieu thereof the words "not less than three councilors."

(8) Amend Article 6, Section 5d, appearing 221 N. C. Reports, 586, line 1, by striking out the words "five councillors" and substituting in lieu thereof the words "not less than three councilors."

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing Rules and Regulations of The North

Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did at regular quarterly meetings unanimously adopt said rules and regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 14th day of February, 1956.

(Seal)

EDWARD L. CANNON, *Secretary,*
*The North Carolina State Bar.*

After examining the foregoing Rules and Regulations of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto—Chapter 84, G.S.

This the first day of March, 1956.

(Signed) M. V. BARNHILL,
*Chief Justice.*

Upon the foregoing certificate, it is ordered that the foregoing Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the first day of March, 1956.

(Signed) CARLISLE W. HIGGINS, *J.*,
For the Court.

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## TO THE HONORABLE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

The following amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted at regular quarterly meetings of the Council of The North Carolina State Bar and pursuant to previous action of the Court, the same are certified with the request to the Court that the said amendments to the Canons of Ethics of The North Carolina State Bar together with the certificate of the Secretary be published in the forthcoming volume of the Reports:

1. Amend Article X, appearing 221 N. C. Reports, 604, "42. Approved Law Lists," to read as follows:

> "42. APPROVED LAW LISTS. It shall be improper for any attorney to permit his name to be published in a law list that is not approved by the Council of The North Carolina State Bar, after April 16, 1948."

2. Amend Article X, appearing 221 N. C. Reports, 605, "44. Specialists," to read as follows:

> "44. SPECIALISTS. The Canons apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles."

3. Amend Article X-E, appearing 221 N. C. Reports, 606, and 239 N. C. Reports, 718, adding an additional paragraph to said Article X-E, said paragraph to read as follows:

"It shall likewise be deemed unethical and improper for any attorney to represent any party in any civil action where such attorney or a member of his family has personally signed any cost or other bond with or without compensation."

4. Amend Article X-G, appearing 241 N. C. Reports, 750, by rewriting the same to read as follows:

"G. When any member of The North Carolina State Bar shall investigate or adjust any claim for any insurance company or agency, or through the service of any other person, such member, his associates, and the person making such investigation are forbidden to represent as attorney any person, firm, or corporation in any wise identified with said claim, as a result of the facts or circumstances on account of which said claim originated, except the insurance company or agency for which the aforesaid claim was investigated or adjusted, or the assured. Provided, nothing contained herein shall prevent a member of the State Bar or his associates, in the event he or they shall institute suit in behalf of such insurance company or agency on account of the facts and circumstances so investigated, from filing a replication to any answer which may be filed in said cause and set up a counter-claim or cross-action in behalf of such insurance company or agency or its assured, who may be involved in such action, or from filing answer, in the event of suit, setting up counter-claim or cross-action in behalf of the insurance company by which he is employed, or its insured, for any property damage or personal injuries which may have been sustained by the insured and growing out of the facts and circumstances investigated. And provided further that this Canon shall not apply to the representation of any person charged with a criminal offense in any court of the State and who may be prosecuted on account of the facts and circumstances originally investigated.

"This Canon shall not be applicable to any case referred by an insurance company or agency to a member of The North Carolina State Bar for handling by such member after the insurance company's claimsman or adjuster has completed an investigation, and in such cases the members of The North Carolina State Bar shall be governed by the provision of Canons 6, 28 and 35."

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

NORTH CAROLINA—WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Canons of Ethics of the Rules and Regulations of The North Carolina State Bar were duly adopted by The North Carolina State Bar in that the said Council did by resolution at regular quarterly meetings adopt said amendments to said Rules and Regulations.

Given over my hand and the seal of The North Carolina State Bar, this the 14th day of February, 1956.

(Seal)

EDWARD L. CANNON, *Secretary,*
*The North Carolina State Bar.*

The Court is of the opinion that its approval is not required as a condition precedent to the promulgation of canons of ethics by the Council of The North Carolina State Bar. Let the foregoing amendments to the canons of ethics of The North Carolina State Bar, together with the certificate of Edward L. Cannon, Secretary, be published in the forthcoming volume of the Reports.

This first day of March, 1956.

(Signed) CARLISLE W. HIGGINS, *J.*,
For the Court.

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# ANALYTICAL INDEX.

## ABATEMENT AND REVIVAL.

**§ 3. Abatement for Pendency of Prior Action in General.**

Whenever the existence of a prior action between the same parties involving the same subject matter is brought to the attention of the court by answer or other proper plea, the court must dismiss the second action and relegate the plaintiff therein to his right to plead a cross action or counterclaim in the former action; nevertheless the matter is not jurisdictional, but is merely procedural and designed to prevent a multiplicity of actions. *Houghton v. Harris*, 92.

**§ 9. Death of Party and Survival of Action.**

Inquisition proceedings to have a person declared incompetent abate upon the death of such person. *In re LeFevre*, 714.

## ACTIONS.

**§ 5. Where Plaintiff's Own Wrong Constitutes Element of Cause of Action.**

A court of justice will not hear a person who seeks to reap the benefits of a transaction which is founded on, or arises out of, his own criminal misconduct or which is in direct contravention of public policy of the State. *Insulation Co. v. Davidson County*, 252.

## ADMINISTRATIVE LAW.

**§ 3. Duties and Authority of Administrative Boards and Agencies in General.**

Discretionary power vested in an administrative board or agency connotes the authority to choose between alternative courses of action. *Burton v. Reidsville*, 405.

Where a local school administrative unit cannot acquire the site selected by it by gift or purchase and proceeds to condemn the property under G.S. 115-125, the notice prescribed by the statute is sufficient and issuance of summons as in case of special proceedings and civil actions is not required, G.S. 1-394, G.S. 1-88, since the proceeding is not judicial in nature unless and until an appeal is taken from the final report of the appraisers. *Board of Education v. Allen*, 520.

**§ 4. Appeal, Certiorari and Review.**

Courts will not interfere with discretionary powers of administrative agencies so long as power is exercised in good faith in accordance with law. *Burton v. Reidsville*, 405.

Courts may review action of administrative board in exercise of discretionary power only for abuse of discretion or disregard of law. *Board of Education v. Allen*, 520.

Where, in an action for *mandamus*, the court considers records and documents which were neither offered in evidence nor brought up by the writ of *certiorari* to defendant board, under the misapprehension that the court was reviewing the correctness of the order of the administrative board, the cause must be remanded. *Realty Co. v. Planning Board*, 648.

## ADOPTION.

**§ 2. Consent of Parents or Abandonment.**

Consent is essential to an order of adoption, G.S. 48-7, unless it has been established that the child has been abandoned. G.S. 48-5. *In re Adoption of Hoose*, 589.

Abandonment of a child within the meaning of the statute obviating the necessity of consent of the child's parents to its adoption, G.S. 48-5, connotes a willful abandonment within the meaning of G.S. 14-322 and G.S. 14-326. *Ibid.*

Ordinarily the consent of the parents of a child to its adoption may be withdrawn or revoked within six months from the date it is given. G.S. 48-11. *Ibid.*

Instrument *held* sufficient as revocation of consent to adoption. *Ibid.*

The act of the adoptive parents of a child in entering into a contract consenting to the adoption of their minor child by another couple does not constitute constructive abandonment of the child so as to obviate the necessity of their consent to its adoption by such other couple. Therefore, when such consent is withdrawn within six months, the proceedings for adoption by such other couple should be dismissed upon motion. *Ibid.*

## ADVERSE POSSESSION.

**§ 1. Actual, Hostile and Exclusive Possession in General.**

Adverse possession means actual possession with intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which the land is susceptible in its present state. *Brown v. Hurley*, 138.

**§ 6. Tacking Possession.**

The party claiming adverse possession under color of title may tack the possession of the predecessors in his chain of title. *Trust Co. v. Miller*, 1.

**§ 15. What Constitutes Color of Title.**

While an instrument that passes title is not color of title, where the deeds under which plaintiff claims convey title only to a part of the land described therein, but do not convey valid title to the area in dispute, such deeds are color of title as to the disputed area. *Trust Co. v. Miller*, 1.

**§ 16. Presumptive Possession to Outermost Boundaries of Deed.**

Possession taken under color of title is commensurate with the limits of the tract to which the instrument purports to convey title provided there has been no adverse possession of the tract in part or in whole by another, and possession under such deed which is exclusive, open, continuous and adverse for seven consecutive years will ripen into an unimpeachable title to the whole, title being out of the State. *Trust Co. v. Miller*, 1.

A deed is not color of title beyond the boundaries set forth in the instrument. *Ibid.*

Color of title, without adverse possession thereunder, does not operate to give constructive possession. *Ibid.*

A party claiming under a deed as color of title must fit the description in the deed to the land it conveys by proof in accordance with appropriate law. *Ibid.*

ADVERSE POSSESSION—*Continued.*

**§ 22. Competency and Relevancy of Evidence.**

It is competent for witnesses to state what acts of ownership have been exercised over the property by claimant, it being for the jury, or the judge when the parties agree to trial by the court, to determine whether such acts of ownership constitute open, notorious and adverse possession. *Brown v. Hurley*, 138.

**§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.**

In this trial by the court under agreement of the parties, there was competent evidence to support the judge's findings of fact that the possession of defendants and their predecessors in title was not adverse to the ownership of the land in dispute, which was claimed by plaintiff and its predecessors in title under color of title. *Trust Co. v. Miller*, 1.

Plaintiff claimed title to the area in dispute under color of title, and introduced in evidence deeds in its chain of title which called for the line of the adjacent lot as the boundary. The line of the adjacent lot was known and established, and plaintiff introduced evidence of actual or constructive possession up to that line. *Held:* In trial by the court under agreement of the parties, the evidence supports the court's findings that the line of the adjacent lot was the boundary to which plaintiff claimed under color of title, plaintiff's deeds not being offered in evidence for the purpose of establishing record title to the disputed area or the purpose of establishing the corner by reference to the line of a junior conveyance. *Ibid.*

In an action to establish title to land, the failure of plaintiff to show valid record title to the disputed area does not justify nonsuit when plaintiff alleges title by seven years adverse possession under color of title, and introduces supporting evidence. *Ibid.*

Evidence tending to show that the land in question was mountain land and that plaintiff had timber cut from the land, employed a caretaker to look after the property and keep off trespassers, and had listed the land for taxation for more than seven years since he had purchased the property, together with evidence fitting the description in the deed to the land claimed, is sufficient to sustain the court's finding, in a trial by the court under agreement of the parties, that plaintiff had been in the adverse possession of the *locus in quo* under known and visible boundary lines for seven years under color of title. *Brown v. Hurley*, 138.

Evidence tending to show that plaintiffs entered into possession of the *locus in quo* under recorded deeds purporting to convey title by definite and visible lines and boundaries, and had remained in possession continuously and adversely for more than seven years, together with evidence tending to fit the descriptions in the deeds to the lands claimed, *is held* sufficient to require the submission of the issue to the jury. *Stewart v. Jaggers*, 166.

**§ 23½. Verdict and Judgment.**

In this trial by the court under agreement of the parties, the court found that plaintiff and its predecessors in title went into possession upon the delivery of the deeds under which plaintiff claimed under color of title, and that plaintiff and its predecessors in title had been in continuous adverse possession of the *locus in quo* from a date more than seven years prior. *Held:* The findings are sufficient to support judgment in plaintiff's favor, notwithstanding the absence of specific finding that the deeds in plaintiff's chain of title were color of title and of adverse possession thereunder for seven years. *Trust Co. v. Miller*, 1.

## APPEAL AND ERROR.

### § 1. Nature and Grounds of Appellate Jurisdiction.

Where the lower court erroneously excludes extrinsic evidence bearing upon the intent of testatrix, the cause will be remanded, and the Supreme Court will not consider the excluded evidence, even though it appear of record, nor attempt to decide what portions of the excluded evidence would be competent upon the question, since the Supreme Court possesses no original jurisdiction in such matters, but has jurisdiction only to review the rulings of the lower court in respect thereto. *Trust Co. v. Wolfe*, 469.

An appeal presents the question whether the ruling or judgment of the court below is correct and not whether the reason given therefor by the lower court or the ground on which it professed to base the ruling or judgment is sound or tenable. *Hayes v. Wilmington*, 525.

The Supreme Court may correct *ex mero motu* an error appearing on the face of the record and remand the cause when it affirmatively appears from the record that the court did not have jurisdiction of some of the parties. *Jones v. Jones*, 557.

Whether an act under which an administrative board was created sufficiently prescribes the standards to guide such agency, whether the agency exceeded its authority in adopting rules for its guidance, and whether the act exceeded constitutional limitations in prescribing penalties for failing to comply with the agency's rulings, will not be considered on appeal when these questions are not raised by the pleadings nor ruled upon by the lower court. *Realty Co. v. Planning Board*, 648.

### § 2. Supervisory Jurisdiction of the Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court will take judicial notice of an opinion rendered at the same time in another case, and, in its supervisory jurisdiction, will order an amendment stricken when such other opinion strikes the judgment pleaded in the amendment. *Kelly v. Piper*, 54.

The Supreme Court has general supervisory authority over the orders, judgments, and decrees of the Superior Courts of this State and will not hesitate to exercise this prerogative when necessary to promote the expeditious administration of justice. *Terrace, Inc., v. Indemnity Co.*, 595.

### § 3. Judgments Appealable.

While ordinarily the action of the trial judge in permitting a party to amend so as to plead a judgment obtained by him in another action, is in the exercise of the court's discretion, and an appeal therefrom will be dismissed as premature, the Supreme Court will take judicial notice of its own decision setting aside the judgment pleaded and ordering a new trial in the other action, and in the exercise of its supervisory power over the courts of the State, will order the amendment stricken *ex mero motu*. *Kelly v. Piper*, 54.

Appeal from interlocutory order which does not affect substantial right is premature and will be disregarded. *Ingle v. McCurry*, 65.

An appeal does not lie from the denial of a motion for judgment on the pleadings. *Baldwin v. Hinton*, 113.

An appeal from an order allowing a referee a certain sum from the trust fund, to be taxed as a part of the costs in such manner as the court should decide upon the determination of the action, is premature, since costs incident

to a reference are taxable in the discretion of the court, and there is no final determination of who should pay the sum. *Perry v. Doub*, 173.

An appeal from the denial of a motion to dismiss on the ground that a judgment of nonsuit entered in a prior action between the parties constituted *res judicata*, is premature when the motion is made prior to the introduction of evidence, and the appeal will be dismissed. *Pemberton v. Lewis*, 188.

Appeal from order for new survey in reference case is premature. *Cox v. Shaw*, 191.

An order of amendment substituting one plaintiff for another affects a substantial right and is appealable. *Exterminating Co. v. O'Hanlon*, 457.

In proceedings instituted by a local school administrative unit to condemn land for a school site under G.S. 115-125, an appeal prior to the hearing upon exceptions to the final report of the appraisers is premature. *Board of Education v. Allen*, 520.

No appeal lies from an order allowing a motion to strike allegations of the complaint. Rule of Practice in the Supreme Court No. 4(a). *Bogue v. Arnold*, 622.

Appeal from the order in this case allowing a party to intervene dismissed as premature. *McPherson v. Morrisette*, 626.

Where court sets aside verdict in its discretion there is no judgment from which appeal will lie. *Byrd v. Hampton*, 627.

While ordinarily an appeal will not lie from an interlocutory order unless it deprives appellant of a substantial right which he might lose if the order is not reviewed before final judgment, where there is no subsisting controversy as between plaintiff and defendants, an order permitting intervention by parties who may litigate their claim against plaintiff by independent action, will be reversed. *Childers v. Powell*, 711.

**§ 6. Moot and Academic Questions.**

Where an act sought to be restrained has been done pending the appeal, the appeal from the order dissolving the temporary restraining order presents an academic question and will be dismissed. *Medlin v. Curran*, 691.

Where an election sought to be restrained has been held pending the appeal, whether the lower court erroneously refused to restrain the election is moot and will not be considered. *Green v. Briggs*, 745.

Where, pending claimants' appeal from a judgment adjudicating their right to recover less than the full amount asserted by them, it appears that claimants accepted the amounts adjudicated without objection, the questions raised by the appeal have become academic and the appeal will be dismissed. *In re Estate of Thomas*, 783.

**§ 12. Powers and Proceedings in Lower Court After Appeal.**

Notice of appeal from a void order does not take the cause out of the Superior Court, and the judge has power thereafter to enter a subsequent order in the cause. *Utilities Com. v. State*, 12.

Attempted appeal from interlocutory order not affecting substantial right may be disregarded in Superior Court. *Ingle v. McCurry*, 65.

**§ 16. Certiorari as Method of Review.**

An attempted appeal from an order entered on motion to strike allegations from a pleading will be treated as a petition for writ of *certiorari* when, and

only when, the order appealed from was entered prior to 1 January, 1956. Even so, the petition will be denied when the record discloses no sufficient reason why the exceptions to the rulings on the motion should be heard before final adjudication of the cause. *Bogue v. Arnold*, 622.

The function of *certiorari*, as an independent remedy, is to review judicial or *quasi* judicial proceedings of inferior boards or tribunals *Realty Co. v. Planning Board*, 648.

In *certiorari*, evidence *dehors* the record is not permitted in the absence of statutory authority. *Ibid.*

**§ 18. Certiorari to Bring Up, Correct or Amplify Record.**

*Certiorari* may be used as an ancillary writ in a *mandamus* action for the purpose of bringing up from the inferior tribunal or board records deemed necessary for use in the trial of the case on its merits. *Realty Co. v. Planning Board*, 648.

**§ 19. Form and Sufficiency of Exceptions and Assignments of Error in General.**

Exceptions must be set out in the case on appeal, and broadside exceptions therein cannot be aided by proper exceptions entered after filing of case on appeal. *Highway Com. v. Brann*, 758.

**§ 20. Parties Entitled to Object and Take Exception.**

Even though the surety company carrying indemnity insurance for defendants does not move to strike from the cross complaint of the other defendant allegations in regard to the insurance, the insured defendants are entitled to object thereto as a matter of right upon motion to strike made in apt time, since such allegations are prejudicial as to them. *Hayes v. Wilmington*, 548.

**§ 21. Exception and Assignment of Error to Judgment.**

A sole exception to the signing of the judgment presents only whether the facts found support the judgment. *Byrd v. Thompson*, 271; *Convent v. Winston-Salem*, 316; *Bailey v. Bailey*, 412.

An exception to the judgment presents the question whether any error appears on the face of the record, including whether the facts found and admitted are sufficient to support the judgment. *Caulborn v. Armstrong*, 663; *Harrell v. Scheidt*, 735.

**§ 22. Exceptions and Assignments of Error to Findings of Fact.**

Where court finds facts under agreement of the parties, exception to the failure of the court to find other facts is not well taken. *Convent v. Winston-Salem*, 316.

Sufficiently specific exceptions to the findings of fact which are not entered until after filing of case on appeal, come too late and must be disregarded, and cannot aid broadside exceptions contained in the entries of appeal. *Highway Com. v. Brann*, 758.

**§ 22a. Exceptions and Assignments of Error to Orders Relating to Pleadings.**

Where demurrer *ore tenus* to two further defenses set up by some of defendants and four further defenses set up by other defendants, stating separate grounds therefor, is sustained, an exception and assignment of error to the

APPEAL AND ERROR—*Continued.*

action of the court in sustaining the demurrer *ore tenus* are not sufficiently specific to meet the requirements of Rule 19(3) of the Rules of Practice in the Supreme Court. *Davis v. Vaughn*, 486.

An exception and assignment of error of one appellant to the action of the court in denying portions of its motion to strike, as shown in the order appealed from, and the exception and assignment of error of the other appellant to the action of the court in allowing portions of the adverse party's motion to strike, as shown by the order appealed from, fail to point out any particular ruling excepted to and are ineffectual as broadside assignments of error. *Harris v. Light Co.*, 438.

**§ 24. Exceptions and Assignments of Error to Charge.**

While ordinarily misstatements of the contentions and the evidence must be brought to the trial court's attention in apt time, this is not required when the misstatement of contentions contains an erroneous view of the law and the misstatement of the evidence contains a material fact not supported by evidence. *Baxley v. Cavenaugh*, 677.

**§ 28. Necessity for Case on Appeal.**

Even in absence of case on appeal, appellant is entitled to a hearing on the record. *S. v. Davis*, 754.

**§ 35. Conclusiveness and Effect of Record.**

Recitals in the judgment that all interested and necessary parties were before the court are ineffective when the record clearly shows to the contrary, since the record must prevail in such instances. *Jones v. Jones*, 557.

The rule that the appeal is controlled by the record does not preclude consideration of matters *dehors* the record which disclose that the question sought to be presented has become moot or academic. *In re Estate of Thomas*, 783.

**§ 38. Form and Contents of Brief and Abandonment of Exceptions by Failure to Discuss Same in the Brief.**

Abandonment of exceptions by failure to discuss in the brief. *Yow v. Yow*, 79; *Stewart v. Jaggers*, 166; *Credit Corp. v. Motors*, 326; *Credit Corp. v. Barnes*, 335.

The brief must refer to the printed pages of the transcript where the exception and assignment of error appear which present the question discussed, Rule of Practice in the Supreme Court No. 28, and failure to comply with this rule results in a failure to present the question for review, since exceptions in the record not set out in appellant's brief will be taken as abandoned. *Cudworth v. Ins. Co.*, 584.

**§ 39. Presumptions and Burden of Showing Error.**

Where the Supreme Court is evenly divided in opinion, the decision of the lower court will be affirmed without becoming a precedent. *R. R. v. R. R.*, 110; *S. v. Smith*, 172.

Where the Supreme Court is in a three-way division of opinion, without a majority for any view, the cause will be disposed of in the manner supported by a majority without becoming a precedent for any of the divergent views. *Mayberry v. Marble Co.*, 281.

The presumption in favor of the validity of acts of public officials which would ordinarily sustain a warrant not introduced in evidence, does not obtain

when the validity of the warrant is challenged in the Superior Court, and testimony and statements in the record disclose that it was not issued by an officer authorized to issue same, without evidence to the contrary. *S. v. McGowan*, 431.

The burden is on appellant to show error amounting to the denial of some substantial right. *Cudworth v. Ins. Co.*, 584.

**§ 40. Harmless and Prejudicial Error in General.**

Appeal from the refusal of the court to order the administrator to cease and desist from aiding the widow in the prosecution of her claim for dower is without substantial legal merit on the heirs' appeal when the identical question is presented by the widow on her appeal. *McMichael v. Proctor*, 479.

**§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.**

Where the evidence admitted tends to establish a particular fact, the exclusion of other evidence offered for the purpose of establishing the same fact, cannot be prejudicial upon review of judgment as of nonsuit. *Petty v. Print Works*, 292.

The admission of evidence over objection cannot be prejudicial when testimony of like import is thereafter admitted without objection. *Davis v. Vaughn*, 486.

Where an exhibit excluded from evidence does not appear of record, its exclusion will not be held for error, since it cannot be determined that its exclusion was prejudicial. *Cudworth v. Insurance Co.*, 584.

**§ 42. Harmless and Prejudicial Error in Instructions.**

An erroneous statement of the law must be *held* for error even though made in stating the contentions. *Baxley v. Cavenaugh*, 677.

Inadvertence in submitting to jury material fact not supported by evidence must be *held* prejudicial. *Ibid.*

Exceptions to disconnected portions of the charge will not be sustained when no prejudicial error is made to appear upon a contextual reading of the charge in the light of the allegations and evidence. *Kimsey v. Reaves*, 690.

**§ 45. Error Cured by Verdict.**

The admission of evidence relating to an issue withdrawn cannot be prejudicial. *Davis v. Vaughn*, 486.

**§ 46. Review of Discretionary Orders.**

The action of the trial court in setting aside the verdict in its discretion will not be disturbed in the absence of abuse, but the rule contemplates the exercise of a legal and judicial discretion rather than an arbitrary and capricious one. *Williams v. Stumpt*, 434.

When it appears that the lower court denied motion for leave to amend a pleading under a misapprehension of the pertinent law, the ruling will be set aside with leave to appellant to renew the motion, if so advised. *Trust Co. v. Wolfe*, 469.

A motion for a continuance is addressed to the discretion of the trial court, and its refusal of the motion is not reviewable in the absence of a showing of abuse of discretion or that defendant has been deprived of a fair trial. *Furniture Co. v. Baron*, 502.

APPEAL AND ERROR—*Continued.*

Where the trial court sets aside the verdict in the exercise of its discretion, there is no final judgment from which an appeal will lie, and all interlocutory rulings, including those relating to the sufficiency of the evidence, must be set aside without prejudice and a *venire de novo* ordered. *Byrd v. Hampton*, 627.

**§ 47. Review of Orders Relating to Pleadings.**

On appeal from an order overruling a demurrer, the Supreme Court will not undertake to chart the course of the trial in advance of the hearing. *Billings v. Taylor*, 57.

The denial of a motion to strike will not be disturbed on appeal when it does not appear that retention of the challenged allegation will materially prejudice defendant on the final hearing. *Dennis v. Detels*, 111.

**§ 49. Review of Findings of Fact or of Judgments on Findings.**

A finding of fact relating to a matter not alleged in the pleading must be stricken on exception and assignment of error. *Trust Co. v. Miller*, 1.

A finding of fact not supported by any evidence in the record must be stricken on exception and assignment of error. *Ibid.*

Where evidence is insufficient to support finding of fact, judgment based thereon will be reversed, or cause remanded. *Burrell v. Burrell*, 24; *S. v. Davis*, 754.

Where one finding of fact, supported by evidence, is sufficient predicate for the judgment, other findings of fact need not be considered. *Brown v. Hurley*, 138.

A finding of fact not germane to the inquiry may be set aside. *Sanders v. Chavis*, 380.

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal. *Ibid.*

**§ 51. Review of Judgments on Motions to Nonsuit.**

Evidence erroneously admitted will nevertheless be considered on appeal in passing upon the sufficiency of plaintiff's evidence to overrule nonsuit, since the admission of such evidence may have caused plaintiff to omit competent evidence of the same import. *Earley v. Eley*, 695.

**§ 53. Determination of Petitions to Rehear.**

Petition to rehear is allowed in this case in the furtherance of the expeditious administration of justice in order that the owner of all of the stock of a corporation should be made a party plaintiff in a suit instituted by the corporation. *Terrace, Inc., v. Indemnity Co.*, 595.

**§ 55. Remand.**

Where it appears that the lower court dismissed the action as of nonsuit and thereafter entered a conditional judgment on the merits, so that the judgment can properly be neither affirmed nor reversed, the cause will be remanded for a hearing *de novo* *Burton v. Reidsville*, 405.

Where, in partition proceedings, the evidence supports the court's findings of fact upon which it is adjudged that a deed of trust on the land be canceled and claim for betterments against the tenant in possession be denied, the judgment will be affirmed as to all parties properly before the court, but when it appears that some of respondents were not validly served with process, order

APPEAL AND ERROR—*Continued.*

for sale for partition must be set aside and the cause remanded so that they may be served and given an opportunity to show cause, if any they have, why they should not be bound by the judgment. *Jones v. Jones*, 557.

When it appears that an order was entered under a misapprehension of the applicable law, the order will be set aside and the cause remanded. *Youngblood v. Bright*, 599.

When it appears that the case was heard in the lower court under a misapprehension of the pertinent principles of law, the cause ordinarily will be remanded for another hearing. *Realty Co. v. Planning Board*, 648.

**§ 59. Force and Effect of Decisions in General.**

Only the decisions of our Supreme Court, as applied to the facts of specific cases, are to be regarded as authoritative in this jurisdiction. *Dennis v. Albemarle*, 221.

**§ 60. Law of the Case and Subsequent Proceedings.**

Decision on a former appeal is the law of the case upon the questions therein presented and decided, both in subsequent proceedings in the trial court and on subsequent appeal upon the same facts. *Hayes v. Wilmington*, 525.

The doctrine of the law of the case applies only to such points as are actually presented and necessarily involved in determining the case, and while the doctrine applies to every point presented and decided even though any one of such points is sufficient to support the decision, the doctrine does not apply to points which are not actually presented and necessarily involved in determining the case and which are therefore *obiter dicta*. *Ibid.*

The doctrine of the law of the case is basically a rule of procedure rather than of substantive law, and in determining the correct application of the rule, the record on former appeal may be examined for the purpose of ascertaining what facts and questions were before the Court, particularly when the case is still in the interlocutory stage and nothing has been done that can prejudice either of the parties. *Ibid.*

On appeal from granting motion to strike cross complaint, conclusions predicated on other pleadings are *obiter*. *Ibid.*

Where an order of the Superior Court recites matters not presented for decision as a basis for its order, and on appeal such matters extrinsic to the decision are also discussed, the conclusions in the decision are *obiter* nonetheless because they derive from unfounded reasons given by the lower court for its decision. *Ibid.*

APPEARANCE.

**§ 1. Distinction Between Special and General Appearance.**

A voluntary appearance whereby a defendant obtains an extension of time in which to plead, is a general appearance. *Youngblood v. Bright*, 599.

The Act of 1951 (G.S. 1-134.1) has no application where objection to the jurisdiction of the court is not made until after a defendant has applied for and obtained an extension of time in which to plead. *Ibid.*

**§ 2. Effect of General Appearance.**

A general appearance waives any irregularity in or lack of service of process. *Youngblood v. Bright*, 599.

## ARBITRATION AND AWARD.

**§ 1. Arbitration Agreements.**

Statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. *Lammonds v. Mfg. Co.*, 749.

**§ 7. Conclusiveness of Award and Award as Bar to Action.**

Common law arbitration between labor union and employer, resulting in award in favor of union, does not preclude, but is an aid to, action by employee to recover benefits due him under the collective labor contract. *Lammonds v. Mfg. Co.*, 749.

## ARREST.

**§ 6. Resisting Arrest.**

An Indictment charging that defendant did unlawfully and willfully resist a public officer while discharging and attempting to discharge a duty of his office is fatally defective in failing to charge the official duty the designated officer was discharging or attempting to discharge, and the Supreme Court will arrest the judgment thereon *ex mero motu*. *S. v. Stonestreet*, 28.

Where police officers attempt an arrest upon an invalid warrant of arrest, the person sought to be arrested has a legal right to resist, and his motion to nonsuit in a prosecution for resisting arrest should be allowed. *S. v. McGowan*, 431.

## ARSON.

**§ 1. Nature and Elements of the Offense.**

Malice is essential element of common law arson. *S. v. Long*, 393.

The common law crime of arson is an offense against the security of habitation, rather than the safety of property, and it is essential under the common law that the property be inhabited by some person. *Ibid.*

The offense of common law arson has not been defined by statute in this State, and therefore the common law definition of the offense is still in force here. *Ibid.*

An "uninhabited house" within the purview of G.S. 14-144 is a house fit for human habitation, but which is uninhabited at the time. *Ibid.*

**§ 2. Indictment.**

It is an essential element of the common law crime of arson that the burning be done or caused maliciously, and the omission of the indictment to so charge is fatal. *S. v. Long*, 393.

An indictment charging that defendant unlawfully, willfully, and feloniously set fire to and burned the dwelling house of a named person, the dwelling being unoccupied at the time of the burning, charges a complete offense and not an attempt, and a conviction thereunder as charged is a misdemeanor and is not a conviction under G.S. 14-67, which relates to an attempt to burn a dwelling house, and is a felony. *Ibid.*

An indictment charging that defendant unlawfully, willfully and feloniously set fire to and burned the dwelling house of a named person, the dwelling being unoccupied at the time of the burning, charges the burning of an "uninhabited house" in violation of G.S. 14-144. *Ibid.*

**§ 4. Sufficiency of Evidence and Nonsuit.**

Where the evidence discloses that the structure the defendant is charged with burning had theretofore been so badly burned before the occurrence in

ARSON—*Continued.*

suit that it was not fit for human habitation, the evidence is insufficient to be submitted to the jury in a prosecution for burning an uninhabited house in violation of G.S. 14-144. *S. v. Long*, 393.

ASSOCIATIONS.

**§ 5. Right to Sue and Be Sued.**

The common law rule that unincorporated associations, including labor unions, have no existence separate and distinct from their members and cannot sue or be sued as a legal entity, obtains in this State except as modified by statute. *Youngblood v. Bright*, 599.

An unincorporated labor union is subject to suit under G.S. 1-97(6) by service on the Secretary of State, only if it is doing business in this State in the sense of performing in this State the acts for which it is formed. *Ibid.*

Chapter 545, Session Laws of 1955, has no application to actions commenced prior to its effective date. *Ibid.*

Upon demurrer of defendant unincorporated labor union challenging the jurisdiction of the court on the ground that the union was not subject to suit as a separate entity under G.S. 1-97(6), the court must consider evidence and find the facts as to whether the union was doing business in this State within the meaning of the statute, and when the lower court has not done so, the cause will be remanded. *Ibid.*

ATTORNEY AND CLIENT.

**§ 1. Office and Conduct of Attorney in General.**

While the court has inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, questions of propriety and ethics are ordinarily for consideration of the North Carolina Bar, Inc. *McMichael v. Proctor*, 479.

**§ 3. Scope of Authority.**

Where competent counsel representing a party fails to demand trial by jury as required by applicable statute, the right to trial by jury will be deemed waived, since ordinarily the attorney has control and management of the suit in matters of procedure. *Furniture Co. v. Baron*, 502.

The relation of the attorney of record to an action, nothing else appearing, continues so long as the opposing party has the right by statute or otherwise to enter a motion in the action or to apply to the court for further relief, and while the attorney's name continues to appear of record, the adverse party has the right to treat him as the authorized attorney so that service of notice of a motion in the cause upon the attorney is service on the party himself. *Weddington v. Weddington*, 702.

AUTOMOBILES.

**§ 1. Authority to License Drivers and to Suspend or Revoke Licenses.**

Revocation of license under the provisions of G.S. 20, Article 2, is an exercise of the police power in furtherance of the safety of the users of the State's highways. *Harrell v. Scheidt*, 735.

The power to issue, suspend, and revoke licenses to operate motor vehicles is vested exclusively in the Department of Motor Vehicles, and revocation or

suspension of license is not a part of, nor within the limits of, punishment to be fixed by the court wherein the offender is tried. *Ibid.*

**§ 2. Grounds and Procedure for Suspension or Revocation of Drivers' Licenses.**

While a prior conviction must be alleged in the indictment or warrant for the second offense in order for the court to inflict the heavier punishment for a second offense, G.S. 20-179, where during the period of revocation of his driver's license by the Department of Motor Vehicles for conviction of driving while under the influence of intoxicating liquor, defendant pleads guilty to another such offense upon warrant not charging a second offense, the Department of Motor Vehicles, upon receipt of report of the later judgment, must revoke defendant's driver's license for three years pursuant to the mandatory provisions of G.S. 20-17(2); G.S. 20-19(d), the revocation of license not being any part of the punishment. *Harrell v. Scheidt*, 735.

**§ 7. Attention to Road, Lookout and Due Care in General.**

It is a well settled principle of law that a person is not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law. *Weavil v. Myers*, 386.

**§ 8. Turning and Turning Signals.**

A motorist proceeding along a highway ordinarily has the right to assume, and to act on the assumption, that the driver of a vehicle approaching from the opposite direction will comply with statutory rules of the road before making a left turn across his path; but he may not indulge this assumption after he sees, or by the exercise of due care should see, that such assumption is unwarranted. *Barker v. Engineering Co.*, 103.

The requirements of G.S. 20-154a that a motorist, before turning across traffic lanes, must first see that such movement can be made in safety and must give signal of his intention to make such movement, plainly visible to the operators of other vehicles which his movement may affect, are for safety upon the highway, and the violation of its provisions constitutes negligence or contributory negligence *per se*, as the case may be, if such violation is a proximate cause of the injury. *Bradham v. Trucking Co.*, 708.

**§ 9. Stopping and Parking.**

The act of the driver of a car in temporarily stopping upon the right side of a highway to speak to a pedestrian does not violate G.S. 20-161(a) as amended. *Skinner v. Evans*, 760.

**§ 10. Negligence or Contributory Negligence in Hitting Parked Vehicle.**

Plaintiff *held* not guilty of contributory negligence as matter of law in hitting vehicle parked without lights. *Weavil v. Myers*, 386.

**§ 13. Skidding.**

Whether negligence of driver skidding because of excessive speed with worn tires, causing head-on collision with car traveling in opposite direction, insulated negligence of driver hitting rear of other car after collision, *held* for jury. *Riddle v. Artis*, 668.

AUTOMOBILES—*Continued.*

**§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.**

Evidence tending to show that the driver of a car at night failed to see the tail lights of the vehicle he was following on the highway until too late to avoid colliding with the rear of the vehicle, is sufficient to be submitted to the jury on the issue of such driver's negligence. *Dosher v. Hunt*, 247.

Whether following car too closely at excessive speed under circumstances was proximate cause of rear-end collision when preceding car was struck by car traveling in opposite direction which skidded because of excessive speed and worn tires, *held* for jury. *Riddle v. Artis*, 668.

**§ 17. Right of Way at Intersections.**

The operator of a motor vehicle along a dominant highway approaching an intersecting servient highway is under no duty to anticipate that the operator of a motor vehicle approaching along the servient highway will fail to stop as required by statute, and, in the absence of anything which gives, or in the exercise of due care should give, notice to the contrary, the driver on the dominant highway is entitled to assume and to act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will act in obedience to the statute and stop before entering the intersection. *Caughron v. Walker*, 153.

A motorist traveling along the dominant highway approaching an intersection with a servient highway does not have the absolute right of way in the sense he is not bound to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances in driving at a speed no greater than is reasonable and prudent under existing conditions, in keeping his vehicle under control, in keeping a reasonably careful lookout, and in taking such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. *Ibid.*

In the absence of anything which gives, or in the exercise of due care should give, notice to the contrary, a motorist traveling along a dominant highway may assume, and act upon the assumption, even to the last moment, that the operator of a vehicle along the servient highway will stop before entering the intersection with the dominant highway. *Smith v. Buie*, 209.

Testimony that stop sign had been erected on servient street is sufficient to warrant finding that municipal authorities had caused stop signs to be erected as authorized by statute. *Ibid.*

**§ 19. Sudden Emergencies.**

The evidence tended to show that defendant, traveling in an easterly direction, saw children on the highway when they were some 400 feet distant, that one of the children was pushing a toy wagon, in which the other was sitting, diagonally in a southeasterly direction, that defendant slowed his truck, but struck one of the children when the wagon was suddenly turned right into his lane of travel. *Held:* Defendant cannot avail himself of the doctrine of sudden emergency, since this doctrine is not available to one who by his own negligence has brought about or contributed to the emergency. *Pope v. Patterson*, 425.

AUTOMOBILES—*Continued.*

**§ 21. Condition and Defect in Vehicles.**

A collision resulting after the door of the car flew open on a curve and the driver fell from the automobile is not necessarily the result of an accident, even though the door had not flown open theretofore, since if the driver was negligent in failing to exercise due care in failing properly to shut the door, or in leaning against it when he came around the curve, and such negligence was a proximate cause of the injury, the result would not be due to unavoidable accident. *Baxley v. Cavenaugh*, 677.

**§ 22. Going to Sleep at Wheel.**

Going to sleep at the wheel, without more, does not constitute culpable negligence. *S. v. Mundy*, 149.

**§ 24. Loading and Protruding Objects.**

Allegations *held* sufficient to state cause of action for failure of warning device at end of lumber protruding from truck. *Weavil v. Myers*, 386.

**§ 33. Pedestrians.**

A pedestrian crossing within the block where there is no marked cross-walk and between intersections where no traffic control signals are maintained, is under duty to yield right-of-way to vehicular traffic, but his failure to do so is not contributory negligence *per se*, and does not relieve the driver of a motor vehicle of the duty, both at common law and under the statute, to exercise due care to avoid hitting him. *Landini v. Steelman*, 146.

A deputy sheriff who stops his car on the right side of the highway and calls to a pedestrian standing on the shoulder opposite him does not assume any obligation for himself or for his superior to protect the pedestrian from dangers of other traffic on the highway, since the relationship of passenger and carrier does not then exist between the pedestrian and the deputy, and further the deputy is not under duty to anticipate negligence on the part of drivers of other vehicles. *Skinner v. Evans*, 760.

Driver of other car hitting pedestrian as he was crossing highway to enter stationary car may be guilty of negligence. *Ibid.*

**§ 34. Children.**

A motorist is under legal duty to exercise due car to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway. *Pope v. Patterson*, 425.

A motorist who sees children on or near the highway must exercise care in proportion to their incapacity to foresee, or to appreciate, and to avoid peril, and in some situations, he must anticipate that a child of tender years may attempt to cross in front of an approaching automobile unmindful of danger. *Ibid.*

**§ 35. Pleadings in Auto Accident Cases.**

Allegations *held* not to show contributory negligence as matter of law in hitting truck stopped on highway. *Weavil v. Myers*, 386.

Allegations *held* sufficient to state cause of action for failure of warning device at end of lumber protruding from truck. *Ibid.*

Complaint *held* to state concurrent negligence on part of defendants proximately causing injuries to plaintiff. *Riddle v. Artis*, 668.

AUTOMOBILES—*Continued.*

Plaintiff alleged that defendant deputy sheriff, traveling in a northerly direction, stopped his car on the hardsurface on his right side of the highway to speak to plaintiff, who was standing on the west shoulder, saw that plaintiff was intoxicated, and called to him to get into his car, that in response thereto plaintiff began walking toward the deputy's car and was struck by an automobile which was traveling north and had turned to its left side of the highway to pass the stationary vehicle. *Held:* Demurrers of the sheriff and deputy sheriff were properly allowed, since the allegations state no negligence on the part of the deputy proximately causing plaintiff's injuries. *Skinner v. Evans*, 760.

Plaintiff alleged that he was walking in a northerly direction on the western shoulder of the highway, that defendant, traveling north at an unlawful rate of speed under the circumstances and without keeping a proper lookout, turned to his left to pass a vehicle standing on the eastern side of the highway and struck plaintiff as plaintiff, in going to enter the stationary car, had reached about the center of the highway. *Held:* Defendant's demurrer to the complaint should have been overruled both in respect to negligence and contributory negligence. *Ibid.*

**§ 41b. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Traveling at Excessive Speed.**

Evidence of excessive speed *held* for jury on question of proximate cause. *Lawrence v. Bethea*, 632.

**§ 41f. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Hitting Vehicle Stopped or Parked on Highway.**

Under the amendment of G.S. 20-141(e) by Chapter 1145, Session Laws of 1953, the failure of a motorist to stop his vehicle within the radius of his lights or the range of his vision may not be held negligence *per se* or contributory negligence *per se*, provided the motor vehicle is not being operated in excess of the maximum speed limit under the existing circumstances as prescribed by G.S. 20-141(b). *Burchette v. Distributing Co.*, 120.

**§ 41g. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Failing to Yield Right of Way at Intersection.**

Evidence of negligence of defendant's driver in entering an intersection with dominant highway without stopping as required by statute, *is held* sufficient to be submitted to the jury on the issue of negligence proximately causing the collision with plaintiff's car which was being driven along the dominant highway. *Caughron v. Walker*, 153.

Evidence of negligence in entering intersection with dominant highway *held* sufficient to be submitted to the jury. *Freedman v. Sadler*, 186.

**§ 41h. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Turning.**

The evidence tended to show that plaintiff, driving north, cleared the crest of the hill, enabling him to see for the first time the truck driven by the individual defendant, traveling south, about 130 feet distant, that the truck was veering to its left of the highway, that plaintiff sounded his horn, but that the driver of the truck, without giving any signal for a left turn, continued to veer to his left to enter a side road on the east, and that the vehicles collided at the entrance of the side road. *Held:* The evidence is sufficient to justify,

though not necessarily to impel, the inference that the collision was proximately caused by the negligence of the driver of the truck in turning into the side road without complying with statutory requirements, and does not disclose contributory negligence as a matter of law on the part of plaintiff, and nonsuit was improperly entered. *Barker v. Engineering Co.*, 103.

**§ 41l. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Hitting Pedestrian.**

Evidence *held* sufficient for jury on issue of negligence in striking pedestrian. *Landini v. Steelman*, 146.

**§ 41m. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Hitting Children.**

Evidence *held* for jury on issue of negligence in striking child on highway. *Pope v. Patterson*, 425.

**§ 42d. Nonsuit for Contributory Negligence in Hitting Vehicle Stopped or Parked on Highway.**

The evidence tended to show that the operator of a tractor-trailer, in the act of turning around, backed on the highway while dark in such manner that the trailer was across his left of the highway while the tractor was on his right with its lights shining down the road, and that plaintiff, traveling in the opposite direction, was blinded by the lights of the tractor and struck the trailer. There was no evidence that plaintiff was exceeding the applicable speed limit prescribed by G.S. 20-141(b)(4). *Held:* Under the 1953 amendment to G.S. 20-141(e) defendant's motions for nonsuit on the grounds of contributory negligence were properly denied. *Burchette v. Distributing Co.*, 120.

Whether a motorist is guilty of contributory negligence as a matter of law in colliding with a vehicle standing on the traveled portion of a highway must be determined largely upon the facts of each particular case in accordance with the standard of care and prevision of a reasonably prudent man under like circumstances. *Weavil v. Myers*, 386.

**§ 42f. Nonsuit for Contributory Negligence in Passing Cars Traveling in Opposite Direction.**

In this action based on collision occurring when defendant turned into side road, evidence *held* for jury on issues of negligence and contributory negligence. *Barker v. Engineering Co.*, 103.

**§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.**

Evidence *held* not to disclose contributory negligence as a matter of law on part of the driver of plaintiff's car, traveling along the dominant highway, in colliding with defendant's vehicle which entered the intersection from a servient highway without stopping. *Caughron v. Walker*, 153.

Evidence *held* not to show contributory negligence as a matter of law on part of plaintiff in failing to see that motorist along servient highway would not stop. *Smith v. Buie*, 209.

**§ 42h. Nonsuit for Contributory Negligence in Turning.**

Plaintiff's evidence tended to show that he was traveling on a four-lane highway and was turning left into an intersection across two traffic lanes immediately after the stop signal at the intersection had turned green from traffic

along the four-lane highway, and collided with defendant's truck, which was traveling in the opposite direction, and which he did not or could not see until it was 8 or 10 feet away because of fog. *Held:* Plaintiff's evidence discloses contributory negligence on his part as a matter of law. *Bradham v. Trucking Co.*, 708.

**§ 42k. Nonsuit for Contributory Negligence of Pedestrian.**

Issues of negligence and contributory negligence *held* for jury in this action to recover for injuries to pedestrian struck while crossing street. *Landini v. Steelman*, 146.

**§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.**

There was some evidence that defendant was traveling 45 miles per hour in a 35-mile per hour speed zone, that a truck, traveling in the same direction at excessive speed, sideswiped defendant's car on its left in attempting to overtake and pass it, causing defendant to lose control of his automobile, so that it ran off the highway and struck plaintiff's cars which were parked in a private drive. *Held:* Whether defendant was guilty of negligence and, if so, whether his negligence was a proximate cause of the damage or was insulated by the intervening negligence of the truck driver, are questions for the jury, and nonsuit is erroneous. *Lawrence v. Bethea*, 632.

**§ 46. Instructions in Auto Accident Cases.**

Defendant's car ran off the highway at a curve into plaintiff's yard and struck plaintiff's car which was parked some 30 feet from the hard-surface. Defendant's evidence was to the effect that he leaned up against the door of his car, that the door flew open when the car hit the edge of the yard, and that defendant fell out of the car. Defendant testified, "I must not have slammed the door, because it wasn't shut when I came around the curve." *Held:* An instruction to the effect that defendant testified that the door had not been so that it would not lock before the accident and that defendant contended that the door had not theretofore been so that it would fly open, and that the occurrence was a pure accident for which defendant should not be held liable, constitutes reversible error. *Baxley v. Cavenaugh*, 677.

**§ 49. Contributory Negligence of Guest or Passenger.**

Where there is evidence that a guest in an automobile saw the tail lights of the vehicle traveling along the highway in front of the car, but no evidence of anything which should have put her on notice that the driver of the car had not seen the preceding vehicle, her failure to warn the driver until it was too late for him to avoid colliding with the rear of the vehicle cannot be held contributory negligence on her part as a matter of law. *Dosher v. Hunt*, 247.

**§ 50. Negligence of Driver Imputed to Guest or Passenger.**

While in proper instances the negligence of the driver of a car will be imputed to the guest or passenger in the guest's action against a third person, the doctrine of imputed negligence has no application in an action by the guest or passenger against the driver. *Dosher v. Hunt*, 247.

Where the owner is riding in her car which is being driven by another on a common trip at her request, proof by the owner that the driver was in the general employ of a corporation cannot justify recovery by the owner against

the corporation for the driver's negligence, since the negligence of the driver, who was under the direction and control of the owner, is imputed to the owner. *Ibid.*

The doctrine of common or joint enterprise as a defense is applicable only as regards third persons, and not as between the parties to the enterprise. *Ibid.*

**§ 53. Negligence of Owner in Permitting Incompetent to Drive.**

Evidence in this case *held* insufficient to support the allegation that defendant owner lent his car to an inexperienced driver so as to warrant the submission of the issue to the jury. *Ransdell v. Young*, 75.

**§ 54a. Liability Under Doctrine of Respondeat Superior in General.**

A person who is injured by the negligence of an employee may sue the employee alone or the employer alone, or may bring a single action against both, and where action is brought against the employee alone, no recovery can be had in a subsequent action against the employer if the employee satisfies the judgment against him or obtains a verdict in his favor, nor may the amount of the recovery against the employer exceed the amount of the recovery against the employee. *Bullock v. Crouch*, 40.

**§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.**

Where there is no allegation that at the time of the accident the driver was operating the automobile for the benefit of the owner, or that the alleged agent was about the owner's business at the time of and in respect to the very transaction out of which the injuries arose, and the evidence tends to show that plaintiff passenger took the car on a trip of her own and merely permitted the driver to operate the automobile a short distance while on that trip, *held* the evidence is not sufficient to sustain the master-servant relationship between the owner and the driver so as to render defendant liable under the doctrine of *respondeat superior*. *Ransdell v. Young*, 75.

The admission of defendant that he owned the truck involved in the collision suffices to take the case to the jury against him under the doctrine of *respondeat superior*. *Caughron v. Walker*, 153.

**§ 56. Assault and Homicide—Culpable Negligence.**

The mere fact that the operator of a motor vehicle involuntarily goes to sleep while operating his automobile does not, nothing else appearing, constitute culpable negligence, it being necessary for this conclusion that the operator have premonitory symptoms of sleep, and, notwithstanding awareness of the likelihood of falling asleep, continued to operate the vehicle under circumstances evincing a thoughtless disregard of consequences or a heedless indifference to the rights and safety of others upon the highway, proximately resulting in injury or death. *S. v. Mundy*, 149.

**§ 57. Assault and Homicide—Proximate Cause, Contributory Negligence and Intervening Negligence.**

Even though the acts of defendant are sufficient to constitute reckless driving, defendant may not be convicted of homicide predicated thereon unless the jury also finds beyond a reasonable doubt that such reckless driving was the proximate cause of the wreck resulting in the death of a person. *S. v. Mundy*, 149.

AUTOMOBILES—*Continued.*

**§ 59. Assault and Homicide—Sufficiency of Evidence and Nonsuit.**

The evidence tended to show that a passenger in an automobile driven by defendant was killed when defendant, in traversing a curve, ran off the road to the right, then to the left, then to the right into a yard, and struck a parked vehicle, knocking it some 47 feet. There was also evidence that defendant was traveling at excessive speed. *Held:* The evidence was sufficient to be submitted to the jury on the charge of manslaughter. *S. v. Mundy*, 149.

The evidence in this case, taken in the light most favorable to the State, *is held* sufficient to take the case to the jury on the charge of manslaughter. *S. v. Wall*, 238.

**§ 60. Assault and Homicide—Instructions.**

An instruction correctly defining the elements of reckless driving, but failing to charge the jury that such acts must be the proximate cause of the wreck and resultant death of the deceased in order for defendant to be guilty of manslaughter, is erroneous, and is prejudicial, particularly when defendant's testimony is to the effect that he fell asleep at the wheel while traveling at a lawful speed, and the court fails to instruct the jury on the law in regard to culpable negligence in falling asleep at the wheel. *S. v. Mundy*, 149.

The charge of the court in this prosecution for manslaughter *is held* prejudicial in failing to delineate between actionable negligence in the law of torts and culpable negligence in the law of crimes. *S. v. Wall*, 238.

**§ 63. Prosecutions for Speeding.**

Testimony of a patrolman from his personal observation of the car driven by defendant, that defendant was traveling at a speed of 65 miles per hour, is sufficient to take the case to the jury in a prosecution for speeding. *S. v. Caviness*, 288.

Competency of "whammy" evidence not presented. *Ibid.*

**§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions Under G.S. 20-138.**

Defendant was under the influence of intoxicating liquor or drugs. The evidence was conflicting as to whether defendant was merely sitting in his parked car, which had been driven by another, when it rolled back and struck the car parked behind it, or whether defendant backed the car. *Held:* The conflicting evidence as to whether defendant was driving takes the case to the jury in a prosecution under G.S. 20-138. *S. v. Robbins*, 161.

Evidence that defendant was found about two blocks from the scene of a wreck, leaning against his car, which had been damaged, that defendant was highly intoxicated and all his companions had been drinking, and testimony that defendant stated that he had been driving, *is held* sufficient, considered in the light most favorable to the State, to be submitted to the jury in a prosecution for driving while under the influence of intoxicating liquor. *S. v. Isom*, 164.

Testimony of State's witnesses to the effect that they smelled the odor of an intoxicant on the breath of defendant immediately after eccentric operation of an automobile by defendant, that defendant was staggering and appeared to be intoxicated, with testimony of some of the State's witnesses that defendant was drunk, *held* to take the issue to the jury on the charge of operating a motor vehicle while under the influence of intoxicating beverages or narcotic

AUTOMOBILES—*Continued.*

drugs, notwithstanding defendant's conflicting evidence that he was not drunk but was suffering from a disease which caused him to lose his equilibrium and balance. *S. v. Owens*, 673.

**§ 76. "Hit and Run" Driving.**

Where the evidence discloses that defendant's vehicle was totally disabled in the collision, defendant cannot be convicted of violating G.S. 20-166(a), and nonsuit on such charge should be granted. *S. v. Wall*, 238.

Where the evidence discloses that the person, other than defendant, riding in the cars involved in the collision were either killed or knocked unconscious, defendant cannot be convicted of failing to give his name, address, operator's license number and the registration number of his vehicle to such person, since the law does not require the doing of a vain thing. *Ibid.*

The evidence in this case, considered in the light most favorable to the State, *is held* sufficient to take the case to the jury on the issue of defendant's guilt of failing to render assistance to persons injured in a collision in which his car was involved, under the existing circumstances. *Ibid.*

In a prosecution of defendant for failing to render assistance to persons injured in a collision in which defendant's car was involved, testimony tending to establish that persons were injured in the collision is competent, but testimony of doctors describing in minute detail the injuries each of the injured persons sustained as appeared when examined in the hospital, the treatment administered, and the condition of each at the time of the trial, is irrelevant and prejudicial. *Ibid.*

A defendant may not be convicted of failing to give assistance to a person injured in a collision when the evidence discloses that such person was instantly killed in the collision. *Ibid.*

**§ 80. Illegal Parking.**

Indictment for parking in a meter zone without depositing the required amount of money in the parking meter, in violation of ordinance, should identify where the vehicle was parked and identify the ordinance by date of its passage or otherwise. *S. v. Burton*, 277.

BANKS AND BANKING.

**§ 8b. Collection of Checks.**

Bank acting as collecting agent for check does not obtain title thereto, and when it allows depositor to draw thereon before collection, and drawee stops payment thereon, bank cannot recover amount against drawee or payee. *Trust Co. v. Raynor*, 417.

BASTARDS.

**§ 1. Nature and Elements of Offense of Willful Refusal to Support Illegitimate Child.**

Failure of defendant to provide medical care incident to pregnancy is no offense under G.S. 49-2, the offense being the willful failure and refusal of defendant to provide support for his illegitimate child. *S. v. Ferguson*, 766.

The offense is a continuing one. *Ibid.*

BASTARDS—*Continued.*

**§ 4. Warrant and Indictment.**

An indictment charging willful failure to provide expenses of pregnancy of prosecutrix cannot be amended to charge willful failure to provide support for the illegitimate child. *S. v. Ferguson*, 766.

**§ 7. Verdict and Judgment.**

Judgment of nonsuit in a prosecution for willful failure to support an illegitimate child does not adjudicate the question of paternity and does not preclude a subsequent prosecution, since the offense is a continuing one. *S. v. Ferguson*, 766.

Where judgment is entered unconditionally allowing defendant's plea of former jeopardy in a prosecution under G.S. 49-2, subsequent proceedings under such warrant are a nullity, but such judgment does not bar further prosecution for the offense if the State elects to proceed under a new criminal accusation and process. *Ibid.*

BILLS AND NOTES.

**§ 15. Endorsers for Transfer.**

Transferee of cheque payable to order is not holder in due course unless instrument is endorsed by payee. *Trust Co. v. Raynor*, 417.

Where a bank accepts a cheque indorsed only for deposit to the credit of the payee, the bank's stamp "absence of endorsement guaranteed" cannot change the positive law requiring that a negotiable instrument payable to order must be indorsed to constitute the transferee a holder in due course.

**§ 17. Assignees and Holders for Collection.**

A husband and wife maintained a joint checking account. A cheque payable to his order was issued to the husband and mailed to him. The wife procured the cheque, indorsed it "for deposit to the account of the within named payee," deposited it in the joint account, and then drew her cheque for the same amount and received payment from the bank. The drawer of the cheque, at the husband's request, stopped payment thereon. *Held:* The bank was not a holder of the cheque in due course and is not entitled to recover thereon against the drawer or payee. *Trust Co. v. Raynor*, 417.

**§ 23½. Stopping Payment.**

The drawer and the payee of a cheque both have a lawful right to stop payment thereon at any time before the instrument is paid or certified or is delivered to a *bona fide* holder for value. *Trust Co. v. Raynor*, 417.

**§ 32. Actions on Notes—Presumptions and Burden of Proof.**

Where, in an action on a note, it is alleged that the makers' signatures to the note were procured by fraud, and supporting evidence is introduced or fraud is admitted, the burden is on plaintiff holder to prove that he or some person under whom he claims acquired title to the note as a holder in due course. *Whitfield v. Mortgage Corp.*, 658.

**§ 34. Actions on Notes—Sufficiency of Evidence.**

Evidence that the representative of a roofing company procured plaintiffs' signatures to a note and deed of trust by fraudulent misrepresentation, that the note and deed of trust were filled out on forms of a mortgage company, that the note was payable to the order of the roofing company at the office of

the mortgage company, and that the trustee named in the deed of trust was an officer of the mortgage company, raises a permissible inference that the mortgage company is not a holder in due course for value and without notice of the fraud, and requires the submission of the issue to the jury. *Whitfield v. Mortgage Corp.*, 658.

**§ 37. Elements and Nature of Offense of Issuing Worthless Check.**

If at the time of delivering a cheque to the payee the maker knows that he has neither funds nor credit to pay the cheque upon presentation, the fact that the payee agrees that the cheque would not be presented for collection, would not constitute a defense, since the offense defined by G.S. 14-107 relates to nuisance resulting to trade and commerce from worthless cheques and not to losses occasioned to payee. *S. v. Jackson*, 216.

The giving of a worthless cheque in contravention of G.S. 14-107 is a crime regardless of the consent of anyone. *Ibid.*

Warrant charging that defendant, individually or under his trade name, issued worthless check *held* not bad for duplicity. *S. v. Jackson*, 216.

## BOUNDARIES.

**§ 3a. Calls to Natural Objects.**

As a general rule course and distance must give way to a call for a natural boundary, and a call to the line of an adjacent tract, if well known and established, is a call to a natural boundary. *Trust Co. v. Miller*, 1.

**§ 5a. Sufficiency of Description and Admissibility of Evidence Aliunde.**

An instrument conveying an interest in land must contain a description sufficiently definite to identify the land, either in itself or by reference to some source *aliunde*, pointed out in the instrument. *Baldwin v. Hinton*, 113.

The fact that the boundaries do not go entirely around the land does not necessarily invalidate the description for uncertainty, and the description in the deed in question *is held* sufficiently certain to permit proof *aliunde* as to the land intended to be conveyed thereby, and parol evidence was competent to identify the land and fit it to the description contained in the instrument. *Brown v. Hurley*, 138.

**§ 6. Nature and Grounds of Processioning Proceeding.**

Where the boundary line called for in a deed is actually located on the premises is an issue of fact. *Trust Co. v. Miller*, 1.

**§ 9. Processioning Proceedings—Burden of Proof.**

In an action to establish a boundary between contiguous tracts, the burden of locating the true boundary line is on plaintiff. *Trust Co. v. Miller*, 1.

## CANCELLATION AND RESCISSION OF INSTRUMENTS.

**§ 12. Sufficiency of Evidence and Nonsuit.**

Evidence in this action by a blind and poorly educated woman to rescind contract of purchase and sale of real property and to recover damages for fraud, *held* sufficient to be submitted to the jury, and further, there being no evidence that plaintiff made any payments on the mortgage executed by her after she discovered that the house was not properly underpinned and had not

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued.*

passed city inspection as represented, there was no sufficient evidence of ratification to bar recovery. *Thompson v. Stadiem*, 291.

Evidence that execution of note and deed of trust was procured by fraud *held* sufficient for jury. *Whitfield v. Mortgage Corp.*, 658.

CARRIERS.

**§ 5. Licensing and Franchise.**

The Utilities Commission has no jurisdiction to determine a petition of an irregular truck carrier to be authorized to exchange freight with a regular truck carrier when the regular truck carrier does not join in the petition and the petition nowhere alleges that the regular truck carrier had made or is desirous of making an agreement with petitioner for interchange of freight. *Utilities Com. v. Truck Lines*, 442.

**§ 11. Liability for Damage to Goods in Transit.**

Evidence that merchandise in good condition was delivered to a carrier and that it was delivered by the carrier in damaged condition, makes out a *prima facie* case precluding nonsuit. *Gurfein v. Roadway Express*, 289.

**§ 21a. Injury to Passengers—Degree of Care Required.**

While a carrier is not an insurer of the safety of its passengers, and its liability to them for injury must be predicated upon negligence proximately causing the injury, the carrier owes its passengers the highest degree of care and their safety consistent with the practical operation and conduct of its business. *Harris v. Greyhound Corp.*, 346.

**§ 21c. Injuries to Passengers in Boarding or Alighting.**

The carrier's legal duty to its passenger continues until such time as it affords its passenger an opportunity to alight safely from its conveyance to a place of safety. *Harris v. Greyhound Corp.*, 346.

Evidence tending to show that the driver of a bus on a rainy night slowed to a stop to permit a passenger to alight at a designated intersection, but that the bus stopped beyond the intersection at or near the edge of a ditch and parapet, that as the passenger stepped from the bus, his foot struck something soft and he was precipitated some ten feet into the ditch to his injury, *is held* sufficient to be submitted to the jury on the issue of the carrier's negligence. *Ibid.*

Evidence tending to show that plaintiff passenger asked to alight at an intersection with which he was thoroughly familiar, that the bus slowed down and came to a gradual stop, but traveled just beyond the intersection, that plaintiff did not then know it had done so, and, assuming that the bus had stopped at the intersection where he could alight in safety and having received no warning from the bus driver, stepped from the bus into a place of danger at the edge of a ten-foot ditch, *is held* not to disclose contributory negligence as a matter of law on part of plaintiff. *Ibid.*

The evidence was in sharp conflict whether defendant's bus stopped for a passenger to alight at an intersection constituting a safe place, or just beyond the intersection at or near a ten-foot ditch constituting a place of danger. *Held:* It was the duty of the court to instruct the jury as to the law applicable to the variant factual possibilities presented by the evidence, and a charge defining negligence and contributory negligence in general terms is insufficient. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

**§ 9. Sufficiency of Registration.**

The index and cross-index of the chattel mortgage in suit each referred to an erroneous page and book. Within two days the cross-index was corrected to show the proper page and book. *Held:* After the correction, a careful examiner, who failed to find the instrument from the direct index would examine the cross-index, which would have pointed out the instrument, and therefore, the registration was notice subsequent to the date of the correction of the cross-index. *Cotton Co. v. Hobgood*, 227.

COMMON LAW.

When the General Assembly legislates in respect to the subject matter of any common law rule, the statute supplants the common law and becomes the public policy of this State in respect to that particular matter. *McMichael v. Proctor*, 479.

COMPROMISE AND SETTLEMENT.

**§ 2. Operation and Effect of Agreements.**

Compromise in action by one driver against the other precludes recovery by such other in separate action. *Houghton v. Harris*, 92.

A concluded agreement of compromise must in its nature be as obligatory in all respects as any other, and either party may use it whenever its stipulations or statements of fact become material evidence for him. *Ibid.*

CONSPIRACY.

**§ 3. Nature and Elements of the Crime.**

As a general rule, if two or more persons combine or conspire to commit a crime, each is liable *criminaliter* for everything done by his confederates in the execution of the common design, as one of its probable and natural consequences, even though what was done was not intended as a part of the original design or common plan. *S. v. Kelly*, 177.

CONSTITUTIONAL LAW.

**§ 6½. Estoppel and Waiver of Constitutional Rights.**

Ordinarily, the acceptance of benefits under a statute or an ordinance estops a party from attacking the constitutionality of the statute or ordinance. *Convent v. Winston-Salem*, 316.

Right to jury trial in civil actions may be waived by failure to follow statutory procedure. *Furniture Co. v. Baron*, 502.

**§ 8a. Legislative Powers and Functions in General.**

The establishment of State policy is the prerogative of the General Assembly. *Utilities Com. v. State*, 12.

The wisdom of enacting a statute is the exclusive function of the General Assembly. *Burchette v. Distributing Co.*, 120; *Furniture Co. v. Baron*, 502.

A statutory provision that no local act shall have the effect of repealing or altering any public law unless the caption of the local act refers to the public law (G.S. 12-1), *is held* ineffectual, since one General Assembly cannot restrict or limit the constitutional power of a succeeding Legislature. *Furniture Co. v. Baron*, 502.

CONSTITUTIONAL LAW—*Continued.*

Legislative power vests exclusively in the General Assembly. *Tillett v. Mustian*, 564.

**§ 8b. Legislative Powers in Regard to Municipal Corporations.**

The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function. *Tillett v. Mustian*, 564.

**§ 8c. Legislative Power—Delegation of Power.**

The General Assembly may confer upon municipal corporations certain law-making powers relating to matters of local self-government. *Tillett v. Mustian*, 564.

**§ 10c. Power and Duty of Courts.**

It is the duty of the courts to construe a statute as written, the wisdom of the enactment being the legislative function. *Burchette v. Distributing Co.*, 120.

Under separation of powers, courts cannot control exercise of discretionary powers by administrative board. *Burton v. Reidsville*, 405.

**§ 13. Police Power—Safety, Sanitation and Health.**

The original zoning power reposes in the General Assembly, which it has delegated to the legislative bodies of municipalities. *In re O'Neal*, 714.

Zoning regulations must bear a substantial relation to the public health, safety, morals or general welfare in order to be valid. *Ibid.*

**§ 18. Equal Protection, Application and Enforcement of Laws.**

If an act is otherwise unobjectionable, all that can be required of it is that it be general in its application to the class or locality to which it applies and that it be public in its character. *Furniture Co. v. Baron*, 502.

**§ 22. Right to Jury Trial in Civil Actions.**

Court may not find facts on issue raised by pleadings in absence of waiver of jury trial. *Ingle v. McCurry*, 65.

The 7th Amendment to the Federal Constitution is not applicable to the states. *Furniture Co. v. Baron*, 502.

Chapter 1057, Session Laws of 1951, providing for the trial of small claims without a jury in actions instituted pursuant thereto unless a demand is made for a jury trial in the manner set out and the costs advanced as required therein, is not unreasonable, and failure to demand a jury trial and advance the costs as stipulated in the statute is a waiver of the right to trial by jury. *Ibid.*

**§ 28. Full Faith and Credit to Foreign Judgments.**

Full Faith and Credit Clause does not require that judgment of another state be binding here as to person not a party to the action in such state nor in privity with party. *Bullock v. Crouch*, 40.

While custody decree of another state is entitled to full faith and credit, courts of this State may modify decree for changed conditions upon obtaining jurisdiction of infant. *Richter v. Harmon*, 373.

**§ 32. Necessity for Indictment.**

A defendant has a constitutional right that the indictment charge the offense with such exactness as to be able to avail himself of the defense of former jeopardy. *S. v. Strickland*, 100.

CONSTITUTIONAL LAW—*Continued.*

Statute providing for transfer of prosecution from Recorder's Court to Superior Court upon defendant's demand for jury trial *held* constitutional provided trial in Superior Court is on indictment. *S. v. Owens*, 673.

In the absence of waiver, a person charged with the commission of a misdemeanor cannot be tried initially in the Superior Court except upon an indictment found by a grand jury. *S. v. Ferguson*, 766.

**§ 34d. Right of Defendant in Criminal Prosecution to Be Represented by Counsel.**

G.S. 15-4.1, implementing Article I, Sec. 11, of the Constitution of North Carolina, makes it mandatory that the clerk of the Superior Court notify the resident judge or the judge holding the courts of the district, and request immediate appointment of counsel for an accused held in custody on a capital charge, who is unable to employ counsel, and failure of such accused to have counsel appointed for her until after verdict and sentence violates her legal rights under the statute and Constitution and also under the due process clause of the Fourteenth Amendment to the Federal Constitution. The fact that the State, after arraignment and plea, elects not to press the charge for the capital offense does not affect the mandatory provisions of the statute. *S. v. Simpson*, 436.

**§ 40. Waiver of Constitutional Rights by Person Accused of Crime.**

A person may waive his constitutional right to be free of unreasonable searches by consenting to search, and evidence *held* to show consent to search of car. *S. v. McPeak*, 243.

Immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed, and therefore a guest or passenger in a car has no ground for objection to the search of the car by peace officers. *Ibid.*

CONTRACTS.

**§ 7a. Contracts Against Public Policy in General.**

Contract between public official, either directly or indirectly through corporation in which he is interested, and the municipality of which he is an official, is not only void as against public policy, but no recovery may be had thereon upon *quantum meruit*. *Insulation Co. v. Davidson County*, 252.

**§ 19. Parties Who May Sue—Third Party Beneficiary.**

As a general rule, a third person may sue to enforce a binding contract made for his benefit even though he is a stranger both to the contract and to the consideration. *Lammonds v. Mfg. Co.*, 749.

**§ 26. Interference With Contractual Rights by Third Persons.**

In an action to restrain individuals from breaching their contract not to engage in competitive employment in a designated area for a specified time, the corporation employing such individuals is not under contractual duty to plaintiff, nor may it be held liable as inducing the individual defendants to breach their contract when there is no allegation that the defendant corporation had any knowledge or notice of the alleged contracts. *Exterminating Co. v. O'Hanlon*, 457.

CONTRACTS—*Continued.*

An action may not be maintained against a third party for inducing breach of an agreement by covenantor when the amended complaint fails to show that the alleged contract was made by the covenantor with the plaintiff. *Ibid.*

CONTROVERSY WITHOUT ACTION.

**§ 2. Facts Agreed and Questions Presented.**

Where the case is submitted to the court upon stipulations and admissions in the pleadings, and the fact appears therein that notice required for the validity of a pertinent resolution or ordinance was not given, the question of validity of the resolution or ordinance is presented to the court in rendering judgment arising as a matter of law on the facts stipulated, and allegation that the resolution or ordinance was *ultra vires* is not necessary. *Blowing Rock v. Gregorie*, 364.

Where the case is submitted to the court upon stipulations and admissions in the pleadings, the facts agreed are in the nature of a special verdict upon which the court is requested to render judgment arising as a matter of law thereon, and the court is not permitted to infer or deduce other facts from those stipulated. Therefore, observations of the court based upon a personal view of the *locus in quo* at the insistence of counsel for both parties, have no place in the judgment and will not be considered on appeal, but do not justify disturbing the judgment when such observations are harmless. *Ibid.*

The questions of estoppel and limitation of action is not presented when there is no reference thereto in the facts agreed. *Ibid.*

**§ 4. Hearings and Judgment.**

Where a case is tried on an agreed statement of facts, such statement is in the nature of a special verdict, and the court is not permitted to infer or deduce further facts from those stipulated. *Sparrow v. Casualty Co.*, 60.

Where the parties agree upon a statement of facts on which the case is submitted to the trial court, exception to the failure of the court to find other facts is not well taken. *Convent v. Winston-Salem*, 316.

CORPORATIONS.

**§ 4. Corporate Existence.**

No less than three persons may operate under charter as a legal corporate entity. *Terrace, Inc., v. Indemnity Co.*, 595.

When one person acquires all of the stock of a corporation, the corporation becomes dormant or inactive and exists only for the purpose of holding legal title of the property for the use and benefit of the single stockholder who becomes seized of the beneficial title to the property, and such individual will not be permitted to cloak his action as an individual behind the legal fiction of the corporate entity. *Ibid.*

Where a single individual purchases all of the stock of a corporation and thus becomes the sole beneficial owner of the assets of the corporation, he may not revitalize the fiction of the corporate entity as a cloak for his actions by thereafter transferring some of the stock to third parties. *Ibid.*

COUNTIES.

**§ 5. County Commissioners.**

The chairman of the board of county commissioners was a stockholder and secretary-treasurer of a private corporation. The county manager entered into contracts between the county and the corporation, and the chairman of the board of county commissioners executed voucher in payment thereof, all without the knowledge of the other commissioners. The commissioners thereafter canceled the contract and demanded the return of the contract price. The corporation repaid the amount received and sued to recover the reasonable value of the services rendered and the materials furnished up to the time of cancellation. *Held:* The contracts were not only void, but, being made in direct contravention of G.S. 14-234, no recovery on a *quantum meruit* basis may be had thereunder, and plaintiff's action should have been dismissed as in case of involuntary nonsuit. *Insulation Co. v. Davidson County*, 252.

COURTS.

**§ 4c. Superior Courts—Jurisdiction on Appeals from Clerk.**

The judge of the Superior Court either in term or vacation has jurisdiction over appeals from judgments of the Clerk of the Superior Court in all matters of law or legal inference. *Highway Com. v. Mullican*, 68.

**§ 5. Superior Courts—Jurisdiction After Orders or Judgments of Another Superior Court Judge.**

One Superior Court judge's order on motion to strike precludes another judge from thereafter considering same matter in the action. *Wall v. England*, 36.

In an action involving the validity of a deed of trust, attacked on the ground of insufficiency of the description, denial of plaintiffs' motion for judgment on the pleadings does not preclude another Superior Court judge, on the hearing on the merits, from adjudicating the sufficiency of the description, when plaintiffs' allegation of ownership is denied in the answer and thus an issue of fact for the jury is raised by the pleadings, certainly when the motion for judgment on the pleadings relates to the original pleadings and amended pleadings are filed by permission of the court without objection. *Baldwin v. Hinton*, 113.

The denial of a motion for a new survey in a reference case prior to the filing of exceptions does not preclude another Superior Court judge from ordering a new survey upon the hearing upon the exception. *Cox v. Shaw*, 191.

CRIMINAL LAW.

**§ 6a. Defense of Entrapment.**

Where the offense is a crime regardless of the consent of anyone, the defense of entrapment must be predicated upon acts of officers or agents of the government or state in inciting, directly or indirectly, the commission of the offense, and it is not entrapment when a person who is not connected with the government or state induces defendant to commit the crime. *S. v. Jackson*, 216.

**§ 8b. Aiders and Abettors.**

When two or more persons aid or abet each other in the commission of a crime, all being present, all are principals and equally guilty, without regard to any previous confederation or design. *S. v. Kelly*, 177.

While mere presence, even with the intention of abetting the commission of a crime, does not constitute aiding and abetting, if the person who is present

communicates in any way to the perpetrator of the crime his intention of assisting, if necessary, or does some act to render aid or commands, advises, instigates or encourages the perpetrator of the crime, he is guilty as an aider or abettor. *Ibid.*

**§ 11. Crimes and Misdemeanors.**

The common-law rule that an attempt to commit a felony is a misdemeanor remains unchanged in this State except where otherwise provided by statute. *S. v. Hare*, 262.

The violation of a municipal ordinance is a misdemeanor. *S. v. Barrett*, 686.

**§ 12g. Transfer of Prosecution from Inferior Court to Superior Court.**

Chapter 482, Session Laws of 1951, providing that upon defendant's demand for a jury trial in a criminal prosecution in the Recorder's Court of the county, the cause should be transferred to the Superior Court of the county, *is held constitutional*, since the act does not require trial in the Superior Court upon the original warrant. *S. v. Owens*, 673.

**§ 17b. Plea of Guilty.**

A plea of guilty has significance only to the extent that it is responsive to the charge made in the indictment. *S. v. Stonestreet*, 28.

Therefore, when the indictment charges no offense, judgment may not be entered on a plea of guilty to an offense. *Ibid.*

A plea of guilty is equivalent to conviction. *Harrell v. Scheidt*, 735.

**§ 17c. Plea of Nolo Contendere.**

A plea of *nolo contendere* is ont open to the defendant as a matter of right, but may be accepted by the court as a matter of grace. *S. v. Barbour*, 265.

A plea of *nolo contendere* is equivalent to a plea of guilty for the purpose of entering judgment in the particular case. *Ibid.*

Upon acceptance of a plea of *nolo contendere* to a valid warrant or indictment, nothing is left for the court but the imposition of judgment, and while the court may hear evidence to aid it in determining the punishment, if such evidence makes it appear that defendant is not guilty, the court should advise him to withdraw his plea, and it is error for the court to find the defendant guilty for part of the offenses charged and not guilty of part. *Ibid.*

**§ 17e. Pleas in Abatement.**

A plea in abatement in a criminal prosecution comes too late when made after plea of not guilty. *S. v. McHone*, 235.

**§ 21. Former Jeopardy—Same Offense.**

Defendant was charged with reckless driving, with speeding and with homicide. Nonsuit was allowed on the charge of reckless driving, and the court did not submit the charge of speeding to the jury. *Held:* The elimination of the charges of reckless driving and speeding at the nonsuit level did not preclude prosecution of the charge of homicide. *S. v. Mundy*, 149.

**§ 27. Judicial Notice.**

"Bootleg whiskey" implies illicit whiskey in the sense that the possession, possession for sale, transportation, etc., thereof, under the circumstances, is unlawful, whether taxpaid or nontax-paid, and therefore, the court cannot take

judicial notice that "bootleg whiskey" is "non-tax-paid liquor." *S. v. Tillery*, 706.

**§ 29a. Facts in Issue and Relevant to Issues in General.**

While relevant evidence will not be excluded simply because it may tend to prejudice the jury or excite its sympathy, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. *S. v. Wall*, 238.

**§ 33. Confessions.**

Ordinarily, the confession of an accused is not rendered inadmissible by the fact that he was intoxicated when it was made, but the extent of his intoxication is relevant, and the weight, if any, to be given his statement under the circumstances is exclusively for the determination of the jury. *S. v. Isom*, 164.

**§ 40d. Character Evidence.**

A witness may not testify as to defendant's bad character when the testimony is not based upon defendant's general reputation and character in the community in which he lives, but upon defendant's reputation in the community in which the homicide occurred, since character evidence may not be based upon the opinions which any person or any number of persons have expressed, unless such opinions have created or indicate defendant's general reputation. *S. v. Ellis*, 142.

Where a character witness testifies that he does not know the general character of defendant, he is disqualified as a character witness against defendant. *Ibid.*

**§ 42e. Evidence Competent to Impeach or Discredit Testimony.**

Where a statement made by defendant is admitted in evidence by agreement of the solicitor and defense counsel, testimony of another statement by defendant at variance therewith is competent for the purpose of contradiction. *S. v. McPeak*, 273.

**§ 43. Evidence Obtained by Unlawful Means.**

Evidence obtained by search of car without warrant *held* competent, since evidence made out *prima facie* case that defendant consented to search. *S. v. McPeak*, 243.

Where defendant moves to suppress the State's evidence on the ground that it was procured by an unlawful search, the court should rule upon the motion at the time and not defer the ruling until after the State's evidence has been introduced. *S. v. McMilliam*, 771.

Where the conditions require a search warrant, evidence obtained upon a search without a warrant or upon an invalid warrant is incompetent. *Ibid.*

Where search warrant is not introduced in evidence and there is no evidence that it was duly issued, there is no presumption of regularity from mere testimony that officers had a warrant. *Ibid.*

**§ 50d. Expression of Opinion by Court During Progress of Trial.**

New trial awarded in this case for impeaching question asked defendant by the court upon the trial. *S. v. Taylor*, 688.

CRIMINAL LAW—*Continued.*

**§ 50f. Argument to Jury.**

While wide latitude is allowed in arguments to the jury, counsel may not travel outside the record and inject into the argument matters not adduced by the evidence. *S. v. Roberts*, 619.

When counsel argues matters to the jury outside the record, it is the duty of the presiding judge to correct the transgression upon objection, and when the remarks are prejudicial and require intervention by the court, the failure of the court to correct the error entitles appellant to a new trial. *Ibid.*

Where defendant introduces no evidence, argument of the solicitor to the effect that defendant had not put on any evidence and that none of his family were in court to show that he was not within the municipality in question at the time the offense was committed therein, is improper and prejudicial and should have been corrected by the court upon objection. *Ibid.*

Remarks of the solicitor in his argument to the effect that he had not said a word about defendant not going on the witness stand is forbidden by statute and prejudicial. *Ibid.*

**§ 52a(1). Consideration of Evidence on Motion to Nonsuit.**

The evidence must be considered in the light most favorable to the State upon demurrer to the evidence. *S. v. Robbins*, 161.

In passing upon a motion for judgment of nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable inference which may fairly be drawn from the evidence. *S. v. Kelly*, 177; *S. v. Kluckhohn*, 306.

**§ 52a(2). Sufficiency of Evidence to Overrule Nonsuit in General.**

If there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the court's duty to submit the case to the jury. *S. v. Kelly*, 177; *S. v. Kluckhohn*, 306.

**§ 52a(3). Sufficiency of Circumstantial Evidence to Be Submitted to Jury.**

Circumstantial evidence tending to identify defendant as the perpetrator of the offenses charged, including footprints, and the circumstance that the car in which the stolen goods were found had been lent to defendant several hours before the offenses were committed, *held* sufficient to sustain conviction. *S. v. Wilborn*, 756.

**§ 52a(9). Taking Case from Jury—Withdrawal of Count.**

The trial court's election not to submit to the jury one of the charges will be treated as the equivalent of a verdict of not guilty on that count. *S. v. Mundy*, 149.

**§ 53d. Statement of Evidence and Explanation of Law Arising Thereon.**

The evidence disclosed that defendant was intoxicated at the time of making a confession of facts tending to incriminate him. The record disclosed that the jury requested additional instructions as to whether it had the power to convict on the statement of a drunk man, to which the court stated that the defendant would have to be crazy or insane not to remember what he had said from one day to the next. *Held:* The jury was entitled to an instruction as to their duty to determine the weight to be given the incriminating statement, and the instruction was not responsive to the jury's inquiry and was highly prejudicial. *S. v. Isom*, 164.

CRIMINAL LAW—*Continued.*

The failure of the court to state the law applicable to defendant's evidence in explanation of incriminating facts adduced by the State must be *held* for prejudicial error. *S. v. Kluckhohn*, 306.

**§ 53f. Expression of Opinion by Court on Evidence.**

Where the court gives the contentions of the State and then states that it does not know what defendant contends, and that it seems there had been a misapprehension in the argument of the cause both by the State and the defendant, the instruction must be held prejudicial as contravening G.S. 1-180. *S. v. Robbins*, 161.

Where the court gives the State's contentions on every phase of the testimony in detail, but gives the defendant's contentions only in brief and general terms, even though defendant had offered voluminous evidence in explanation of incriminating circumstances adduced by the State, the charge must be *held* prejudicial. *S. v. Kluckhohn*, 306.

**§ 53j. Charge on Credibility of Witnesses.**

Where the State relies upon the unsupported evidence of accomplices for a conviction, the refusal of the court to charge in response to a special request that the State's witnesses were accomplices according to their own testimony, and that their testimony was unsupported by any other evidence in the case, must be *held* for prejudicial error. *S. v. Hooker*, 429.

**§ 53k. Statement of Contentions.**

Where the court states the respective contentions of the parties fairly and impartially, a party desiring more specific instructions in regard thereto should tender request therefor. *S. v. McPeak*, 273.

Statement of contentions as containing expression of opinion on evidence, see *supra*, § 53f.

**§ 53l. Requests for Instructions.**

While the court is not required to give requested instructions in the exact language of the request, even though the instruction be correct in itself and supported by evidence, the court must give such instruction at least in substance. *S. v. Hooker*, 429.

**§ 53n. Charge on Right of Jury to Recommend Life Imprisonment.**

Charge *held* for error in failing to instruct jury as to effect of such recommendation by them. *S. v. Carter*, 106; *S. v. Adams*, 290.

**§ 53p. Instruction on Duty to Reach Verdict.**

The charge of the court as to the duty of the jury to make a diligent effort to arrive at a verdict *held* proper. *S. v. Barnes*, 174.

**§ 54f. Unanimity and Polling Jury.**

The spontaneous statement of one of the jurors when the jury returned to the courtroom that the jury stood ten for conviction and two for acquittal *held* innocuous. *S. v. Barnes*, 174.

**§ 56. Arrest of Judgment.**

Where indictment or count is fatally defective, the Supreme Court will arrest judgment *ex mero motu*. *S. v. Stonestreet*, 28; *S. v. Strickland*, 100; *S. v. Ritchie*, 182.

CRIMINAL LAW—*Continued.*

The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, but the State may thereafter proceed upon a sufficient bill of indictment, if so advised. *S. v. Strickland*, 100.

Objection that warrant or indictment charged offense disjunctively and alternately cannot be raised by motion in arrest. *S. v. Jackson*, 216.

**§ 60a. Judgment and Commitment in General.**

A valid judgment of a court of competent jurisdiction is the real and only authority for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense. *In re Swink*, 86.

A commitment has no validity except that derived from the judgment, and to the extent it fails to set forth or certify the judgment accurately, the commitment is void and the judgment itself controls. *Ibid.*

**§ 60b. Conformity of Judgment to Verdict or Plea.**

Where defendant is charged with attempted robbery with firearms, his plea of guilty of robbery without firearms is insufficient to support judgment. *S. v. Hare*, 262.

Where the record discloses that the defendant entered a plea of *nolo contendere* and that the court, without the intervention of a jury, found defendant guilty of part of the offenses charged and not guilty of part, and imposed sentence "on the verdict," the record does not support the judgment, and the judgment must be vacated and the cause remanded for imposition of sentence upon the plea. *S. v. Barbour*, 265.

**§ 62e. Concurrent and Cumulation Sentences.**

Where the court enters separate judgments, each complete within itself, imposing sentences to the same place of confinement, the sentences run concurrently as a matter of law. *S. v. Stonestreet*, 28.

Where judgments appear on the minutes of the court in immediate succession and are consecutively numbered, a provision in a subsequent judgment that it should begin at the expiration of the sentence imposed in the preceding numbered judgment, is effective, the reference to the preceding numbered judgment being sufficient identification thereof. *Ibid.*

Where a judgment provides that the sentence therein imposed is "to begin at the expiration of existing sentences" and it appears that the sentences the defendant was then serving were imposed in another court, the sentences run concurrently, since the provision in the later judgment that it was to begin at the expiration of existing sentences has no meaning apart from what may be disclosed by investigations and evidence *dehors* the record, and is, therefore, void for uncertainty. *Ibid.*

Sentences imposed by different courts to the same place of confinement run concurrently in the absence of valid provisions in the judgments to the contrary. *Ibid.*

Sentences imposed to different places of confinement do not run concurrently. Sentences in the present case were imposed prior to the enactment of Chapter 57, Session Laws of 1955, and therefore this statute has no application thereto. *Ibid.*

CRIMINAL LAW—*Continued.*

**§ 62f. Suspended Judgments and Executions.**

Where the court before entering judgment on several counts states that it intends to give active sentences on several of the counts, but that if defendant consented to a suspended sentence on another count, the court would make the active sentences less than it would otherwise impose, *held* not prejudicial, there being no comment or suggestion that the suspended sentence would restrict the defendant's right to appeal from the judgments imposing active sentences. *S. v. Stonestreet*, 28.

Where defendant appeals from judgment imposing a suspended sentence, and there is no error in the trial, the cause must be remanded for proper judgment, since the suspended sentence cannot stand in the absence of defendant's consent thereto. *S. v. Coleman*, 109; *S. v. Ritchie*, 182; *S. v. Ingram*, 190.

The violation of a municipal ordinance is a violation of a condition of a suspended judgment that defendant violate no penal law of the State. *S. v. Barrett*, 686.

Whether a defendant has willfully violated the conditions upon which sentence of imprisonment was suspended is for the determination of the court. *Ibid.*

Evidence sufficient to sustain the findings of the court that defendant had willfully violated conditions upon which execution of sentence of imprisonment had been suspended supports the court's order revoking probation and activating the sentence, rendering immaterial whether there was sufficient competent evidence to support the finding that defendant had violated a third condition. *Ibid.*

The violation of condition of suspended execution that defendant not permit people to congregate or remain at her home after the hours of darkness does not justify putting the sentence into effect in the absence of a finding, supported by evidence, that defendant allowed people to congregate and remain in her home after the hours of darkness with such frequence and in such numbers as to raise an inference that she was violating the law in some respect. *S. v. Davis*, 754.

Where only incompetent evidence supports the court's finding that defendant had breached the conditions of a suspended judgment by having in his possession or on his premises intoxicating liquor, the judgment activating the suspended sentence must be vacated and the cause remanded. *S. v. McMilliam*, 775.

**§ 62h. Repeated Offenses.**

While warrant must charge second offense to support more severe punishment for second conviction, license to drive must be revoked for three years upon adjudication of guilt of second offense of drunken driving, even though warrant does not charge second offense. *Harrell v. Scheidt*, 735.

**§ 62i. Maximum and Minimum Terms.**

Where the Governor commutes a sentence "from two years, four months, thirteen days to four years, four months and thirteen days" the sentence, as commuted, remains as indeterminate sentence for the minimum and maximum terms stated therein, and whether the petitioner is to be discharged at the conclusion of the minimum term or at some time thereafter prior to the expiration of the maximum term is for determination by the State Highway and Public Works Commisison. *In re Swink*, 86.

CRIMINAL LAW—*Continued.*

**§ 67b. Judgments Appealable.**

Where prayer for judgment is continued for a specified term upon conditions stipulated, there is no final judgment and an appeal must be dismissed as premature. *S. v. Koone*, 628.

**§ 68a. Right of State to Appeal.**

The State may appeal in those cases specified by statute and none other. G.S. 15-179. *S. v. Ferguson*, 766.

A final judgment unconditionally allowing defendant's plea of former jeopardy is not a special verdict in law, and the State has no right of appeal therefrom. *Ibid.*

**§ 73e. Case on Appeal.**

Defendant is entitled to a hearing on the record proper even in the absence of case on appeal. *S. v. Davis*, 754.

**§ 77b. Form and Requisites of Transcript.**

Where the case on appeal from order activating a suspended judgment specifically states that the judge's finding of breach of condition was based upon evidence in a companion case and that the evidence in the companion case was omitted to avoid repetition, and both cases are argued at the same time, the Supreme Court may consider the record evidence in the companion case in deciding the appeal. *S. v. McMilliam*, 775.

**§ 77c. Presumption of Regularity of Matters Not Appearing of Record.**

The presumption in favor of the validity of acts of public officials which would ordinarily sustain a warrant not introduced in evidence, does not obtain when the validity of the warrant is challenged in the Superior Court, and testimony and statements in the record disclose that it was not issued by an officer authorized to issue same, without evidence to the contrary. *S. v. McGowan*, 431.

Where search warrant is not introduced in evidence and there is no proof that it was duly issued, there is no presumption of its regularity. *S. v. McMilliam*, 771.

**§ 78d(1). Form and Requisites of Objections and Exceptions to Evidence.**

Where, in a prosecution for speeding, the defendant makes no objection to evidence offered by the State in regard to a clocking apparatus, but to the contrary develops the subject in greater detail on cross-examination, defendant cannot challenge on appeal the admissibility of such evidence. *S. v. Caviness*, 288.

Where ruling on defendant's motion to suppress the State's evidence on the ground that it was obtained without valid search warrant is erroneously deferred until after the introduction of the State's evidence, the fact that defendant objected to some, but no all, of the evidence procured by the search, under the misapprehension of the court and counsel that no objections were required to be made to the introduction of the evidence in view of the motion to suppress, and it appears that the motion to suppress should have been allowed, neither the evidence objected to nor the evidence unobjected to should be considered in passing on the sufficiency of the evidence to support a finding of fact. *S. v. McMilliam*, 775.

CRIMINAL LAW—*Continued.*

**§ 81a. Appeal—Scope and Extent of Review.**

Supreme Court will arrest judgment on void or fatally defective indictment *ex mero motu*. *S. v. Stonestreet*, 28; *S. v. Strickland*, 100.

**§ 81b. Appeals—Presumptions and Burden of Showing Error.**

Where the Supreme Court is evenly divided in opinion, the decision of the lower court will be affirmed without becoming a precedent. *S. v. Smith*, 172.

**§ 81c(4). Harmless and Prejudicial Error—Error Relating to One Count Only.**

Where two or more counts or indictments are consolidated for the purpose of a single judgment, error relating to one count or indictment requires remand for proper judgment on the valid counts or indictments, but where separate judgments are entered on each count or indictment, each judgment complete within itself, a valid judgment pronounced on a plea of guilty on one valid count or indictment will be upheld, notwithstanding that judgment must be arrested on the other counts or indictments. *S. v. Stonestreet*, 28.

**§ 81f. Review of Judgments on Motions to Nonsuit.**

The Supreme Court will not grant a motion to nonsuit even though denial of the motion must be based on incompetent evidence erroneously admitted over objection, since had the evidence been excluded, the State might have sustained its case by competent evidence. *S. v. McMilliam*, 771.

**§ 81h. Review of Findings of Fact.**

Where, upon hearing *de novo* on appeal to the Superior Court from an order activating a suspended sentence, the Superior Court fails to find wherein the defendant had violated the conditions of suspension, defendant is entitled to have the cause remanded for a specific finding in regard thereto, since only by such finding may defendant test the validity of the condition for violation of which the suspended execution was activated. *S. v. Davis*, 754.

Where the findings of fact are insufficient to support the judgment, the cause will be remanded. *Ibid.*; *S. v. McMilliam*, 775.

**§ 83. Disposition of Appeal—Remand.**

Where the record discloses that the defendant entered a plea of *nolo contendere* and that the court, without the intervention of a jury, found defendant guilty of part of the offenses charged and not guilty of part, and imposed sentence "on the verdict," the record does not support the judgment, and the judgment must be vacated and the cause remanded for imposition of sentence upon the plea. *S. v. Barbour*, 265.

DAMAGES.

**§ 6. Mitigation of Damages.**

When the rule as to the duty to minimize damages applies, the party who breached the contract has the burden of showing matters in mitigation. *Produce Co. v. Currin*, 131.

**§ 13a. Instructions on Issue of Damages.**

The evidence was in conflict as to whether the injuries received by plaintiff in the accident caused or aggravated plaintiff's kidney condition, or whether the kidney condition subsequent to the accident was entirely unconnected with

the injuries received therein. *Held:* On the question of damages for the kidney condition, the court should have instructed the jury in regard to the variant factual possibilities presented by the evidence as a substantial feature of the case, and a general instruction only to the effect that plaintiff was entitled to recover all damages which were the immediate and necessary consequences of the injuries, is insufficient. *Harris v. Greyhound Corp.*, 346.

Where the element of future damages figures largely in consideration of the issue, an instruction to the effect that the jury might take into consideration the mortuary tables as to the life expectancy of plaintiff, without reference to the evidence as to plaintiff's health prior and subsequent to the accident and without charging that the mortuary tables should be considered only as evidence together with other evidence as to the health, constitution and habits of plaintiff, is incomplete and erroneous. *Ibid.*

## DEATH.

### § 3. Nature and Grounds of Action for Wrongful Death.

Right of action for wrongful death is purely statutory, and the statute authorizes such action only when the deceased, if he had lived, could have maintained an action for the wrongful act, neglect or default. *Lewis v. Ins. Co.*, 55.

Administrator of infant may not bring action against infant's mother for wrongful death, nor may a defendant in such action have the mother joined for contribution or indemnity. *Ibid.*

## DEDICATION.

### § 4. Acceptance of Dedication.

Where a municipality improves, repairs, or paves a street dedicated to the public by the registration of a plat showing such street, especially when accompanied by a long-continued use of the street by the public, there is an acceptance of the dedication of the street as a public street of the town. *Blowing Rock v. Gregorie*, 364.

### § 5. Title and Rights Acquired.

Purchasers of lots sold by reference to the recorded map of a subdivision acquire vested rights to have all and each of the streets shown on the map kept open. *Blowing Rock v. Gregorie*, 364.

### § 6. Revocation of Dedication.

Where the dedication of a street has become complete by the acceptance by the town, the right to revoke the dedication is gone except with the consent of the town, acting on behalf of the public, and the consent of those persons having vested rights in the dedication. *Blowing Rock v. Gregorie*, 364.

Where persons purchase lots with reference to a recorded map and thereby acquire an easement to use the streets shown on the plat, the closing of a street shown on the plat by the municipality without their request or consent would deprive them of property rights in violation of Art. I, Sec. 17, of the State Constitution and the 14th Amendment to the Constitution of the United States. *Ibid.*

DEDICATION—*Continued.*

An accepted dedication of streets in a subdivision cannot be revoked by successors in title to the subdivision quitclaiming all their right therein to an owner of a lot contiguous to the street when the municipality does not lawfully consent to such revocation. *Ibid.*

DEEDS.

**§ 13a. Estates and Interests Conveyed.**

Conveyance of a lot, without reservation, according to a map showing the lateral lines extending across the full width of a street on the front of the lot carries the fee in the land covered by the street, subject to the easement of the street. *Jones v. Turlington*, 681.

**§ 16b. Restrictive Covenants.**

Plaintiff *held* estopped by subsequent agreement from enforcing personal covenant containing residential restrictions. *Shuford v. Oil Co.*, 636. Change of condition *held* to render enforcement of residential restrictions inequitable. *Ibid.*

Where the grantor's deed to one lot out of a tract of land owned by him stipulates that the restrictive covenants therein contained should not impose any restrictions on the grantor's other property adjacent to the lot conveyed or in its vicinity, the deed negatives a general scheme of development, and only the grantor therein is entitled to enforce the restrictions. *Ibid.*

Restrictive covenants are to be strictly construed against the covenantee. *Ibid.*

DESCENT AND DISTRIBUTION.

**§ 3b. Right to Inherit and Forfeiture of Right.**

The acquittal of a widow of the murder of her husband is a complete defense to the claim that she had, by firing the pistol causing his death, forfeited her property rights in his estate. *McMichael v. Proctor*, 479.

DETINUE.

**§ 2. Actions for Recovery of Personalty.**

In an action for possession of personal property, verdicts that plaintiff is the owner and entitled to possession of such articles of personal property "set out in the complaint as are now in the possession of defendant," are too vague, uncertain, and ambiguous to support a judgment. *Caulbourn v. Armstrong*, 663.

In an action to recover possession of personalty, defendant's denial of the allegation that she is in the wrongful possession raises an issue for the jury, since even though plaintiff be owner of the property, it does not follow that defendant is in the wrongful possession thereof. *Ibid.*

In an action to recover possession of specific items of personalty the question of the value of the personalty does not arise until plaintiff has recovered judgment, and the property is not recovered upon execution or is recovered in a damaged condition. *Ibid.*

Tenant in common in personalty cannot maintain action for possession. *Ibid.*

DIVORCE AND ALIMONY.

**§ 1b. Grounds for Divorce—Abandonment.**

In the wife's action for divorce *a mensa et thoro* on the ground of abandonment under G.S. 50-7(1), as well as in an action for divorce *a mensa et thoro* on the ground that defendant offered such indignities to the person of plaintiff as to render her condition intolerable and life burdensome, G.S. 50-7(4), the conduct of the husband may be so cruel, without the infliction of any physical violence, as to compel the wife to leave him and thus constitute an abandonment of the wife by him. *Bailey v. Bailey*, 412.

The courts will not attempt to define what is such cruel treatment by a husband as to compel his wife to leave him and constitute an abandonment by the husband of the wife. *Ibid.*

**§ 2d. Divorce on Ground of Insanity of Spouse.**

The statutory right to divorce on the ground of insanity requires that insanity must have been the reason for the separation, but does not require any greater proof of separation and its continuance than is required in a divorce based on two years separation. *Mabry v. Mabry*, 126.

The statutory requirement for divorce on the ground of insanity that the insane spouse should have been confined in an institution for five consecutive years next preceding the bringing of the action is for the purpose of determining the mental condition of the spouse after five consecutive years' treatment for mental disorder, in order that the incurability or permanence of the mental disorder, which constitutes the basis for the right to the divorce, may be established. *Ibid.*

The fact that a husband, during his five years of confinement in the State Hospital, had twice been released to his relatives for short probationary periods, does not preclude the wife's right to divorce on the ground of his insanity, since such release on probation does not discharge the husband or remove him from the constructive custody of the State Hospital. *Ibid.*

**§ 5b. Pleadings in Action for Absolute Divorce.**

Allegations to the effect that plaintiff was compelled to leave her husband by reason of his willful failure and refusal to provide her with reasonable support and necessary medical attention and that such willful failure was without fault or provocation on her part, are sufficient to state a cause of action for divorce on the ground of abandonment. *McDowell v. McDowell*, 286.

**§ 5c. Pleadings in Action for Divorce from Bed and Board.**

Allegations to the effect that the husband permitted his grown children by a prior marriage to remain in his home in a drunken condition, and to curse, abuse and harass his wife at all hours of the day and night, and that he told her to get her things out of his house, *are held* sufficient to state a cause of action for divorce *a mensa et thoro* on the ground of abandonment, and, treated as an affidavit upon the hearing for subsistence *pendente lite*, to support the court's finding that the husband abandoned the wife. *Bailey v. Bailey*, 412.

**§ 5d. Pleadings in Action for Alimony Without Divorce.**

The complaint in this action for alimony without divorce *held* verified according to the requirements of G.S. 50-16. *McDowell v. McDowell*, 286.

Where, in an action for alimony without divorce, the complaint states a cause of action for divorce on the ground of abandonment, demurrer is prop-

DIVORCE AND ALIMONY—*Continued.*

erly overruled, notwithstanding the failure of the complaint to allege specific acts and conduct of the defendant necessary to support a cause of action for divorce on the ground that defendant offered such indignities to plaintiff's person as to render her condition intolerable and life burdensome. *Ibid.*

**§ 12. Alimony Pendente Lite.**

G.S. 50-16 provides two separate remedies, one for alimony without divorce, and the other for subsistence and counsel fees *pendente lite*, so that both temporary and permanent alimony may be awarded under the statute. *Yow v. Yow*, 79.

Under the provisions of G.S. 50-11, a decree for absolute divorce on the ground of two years' separation in the husband's action does not destroy the wife's right to receive subsistence *pendente lite* under prior orders rendered in her action for alimony without divorce theretofore instituted, since the word "alimony" used in the statute includes subsistence *pendente lite*. The amendment of the statute by Chapter 1313, Session Laws of 1953 and by Chapter 872, Session Laws of 1955, were not applicable in this case since they were enacted subsequent to the decree of absolute divorce. *Ibid.*

Order for subsistence *pendente lite* was entered in the wife's action for alimony without divorce. While her action was pending, the husband obtained a decree for absolute divorce on the ground of two years' separation. *Held:* The wife will not be denied her rights to payments in arrears under the order for subsistence *pendente lite* on the ground that she had unreasonably delayed the trial of her action when it appears that defendant had never filed answer in her action, and there is no evidence of record that he had ever requested a final determination of her suit. *Ibid.*

The wife has a legal right to the allowance in proper cases of subsistence and counsel fees *pendente lite* in her action for alimony without divorce. G.S. 50-16, and while the action remains pending, the court, upon proper circumstances, has authority in its sound discretion to enter a second order allowing additional counsel fees. Such additional order is proper for counsel instituting proceeding to enforce the payment to the wife of subsistence *pendente lite* in arrears. *Ibid.*

A final decree in the wife's action for alimony without divorce would terminate orders in the action for subsistence *pendente lite* but would not affect payments in arrears due thereunder. *Ibid.*

Findings to the effect that defendant had abandoned his wife without any fault or provocation on her part and without providing for her any maintenance or support, *held* to support order for subsistence *pendente lite* in the wife's action for alimony without divorce under G.S. 50-16. *Bailey v. Bailey*, 412.

An order for subsistence *pendente lite* does not affect the ultimate rights of the parties nor require a jury trial. *Ibid.*

**§ 15. Alimony Upon Absolute Divorce.**

Pending the wife's action for alimony without divorce, the husband obtained decree of absolute divorce on the ground of two years' separation. *Held:* The final judgment in her action would be rendered after absolute divorce, and therefore she would not be entitled to permanent alimony in her action, since under the common law she would not be entitled to alimony after a divorce *a vinculo*, and the proviso of G.S. 50-11 would not be applicable. *Yow v. Yow*, 79.

DIVORCE AND ALIMONY—*Continued.*

**§ 16. Enforcing Payment of Alimony.**

A finding that defendant possessed the means to comply with the orders for payments of subsistence *pendente lite* at some time during the period he was in default in such payments, is necessary to support the court's finding that the failure to make the payments were deliberate and willful, and in the absence of such finding, the decree committing him to prison for contempt must be set aside. *Yow v. Yow*, 79.

**§ 17. Jurisdiction and Procedure to Award Custody of Children of the Marriage.**

Decree awarding custody of the children of the marriage as between the parents living in a state of separation was entered in *habeas corpus* proceedings. G.S. 17-39. *Held:* Upon the later institution by the wife of an action for divorce, the jurisdiction of the court entering the decree in *habeas corpus* was ousted, and the court in which the divorce proceeding is instituted acquires and retains jurisdiction over the custody of the children until the death of one of the parties or the youngest child reaches maturity, whichever event shall first occur. *Weddington v. Weddington*, 702.

While the adverse party in a divorce action has the right to notice of a motion for the custody of the children of the marriage, G.S. 50-13, such notice served on the attorney of record of the adverse party is valid even though the party be a nonresident, certainly when the notice is also served on him by a process server of the state of his residence. *Ibid.*

Decree of divorce was entered by a court of this State having jurisdiction of both the parties. Thereafter notice of motion in the cause for custody of a child of the marriage was validly served on the nonresident defendant. *Held:* The court had jurisdiction of the person of defendant, and therefore, its order awarding the custody of one of the children to the resident plaintiff is binding upon the nonresident defendant personally, rendering him subject to the exercise of the coercive jurisdiction of the court to enforce the order, but the child not being within the State, the order is unenforceable as to it. *Ibid.*

**§ 20. Enforcement of Decree for Custody.**

When the court enters or continues an order permitting a child, the subject of its custody decree in a divorce action, to visit its nonresident parent, the court may require the defendant to give bond for the safe return of the infant or impose other pertinent provision before the defendant may be allowed to take the child out of the jurisdiction of the court. *Weddington v. Weddington*, 702.

**§ 21. Foreign Decrees.**

The decree of a court of competent jurisdiction awarding the custody of a minor child of the marriage in an action for divorce is binding on our courts under the Full Faith and Credit Clause of the Federal Constitution, and ordinarily only the courts of the state rendering the decree have jurisdiction to amend or modify it. *Richter v. Harmon*, 373.

Where decree awarding custody of the minor child of the marriage is entered in a divorce action in another state by a court of competent jurisdiction obtaining jurisdiction of defendant by publication, but subsequent thereto plaintiff moves to another state, and the minor child thereafter visits her father in this State, the courts of the state in which the divorce decree was entered no longer

DIVORCE AND ALIMONY—*Continued.*

have jurisdiction and can make no modification of its custody decree that would have any extraterritorial effect, and therefore the custody decree may be modified for change of conditions transpiring subsequent to its rendition by the courts of a state acquiring jurisdiction of the child. *Ibid.*

DOMICILE.

**§ 2. Change of Domicile.**

Intent alone is insufficient to establish a legal residence or domicile by choice, it being required that there be both residence and *animus manendi*. *Burrell v. Burrell*, 24.

**§ 3. Domicile of Infants.**

Where the mother of a minor child is awarded its custody in a divorce action, the domicile of the child is that of the mother. *Richter v. Harmon*, 373.

DOWER.

**§ 9. Forfeiture of Dower.**

The acquittal of a widow of the murder of her husband is a complete defense to the claim that she had, by firing the pistol causing his death, forfeited her property rights in his estate. G.S. 30-4, G.S. 52-19, G.S. 28-10. *McMichael v. Proctor*, 479.

The statutes enumerating the grounds for forfeiture by a widow of her right to dower exclude any other reason for such forfeiture under the maxim *inclusio unius est exclusio alterius*. *Ibid.*

EJECTMENT.

**§ 4. Summary Ejectment—Jurisdiction.**

A magistrate has no jurisdiction to try an action in which title to real property is at issue and his jurisdiction of an ejectment action obtains only when there is a contract of rental and the relation of landlord and tenant exists between the plaintiff and the defendant. *Harwell v. Rohrabacher*, 255.

Where, after the termination of a contract to purchase realty, the purchaser leases the premises from vendors and pays rent to them, and, after the sale of the property to a third person, pays rent to the grantee, the grantee may maintain an action in summary ejectment for possession of the property after due notice to vacate, title to the property not being in issue. It is immaterial whether possession was taken before or after the cancellation of the contract to purchase. *Ibid.*

**§ 5. Summary Ejectment—Pleadings, Question of Title.**

If the defendant in summary ejectment wishes to assert that title to real property is in controversy and will arise in the trial of the action, he must plead his defense by written answer signed by him or his attorney, G.S. 7-124, and, in the absence of such answer, he cannot draw the title into issue. *Harwell v. Rohrabacher*. 255.

**§ 10. Nature and Grounds of Action.**

Even though an action is nominally to quiet title, where defendants are in the actual possession and plaintiffs seek to recover possession, the action is in essence in ejectment. *Baldwin v. Hinton*, 113.

EJECTMENT—*Continued.*

**§ 15. Burden of Proof.**

In an action to establish title to land, plaintiff must rely upon the strength of its own title and not upon the weakness or want of title in the defendants. *Trust Co. v. Miller*, 1; *Jones v. Turlington*, 681.

**§ 17. Sufficiency of Evidence and Nonsuit.**

In an action to recover possession of land, the burden is upon plaintiff to make out his title, and where he fails to show title in himself, nonsuit is proper. *Jones v. Turlington*, 681.

**§ 19. Verdict and Judgment.**

Ordinarily, an action in ejectment must be dismissed when the land in controversy is not identified in the pleadings or the stipulations of the parties, but where the parties stipulate that plaintiffs were in possession of a certain 5-acre tract staked off, and that defendants are now in possession thereof, and no contention is made as to the identity of the 5-acre tract, judgment for plaintiffs will be vacated and the cause remanded for identification of the land so that judgment may be entered affirmatively adjudicating plaintiffs' title to an identified tract. *Baldwin v. Hinton*, 113.

ELECTIONS.

**§ 6½. Conduct of Elections in General.**

The performance of certain acts within a particular time or in a particular manner in accordance with statutory provision is essential to the validity of an election when the statute so provides, but when the statute does not so provide, such provisions will usually be deemed directory, and technical failure to observe them will be treated as a mere irregularity not essential to the validity of the election when such failure has no bearing whatever on the outcome of the election and is not prejudicial to anyone. *Green v. Briggs*, 745.

**§ 9. Time of Holding Election and Notice.**

The failure of the Board of Elections to give statutory notice of its release of petition forms for the calling of a beer and wine election, G.S. 18-124, when the release of such forms is promptly given wide publicity by press and radio, will not invalidate the election, there being a substantial compliance with the requirement of the statute, and the failure of statutory notice not being prejudicial. *Green v. Briggs*, 745.

The statutory requirement that a beer and wine election should be called within thirty days of the date of the return of the petitions, G.S. 18-124, is for the benefit of the proponents of such election, and when there is valid reason for delay and such delay does not prejudice the rights of anyone or affect the outcome of the election, opponents of the election may not complain thereof. *Ibid.*

ELECTRICITY.

**§ 3. Rates.**

Where a power company sells electric energy in several states, it is desirable that its schedules of rates be uniform within the entire territory served by it so long as such rates will not give an excessive return on the investment of the utility in any particular jurisdiction or be unjustifiably high in any jurisdiction served by it. *Utilities Com. v. Municipal Corps.*, 193.

ELECTRICITY—*Continued.*

A municipality retailing electric energy in its proprietary capacity for a profit utilized for public purposes is not a nonprofit-making corporation in the same sense as an electric membership corporation, nor does it operate under the same conditions, since an REA cooperative must construct and maintain lines through sparsely settled rural areas, and therefore, such differences justify a lower rate schedule for REA cooperatives in conformity with public policy. *Ibid.*

A party may not attack a rate schedule for a certain classification for consumers of electric energy on the ground of discrimination in that energy sold under such schedule would be at a loss which would have to be made up by other customers of the power company, when such party does not seek the cancellation or increase of such rate, but seeks to obtain electric energy under the identical rate it contends is discriminatory. *Ibid.*

The difference in the respective peak loads of municipal and industrial consumers of electric energy is sufficient to justify placing them in different classifications for rate-making purposes. *Ibid.*

While there must be no unreasonable discrimination in the schedule of rates charged for the same kind and degree of service, any matter which presents a substantial difference between customers, such as quantity used, time of use, or manner of service, may be proper ground for classification for rate-making purposes. *Ibid.*

Where the Utilities Commission finds, upon supporting evidence, that a power company is entitled to increase in rates, it is incumbent upon the Commission to approve schedules that in its opinion will be fair and equitable as between the established classifications of customers to be served, and in so doing, it may withdraw a schedule based upon contracts having no fuel clause, and require all customers coming within the same classification to pay rates fluctuating with the cost of fuel so that the rate will be uniform for all within the same classification. *Ibid.*

EMINENT DOMAIN.

**§ 6. Delegation of Power.**

The General Assembly has delegated to the respective local school administrative units the authority to take land for school sites and other school facilities and has prescribed the procedure therefor. *Board of Education v. Allen*, 520.

**§ 8. Amount of Compensation.**

On the question of the amount of compensation to be paid for the taking of land under eminent domain, consideration of future uses to which the property is reasonably adapted should be limited to those uses which are so reasonably probable as to have an effect on the present market value of the land, and purely imaginative or speculative value should not be considered. *Light Co. v. Clark*, 577.

The nature and extent of the easement acquired determines whether there is any substantial difference between the value of the easement and a fee simple estate in the land, and each case must stand on its own exact facts. *Ibid.*

**§ 14. Procedure in General.**

Prescribing the procedure for the taking of land for public use is the exclusive prerogative of the Legislature, limited only by the constitutional requirement that just compensation be paid. *Board of Education v. Allen*, 520.

EMINENT DOMAIN—*Continued.*

Where a local school administrative unit cannot acquire the site selected by it by gift or purchase and proceeds to condemn the property under G.S. 115-125, the notice prescribed by the statute is sufficient and issuance of summons as in case of special proceedings and civil actions is not required, G.S. 1-394, G.S. 1-88, since the proceeding is not judicial in nature unless and until an appeal is taken from the final report of the appraisers. The clerk of the Superior Court, in appointing appraisers under the statute, acts as the agent designated by the General Assembly to perform this duty, and not in his capacity as a judicial officer. *Ibid.*

Under G.S. 115-125, the selection of a site for a new building or other school facilities by the local school administrative unit is a matter committed to the sound discretion of such administrative agency, which exercise of discretion the courts can review only for arbitrary abuse of discretion or disregard of law, the appeal from the final report of the appraisers being solely upon the question of the amount of compensation to be paid for the land taken. *Ibid.*

**§ 17. Exceptions to Report and Appeal.**

Acceptance by respondents of voluntary payment by petitioner of award fixed by commissioners settles the question of compensation. *Highway Com. v. Mullican*, 68; *Highway Com. v. Brown*, 758.

**§ 18c. Competency and Relevancy of Evidence.**

Where respondents introduce evidence of the suitability of their land for a dam site and contend that the taking of the easement by petitioner decreased the present value of their land by impairing or destroying its availability for this purpose, it is error for the court to exclude testimony of a qualified witness as to the high cost of constructing a dam at the site as tending to show the remoteness of the availability of the property for this purpose so that such purpose would not enter into the contemplation of a prospective seller or purchaser of the property and thus affect or enhance the present market value of the land. *Light Co. v. Clark*, 577.

**§ 18e. Instructions.**

Instruction that value of perpetual easement equaled the fee *held* prejudicial on facts of this case. *Light Co. v. Clark*, 577.

EQUITY.

**§ 1. Nature and Essentials of Equity.**

Equity does not override the law or create rights which the common law has denied. *McMichael v. Proctor*, 479.

ESTATES.

**§ 16. Joint Estates and Survivorship in Personalty.**

Nothing else appearing, money in a bank to the joint credit of husband and wife and also stock issued to husband and wife, belong one-half to the husband and one-half to the wife. *Bowling v. Bowling*, 515.

Where agreements relating to deposits provide that each should be held for the account of a husband and wife as joint tenants with right of survivorship and not as tenants in common, and the agreements are executed by both hus-

ESTATES—*Continued.*

band and wife, the right of survivorship exists pursuant to the contracts, and upon the death of the husband the widow is entitled to take the whole. *Ibid.*

ESTOPPEL.

**§ 6a. Equitable Estoppel in General.**

A party will not be allowed to accept the benefits arising from certain terms of a contract and at the same time deny the effect of other terms of the same agreement. *Shuford v. Oil Co.*, 636.

**§ 11a. Pleading Estoppel.**

Defense of estoppel is not presented in controversy without action when facts agreed do not refer to this defense. *Blowing Rock v. Gregorie*, 364.

EVIDENCE.

**§ 5. Judicial Notice of Matters Within Common Knowledge.**

Courts may take judicial notice of any fact in the field of any particular science which is either so notoriously true as not to be the subject of reasonable dispute or which is capable of demonstration by resort to readily accessible sources of indisputable accuracy, and judges may inform themselves as to such facts by reference to standard works on the subject. *Kennedy v. Parrott*, 355.

The courts will take judicial notice of the fact that about 7:00 p.m. on 26 November, 1954, in North Carolina, was within the time between one-half after sunset and one-half hour before sunrise. *Weavil v. Myers*, 386.

Courts cannot take judicial notice that "bootleg whiskey" is nontax-paid whiskey. *S. v. Tillery*, 706.

**§ 19. Evidence Competent to Impeach or Discredit Witness.**

Where a passenger in a car, in testifying for the driver, states that the driver told her that when he entered the interscton the traffic control light was green, and that his driving did not alarm her so she was assuming he was driving safely, *held*, it is competent for the adverse party, on cross-examination, to elicit from her testimony, for the purpose of impeachment, that in her separate action against the driver she had alleged that he entered the intersection when the red light was against him, and the court's action in withdrawing from the jury such impeaching evidence must be held for prejudicial error. *Piper v. Ashburn*, 51.

**§ 24. Relevancy and Materiality in General.**

While relevant evidence will not be excluded simply because it may tend to prejudice the jury or excite its sympathy, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. *S. v. Wall*, 238.

**§ 49. Opinion Testimony—Invading Province of Jury.**

In an action on a windstorm policy, witnesses may testify as to conditions they saw at the time they visited the scene, as facts within their knowledge, upon which the conclusion as to whether the damage was caused by wind or rain may be drawn by the jury, but it is error to permit the witnesses to give their opinions that the damage was caused by wind, since this allows them to decide the ultimate issue and thus invade the prerogative of the jury. *Wood v. Ins. Co.*, 158.

EXECUTORS AND ADMINISTRATORS.

**§ 3. Removal and Revocation of Letters.**

Findings by the clerk that the executor had neglected, failed and refused to pay to one of the beneficiaries her share of the personal estate and had arbitrarily commingled the funds of the estate with moneys belonging to the beneficiary from the sale of certain articles of personalty belonging to her, *are held* sufficient to justify his order revoking the letters testamentary issued to the executor, G.S. 28-32, and when such findings are supported by evidence, judgment of the court approving the clerk's order of removal will not be disturbed. *In re Estate of Boyles*, 279.

The clerk of the Superior Court, as probate judge, has exclusive jurisdiction to hear and decide a motion to remove an administrator for cause. *McMichael v. Proctor*, 479.

**§ 9½. Partnership Property.**

Upon the death of a partner, the surviving partner or partners are required to give bond, G.S. 59-74, and, together with the personal representative of the deceased partner, to make a full and complete inventory of the partnership's liabilities and assets, including real estate, G.S. 59-76, with the exclusive right in the personal representative to require a true accounting either by the surviving partner or partners or by a receiver under court supervision. *Ewing v. Caldwell*, 18.

**§ 20. Distribution of Estate.**

Where the will provides that testator's widow should receive an annuity in a specified sum for life, consonant with an antenuptial agreement between the parties, and that the estate should remain unsettled for this purpose during the widow's lifetime, the executor is not entitled to force the widow to accept a lump sum payment in commutation of the annuity. *Stewart v. Stewart*, 284.

**§ 29. Commissions and Attorneys' Fees.**

An administrator should maintain a position of strict impartiality as between contending claimants, and the clerk should not allow compensation or counsel fees for his services or the services of his counsel in furthering the claim of the widow in conflict with those of the heirs. *McMichael v. Proctor*, 479.

FRAUD.

**§ 1. Fraud in General.**

In order to recover for fraud, plaintiff must show (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) intended to deceive; (4) does in fact deceive; (5) resulting in damage. *Early v. Eley*, 695.

**§ 3. Past or Subsisting Fact.**

In the sale of stock, statements, "the stock is gilt edged"; "nothing better can be bought," are expressions of commendation or opinion which cannot constitute fraud. *Early v. Eley*, 695.

**§ 4. Knowledge and Intent to Deceive.**

The failure of the presiding officer at a stockholders' meeting to challenge the statement of an auditor, not directed to anyone in particular, though more applicable to the person who had made a prior audit, to the effect that the stock was watered and that the books showed a 12 per cent profit "when you

FRAUD—*Continued.*

know you have not made it," cannot be *held* an admission by such presiding officer of the truth of the statement so as to fix him with *scienter* in an action against him for fraud, it having been his duty to keep the debate within proper bounds rather than to take part in it. *Early v. Eley*, 695.

Subsequent acts and conduct of persons charged with fraud may be competent on the issue of original intent and purpose. *Ibid.*

Proof of *scienter* is necessary in an action for deceit. *Ibid.*

**§ 12. Sufficiency of Evidence and Nonsuit.**

Evidence that plaintiff was induced to purchase stock in corporation by fraudulent misrepresentations *held* insufficient. *Early v. Eley*, 695.

GAMBLING.

**§ 9. Sufficiency of Evidence and Nonsuit.**

Evidence in this case *held* sufficient to sustain conviction of defendant of unlawfully, willfully and knowingly allowing a game of chance, in which money was bet, to be played on his premises, and of unlawfully operating a gaming table at which games of chance were played. *S. v. McHone*, 235.

HABEAS CORPUS.

**§ 2. To Obtain Release from Unlawful Restraint.**

The sole question for determination upon *habeas corpus* hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty, and when it appears that defendant had not completed prison sentence lawfully imposed under one of several judgments, order remanding the petitioner to custody to complete the serving of the sentence will be affirmed, with such modifications as are necessary to correct error in computing the date when petitioner would be eligible for release. *In re Swink*, 86.

Where upon *habeas corpus* it appears that petitioner is serving a sentence under a void judgment, petitioner is entitled to his immediate release, without prejudice to the right of the solicitor to prosecute the petitioner on a new bill of indictment, if so advised. *S. v. Hare*, 262.

**§ 3. To Obtain Custody of Minor Child.**

Jurisdiction of court entering order in *habeas corpus* for custody of child of separated parents is ousted by filing of action for divorce by one of parents. *Weddington v. Weddington*, 702.

In a special proceeding by the father to obtain custody of his child as against the child's maternal grandparents, judgment of the court awarding the custody of the child to its grandparents upon findings, supported by evidence, that it is to the best interests of the child that its custody remain with its grandparents, will not be disturbed. *Holmes v. Sanders*, 171.

HIGHWAYS.

**§ 4c. Construction of Highways—Liability for Injury to Contiguous Property.**

Allegations to the effect that defendant, in constructing a highway contiguous to plaintiff's property, caused great clouds of dust to form and settle on plain-

HIGHWAYS—*Continued.*

tiff's tobacco, causing considerable damage to the crop, which the defendant by due diligence could have prevented by watering the roadway with facilities on hand and available, and that defendant negligently failed and neglected to use such facilities, proximately causing damage to plaintiff's crop in a designated sum, *are held* sufficient to allege actionable negligence in the breach of a legal duty owed by defendant to plaintiff, proximately causing the damage to plaintiff, and demurrer was properly overruled. *Billings v. Taylor*, 57.

HOMESTEAD.

**§ 4c. Parties Who May Claim Homestead.**

The grantee in a deed executed by the judgment debtor prior to the rendition of the judgment is not entitled to assert homestead in the lands as against the judgment creditor when the deed is not registered prior to the docketing of the judgment, and the property is subject to sale under execution to satisfy the judgment. *Dula v. Parsons*, 32.

HOMICIDE.

**§ 8a. Manslaughter—Negligence or Culpability of Defendant.**

G.S. 14-34 does not apply when there is no evidence that defendant intentionally pointed his pistol at anyone; but defendant may be guilty of culpable negligence in handling pistol, causing it to fire from hotel window and kill pedestrian in the street below. *S. v. Kluckhohn*, 306.

**§ 11. Self-Defense.**

The right of a person to stand his ground and fight in his self-defense, regardless of the character of the assault made upon him, when such person is on his own premises, applies not only when he is in his home or place of business, but also when he is within the curtilage of his home, and where there is evidence that defendant was standing on the edge of her yard by the roadside when the assault was made upon her, it is for the jury to determine whether the assault occurred while defendant was on her own premises. *S. v. Frizzelle*, 49.

Wildlife protector not required to retreat when he is engaged in performance of official duties. *S. v. Ellis*, 142.

**§ 22. Evidence Competent on Issue of Self-Defense.**

In a prosecution of a wildlife protector for homicide, it is error for the court to exclude defendant's testimony tending to explain that he was on the property of deceased's brother for the purpose of discharging a duty of his office, particularly in view of instructions predicating his right to kill in self-defense upon whether he was a trespasser upon the property or was there in the discharge of the duties of his office. *S. v. Ellis*, 142.

**§ 25. Sufficiency of Evidence and Nonsuit.**

Evidence in this case *held* sufficient to support conviction of defendant for manslaughter. *S. v. Thomas*, 111.

Evidence that driver and passenger were engaged in common design, that they knew a car was following them, that the driver stopped the car so as to block highway and that passenger got out and shot the driver of the following car, *held* sufficient to convict the driver of the first car of murder in the second degree, both as aider and abettor and as co-conspirator. *S. v. Kelly*, 177.

HOMICIDE—*Continued.*

Evidence tending to show that defendant was handling his pistol in his hotel room, and fired same through the window, fatally injuring a person in a parking lot below, is sufficient to be submitted to the jury on the issue of defendant's culpable negligence in a prosecution for manslaughter, notwithstanding testimony that defendant did not know the gun was loaded and did not consciously point it at anyone. *S. v. Kluckhohn*, 306.

**§ 27e. Instructions on Question of Manslaughter.**

Where there is no evidence that defendant intentionally pointed his pistol at anyone, G.S. 14-34 does not apply, and an instruction that the violation of the statute, proximately resulting in injury and death, would constitute manslaughter, must be *held* for error. The State's evidence of a statement by defendant to the effect that he was "dry firing" the pistol does not amount to evidence that defendant intentionally pointed the weapon at deceased, though it is competent upon the question of culpable negligence. *S. v. Kluckhohn*, 306.

Where, in a prosecution for manslaughter, defendant relies upon misadventure or accident, an instruction to the effect that where a person does a lawful act in a careful and lawful manner and without any unlawful intent, resulting in death, the homicide is excusable, but that the absence of any of these elements would involve guilt, is erroneous, since a mere negligent departure from the rule given would not necessarily constitute culpable negligence. *Ibid.*

**§ 27f. Instructions on Self-Defense.**

Where there is evidence that defendant was on her own premises when she was assaulted, it is error for the court, in charging the jury on the plea of self-defense, to fail to instruct the jury in regard to defendant's right to stand her ground regardless of whether the assault upon her was felonious or nonfelonious. *S. v. Frizzelle*, 49.

**§ 27i. Charge on Right to Recommend Life Imprisonment.**

Charge *held* for error in failing to instruct jury as to effect of recommendation of life imprisonment by them. *S. v. Carter*, 106; *S. v. Adams*, 290.

HUSBAND AND WIFE.

**§ 12c. Conveyances by Wife to Husband.**

A conveyance by the wife of her lands to the husband, either directly or indirectly, without complying with the requirements of G.S. 52-12, is void. *Davis v. Vaughn*, 486.

**§ 12d(4). Revocation and Rescission of Separation Agreements.**

A separation agreement is terminated by the subsequent reconciliation of the parties for every purpose in so far as it remains executory. *Jones v. Lewis*, 259.

Where a deed of separation contains a division of property and is executed in all respects in conformity with law, including the private examination of the wife, a subsequent reconciliation of the parties does not revoke or invalidate the agreement in so far as it constitutes a settlement, and the wife is thereafter estopped to claim an interest in realty conveyed by her to her husband in the deed of separation. *Ibid.*

Where, in the husband's action for possession of certain articles of personalty, the wife testifies that certain items of the property was conveyed to her

by separation agreement duly executed by the parties, and denies the husband's allegation that the parties became reconciled after the execution of the agreement, an issue of fact is raised for the determination of the jury. *Caulbourn v. Armstrong*, 663.

**§ 14. Creation of Estates by Entireties.**

A wife owning the fee in lands conveyed same, with the joinder of her husband, to third parties by deed which failed to incorporate certificate of the certifying officer that the deed was not unreasonable or injurious to her, as required by G.S. 52-12. On the same day the third persons reconveyed the lands to the wife and husband. The simultaneousness of the transaction, coupled with the averments of answers offered in evidence, manifested an intention to thus vest in the husband and wife an estate by entireties. *Held:* The conveyances are void, since parties cannot do by indirection that which they cannot do directly. Therefore the fee remained in the wife, and upon her death, her heirs are entitled to the lands as against the surviving husband or his lienee. *Davis v. Vaughn*, 486.

**§ 15a. Nature and Incidents of Estates by Entireties.**

An estate by the entirety in personal property is not recognized in this State. *Bowling v. Bowling*, 515.

## INDEMNITY.

**§ 1. Nature, Validity and Requisites of Agreement.**

Allegations to the effect that contract of indemnity was executed by the indemnitors and delivered to the indemnitee, and that the indemnitee was induced thereby to become surety for the principal indemnitor on numerous performance bonds, resulting in liability or loss to the indemnitee, are sufficient to state a cause of action on the indemnity agreement, notwithstanding the indemnitee did not exercise the agreement, the fact that the indemnitee accepted and acted upon the indemnity contract being sufficient to show the mutuality required by law. *Casualty Co. v. Angle*, 570.

**§ 2d. Liability or Loss.**

An indemnity agreement may contract against actual loss or liability, or both, and in this case the agreement indemnifying the surety on a contractor's performance bonds against all claims, demands, damages, etc., and obligating indemnitors to pay the indemnitee all amounts for which it should become liable by reason of the performance bonds, *is held* to warrant suit against the indemnitors for loss to indemnitee under the contractor's bonds prior to the determination of the amount of loss against the principal on the contractor's bonds. *Casualty Co. v. Angle*, 570.

## INDICTMENT AND WARRANT.

**§ 6½. Issuance of Warrant.**

A justice of the peace who is also an officer on the police force of a municipality may lawfully, in his capacity as a justice of the peace, take the oath of another police officer to an affidavit on which a criminal warrant is to be issued, and then, as a justice of the peace, lawfully issue a warrant thereon, addressed to the chief of police or any other lawful officer of the town or county, returnable for trial before the judge of the recorder's court of the town. *S. v. McHone*, 231, 235.

INDICTMENT AND WARRANT—*Continued.*

A valid warrant of arrest must be based on an examination of the complainant under oath, must identify the person charged, contain directly or by proper reference at least a defective statement of the crime charged, be directed to a lawful officer or to a class of officers commanding the arrest of the accused, and be issued by an officer, lawfully authorized to do so. G.S. 15-18. *S. v. McGowan*, 431.

The issuance of a warrant is a judicial act; the service of a warrant is an executive function. *Ibid.*

The presumption of validity of a warrant when it does not appear in evidence does not apply when there is testimony and statements in the record disclosing its invalidity. *Ibid.*

An order of arrest signed by a police officer and not by a judicial officer as required by G.S. 15-18, is void. *Ibid.*

**§ 9. Charge of Crime.**

A defendant has the constitutional right, as an essential of jurisdiction, that the warrant or indictment charge the offense against him with such exactness that he can have a fair and reasonable opportunity to prepare his defense and to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and further the charge must enable the court, on conviction, to pronounce sentence according to law. *S. v. Strickland*, 100.

G.S. 15-153 does not abolish the requirement that the charge against a defendant must be sufficiently definite to safeguard his constitutional guarantees. *Ibid.*

An indictment charging larceny and receiving stolen goods knowing them to have been stolen, which describes the property in each count as a "quantity of meat" of a specified value belonging to a designated company, *is held* an insufficient description of the property to meet constitutional requirements, and judgment upon conviction under such indictment must be set aside. *Ibid.*

A warrant charging that defendant, trading under a trade name, did, on a specified date, unlawfully and willfully issue a cheque knowing at the time that the named defendant, or the named defendant trading under the designated trade name, or the designated firm, did not have sufficient funds or credit to pay the cheque upon presentation, is sufficient and is not objectionable on the ground that the offense was charged disjunctively or alternately. *S. v. Jackson*, 216.

Objection that the warrant charged the offense disjunctively and alternately must be raised by motion to quash before entering a general plea, and it cannot be asserted by motion in arrest of judgment. *Ibid.*

The indictment must charge the offense with sufficient definiteness to enable defendant to prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense, and to enable the court to know what judgment to pronounce in case of conviction. *S. v. Burton*, 277.

**§ 13. Motions to Quash.**

Upon defendant's demand for a jury trial in a prosecution upon a warrant in the Recorder's Court, the cause was transferred to the Superior Court and an indictment returned by the grand jury. *Held:* The court's unequivocal finding, upon defendant's motion to quash, that the defendant was being tried

upon the indictment, is conclusive, notwithstanding a *lapsus linquae* in the charge that defendant was being tried upon a warrant. *S. v. Owens*, 673.

**§ 15. Amendment.**

The trial court has the discretionary power to allow a warrant to be amended by substituting the words "illegally transporting taxpaid liquor," for the words "transporting illegal taxpaid liquor," since the amendment does not change the nature of the offense intended to be charged. *S. v. McHone*, 231.

A warrant charging that defendant willfully refused to provide expenses of pregnancy of prosecutrix may not be amended by charging defendant with willful refusal to support his illegitimate child, since a warrant may not be amended to charge an offense committed, if at all, after the warrant was issued. *S. v. Ferguson*, 766.

**§ 22. Sufficiency of Indictment to Support Conviction of Less Degree of Crime.**

While an indictment will support a conviction of a less degree of the crime therein charged, it will not support a conviction for an offense more serious than that charged. *S. v. Hare*, 262.

## INFANTS.

**§ 21. Custody and Control—Jurisdiction to Award.**

Any action as it relates to the custody of a child is in the nature of an *in rem* proceeding, and the child must be present in the State and within the jurisdiction of a court of competent jurisdiction before such court may render a valid decree awarding its custody. *Richter v. Harmon*, 373.

The courts of the state in which an infant is residing have jurisdiction to determine the right to its custody even though the domicile of the child be elsewhere. *Ibid.*

Court of state of child's residence may modify custody decree for changed conditions when state rendering decree has lost jurisdiction. *Ibid.*

A court is without power to make a valid order awarding the custody of a child when the child is not within the State, since the court must have jurisdiction before it may enter a valid and enforceable order. *Weddington v. Weddington*, 702.

**§ 22. Right to Custody.**

The courts of this State will not hesitate to award the custody of a minor child to a nonresident parent if it is found that it will be for the best interest of the minor child to do so. *Richter v. Harmon*, 373.

## INSANE PERSONS.

**§ 8. Control, Management and Sale of Property.**

A proceeding may be maintained under G.S. 33-20 to authorize the guardian of an incompetent to settle the ward's interest in a partnership under a plan providing that each partner should receive in settlement certain property together with stock in a proposed corporation to be formed to carry on the business, the proceeding not being one for sale or mortgaging of the incompetent's estate. *In re Edwards*, 70.

INJUNCTIONS.

**§ 8. Continuance, Modification and Dissolution of Temporary Restraining Orders.**

Where, upon the hearing of a motion to show cause why a temporary restraining order should not be continued to the hearing, the evidence supports the court's conclusion that plaintiff is not entitled to the ultimate equity sought, the court, in its discretion, may dissolve the temporary restraining order. *Shuford v. Oil Co.*, 636.

INSURANCE.

**§ 13a. Construction of Insurance Contracts in General.**

While a policy of insurance must be construed liberally with respect to the persons insured and strictly with respect to the insurance company, yet insurance contracts must be construed according to the meaning of the terms used, and when the words are plain and unambiguous, they must be given their ordinary meaning. *McDaniel v. Ins. Co.*, 275.

**§ 39. Accident and Health Insurance—Risks Covered.**

Where a policy provides benefits in case of death of insured through external, violent and accidental means which, except in the case of drowning or death from internal injuries revealed by an autopsy, leave a visible contusion or wound upon the exterior of the body, proof of death by heatstroke or sunstroke does not come within the coverage regardless of whether such death be deemed through external, violent or accidental means, since there is no visible contusion or wound upon the exterior of the body, and the proof does not bring the death within the exceptions. *McDaniel v. Ins. Co.*, 275.

Evidence *held* for jury on question of whether illness had its inception more than fifteen days after issuance of policy. *Cudworth v. Ins. Co.*, 584.

**§ 43½. Auto Insurance—Collision and Accidental Damage.**

The facts agreed were to the effect that an employee, while using the employer's automobile for the performance of his duties within the municipality, took the insured automobile without the knowledge or consent of insured employer, and that the automobile was later located in a distant state, resulting in loss to insured in a stipulated sum. *Held:* The loss was not covered by a policy obligating insurer to pay for any direct or accidental loss of or to the insured automobile, since under the facts agreed, the loss was not accidental. *Sparrow v. Casualty Co.*, 60.

**§ 45½. Auto Theft.**

Where the facts agreed disclose that an employee, while using the employer's car for the performance of his duties within the municipality, took the car without the knowledge or consent of insured, and that later the automobile was found in a distant state, resulting in loss in a stipulated sum, *held*, such loss is not covered by a policy of insurance obligating insurer to pay for loss or damage to the automobile caused by theft, larceny, robbery or pilferage. *Sparrow v. Casualty Co.*, 60.

**§ 54. Windstorm Insurance.**

Testimony of facts tending to show that the damage to the insured house under construction resulted from wind, and testimony *contra* tending to show that the damage resulted from pressure of rain water against the foundation wall, requires the overruling of defendant's motion to nonsuit in an action on a

windstorm policy, the credibility of the conflicting testimony being for the jury. *Wood v. Ins. Co.*, 158.

In an action on a windstorm policy, witnesses may testify as to conditions they saw at the time they visited the scene, as facts within their knowledge, upon which the conclusion as to whether the damage was caused by wind or rain may be drawn by the jury, but it is error to permit the witnesses to give their opinions that the damage was caused by wind since this allows them to decide the ultimate issue and thus invade the prerogative of the jury. *Ibid.*

## INTOXICATING LIQUOR.

**§ 2. Construction and Operation of Statutes.**

In counties not electing to operate county liquor stores, the Turlington Act, as modified by the Alcoholic Beverage Control Act, is applicable. *S. v. Richie*, 182.

In a county not electing to operate county liquor stores, the provisions of G.S. 18-11, as modified by G.S. 18-49 and G.S. 18-58, render the possession of more than one gallon of tax-paid liquor, even though in the home of a resident, *prima facie* evidence that such liquor is kept for the purpose of sale in a prosecution under a warrant or indictment charging that offense. *Ibid.*

In a county not electing to operate county liquor stores, a person may lawfully have or keep in his private dwelling, while same is occupied and used by him as his dwelling only, an unlimited quantity of tax-paid liquor for the personal consumption of himself and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein. *Ibid.*

When the warrant or indictment charges the unlawful possession and unlawful transportation of nontax-paid liquor, defendant may be convicted, as the evidence may warrant, either under the Alcoholic Beverage Control Act, G.S. 18, Article 3, or the Turlington Act, G.S. 18, Article 1, the statutes being construed *in pari materia*. *S. v. Tillery*, 706.

**§ 9a. Indictment and Warrant.**

A count charging possession of tax-paid liquor in a dry county charges no offense apart from the counts of unlawful transportation and possession for the purpose of sale. *S. v. Ritchie*, 182.

Where the warrant charges illegal possession and transportation of nontax-paid liquor, the State is limited to the charges therein set out and must prove that the liquor was nontax-paid. *S. v. Tillery*, 706.

**§ 9d. Sufficiency of Evidence and Nonsuit.**

In this prosecution of a resident of a county which had not elected to operate county liquor stores, the evidence *is held* sufficient to sustain conviction of defendant of possession of tax-paid liquor for the purpose of sale. *S. v. Ritchie*, 182.

Evidence in this case that officers, under authority of a search warrant, found a quantity of tax-paid liquor in defendant's possession in her home, and that defendant possessed it for the purpose of sale, *held* sufficient to take the case to the jury. *S. v. Ingram*, 190.

The evidence considered in the light most favorable to the State *is held* sufficient to sustain defendant's conviction of illegal transportation of taxpaid liquor. *S. v. McHone*, 231.

INTOXICATING LIQUOR—*Continued.*

Where, in a prosecution upon a warrant charging unlawful possession and transportation of nontax-paid liquor, the State introduces no evidence that the container or containers did not bear a revenue stamp of the federal government or stamp of any of the county boards of North Carolina, G.S. 18-8, but the only testimony describing the liquor is that it was "bootleg whiskey," defendant's motion for judgment of nonsuit should have been allowed. *S. v. Tillery*, 706.

**§ 9g. Verdict and Judgment.**

Where an indictment charges separately the unlawful possession and unlawful transportation of intoxicating liquor, a separate judgment may be pronounced on each count. *S. v. Stonestreet*, 28.

The indictment charged defendant with unlawfully and willfully receiving intoxicating liquor. Defendant plead guilty to unlawful possession. The plea must be given significance by reference to the charge, and since "receiving" of intoxicating liquor is not an offense under our statute, the judgment must be arrested. *Ibid.*

JUDGMENTS.

**§ 3½. Construction of Consent Judgments.**

A consent judgment is to be construed in the same way as if the parties had entered into the contract by a writing duly signed and delivered. *Rand v. Wilson County*, 43; *Houghton v. Harris*, 92.

A consent judgment directed trustees named therein to pay taxes lawfully due. The land in question had not been properly listed for more than five years. *Held:* The trustees could not tender the taxes lawfully due for the five years next preceding the tender, but were compelled to pay the amount demanded by the county and then sue to recover so much of the amount as was not lawfully due, G.S. 105-267, and the contention that the judgment authorized them to pay only the taxes due is untenable. *Rand v. Wilson County*, 43.

**§ 17d. Operation and Effect of Judgments of Dismissal.**

When the court allows motion to dismiss as in case of nonsuit, it terminates the action, and no suit is thereafter pending in which the court can make a valid order. *Burton v. Reidsville*, 405.

**§ 18. Process, Service and Jurisdiction.**

Unless a party is brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. Therefore, where service by publication as to certain respondents is fatally defective, the judgment is void as to such respondents. *Jones v. Jones*, 557.

And where the record discloses a fatally defective service by publication, the record controls and not recitals in the judgment that all interested parties were before the court. *Ibid.*

**§ 19. Time and Place of Rendition.**

An order signed out of the county and out of the district without notice to the adversary parties and without their consent is void. *Utilities Com. v. State*, 12.

Where the judge acquires jurisdiction at term, he has jurisdiction to sign judgment out of term and out of the county by consent of the parties. *Houghton v. Harris*, 92.

JUDGMENTS—*Continued.*

**§ 22. Lien of Judgment.**

A duly docketed judgment is a lien on the real property of the judgment debtor situated in the county and owned by the judgment debtor at the time the judgment is docketed and any land acquired by him at any time within ten years from date of the rendition of the judgment. *Dula v. Parsons*, 32.

**§ 23½. Claims of Third Persons.**

Person claiming under unregistered deed may not claim interest as against judgment creditor. *Dula v. Parsons*, 32.

**§ 27a. Setting Aside Default Judgments for Surprise and Excusable Neglect.**

Upon motion to set aside default judgment for surprise and excusable neglect under G.S. 1-220, findings of fact as to conferences between a representative of defendant's insurer and the attorney for plaintiff have no bearing upon defendant's failure to defend the action and will be set aside since defendant's conduct must be judged by what he did and not what a person not a party to the action did. *Sanders v. Chavis*, 380.

Averments that defendant's car involved in the accident was covered by an assigned risk policy of insurance and that the insurer had no knowledge of the institution of the action against insured and no opportunity to defend its insured, do not tend to justify defendant's failure to defend the action or his failure to notify his insurer to do so. *Ibid.*

Where the evidence is sufficient to support the court's finding that plaintiff administrator did nothing to hinder, delay or interfere with the defendant in the defense of the action, and that defendant's failure to defend the action or notify his insurer to do so was inexcusable, the findings support the denial of defendant's motion under G.S. 1-220 to set aside the default judgment, notwithstanding that the court's finding that the evidence of both parties tended to show that plaintiff advised defendant to contact his insurance agent was erroneous in that only plaintiff's evidence tended to support such finding. *Ibid.*

Upon motion to set aside a default judgment under G.S. 1-220, a finding upon supporting evidence that defendant's failure to defend the action was inexcusable renders the existence of a meritorious defense immaterial. *Ibid.*

**§ 32. Operation of Judgment as Bar to Subsequent Action in General.**

Where a second action between the same parties involving the same subject matter is prosecuted to final judgment before the first cause is heard, the judgment in the second action is valid and binding on the parties and estops the parties and their privies not only as to the issues arising on the pleadings, but also as to all relevant and material matters within the scope of the pleadings which the parties in the exercise of reasonable diligence could and should have brought forward, and constitutes a bar to the further prosecution of the action first instituted. *Houghton v. Harris*, 92.

The judgment rolls in previous proceedings to have a segment of abandoned highways declared a neighborhood public road *held* not to support a plea of *res judicata* in plaintiff's action against the owner of land abutting the other side of the abandoned highway to have the plaintiff declared owner in fee and entitled to possession of that half of the abandoned road lying on his side of the center line. *Woody v. Barnett*, 782.

JUDGMENTS—*Continued.*

**§ 33a. Judgments of Nonsuit as Bar to Subsequent Action.**

A judgment of nonsuit is not *res judicata* as to a second action unless it is made to appear that the second action is between the same parties, on the same cause of action, and upon substantially the same evidence. *Pemberton v. Lewis*, 188.

**§ 33b. Judgments as Bar to Subsequent Action—Consent Judgments.**

Consent judgment of compromise and settlement of auto accident liability precludes either party from thereafter litigating such liability. *Houghton v. Harris*, 92.

**§ 33f. Res Judicata—Procedural Orders.**

While procedural order does not constitute *res judicata* in strict sense, unappealed from order striking matter from pleading precludes filing of amended pleading containing substantially identical allegations. *Wall v. England*, 36.

In an action involving the validity of a deed of trust, attacked on the ground of insufficiency of the description, denial of plaintiffs' motion for judgment on the pleadings does not preclude another Superior Court judge, on the hearing on the merits, from adjudicating the sufficiency of the description, when plaintiffs' allegation of ownership is denied in the answer and thus an issue of fact for the jury is raised by the pleadings, certainly when the motion for judgment on the pleadings related to the original pleadings and amended pleadings are filed by permission of the court without objection. *Baldwin v. Hinton*, 113.

Denial of a motion for a new survey in a reference case prior to the filing of exceptions does not preclude another Superior Court judge from ordering a new survey upon the hearing on the exceptions. *Cox v. Shaw*, 191.

**§ 34. Res Judicata—Judgments of Other States.**

In order for a judgment of another state to be *res judicata* or binding upon a resident of this State under the Full Faith and Credit Clause of the Federal Constitution, Article IV, Section 1, the resident must have been a party to the action in such other state or in privity with the defendant therein. *Bullock v. Crouch*, 40.

A judgment obtained in another state against the driver of a motor vehicle upon adjudication that the accident in suit was caused by the negligence of such driver, is not *res judicata* or binding upon the employer of the driver sought to be held liable under the doctrine of *respondeat superior* in an action instituted in this State, since the employer's liability is derivative and does not arise out of mutuality. *Ibid.*

**§ 35. Plea of Bar, Hearings and Determination.**

A motion for dismissal on the ground that a judgment of nonsuit in a prior action between the parties constituted *res judicata*, is premature when made prior to the introduction of evidence, since only by a consideration of the evidence in both actions may the court determine whether or not the evidence in both trials is substantially the same, and certainly such motion is properly denied when the court finds that the allegations in the complaints in the two actions are not substantially identical. *Pemberton v. Lewis*, 188.

LABORERS' AND MATERIALMEN'S LIENS.

**§ 5. Filing and Notice of Lien.**

The filing of a lien for labor or materials imports more than mere delivery of the written claim to the clerk's office, and requires the transcribing of the notice of lien in the lien docket in the clerk's office and the indexing of same in the name of the claimant, G.S. 44-38, G.S. 2-42, but, as distinguished from liens required by statute to be registered in the office of the register of deeds, G.S. 161-22, does not require cross-indexing. *Saunders v. Woodhouse*, 608.

The attachment of original notice and claim of lien, in due and proper form, to a page in the "lien docket" book in the clerk's office with the indexing of the same in the name of claimant, showing the name of the lienee, is a filing of the lien as required by statute, notwithstanding that the book was used for filing liens for old age assistance, G.S. 108-30.1, and notwithstanding that the clerk filled in blanks left exposed on the page relating to old age assistance, since both liens are required to be filed in the one lien docket book, G.S. 44-38, G.S. 2-42, and since the recitals relating to old age assistance, even though inconsistent, could not mislead. This result is not affected by the fact that another lien docket book was kept in the clerk's office, but had not been used for over thirty years, or the fact that all liens had theretofore been filed in the judgment docket. *Ibid.*

**§ 8. Attachment of Lien and Priorities.**

A laborer's or materialman's lien in proper form, which is properly filed and indexed as required by statute, relates back to materials furnished and labor done within six months prior to the filing date, and when perfected by institution of action thereon within six months from the date of filing, has priority over a deed of trust executed prior to the filing of the lien but within the six months period. *Saunders v. Woodhouse*, 608.

**§ 9. Rights and Liabilities of Third Persons.**

In an action to establish and enforce a lien for labor on defendants' land, the holders of a mortgage on the land, asserted as a prior lien, are not necessary parties to a complete determination of the controversy between plaintiff and defendants, but are only proper parties. *Childers v. Powell*, 711.

LANDLORD AND TENANT.

**§ 3. Title of Landlord and Estoppel of Tenant.**

A person who enters into possession of premises as the tenant of another may not deny the title of his landlord. *Harwell v. Rohrabacher*, 255.

**§ 8. Possession and Use.**

The lease provided that lessee should enclose space in lessors' warehouse and pay lessors a stipulated rent per 1,000 square feet of space enclosed. *Held:* The enclosure of space by lessees pursuant to the agreement fixed the location and dimensions of the space leased, and during the term lessors had no right to dismantle any part of the enclosure or take possession of the leased space. *Produce Co. v. Currin*, 131.

In the absence of provision to the contrary, there is an implied covenant that the lessee shall have the quiet and peaceable possession of the leased premises during the term. *Ibid.*

LANDLORD AND TENANT—*Continued.*

The unauthorized entry and repossession of the leased premises by lessors, or others acting under their direction, constitutes a breach of the lease agreement, entitling lessee at his election to sue for damages. *Ibid.*

**§ 12. Actions for Breach of Lease.**

Plaintiff leased certain space in defendants' warehouse. The lease provided that lessors should have the right to use the space for the sale of tobacco from the beginning of the season of any year until October 15. During the term, lessors dismantled part of the enclosure. Lessors offered evidence that the reason the enclosure was dismantled was in order for lessors to have the space considered by the Tobacco Board of Trade in calculating the selling time to be allotted to lessors. *Held:* The evidence is irrelevant, since it explains why lessors dismantled the enclosure, but does not establish legal justification thereof. *Produce Co. v. Currin*, 131.

The measure of damages for the lessors' unauthorized repossession of the premises during the term is the difference between the rent agreed upon and the market rental value for the remainder of the term, plus any special damages alleged and proved. *Ibid.*

Where lessee makes improvements on the property as authorized by the lease agreement, and during the term lessors take unauthorized possession of the premises, the measure of damages, in the absence of allegation and proof of special damages, is the difference between the rent agreed upon and the fair rental value of the leased premises, as improved, for the remainder of the term. *Ibid.*

Where lessee, under the provisions of the lease, encloses a part of lessors' warehouse, under agreement that the cost of such improvements should apply to rent, evidence of the cost of the improvements is competent for the purpose of showing that lessee had paid the rent by application of the costs of the improvements for the full five-year term, and is not objectionable as tending to prove special damages without allegation thereof. *Ibid.*

Where the issue of damages for lessors' breach of the lease agreement involves solely the determination of the fair value of the leased premises as improved by lessee for the remainder of the term, an instruction giving the jury the basic rule for measuring damages for breach of contract, together with the conflicting contentions of the parties based thereon, will not be held erroneous for asserted failure of the court to apply the general rule to the evidence in the case. *Ibid.*

Lessors breached the lease agreement by taking unauthorized possession of the premises during the term. No special damages were alleged or proved, and the issue of damages related solely to the difference between the rent agreed and the rental value of the premises as improved by lessee. *Held:* The rule requiring a party to minimize his damages has no application to lessee. *Ibid.*

LARCENY.

**§ 4. Indictment.**

Indictment charging larceny of "quantity of meat" of specified value *held* insufficient. *S. v. Strickland*, 100.

## LIMITATION OF ACTIONS.

**§ 15. Pleading the Statute.**

Defense of statute of limitations is not presented in controversy without action when facts agreed do not refer thereto. *Blowing Rock v. Gregorie*, 364.

## MANDAMUS.

**§ 1. Nature and Grounds of Writ in General.**

The function of *mandamus* is to compel inferior tribunals, officers, or administrative boards to perform duties imposed upon them by law, which writ is issued in the exercise of the court's original, as distinguished from appellate, jurisdiction, and the writ may not be used to serve the purpose of a writ of error or appeal, or to correct action, however erroneous it may have been. *Realty Co. v. Planning Board*, 648.

**§ 4. Proceedings.**

In *mandamus* proceedings, the general rules governing trials of actions at law and suits in equity control, in so far as applicable, in respect to the right (1) to a hearing, (2) to present evidence, and (3) to object to rulings on questions of reception and exclusion of evidence. *Realty Co. v. Planning Board*, 648.

Where the pleadings in an action for *mandamus* raise an issue of fact, either party is entitled to a jury trial, G.S. 1-513, but if neither party moves for jury trial, it then becomes incumbent upon the trial judge to find the facts and enter judgment thereon. *Ibid.*

The court may not consider records and documents which were neither offered in evidence nor brought up by ancillary writ of *certiorari*. *Ibid.*

## MASTER AND SERVANT.

**§ 2d. Collective Bargaining.**

As a general rule, an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions. *Lammonds v. Mfg. Co.*, 749.

Plaintiff employee alleged the existence of a collective labor contract between defendant and a labor union, that plaintiff was required to work under an increased work load assignment in violation of the contract, and that such violation entitled plaintiff to back pay under the terms of the contract. *Held:* The complaint states a cause of action in plaintiff's favor as a third party beneficiary. *Ibid.*

Common law arbitration *held* not to preclude action to recover benefits due employee under collective labor contract. *Ibid.*

**§ 4a. Distinction Between Employee and Independent Contractor.**

Where a subcontractor is employed to make necessary repairs in a heating system, subject to the right of the contractor and the owner to inspect but without the right of supervision during the progress of the work, the subcontractor is an independent contractor, and in regard to the liability of the owner for injury to an employee of the subcontractor, whether the contractor was an agent of the owner or was acting for itself in the discharge of a duty owed the owner, is immaterial. *Petty v. Print Works*, 292.

MASTER AND SERVANT—*Continued.*

**§ 9. Wages and Compensation.**

Evidence that plaintiff was employed as manager for defendant's business in a certain town at a stipulated salary per week, that the work-week contemplated was 44 hours, and that it was agreed that plaintiff should have additional compensation for overtime, together with evidence that plaintiff had worked overtime, *is held* sufficient to overrule nonsuit in plaintiff's action to recover compensation for such overtime. *Leonard v. Benfield*, 169.

The amount of additional compensation for overtime work, if any, in the absence of specific agreement, is the reasonable worth of the services rendered. *Ibid.*

**§ 12. Liability of Contractee to Employees of Independent Contractor.**

Nonsuit *held* proper in this action by employee of independent contractor against contractee to recover for negligent injury caused by defective scaffold gratuitously furnished by contractee. *Petty v. Print Works*, 292.

**§ 21. Liability of Employer for Negligence of Employee.**

A person who is injured by the negligence of an employee may sue the employee alone or the employer alone, or may bring a single action against both, and where action is brought against the employee alone, no recovery can be had in a subsequent action against the employer if the employee satisfies the judgment against him or obtains a verdict in his favor, nor may the amount of the recovery against the employer exceed the amount of the recovery against the employee. *Bullock v. Crouch*, 40.

**§ 39a. Employees Within Coverage of Compensation Act.**

The facts found by the Industrial Commission in this case *are held* to support its finding that the deceased insurance agent, at the time of his fatal accident, was not an employee of defendant insurance companies within the purview of the Workmen's Compensation Act. *Hawes v. Accident Asso.*, 62.

**§ 40c. Compensation Act—Whether Accident Arises in Course of Employment.**

Evidence that, although the employee had been on a private mission of his own prior to the injury in suit, he had returned to his employment and was about his employer's business at the time of the accident, supports the conclusion of the Industrial Commission that the accident arose in the course of the employment. *Gant v. Crouch*, 604.

**§ 40d. Compensation Act—Whether Accident Arises Out of Employment.**

Where there is conflicting evidence as to whether the accident causing the death of an employee was due to his intoxication or due to other traffic forcing the vehicle the employee was driving off the road onto the shoulders, which gave way, causing the vehicle to turn over, and resulting in the death of the employee, the finding of the Commission that the accident was not caused by the employee's intoxication, being supported by evidence, is binding on the courts. *Gant v. Crouch*, 604.

**§ 42b. Compensation Carriers Liable for Award.**

The evidence supported the finding of the Industrial Commission that the employee was exposed to the hazards of silica dust up to the time of the termination of his employment for disability from silicosis. At that time the em-

ployer had no compensation insurance, the policy having expired some nineteen days prior thereto. A majority of the Court being of the opinion that the insurance carrier is liable at least *pro rata* in accordance with the number of working days or parts thereof it was on the risk during the last thirty days the employee worked, G.S. 97-57, the cause is remanded for computation of the respective liabilities. *Mayberry v. Marble Co.*, 281.

**§ 50. Compensation Act—Burden of Proof.**

Where the recovery of compensation by the dependents of a deceased employee is resisted on the ground that the death of the employee was occasioned by his intoxication, the burden of proof on such defense is on defendants. *Gant v. Crouch*, 604.

**§ 52. Hearings and Findings of Commission.**

The Industrial Commission is a continuing body which acts by a majority of its qualified members. Therefore, a decision reached by a 2-1 vote of its then members is a decision of the majority notwithstanding that a prior member of the Commission had voted *contra* on the question at a previous hearing. *Gant v. Crouch*, 604.

**§ 53b(1). Compensation Act—Amount of Award for Injury.**

Where an employee suffers an injury to his eye arising out of and in the course of his employment, resulting in temporary total disability and permanent partial loss of vision of an eye, the employee is entitled to compensation for the healing period, plus compensation for 120 weeks, for that portion of the compensation provided for total loss of an eye (60 per cent), that the partial loss of vision bears to a total loss. G.S. 97-31(2)(t). *Watts v. Brewer*, 422.

Claimant received an injury to his eye in the course of his employment. After a healing period of a little more than a month, he returned to his same job at the same wage. *Held:* Notwithstanding that "disability" as used in G.S. 97-31 has the same connotation accorded it in G.S. 97-2(i), the provision of the former statute that disability caused by the injuries enumerated "shall be deemed to continue" are mandatory, and the Commission is without authority to deny compensation which the statute provides on the ground that the employee is earning as much as he was earning before the injury. *Ibid.*

**§ 53b(4). Compensation Act—Costs and Attorneys' Fees.**

Where the notice of appeal from the Industrial Commission and the exceptions which defendants filed in the Superior Court recite that the insurance carrier excepted to the award and appealed to the Superior Court, the recital supports the finding of the Superior Court that the appeal was brougth by the insurer, and supports the court's order that reasonable fees to the attorney for claimants should be allowed as a part of the costs. *Gant v. Crouch*, 604.

**§ 53d. Persons Entitled to Distribution of Award Under Compensation Act.**

Where it appears that a child was born to the common law wife of the employee shortly after the employee's death, but there is no sufficient evidence that the child was an acknowledged illegitimate child of the employee, such child is not entitled to participate in the distribution of the award as a dependent. *Wilson v. Construction Co.*, 96.

MASTER AND SERVANT—*Continued.*

The employee died leaving surviving him his widow and three children. At the time of his death the employee was not living with his wife, but was living with another as his common law wife and was supporting her and her three children of which he was not the father. *Held:* The employee's widow and three children are conclusively presumed to be wholly dependent and are entitled to the entire compensation payable for his death, share and share alike, to the exclusion of the common law wife and her children. *Ibid.*

Under the Workmen's Compensation Act those entitled to benefits for the death of an employee resulting from one of the risks of industry are entitled to make claim directly before the Industrial Commission in lieu of the old action for wrongful death, and if the employee leaves no widow or children surviving, actual dependency must be established, and if there is no actual dependent, the compensation is to be commuted and paid to the employee's next of kin. G.S. 97-40. *Ibid.*

**§ 55d. Appeal and Review of Award in Superior Court.**

The findings of fact of the Industrial Commission are conclusive and binding if supported by competent evidence, notwithstanding that there may be competent evidence which would have supported a contrary finding. *Hawes v. Accident Asso.*, 62.

Conclusions of law of the Industrial Commission based on the facts found are reviewable, and whether the relationship between the parties upon certain facts was that of employer and employee is a conclusion of law and reviewable. *Ibid.*

On appeal from award of the Industrial Commission, appellants are not required to serve their assignments of error at the time they serve notice of their appeal, but have a reasonable time after the certification of the record by the Industrial Commission to file their assignments of error along with the certified copy of the record. Five days *is held* a reasonable time within the meaning of this rule. *Wilson v. Construction Co.*, 96.

**§ 60. Right to Unemployment Compensation.**

Construing G.S. 96-13 and G.S. 96-14 together to harmonize and give effect to all of the provisions of each, it *is held* that the words "available for work" as used in G.S. 96-13 mean "available for suitable work" in the same sense as the words "suitable work" are used in G.S. 96-14. *In re Miller*, 509.

A textile worker whose religious faith impels her to regard the period from sundown Friday until sundown Saturday as the true Sabbath, and who therefore seeks only such employment as would not require her to do secular work during this period, *held* not unavailable for work within the purview of G.S. 96-13, properly construed, since her refusal to engage in work which would offend her moral conscience would not render her unavailable for suitable work. *Ibid.*

MORTGAGES.

**§ 4. Form and Requisites.**

A deed of trust describing the land as located in a certain township and settlement, and consisting of 10.65 acres, more or less, is void for insufficiency of the description, nor is reference in the instrument to the item of a will disclosing that the trustor was devised a 19-acre tract on the west end of a 54-acre tract a sufficient aid to the description when it appears that the trustor had

been allotted 19 acres in the center of the 54-acre tract, and intended to convey a part of such tract as security. *Baldwin v. Hinton*, 113.

**§ 36. Deficiency and Personal Liability.**

Where, in an action on a note, plaintiffs' evidence makes out a *prima facie* case and does not establish defendant's affirmative defense that the action was to recover a deficiency judgment precluded by G.S. 45-21.38, the dismissal of the action by the court prior to the introduction of evidence by defendant, upon the court's finding of facts in accordance with the allegations of defendant's affirmative defense, is reversible error as depriving plaintiffs of their constitutional right of trial by jury. *Ingle v. McCurry*, 65.

MUNICIPAL CORPORATIONS.

**§ 4. Dissolution.**

An election to vote on a proposed repeal of the charter of a municipal corporation created by special act, upon petition of not less than twenty-five per centum of its qualified electors, G.S. 160-353, *et seq.*, may not be held prior to or simultaneously with the first regular election to be held in such municipality, the statute being strictly construed since such election is in effect to repeal the special act of the General Assembly creating the municipality. *Tillett v. Mustian*, 564.

**§ 8d. Housing and Housing Authorities.**

The disposition of apartment houses owned by the city and situate on lands of others, rests in the sound discretion of the council of the city. *Burton v. Reidsville*, 405.

**§ 12. Liability for Torts—Governmental or Corporate Function.**

Governmental function and liability for negligence are diametrically opposed unless liability for negligence is expressly provided by statute. Whether the maintenance of a park and playground is a governmental function of a municipality, *quaere? Lovin v. Hamlet*, 399.

**§ 22. Rights of Parties Under Ultra Vires Contract.**

Where contract is between municipality and corporation in which municipal official is interested, the contract is not only void as against public policy, but no recovery may be had thereon upon *quantum meruit*. *Insulating Co. v. Davidson County*, 252.

**§ 25b. Control and Regulation of Streets.**

Testimony to the effect that at an intersection within a municipality, one street was a through street and the other a cross street on which a stop sign was erected, nothing else appearing, is sufficient to warrant a finding that the municipal authorities had caused the stop sign to be placed on the cross street as authorized by statute. *Smith v. Buie*, 209.

A municipality holds its streets in trust not only for itself and its citizens, but also for the general public. *Blowing Rock v. Gregorie*, 364.

G.S. 153-9(17) applies to municipalities in closing a public street. *Ibid.*

G.S. 153-9(17) and G.S. 160-200(11) may be harmonized, and therefore must be construed *in pari materia*, so that a municipality may not close a public road or street without giving notice by registered mail to individuals owning prop-

erty adjoining the road or street, and notice by publication in the newspaper published in the county. *Ibid.*

**§ 30. Power to Make Improvements and Levy Assessments Therefor.**

An act applicable to a single municipality which authorizes the municipality to make street improvements and assess the cost thereof against abutting property owners without a petition *held* not in contravention of Section 29, Article II, of the Constitution of North Carolina, since the act is merely declaratory of the powers given the municipality under the general law and does not purport to authorize the laying out of a particular street or streets or to authorize the maintenance or discontinuance of a designated street or streets. *In re Assessments*, 494.

Statutory procedure for public improvements *held* substantially complied with. *Ibid.*

**§ 32. Amount of Assessments and Land Subject Thereto.**

Where a triangular area condemned by a municipality for street purposes lies between the lot of petitioner and the actual street, so that the last twenty feet of petitioner's lot abuts on the triangular area rather than on the street, such twenty feet may not be used in calculating the number of feet of petitioner's property which abuts the street for the purpose of assessment in the absence of evidence that the area had been used for street and sidwalk purposes by the municipality. *In re Assessments*, 494.

**§ 36. Nature and Extent of Municipal Police Power in General.**

The rules applicable to the construction of statutes apply equally to the construction of an ordinance adopted by the "legislative body" of a municipality. *In re O'Neal*, 714.

The General Assembly has delegated its police power to enact zoning regulations to municipal corporations. *Ibid.*

**§ 37. Zoning Ordinances and Building Permits.**

In this action contesting validity of zoning regulation prohibiting enlargement of church school, *held:* the Bishop, by accepting the benefits of the provisions of the zoning ordinance, waived any right to contest the validity of the ordinance, and under the facts, the Sisters were likewise estopped. *Convent v. Winston-Salem*, 316.

In order to be valid, a zoning regulation must bear a substantial relation to the public health, safety, morals or general welfare. *In re O'Neal*, 714.

The zoning power of a municipality is limited by the enabling act, and the "legislative body" of a municipality cannot delegate such power to a board of adjustment or to a zoning commission. Therefore a board of adjustment may not permit a type of business or building prohibited by ordinance. *Ibid.*

North Carolina Building Code has force of law. *Ibid.*

Misapprehension as to the applicability of the 1936 North Carolina Building Code and delay in its enforcement do not bar later enforcement. *Ibid.*

Where an ordinance deals solely with zoning, a provision thereof relating to the continuance of lawful uses relates to uses lawful in respect to zoning regulations, and a use lawful under zoning regulations in force at the time of the adoption of the ordinance comes within the exception, notwithstanding that

the building, at the time of the beginning of its use for a nursing home, violated pertinent provisions of the Building Code. *Ibid.*

Zoning regulations must be interpreted to achieve a fair balance between the purpose of preserving the true character of a neighborhood by excluding new uses and structures prejudicial to the restricted purposes of the area, and the purpose of protecting an owner's property from impairment which would result from enforced accommodation to new restrictions. *Ibid.*

Zoning ordinances are in derogation of the right of private property, and exemptions should be liberally construed in favor of the property owner. *Ibid.*

Under facts of this case owner was entitled to construct building to conform to Building Code in order to continue use permitted at time of adoption of zoning ordinance. *Ibid.*

## NARCOTICS.

### § 3. Forfeitures.

The forfeiture of a vehicle used in illegal transportation of narcotics can be defeated and the car recovered by the true owner only if he can establish his title and show that the transportation of contraband was without his knowledge or consent. *S. v. McPeak*, 273.

Where a petitioner testifies that the vehicle used in the transportation of narcotics was owned by her, and introduces in evidence bill of sale and registration card issued in her name for a particular year, but there is evidence that the car was registered in the name of another for the subsequent year, and that the driver, when arrested, had in his possession registration card showing such other as the owner, and testifies that he and such owner are one and the same, the conflicting evidence is for the jury on the issue, the credibility of the witnesses, and the weight to be given their testimony being for its determination. *Ibid.*

## NEGLIGENCE.

### § 1. Acts and Omissions Constituting Negligence in General.

Actionable negligence embraces negligence and proximate cause. *Williamson v. Clay*, 337.

A person who enters upon an active course of conduct is under positive duty to exercise ordinary care to protect others from harm, and a violation of this duty is negligence. *Ibid.*

An unavoidable accident can occur only in the absence of causal negligence. *Baxley v. Cavenaugh*, 677.

### § 3. Dangerous Substances and Instrumentalities.

A person may be negligent in failing to ascertain that liquid in bottom of can was gasoline before filling the can with water and throwing contents on fire. *Williamson v. Clay*, 337.

### § 4b. Doctrine of Attractive Nuisance.

The attractive nuisance doctrine does not apply to a municipal recreation and amusement park; children are at least impliedly invited to visit such park and make use of its facilities. *Lovin v. Hamlet*, 399.

It is not negligence for a person to maintain an unenclosed pool or pond on his premises. *Ibid.*

NEGLIGENCE—*Continued.*

Liability under the doctrine of attractive nuisance is usually predicated upon proof that children were in fact attracted by the instrumentality or condition which caused injury or death, and that children had been attracted to such instrumentality or condition to such an extent and over such a period of time that any person of ordinary prudence would have foreseen that injury or death was likely to result. *Ibid.*

Complaint *held* insufficient to state cause of action for wrongful death upon doctrine of attractive nuisance. *Ibid.*

**§ 6. Concurring Negligence.**

Negligence originating from separate or distinct sources or agencies operating independently of each other may concur in proximately causing injury, and in such event, the author of each negligent act or omission may be held liable by the injured party severally or together as joint tort-feasors. *Riddle v. Artis*, 668.

**§ 7. Intervening Negligence.**

In order for the negligence of one wrongdoer to insulate the negligence of another, it must break the chain of causation set in motion by the original wrongdoer and become itself solely responsible for the injuries, and be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer and produce a result which otherwise would not have occurred, and which reasonably could not have been anticipated. *Hayes v. Wilmington*, 525.

In order for the intervening negligence of an independent agency to relieve the original wrongdoer of liability, such intervening negligence must constitute an independent force which breaks the chain of causation and turns aside the natural sequence of events set in motion by the original wrongdoer and be reasonably unforeseeable on the part of the original actor *Riddle v. Artis*, 668.

**§ 8. Primary and Secondary Liability.**

The doctrine of primary and secondary liability in tort actions is based on active negligence and negative negligence of joint tort-feasors. *Lewis v. Ins. Co.*, 55.

The doctrine of primary and secondary liability as applied in tort cases is a branch of the law of indemnity, and the doctrine is not applicable when the person against whom indemnity is sought breaches substantially equal duties owed to the injured person, since if both are *in pari delicto*, neither will be required to relieve the other of the entire loss. *Hayes v. Wilmington*, 525.

**§ 9. Anticipation of Injury.**

Foreseeability, as an element of proximate cause, does not require that the tort-feasor should have been able to foresee the injury in the precise form in which it occurred, but only that he could have foreseen, in the exercise of due care, that consequences of a generally injurious nature would likely result from his act or omission. *Riddle v. Artis*, 668.

**§ 9½. Anticipation of Negligence.**

It is a well settled principle of law that a person is not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he is entitled to assume

and to act upon the assumption that every other person will perform his duty and obey the law. *Weavil v. Myers*, 386.

**§ 11. Contributory Negligence of Persons Injured in General.**

Whether inattention to a known danger, when caused by the momentary and involuntary diversion of plaintiff's attention, constitutes contributory negligence as a matter of law, is to be determined upon the circumstances of each particular case. *Dennis v. Albemarle*, 221.

Contributory negligence need not be the sole proximate cause of the injury in order to bar recovery, but suffices for this purpose if it contributes to the injury as a proximate cause, or one of them. *Weavil v. Myers*, 386.

Contributory negligence on the part of plaintiff presupposes negligence on the part of defendant, and bars recovery if it concurs with defendant's negligence in proximately causing the injury. *Garrenton v. Maryland*, 614.

**§ 14½. Sudden Peril or Emergency.**

What constitutes due care in a sudden emergency is to be determined in the light of what an ordinarily prudent person would have done under such emergency circumstances. *Williamson v. Clay*, 337.

**§ 16. Pleadings in Actions for Negligence.**

In an action for negligence it is not necessary for plaintiff to allege specifically that it was the duty of defendant to do or not to do a particular thing, it being sufficient for plaintiff to state in a concise manner the essential, ultimate facts from which such duty appears or will be implied by law. *Billings v. Taylor*, 57.

In an action for negligence it is not necessary that custom or common practice be specifically pleaded, since these are evidentiary facts bearing on the question of due care, and may be proved under the allegation of ultimate facts showing negligence. *Ibid.*

In an action for personal injury, allegations in the cross action of one defendant against another defendant to the effect that such other defendant was required under the contract for the work out of which the injury arose to furnish faithful performance bond and take out and maintain liability and property damage insurance, are irrelevant and are properly stricken on motion aptly made even though the surety company, later joined as a party, fails to move that such allegations be stricken. *Hayes v. Wilmington*, 548.

**§ 17. Burden of Proof in Actions for Negligence.**

In order to recover for actionable negligence plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach. *Petty v. Print Works*, 292.

**§ 18. Relevancy and Competency of Evidence.**

In an action for damages for personal injury, evidence that the defendant's liability for the act complained of has been insured by a third party is ordinarily incompetent. *Hayes v. Wilmington*, 548.

**§ 19b(1). Sufficiency of Evidence and Nonsuit on Issue of Negligence.**

Evidence *held* for jury on issue of defendant's negligence in failing to anticipate or ascertain that can contained inflammable substance before throwing contents on fire. *Williamson v. Clay*, 337.

NEGLIGENCE—*Continued.*

**§ 19c. Nonsuit for Contributory Negligence.**

Nonsuit on the ground of contributory negligence may be allowed when, and only when, no other inference is reasonably deducible from the plaintiff's evidence. *Caughron v. Walker*, 153; *Smith v. Buie*, 209; *Dennis v. Albemarle*, 221.

If plaintiff's evidence establishes contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom, the defendant is entitled to have his motion for judgment of nonsuit sustained. *Bradham v. Trucking Co.*, 708.

While diverting circumstances, in general or standing alone, will not ordinarily preclude nonsuit for plaintiff's failure to see and avoid a known danger, when, under all of the circumstances and conditions, diverse inferences may be drawn as to whether a reasonably prudent man, under similar circumstances, would have been advertent to the danger in time to have avoided the injury, the issue of contributory negligence is for the jury. *Dennis v. Albemarle*, 221.

**§ 20. Instructions in Actions for Negligence.**

Defendant's evidence tended to show that he was confronted by a fire in the upholstery of a car being repaired, that he picked up a can and filled it with water and threw the contents on the fire, that when he picked up the can it had a little liquid in the bottom which he thought was water, but which turned out to be gasoline or other inflammable liquid. Defendant contended he was confronted by an acute emergency. *Held:* The court should have applied the apposite legal principles to defendant's evidence, and a general instruction on the doctrine of sudden emergency is insufficient. *Williamson v. Clay*, 337.

An instruction on the issue of contributory negligence to the effect that if plaintiff were guilty of contributory negligence which was the proximate cause of the accident, to answer the issue in the affirmative, must be *held* for error as excluding the question of concurring proximate cause. *Garrenton v. Maryland*, 614.

**§ 21. Issues and Verdict.**

The jury answered the issues of negligence and contributory negligence in the affirmative and awarded damages. *Held:* The court should have accepted the verdict and rendered judgment thereon, treating the award of damages as surplusage, and when the court erroneously refuses to accept the verdict and sends the jury back for further deliberation, judgment for plaintiff upon the revised verdict will be set aside and a new trial awarded. *Swann v. Bigelow*, 285.

PARENT AND CHILD.

**§ 1b. Liability of Parent for Negligent Injury to Child.**

In this State an action for wrongful death of an unemancipated child cannot be maintained against his mother for ordinary negligence resulting in his death, since, had the child survived, he could not have maintained an action against her to recover damages for his injuries. *Lewis v. Ins. Co.*, 55.

Therefore, defendant in action for wrongful death may not have the mother joined for contribution or indemnity. *Ibid.*

## PARTIES.

**§ 1. Parties Plaintiff.**

Where a consent judgment directs named persons to sell and convey land, to collect the proceeds, to pay the taxes lawfully due, and to distribute the balance as directed, the persons named are trustees of an express trust within the purview of G.S. 1-63, notwithstanding that the judgment denominates them as commissioners, and may maintain an action to recover the taxes paid under protest without the joinder of the beneficiaries. *Rand v. Wilson County*, 43.

Every action must be prosecuted in the name of the real party in interest. *Terrace, Inc., v. Indemnity Co.*, 595.

**§ 7. Interveners.**

While ordinarily it is within the discretion of the court to permit proper parties to intervene, G.S. 1-73, where defendants file no answer and whatever judgment may be entered will be by default and will not affect the rights of such third parties, they may not be allowed to intervene and thus engraft a new and live controversy on a moribund action, but must litigate their rights as between themselves and plaintiff by independent action. *Childers v. Powell*, 711.

**§ 12. Deletion of Parties.**

Where the individual defendant is mentioned only in the captions of the summons and complaint, without any reference to him in the body of the complaint, his name should be stricken. *Weavil v. Myers*, 386.

## PARTITION.

**§ 4c. Decree of Sale for Partition.**

Where, in partition proceedings, the evidence supports the court's findings of fact upon which it is adjudged that a deed of trust on the land be canceled and claim for betterments against the tenant in possession be denied, the judgment will be affirmed as to all parties properly before the court, but when it appears that some of respondents were not validly served with process, order for sale for partition must be set aside and the cause remanded so that they may be served and given an opportunity to show cause, if any they have, why they should not be bound by the judgment. *Jones v. Jones*, 557.

**§ 4g(1). Actual Partition—Division.**

Where, in the actual division of land between two tenants in common, there is a difference in the value of the two tracts, the person to whom is allotted the more valuable tract should pay to the other only one-half the difference in the value. *Byrd v. Thompson*, 271.

**§ 4g(3). Actual Partition—Appeal to Superior Court.**

Where actual partition has been ordered, whether the tracts as divided by the commissioners are unequal in value or fair and equitable is a question of fact determinable by the Superior Court on appeal, and its order confirming the report will not be disturbed when the judgment is supported by the findings and the findings are supported by the evidence. *Byrd v. Thompson*, 271.

**§ 6. Parol Partition.**

A parol partition by tenants in common is not void, but is voidable only by the parties thereto or their heirs or assigns. *Baldwin v. Hinton*, 113.

PARTITION—*Continued.*

**§ 7½. Partition by Unilateral Act of One Tenant.**

One tenant in common cannot make a valid partition binding on the other by assuming to convey or devise either half of the lands specifically. *Taylor v. Taylor*, 726.

PARTNERSHIP.

**§ 1c. Firm Property.**

Under the Uniform Partnership Act, G.S. 59-31 *et seq.*, each partner is co-owner with the other partners of the specific partnership property as a tenant in partnership, and each has an interest in the partnership and the right to participate in the management. Whether the record title to realty owned by the partnership is in the name of one partner, rather than the names of all, makes no difference unless innocent third parties are affected. *Ewing v. Caldwell*, 18.

**§ 10. Dissolution by Death of Partner.**

Upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners for partnership purposes, and the interest of the deceased partner in the partnership is his share of the profits and surplus, which is personalty. *Ewing v. Caldwell*, 18.

**§ 13. Collection of Assets by Surviving Partner and Accounting.**

Only personal representative of deceased partner may sue for accounting. *Ewing v. Caldwell*, 18.

PENALTIES.

**§ 1. Nature and Essentials of Right of Action.**

An action to recover a statutory penalty, including the statutory penalty for usurious interest paid, is *ex contractu*. *Credit Corp. v. Motors*, 326.

PHYSICIANS AND SURGEONS.

**§ 14. Duties and Liabilities in General.**

The acceptance of a person as a patient by a physician or surgeon does not create a contract in the ordinary sense of that word, but rather a status or relationship, although in any event the agreement imposes on the physician or surgeon the duty, in the treatment of the patient, to apply his skill and ability in a careful and prudent manner. *Kennedy v. Parrott*, 355.

A surgeon may not be held liable on the basis of negligence for conduct resting upon judgment, opinion or theory when the surgeon possesses the requisite skill and ability and acts according to his best judgment and in a careful and prudent manner. *Ibid.*

**§ 15½. Unauthorized Operations.**

Where a patient consents to a major internal operation, the consent, in the absence of proof to the contrary, will be construed as general in nature, and the surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated in order to remedy any abnormal or diseased condition discovered in the area of the original incision. *Kennedy v. Parrott*, 355.

PHYSICIANS AND SURGEONS—*Continued.*

**§ 20. Sufficiency of Evidence and Nonsuit in Actions for Malpractice.**

Evidence *held* not to show that extension of operation in accordance with sound surgical procedure was unauthorized or that operation was negligently performed. *Kennedy v. Parrott*, 355.

PLEADINGS.

**§ 1. Filing Complaint.**

The court's denial of defendant's motion to dismiss for failure of plaintiff to file the complaint in due time will not be disturbed, since the court in its discretion has authority to enlarge the time for pleading, G.S. 1-152, and the exercise of such discretion is not reviewable. *Early v. Eley*, 695.

**§ 2. Joinder of Causes.**

Causes of action against three separate defendants based on the alleged violation of three separate and distinct contracts, entered into at different times, with different expiration dates, are improperly joined, there being no allegations disclosing a connected series of transactions connected with the same subject of action. *Exterminating Co. v. O'Hanlon*, 457.

**§ 3a. Statement of Causes of Action in General.**

Where plaintiffs declare upon several causes of action, each cause should be separately stated. *Tart v. Byrne*, 409.

Where the complaint alleges a contract between plaintiff corporation and an individual defendant, but the contract attached to the complaint as an exhibit discloses that the contract sued on was between the individual defendant and a different corporation, the exhibit puts to naught the action asserted in the complaint, since the legal entity of each corporation may not be disregarded. *Exterminating Co. v. O'Hanlon*, 457.

**§ 6. Answer—Time for Filing.**

Where service is had by publication in a special proceeding, respondents should be given not less than 10 days after the seven days from the last publication in which to answer or demur. *Jones v. Jones*, 557.

**§ 7. Answer—Defenses in General.**

A defendant may set up and rely upon contradictory defenses. *Hayes v. Wilmington*, 525.

**§ 10. Counterclaims.**

Where plaintiff's action is on contract and defendants' counterclaim exists at the commencement of the action and is on contract, it is not required that such counterclaim relate to the contract or transaction set forth in the complaint, G.S. 1-137(2) rather than G.S. 1-137(1) being controlling. *Credit Corp. v. Motors*, 326.

In plaintiff's action in debt, defendants may set up counterclaims to recover the penalty for usurious interest paid by defendants to plaintiff in connection with separate and independent transactions between them when the claims for such penalties existed prior to the commencement of plaintiff's action. *Ibid.*

**§ 15. Office and Effect of Demurrer.**

Upon demurrer a complaint will be liberally construed with a view to substantial justice between the parties, and its allegations of fact will be taken as

PLEADINGS—*Continued.*

true with every reasonable intendment in favor of the pleader, but a demurrer does not admit conclusions or inferences of law. *Weavil v. Myers*, 386.

A demurrer is a pleading within the purview of G.S. 1-151 requiring that pleadings be liberally construed with a view to substantial justice between the parties. *Exterminating Co. v. O'Hanlon*, 457.

A demurrer admits the allegations of fact contained in the complaint, but does not admit legal conclusions drawn therefrom by the pleader. *Tillett v. Mustian*, 564; *Skinner v. Evans*, 760.

**§ 17. Demurrer—Statement of Grounds.**

Demurrer, in this case, liberally construed *held* to substantially set forth as the ground of demurrer a misjoinder of both parties and causes, even though it does not use the specific words. *Exterminating Co. v. O'Hanlon*, 457.

**§ 19a. Demurrer to Jurisdiction.**

Upon motion to dismiss on the ground that the court has no jurisdiction of the subject matter, the court is limited to a consideration of factors bearing on the question of jurisdiction as disclosed by the record and the pleadings. *Utilities Com. v. Truck Lines*, 442.

**§ 19b. Demurrer for Misjoinder of Parties and Causes.**

Demurrer for misjoinder of parties and causes of action *held* properly sustained. *Tart v. Byrne*, 409.

Complaint alleging separate causes of action against different defendants for breach of separate contract *held* demurrable for misjoinder of parties and causes. *Exterminating Co. v. O'Hanlon*, 457.

**§ 19c. Demurrer for Failure of Complaint to State Cause of Action.**

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, it will survive a demurrer based on the ground that it does not allege a cause of action, since a complaint cannot be overthrown by a demurrer unless it is totally lacking in sufficiency. *Weavil v. Myers*, 386; *Bailey v. Bailey*, 412.

Where the complaint alleges causes of action for breach of contracts executed by the defendants, respectively, with the corporate plaintiff, as shown by the contracts attached as exhibits, but thereafter the summons and complaint are amended by substituting a different corporate plaintiff, the action may not be maintained by the original plaintiff, since its name had been stricken as plaintiff and no action is pending in its name, nor by the substituted plaintiff, since the contracts alleged in the amendment are not between the individual defendants and the substituted plaintiff. *Exterminating Co. v. O'Hanlon*, 457.

**§ 20½. Form and Effect of Judgment on Demurrer.**

Where there is a misjoinder of parties and causes of action, the action must be dismissed; it is only where several causes of action have been improperly joined that the court will sever the causes and divide the action without dismissal. *Tart v. Byrne*, 409; *Exterminating Co. v. O'Hanlon*, 457.

**§ 22. Amendment of Pleadings.**

An order striking certain matter from a pleading with permission to the pleader to file further pleading if so advised, does not authorize the pleader to

file a subsequent amendment reiterating *verbatim* or in substance the matter ordered stricken. *Wall v. England*, 36.

Where it is admitted on appeal that the judgment in question was a consent judgment, motion on appeal for permission to amend the complaint to allege that the judgment was a consent judgment may be allowed. *Rand v. Wilson County*, 43.

The trial court has the discretionary power to permit plaintiff to amend his complaint, prior to the introduction of any evidence, so as to allege damages in a larger amount. *Burchette v. Distributing Co.*, 120.

Court does not have discretionary power to allow amendment of pleadings and process by striking name of plaintiff and substituting another plaintiff. *Exterminating Co. v. O'Hanlon*, 457.

When it appears that the lower court denied motion for leave to amend a pleading under a misapprehension of the pertinent law, the ruling will be set aside with leave to appellant to renew the motion, if so advised. *Trust Co. v. Wolfe*, 469.

**§ 23. Amendment After Decision on Appeal.**

Where judgment overruling a demurrer is reversed on appeal, plaintiff may seek leave to amend if he is so advised. *Lovin v. Hamlet*, 399.

**§ 23½. Effect of Decision Setting Aside Amendment by Trial Court.**

Where an amendment allowed by the trial court is set aside on appeal for want of authority of the court to allow the amendment, the case stands as never amended. *Exterminating Co. v. O'Hanlon*, 457.

**§ 30. Time of Making Motion to Strike Matter of Right or Discretion.**

Motions to strike which are made in apt time are made as a matter of right and are not addressed to the discretion of the lower court. *Hayes v. Wilmington*, 548.

**§ 31. Motions to Strike.**

In an action against a railroad company to recover for the wrongful death of a passenger in an automobile fatally injured in a railroad crossing accident, allegations in the complaint to the effect that before entering the crossing, defendant was under duty to stop its train to ascertain whether the running of the train across the highway would endanger the life of any person thereon, are properly stricken on motion. *Gray v. R. R.*, 107.

In this action for wrongful death, allegations in respect to damages *held* properly stricken in the light of the established rule for the admeasurement of damages in such cases. *Ibid.*

Allegation in cross complaint of one defendant against the other that first defendant was required to take out liability insurance for construction out of which injury arose, *held* irrelevant and should have been stricken on motion. *Hayes v. Wilmington*, 548. In determining whether name of additional party joined for contribution should be stricken on motion, only allegations of cross complaint should be considered, and whether first defendant's negligence insulated that of second under allegations of complaint, is not presented. *Hayes v. Wilmington*, 525.

The motion of an additional party to have his name stricken from the pleadings on the ground that no cause of action was stated against him either in

PLEADINGS—*Continued.*

the main action or in the original defendant's cross-action operates, for all practical purposes, as a demurrer challenging the legal sufficiency of the challenged pleadings to state facts sufficient to constitute a cause of action against him. *Hayes v. Wilmington*, 525.

**§ 31½. Motions to Strike—Subsequent Pleadings.**

An order striking certain allegations from an answer was entered at term by the presiding judge, with leave to defendant to file answer or other pleading. No exception was taken to the order. Thereafter defendant filed an amended further answer. At a subsequent term, upon the hearing of plaintiff's motion to strike, the court found that the amended further answer contained the identical matter stricken under the prior order. *Held:* Order striking the amended further answer is affirmed, since defendant was concluded by the prior order as the law of the case, there being no right of appeal from one Superior Court judge to another. *Wall v. England*, 36.

PRINCIPAL AND SURETY.

**§ 8. Bonds for Private Construction.**

Corporation owning apartment building may not recover on bond for its construction when individual, who purchased all its stock and thus was beneficial owner of all its property, had signed agreement that no claim should be made for defective workmanship or inferior materials. *Terrace, Inc., v. Indemnity Co.*, 595.

PROCESS.

**§ 3. Amendment of Process.**

The court does not have discretionary power to permit an amendment of the summons and complaint by striking the name of the plaintiff and substituting therefor another plaintiff when such amendment changes the cause of action. In an action to enjoin violation of contracts, an amendment substituting for the original corporate plaintiff the name of a separate corporate entity changes the cause of action, and may not be allowed. *Exterminating Co. v. O'Hanlon*, 457.

**§ 6. Service by Publication.**

Where neither the pleadings nor affidavit state the residences of respondents to be served with process by publication, nor that their addresses were unknown, nor that they were minors, when this fact is known to petitioner, service of process based thereon is void. *Jones v. Jones*, 557.

Service by publication is in derogation of the common law, and the statutory prerequisites must be strictly complied with in order to support a valid order for substitute service. *Ibid.*

**§ 11. Service on Associations.**

An unincorporated labor union is subject to suit under G.S. 1-97(6) by service on the Secretary of State, only if it is doing business in this State in the sense of performing in this State the acts for which it is formed. *Youngblood v. Bright*, 599.

## PUBLIC OFFICERS.

**§ 4b. Prohibition Against Person Holding Two Public Offices Simultaneously.**

Justice of the peace may be also municipal police officer. *S. v. McHone*, 231, 235.

**§ 7a. Duties and Functions in General.**

Discretionary power vested in administrative agencies or officials connotes the authority to choose between alternative courses of action, and, under the separation of powers, the courts are without authority to act as supervisory agencies to control and direct the exercise of such discretion so long as the agencies or officials act in good faith and in accordance with law, but may, in a proper proceeding, determine only whether such power has been exercised capriciously or arbitrarily or in bad faith or in disregard of law. *Burton v. Reidsville*, 405.

**§ 7b. Making of Contract with Public for Private Gain.**

The statutory prohibition against an appointed or elected official making any contract for his own benefit under authority of his office extends to an official of a corporation who makes a contract between the corporation and a municipality or board of which he is a member. *Insulation Co. v. Davidson County*, 252.

A public office is a public trust and the courts will not countenance the subversion thereof for private gain, and therefore the courts will not only declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but will also deny recovery on a *quantum meruit* basis. *Ibid.*

**§ 9. Attack of Official Acts.**

Where the exercise of discretionary power by a municipality is attacked on the ground that the city officials acted arbitrarily and in bad faith, nonsuit cannot be properly entered, but the court should hear the evidence, find the ultimate facts, and enter an affirmative judgment, the question of abuse of discretion being one of fact for the court. *Burton v. Reidsville*, 405.

## QUASI-CONTRACTS.

**§ 1. Elements and Grounds of Remedy.**

No recovery may be had on *quantum meruit* where the contract is void as against public policy. *Insulation Co. v. Davidson County*, 252.

## QUIETING TITLE.

**§ 1. Nature and Grounds of Remedy.**

G.S. 41-10 is a remedial statute and is to be liberally construed to advance the remedy and permit the courts to bring the parties to an issue. *Trust Co. v. Miller*, 1.

Even though an action is nominally to remove cloud from title, where defendants are in actual possession, and plaintiffs seek to recover possession, the action in essence is in ejectment. *Baldwin v. Hinton*, 113.

RAILROADS.

**§ 4. Accidents at Crossings.**

In this action to recover for injuries sustained in an accident at a railroad grade crossing, the evidence tending to show that the collision occurred in broad daylight at a level crossing, and that plaintiff driver at the stop sign beside the road 45 feet from the tracks could see 300 feet down the tracks in the direction from which the train came, *is held* to disclose contributory negligence barring recovery as a matter of law. *Moser v. R. R.*, 74.

Though a traveler and the railroad have equal rights to cross at a grade crossing, the traveler must yield the right of way to the railway company in the ordinary course of its business. *Gray v. R. R.*, 107.

RECEIVING STOLEN GOODS.

**§ 3. Indictment.**

Indictment charging receiving "quantity of meat" of specified value, with knowledge it had been stolen, *held* fatally defective. *S. v. Strickland*, 100.

REFERENCE.

**§ 11. Jurisdiction of Superior Court Upon Appeal.**

Upon the hearing upon exceptions to the report of a referee, the court has authority to affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of the referee. *Cox v. Shaw*, 191.

Upon the hearing of exceptions to the referee's report, the court's order vacating the report and ordering a new survey is purely interlocutory and affects no substantial right, and an appeal therefrom is fragmentary and premature. *Ibid.*

Where defendant, upon the filing of the report of the referee, moves for a new survey prior to the filing of exceptions, the reference is not before the court upon the hearing of the motion, and the denial of the motion does not preclude another Superior Court judge from vacating the report and ordering a new survey upon the hearing upon the exceptions. *Ibid.*

REGISTRATION.

**§ 2. Requisites and Sufficiency of Registration.**

The proper indexing and cross-indexing of instruments required to be registered is an essential part of their registration. *Cotton Co. v. Hobgood*, 227.

**§ 4. Registration as Notice.**

No notice, however full and formal, as to the existence of a prior deed can take the place of registration, and a statement in registered deeds of trust that a certain tract was excluded therefrom because such tract had been sold by prior deed to another, is insufficient notice of such prior deed as against creditors and purchasers for value when such prior deed is not recorded. *Dula v. Parsons*, 32.

If the index and cross-index of an instrument contain matter sufficient to put a careful and prudent examiner upon inquiry, the record constitutes notice as to all matters which would have been discovered by a reasonable inquiry. *Cotton Co. v. Hobgood*, 227.

## ROBBERY.

**§ 1. Nature and Elements of the Offense.**

G.S. 14-87 does not change the offense of common-law robbery or divide it into degrees, but merely provides more severe punishment when the offense is committed or attempted with the use or threatened use of firearms or other dangerous means. *S. v. Hare*, 262.

## SALES.

**§ 11. Transfer of Title and Right to Possession.**

In the husband's action to recover possession of certain items of personalty, the wife alleged that he had executed a bill of sale to her for certain of the items and testified that he had surreptitiously removed the bill of sale from her lock box and destroyed same, and offered in evidence what she testified was a duplicate original signed by him. The husband denied that he had signed the original of the copy produced by the wife. *Held:* An issue of fact was raised for the jury. *Caulbourn v. Armstrong*, 663.

**§ 27. Actions and Counterclaims by Purchaser.**

Plaintiff's evidence was to the effect that after using a hair rinse purchased from defendant she had weeping dermatitis of her entire scalp and parts of her face and neck, and that a friend, who purchased and used the same brand of rinse, had her scalp become red and inflamed. There was no evidence that the rinse had been adulterated, misbranded or falsely advertised, or that it contained any poisonous substance. *Held:* The evidence leaves in speculation and conjecture whether the plaintiff's condition was due to allergy or to some harmful and poisonous substance in the rinse, and therefore nonsuit was properly entered in her action for breach of implied warranty. *Hanrahan v. Walgreen Co.*, 268.

It is generally held that the seller is not liable to the purchaser for damages from the use of the product resulting from an allergy or unusual susceptibility peculiar to the purchaser which is wholly unknown to the seller. *Ibid.*

## SCHOOLS.

**§ 6a. Selection of School Sites.**

Local school administrative unit is administrative agency of the State in selecting a site for a new school in exercise of its sound discretion, and the courts may interfere with such discretionary power only for abuse of discretion or disregard of law. *Board of Education v. Allen*, 521.

## SEARCHES AND SEIZURES.

**§ 1. Necessity for Warrant.**

A person may waive his constitutional right to be free of unreasonable searches by consenting to search, and evidence in this case *held* to make out *prima facie* case that owner consented to search of car. *S. v. McPeak*, 243.

A search warrant is required by officers seeking to enter a person's private dwelling for the purpose of search and seizure. *S. v. McMilliam*, 771.

Where search warrant is not introduced in evidence and there is no proof that it was duly issued, there is no presumption of its regularity. *Ibid.*

SPECIFIC PERFORMANCE.

**§ 4. Proceedings and Decree.**

Provision in a decree for specific performance of a contract to convey realty that if defendants failed to execute the deed according to the judgment, the judgment itself should operate as a conveyance, should be predicated upon the payment of the purchase price into the office of the clerk of the Superior Court by the purchasers. *Reynolds v. Earley*, 623.

STATUTES.

**§ 2. Constitution Proscription Against Passage of Certain Special Acts.**

Statute providing trial of small claims without jury does not purport to establish court inferior to Superior Court within purview of Art. II, sec. 29. *Furniture Co. v. Baron*, 502. Statute providing for improvements of streets of a municipality not an act authorizing laying out or discontinuing street. *Assessments, In re*, 494.

**§ 3. Enactment by Reference.**

The 1936 North Carolina Building Code has the force of law by reason of its ratification and adoption by Chapter 280, Public Laws of 1941. *In re O'Neal*, 714.

**§ 5a. Construction in General.**

It is the duty of the courts to construe a statute as written. *Burchette v. Distributing Co.*, 120.

Enumeration in statute as to facts upon which it should be applicable excludes those not enumerated under maxim *inclusio unius est exclusio alterius*. *McMichael v. Proctor*, 479.

**§ 5c. Construction—Captions.**

Under our Constitution, the validity of a statute may not be attacked on the ground that its provisions do not correspond with the subject expressed in the title, since, though a title may be called in aid of construction, it does not control the text. *Blowing Rock v. Gregorie*, 364.

**§ 5d. Statutes in Pari Materia.**

Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts. *Credit Corp. v. Motors*, 326; *Blowing Rock v. Gregorie*, 364; *In re Miller*, 509.

**§ 12. Repeal by Enactment.**

A statutory provision that no local act shall have the effect of repealing or altering any public law unless the caption of the local act refers to the public law (G.S. 12-1), *is held* ineffectual, since one General Assembly cannot restrict or limit the constitutional power of a succeeding Legislature. *Furniture Co. v. Baron*, 502.

**§ 13. Repeal by Implication and Construction.**

A statute providing for a small claims docket in the Superior Court of one county and providing for the trial of such cases without a jury unless a jury trial is aptly demanded and the costs advanced as prescribed by the act, does not purport to repeal any general law but merely provides an optional method of trial in the Superior Court of the county in cases coming within the statutory definition of small claims. *Furniture Co. v. Baron*, 502.

## TAXATION.

**§ 26½. Listing of Realty for Taxation.**

The listing of land in the name of the estate of the deceased owner is a void listing. G.S. 105-301(3). *Rand v. Wilson County*, 43.

Where land has been improperly listed for taxation, the tax listing authorities have authority to list the property properly for taxation for the five years next preceding the date the taxes due are tendered. *Ibid.*

**§ 38c. Recovery of Tax Paid Under Protest.**

Where land had been improperly listed for more than five years, persons authorized by judgment to sell land, pay taxes, and distribute balance of proceeds, could not pay taxes for prior five years only, but had to pay all taxes assessed and bring action to recover taxes for those years prior to the five years, which action they could maintain without the joinder of the beneficiaries. *Rand v. Wilson County*, 43.

Suit to recover taxes paid under protest for accumulation of years is not subject to demurrer for misjoinder of causes. *Ibid.*

## TENANTS IN COMMON.

**§ 4. Right to Possession.**

One tenant in common may not maintain an action against a cotenant to recover possession of specific personal property, the remedy being by partition. *Caulbourn v. Armstrong*, 663.

**§ 8. Rights and Remedies Against Third Parties.**

While one tenant in common may recover judgment for trespass only for his proportionate part of the damages, one tenant in common may recover possession of the entire tract in an action in ejectment against a third party. *Baldwin v. Hinton*, 113.

## TORTS.

**§ 6. Joinder of Additional Defendants for Contribution.**

In an action for wrongful death instituted by the administrator of a deceased unemancipated child against the driver of the car inflicting the fatal injury, defendant is not entitled to have the child's mother joined as a party defendant for the purpose of contribution or indemnity upon allegations that the child's mother was negligent in permitting the child to enter upon the highway unattended, since the mother cannot be liable to the plaintiff as a joint tort-feasor, and the statutory right of contribution and the right to indemnity on the ground of primary and secondary liabiliy are both based upon the liability of a joint tort-feasor. *Lewis v. Ins. Co.*, 55.

Allegations of answer *held* sufficient to state cause of action for contribution against additional defendants. *Hayes v. Wilmington*, 525; *Hayes v. Wilmington*, 548.

In order for the original defendant to be entitled to the joinder of an additional party for the purpose of contribution under G.S. 1-240, the cross complaint must allege facts so related to the subject matter declared on in plaintiff's complaint as to disclose that plaintiff, had he desired to do so, could have joined the additional party as a defendant, and that such additional party is liable to plaintiff, along with the original defendant, as a joint tortfeasor. *Hayes v. Wilmington*, 525.

TORTS—*Continued.*

The original defendant may file answer denying negligence, and alleging negligence of other defendants as a sole proximate cause, and also alleging conditionally or in the alternative, for the purpose of the joinder of a third party for contribution, that if defendant were negligent, such third party also was negligent, and that the negligence of such third party concurred in causing the injury in suit, since a defendant who elects to plead a joint tortfeasor into his case is not required to surrender other defenses available to him. *Ibid.*

When an alleged joint tortfeasor is brought into a case as an additional party defendant, and it turns out that no cause of action is stated against him, either in the main action or in a cross-action pleaded by another defendant, he is an unnecessary party to the action and, on motion, may have his name stricken from the record as mere surplusage. *Ibid.*

TRIAL.

**§ 5½. Pre-Trial and Stipulations.**

Where it is stipulated by the parties that title was not in controversy in the suit, such stipulation precludes the raising of the question of title by after-judgment pleadings in the action, and precludes issuance of restraining orders based upon such after-judgment pleadings. *Strickland v. Kornegay*, 66.

Where plaintiffs rely upon adverse possession under color of title, they are under necessity of introducing written instruments purporting to convey title to the lands claimed by definite lines and boundaries, and to this extent must rely upon the record to show color of title, and therefore a stipulation in the record that plaintiffs rely upon the record title dos not require nonsuit for failure of proof of good record title. *Stewart v. Jaggers*, 166.

**§ 6. Acts and Conduct of Court as Amounting to Expression of Opinion on Evidence.**

It is not unusual nor improper for a trial judge to ask questions of a witness to make clear his testimony on some point or to facilitate the taking of the testimony, and while frequent interruptions and prolonged questioning are not approved and will be held for prejudicial error when amounting to an expression of opinion by the court on the weight of the evidence or the credibility of the witnesses, the record in this case fails to show prejudice in this respect. *Andrews v. Andrews*, 779.

**§ 21. Office and Effect of Motion to Nonsuit.**

Defendant's motion for judgment of nonsuit is equivalent to a voluntary nonsuit on its counterclaim. *Bradham v. Trucking Co.*, 708.

**§ 22a. Consideration of Evidence on Motion to Nonsuit in General.**

In determining its sufficiency for submission to the jury, the evidence, whether offered by plaintiff or by defendant, must be considered in the light most favorable to plaintiff. *Williamson v. Clay*, 337; *Harris v. Greyhound Corp.*, 346.

**§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.**

Defendant's testimony cannot warrant judgment as of nonsuit when there is other evidence favorable to plaintiff at variance therewith, since it is for the jury to pass upon the credibility of the witnesses and the weight to be given the testimony. *Williamson v. Clay*, 337.

TRIAL—*Continued.*

While ordinarily defendant's evidence which contradicts that of plaintiff is not to be considered on motion to nonsuit, in an action for malpractice the testimony of defendant's expert witnesses which discloses known and generally accepted facts, corroborated by textbook statements, in regard to the particular disease or ailment in controversy, may be considered. *Kennedy v. Parrott*, 355.

**§ 22c. Nonsuit—Contradictions and Discrepancies in Plaintiff's Evidence.**

Discrepancies and contradictions in the plaintiff's evidence are for the jury and not for the court. *Lawrence v. Bethea*, 632.

**§ 23a. Sufficiency of Evidence in General.**

A verdict may not be based upon mere conjecture or guesswork. *Hanrahan v. Walgreen Co.*, 268.

While plaintiff's testimony of statements made by defendant, even though denied by defendant, must be taken as true in passing upon defendant's motion to nonsuit, yet when such statements are in direct conflict with scientific fact, they may be lacking in sufficient probative force to require their submission to the jury. *Kennedy v. Parrott*, 355.

While the affirmative testimony of a credible witness is ordinarily more reliable than the negative testimony of an equally credible witness, nevertheless such negative testimony is evidence to be considered by the jury. *Cudworth v. Ins. Co.*, 584.

**§ 24a. Nonsuit on Affirmative Defense.**

Where plaintiff's evidence does not establish affirmative defense, dismissal prior to introduction of evidence by defendant upon findings by the court in accordance with allegations in defendant's answer, is error. *Ingle v. McCurry*, 65.

**§ 26. Form, Rendition and Effect of Judgments of Nonsuit.**

When the court allows motions to dismiss as in case of nonsuit, it terminates the action, and no suit is thereafter pending in which the court can make a valid order. *Burton v. Reidsville*, 405.

**§ 29. Peremptory Instructions in Favor of Party Having Burden of Proof.**

Where plaintiffs' evidence is sufficient to make out their case and is not controverted by any evidence to the contrary, the court may give a peremptory instruction that if the jury believes all the evidence and finds by the greater weight of the evidence the facts to be as the evidence tends to show, to answer the issue in the affirmative. *Stewart v. Jaggers*, 166.

While ordinarily a verdict may not be directed in favor of the party having the burden of proof, when only one inference can be drawn from the facts admitted, the court may draw the inference and peremptorily instruct the jury. *Davis v. Vaughn*, 486.

**§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.**

Even in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. *Williamson v. Clay*, 337.

TRIAL—*Continued.*

It is the duty of the court and not the jury to relate and apply the law to the variant factual situations having support in the evidence. *Harris v. Greyhound Corp.*, 346.

**§ 32. Requests for Instructions.**

While the court is not required to give requested instructions in the exact language of the request, even though the instruction be correct in itself and supported by evidence, the court must give such instruction at least in substance. *S. v. Hooker*, 429.

**§ 33. Additional Instructions and Redeliberation of Jury.**

Court is without power to refuse to accept sensible verdict and have jury redeliberate. *Swann v. Bigelow*, 285.

**§ 36. Form and Sufficiency of Issues in General.**

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. G.S. 1-200. This rule applies to new matter alleged in the answer. *Caulbourn v. Armstrong*, 663.

**§ 39. Form and Sufficiency of Verdict.**

A verdict should be certain and import a definite meaning free from ambiguity and be sufficient in form and substance to support a judgment which is definite in terms and capable of execution. *Caulbourn v. Armstrong*, 663.

**§ 42. Acceptance or Rejection of Verdict by Court.**

The jury answered the issues of negligence and contributory negligence in the affirmative and awarded damages. *Held:* The court should have accepted the verdict and rendered judgment thereon, treating the award of damages as surplusage, and when the court erroneously refuses to accept the verdict and sends the jury back for further deliberation, judgment for plaintiff upon the revised verdict will be set aside and a new trial awarded. *Swann v. Bigelow*, 285.

A party has a substantial right in a verdict rendered by the jury in his favor. *Williams v. Stumpf*, 434.

**§ 45. Judgment Non Obstanti Veredicto.**

Party is not entitled to judgment *non obstanti veredicto* on grounds at variance with theory of trial. *Dail v. Sparrow*, 71.

**§ 49. Setting Aside Verdict as Contrary to Evidence.**

The trial court has the discretionary power to set aside the verdict as being contrary to the weight of the evidence, but it is questionable whether the court should hear evidence outside the trial in order to determine whether the verdict should be set aside, and refuse to permit cross-examination of the witnesses called by the court for this purpose. *Williams v. Stumpf*, 434.

**§ 49½. Setting Aside Verdict for Inadequate or Excessive Award.**

Whether the verdict should be set aside as excessive rests within the discretion of the trial court. *Housing Authority v. Jenkins*, 73.

TRIAL—*Continued.*

**§ 51. Setting Aside Verdict for Error of Law.**

A party is not entitled to set aside the verdict as a matter of law on a ground at variance with the theory of trial. *Dail v. Sparrow*, 71.

**§ 55. Trial by Court by Agreement—Findings and Judgment.**

In a trial by the court under agreement of the parties, the court's findings of fact are conclusive if supported by competent evidence, notwithstanding the introduction of evidence to the contrary by the adverse party. *Trust Co. v. Miller*, 1.

TRUSTS.

**§ 4c. Actions to Establish Resulting Trust.**

Evidence in this case that plaintiff furnished the entire consideration for the deed executed to one defendant, who thereafter transferred without consideration a one-half interest to the other defendant, *held* sufficient to support the verdict that defendants held the property in trust for plaintiff. *Wood v. Massingill*, 625.

USURY.

**§ 1. In General.**

An action to recover a statutory penalty, including the statutory penalty for usurious interest paid, is *ex contractu*. *Credit Corp. v. Motors*, 326.

**§ 9c. Actions—Pleadings.**

Counterclaims for usury in this action *held* not demurrable, considering the allegations and exhibits in the light most favorable to defendants, on the ground that the dates and amounts were not alleged with the required definiteness. *Credit Corp. v. Motors*, 326.

In plaintiff's action in debt, defendants may set up counterclaims to recover the penalty for usurious interest paid by defendants to plaintiff in connection with separate and independent transactions between them when the claims for such penalties existed prior to the commencement of plaintiff's action. *Ibid.*

UTILITIES COMMISSION.

**§ 1. Nature and Functions of Commission in General.**

The standard provided by the General Assembly for the fixing of rates for public utilities operating in this State, and whether such standard is outmoded, lie within the exclusive province of the General Assembly, the Utilities Commission not being a policy-making agency. *Utilities Com. v. State*, 12.

The General Assembly has provided the standard to be followed by the Utilities Commission in fixing charges to be made by public utilities operating in this State, and such standard is binding upon the Commission and the courts. *Ibid.*

**§ 2. Jurisdiction.**

The common capital stock of a corporation is a security within the meaning of that term as used in G.S. 62-82, 83, and the Utilities Commission has authority not only to veto a proposed issue and sale of capital stock by a public utility to its stockholders at a designated price per share, but also to stipulate the minimum price at which the stock may be sold. *Utilities Com. v. Tel. Co.*, 46.

The Utilities Commission has no jurisdiction to determine a petition of an

irregular truck carrier to be authorized to exchange freight with a regular truck carrier when the regular truck carrier does not join in the petition and the petition nowhere alleges that the regular truck carrier had made or is desirous of making an agreement with petitioner for interchange of freight. *Utilities Com. v. Truck Lines*, 442.

**§ 3. Hearings, Orders and Judgments.**

An order of the Utilities Commission granting a petition of railroad companies for increase in intrastate freight rates, entered without any evidence of the fair value of the respective properties of the companies used and useful in conducting their intrastate business separate and apart from their interstate business, is unsupported by evidence of the type required by G.S. 62-124, and judgment of the Superior Court reversing such order is without error. *Utilities Com. v. State*, 12.

However, reversal does not deprive petitioner from thereafter filing petition that order be issued *nunc pro tunc*. *Utilities Com. v. State*, 685.

In determining a petition for increase in intrastate freight rates, the Utilities Commission must follow the standard prescribed by statute, and whether the Interstate Commerce Commission may thereafter order an increase in intrastate rates if the Utilities Commission should deny the petition, is irrelevant. *Ibid.*

Findings of Commission *held* to support order that telephone company should not sell additional stock to stockholders for less than $125 per share. *Utilities Com. v. Tel. Co.*, 46.

In determining fair rates to be charged by a power company, evidence of rates charged by another company in the same territory is properly excluded when there is no evidence of relative cost conditions. *Utilities Com. v. Municipal Corps.*, 193.

A purchaser of electric energy has no vested right in a schedule approved by the Utilities Commission, and whether a utility will be permitted to withdraw an existing schedule of rates is a matter for determination of the Commission in accordance with law. *Ibid.*

Informal conference held without notice was not a formal hearing and appellants were not prejudiced by order based thereon. *Ibid.*

An order of the Utilities Commission giving municipalities the option to purchase electricity for industrial customers at a lower rate, but expressly providing that the municipalities should be free to contract with such industrial customers with respect to the price they would be required to pay the municipalities for the electric energy purchased by them, does not violate G.S. 62-30 (3). *Ibid.*

In a hearing before the Utilities Commission to fix rates for electric energy, reports made by municipal customers to the Utilities Commission pursuant to G.S. 62-98, are properly received in evidence as exhibits and made part of the record as authorized by G.S. 62-18, such evidence being competent on the question of whether the proposed schedules are fair and equitable to the municipal customers, though not relevant on the question of the power company's right to a general increase in rates. *Ibid.*

Upon dismissal upon challenge to jurisdiction, Commission should not make findings relating to merits. *Utilities Com. v. Truck Lines*, 442.

UTILITIES COMMISSION—*Continued.*

**§ 5. Appeals.**

G.S. 62-26.10 and 62-123 make the rates fixed by the Utilities Commission not only *prima facie* evidence of their validity, but also that they are just and reasonable. *Utilities Com. v. Municipal Corps.*, 193.

Where the Utilities Commission dismisses a petition on motion on the ground that it is without jurisdiction to grant the relief sought, the merits of the controversy are not before it for decision, and neither the order of he Commission nor the judgment of the Superior Court on appeal should contain findings of fact or conclusions of law in respect to the merits, and such irrelevant findings and conclusions may be stricken. *Utilities Com. v. Truck Lines*, 442.

Decision affirming an order of the Superior Court reversing an order of the Utilities Commission allowing an increase in rates, on the ground that the Commission failed to follow the standards prescribed by G.S. 62-124, does not estop petitioner from filing another petition requesting that an order be entered affirming the increase *nunc pro tunc*, if petitioner is so advised, the question of whether the increase is reasonable or unreasonable being an open question for determination by the Commission upon evidence contemplated by the statute. *Utilities Com. v. State*, 685.

VENDOR AND PURCHASER.

**§ 18. Rescission and Abandonment of Contract.**

Where the purchaser, by and with consent of vendors, cancels his binding contract to purchase the premises and withdraws his deposit of earnest money, he terminates the contract. *Harwell v. Rohrabacher*, 255.

VENUE.

**§ 1a. Residence of Parties.**

The residence of the parties at the time of the institution of the action is controlling and is not affected by subsequent change of residence. *Burrell v. Burrell*, 24.

Evidence *held* insufficient to support finding that plaintiff was a resident of the county in which the action was instituted. *Ibid.*

WATERS AND WATERCOURSES.

**§ 1. Riparian Rights to Accretion.**

The grantee of a lot, including the fee subject to an easement for a street across the end of the lot fronting on navigable water, is entitled, as littoral or riparian owner, to land gradually built up through forces of nature or processes of accretion from the water. *Jones v. Turlington*, 681.

WILLS.

**§ 31. General Rules of Construction.**

The objective of construction is to ascertain the intent of testator as expressed in the will, and to this end the condition and circumstances surrounding testator at the time he executed the instrument, including the relationship between testator and the beneficiaries named herein, and the condition, nature and extent of testator's property, are competent to be considered. *Trust Co. v. Wolfe*, 469.

WILLS—*Continued.*

**§ 33a. Estates and Interests Created—Definiteness and Certainty of Devises and Bequests.**

Testator owned a one-half undivided interest in certain lands. He devised, under the mistaken belief that he owned the entire interest in the tract, a life estate therein to his wife and attempted to devise the remainder in he entire tract, by metes and bounds, one-half to each of two sons for life, remainder to their lawful children. *Held:* The devise of the life estate to the widow is valid, but the devises of the remainder thereafter are void for uncertainty, and as thereto testator died intestate and such interest descends to his heirs at law. *Taylor v. Taylor*, 726.

**§ 33d. Estates in Fee or in Trust.**

A devise of lands to testator's niece in fee simple, followed by statements that testator was so disposing of his lands because he wanted his sister and her children (of whom the devisee was one) to get the benefit and that he wanted the devisee to have full control of the lands to use as she might see fit for her mother, brother, sisters, herself, or any other relative, *is held* to create an estate in fee simple, the additional statements being precatory and without mandatory force. *Andrew v. Hughes*, 616.

**§ 33e. Annuities.**

Where the will provides that testator's widow should receive an annuity in a specified sum for life, consonant with an antenuptial agreement between the parties, and that the estate should remain unsettled for this purpose during the widow's lifetime, the executor is not entitled to force the widow to accept a lump sum payment in commutation of the annuity. *Stewart v. Stewart*, 284.

**§ 34e. Designation of Amount or Share.**

Ordinarily, the word "estate," unless restricted by the context, embraces a testator's entire property, real and personal, although in its technical sense it may refer only to the degree, quantity, nature and extent of a person's interest in land. *Trust Co. v. Wolfe*, 469.

The word "property" and the words "personal property" have varied meanings according to the context and circumstances. *Ibid.*

**§ 39. Actions to Construe Wills.**

Extrinsic evidence is competent to show circumstances surrounding testatrix at time of executing will in order to aid court in ascertaining intent. *Trust Co. v. Wolfe*, 469. Supreme Court will not initially rule on competency of evidence for this purpose nor attempt to construe will in advance of ruling thereon by lower court. *Ibid.*

Where the lower court erroneously excludes extrinsic evidence bearing upon the intent of testatrix, the cause will be remanded, and the Supreme Court will not consider the excluded evidence, even though it appear of record, nor attempt to decide what portions of the excluded evidence would be competent upon the question, since the Supreme Court possesses no original jurisdiction in such matters, but has jurisdiction only to review the rulings of the lower court in respect thereto. *Ibid.*

**§ 43. Void Legacies and Devises.**

Testator devised a life estate in three tracts of land to his wife with remainder in each tract, respectively, to each of his three sons for life, remainder to

their lawful children. The devises of the remainder after the widow's life estate were ineffectual as to two of the tracts. *Held:* The will is not void because incapable of execution according to the intent of testator, but the devise of the life estate to the wife and the valid devise of the remainder of one of the tracts will be given effect. G.S. 31-40. *Taylor v. Taylor*, 726.

**§ 44. Doctrine of Election.**

The doctrine of election does not apply unless testator's intent to put the beneficiary to an election clearly appears from the will; therefore, where it clearly appears from the will that testator, who predeceased his wife, attempted to devise lands held by them by the entireties under the mistaken belief that he owned the lands individually, the widow is not put to her election and may claim sole ownership to the lands held by entireties, and at the same time claim as legatee and devisee under the will. *Taylor v. Taylor*, 726.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-38. Where plaintiff's deed calls for line of adjacent tract, such line may be used to determine extent of possession under color, even though deed to adjacent tract is junior to plaintiff's chain of title. *Trust Co. v. Miller*, 1.

1-57. Action must be prosecuted in name of real party in interest. *Terrace, Inc., v. Indemnity Co.*, 595. Employee may sue for benefits under collective bargaining agreement. *Lammonds v. Mfg. Co.*, 749.

1-63. Trustee of express trust may sue to recover taxes wrongfully demanded without joinder of beneficiaries. *Rand v. Wilson County*, 43.

1-73. Party may not be allowed to intervene so as to engraft new action on moribund controversy. *Childers v. Powell*, 711.

1-82. Residence of parties at time of institution of action is controlling unaffected by subsequent change of residence. *Burwell v. Burwell*, 24.

1-97(6). Labor union is subject to suit under this section only if it is performing in this State acts for which it was formed. *Youngblood v. Bright*, 599.

1-100. Where service is had by publication in a special proceeding respondents should be given not less than ten days after seven days from last publication in which to answer. *Jones v. Jones*, 557.

1-123; 1-127(5). Demurrer for misjoinder of parties and causes of action *held* properly sustained. *Tart v. Byrne*, 409.

1-127. Demurrer is properly sustained in action by beneficiaries under will of deceased partner for partnership accounting. *Ewing v. Caldwell*, 18.

1-134.1. Has no application where objection to jurisdiction is not made until after application of extension of time to plead. *Youngblood v. Bright*, 599.

1-151. Demurrer is a pleading within rule of liberal construction. *Exterminating Co. v. O'Hanlon*, 457.

1-152. Denial of motion to dismiss because complaint not filed in time will not be disturbed, since court has discretionary power to extend time for filing pleading. *Early v. Eley*, 695.

1-163. Amendment which changes name of plaintiff and cause of action may not be allowed. *Exterminating Co. v. O'Hanlon*, 457. Plaintiff may be allowed to amend complaint to allege damages in larger sum. *Burchette v. Distributing Co.*, 120.

1-172; 1-184. Court may not find facts on issue raised by pleadings in absence of consent. *Ingle v. McCurry*, 65. Statute providing for trial of small claims without a jury unless jury trial is aptly demanded *held* constitutional. *Furniture Co. v. Baron*, 502.

1-180. Failure to charge on substantive feature is error even in absence of request for instructions. *Williamson v. Clay*, 337. Charge *held* for error in failing to give defendant's contentions equal stress. *S. v. Kluckhohn*, 306. Charge that court did not know what contentions of defendant were *held* prejudicial. *S. v. Robbins*, 161.

1-200. Issues and verdict should be complete and unambiguous. *Caulbourn v. Armstrong*, 663.

1-220. Matters relating to defendant's insurer have no relevancy to defendant's conduct as being inexcusable. *Sanders v. Chavis*, 380.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

1-234. Grantee in deed executed by judgment debtor prior to rendition of judgment is not entitled to assert homestead as against judgment creditor when deed is not registered until after docketing of judgment. *Dula v. Parsons*, 32.

1-240. Allegations *held* sufficient to state cause of action for contribution against additional defendants. *Hayes v. Wilmington*, 525.

1-272. Judge of Superior Court, either in term or vacation, has jurisdiction of appeals from clerk in matters of law or legal inference. *Highway Com. v. Mullican*, 68.

1-277. Order of court vacating referee's report and directing new survey is interlocutory and appeal will not lie therefrom. *Cox v. Shaw*, 191.

1-513. *Mandamus* and *certiorari* are separate remedies, and where court in *mandamus* proceeding considers documents not introduced in evidence nor brought up by *certiorari*, under misapprehension that it was reviewing order of administrative board, cause must be remanded. *Realty Co. v. Planning Board*, 648.

1-544; 95-36.1. Common law arbitration *held* not to preclude action to recover benefits due employee under collective labor contract. *Lammonds v. Mfg. Co.*, 749.

4-1. Common law definition of arson obtains in this State. *S. v. Long*, 393.

7-124. Defendant in summary ejectment who wishes to assert title must plead matter by written answer. *Harwell v. Rohrabacher*, 255.

7-149(12). Warrant may be amended from "transporting illegal taxpaid liquor" to "illegally transporting taxpaid liquor." *S. v. McHone*, 231.

8-39. Description must be certain in itself or refer to source making it certain. *Baldwin v. Hinton*, 113.

8-39; 39-2. Fact that boundaries do not go entirely around land does not necessarily invalidate description for uncertainty. *Brown v. Hurley*, 138.

8-46. Mortuary tables are only evidence to be considered with other evidence. *Harris v. Greyhound Corp.*, 346.

8-54. Solicitor should not remark that he had not said a word about defendant's failure to take stand. *S. v. Roberts*, 619.

12-1. Statute that no local act should repeal public law unless caption of local act refers to the public law, *held* unconstitutional. *Furniture Co. v. Baron*, 502.

14-4. Violation of municipal ordinance is misdemeanor and is violation of condition that defendant violate no penal law of State. *S. v. Barrett*, 686.

14-17. Under amendment, trial court must not only instruct jury of right to recommend life imprisonment, but also as to legal effect of such recommendation. *S. v. Carter*, 106.

14-34. Does not apply when there is no evidence that defendant intentionally pointed weapon at anyone. *S. v. Kluckhohn*, 306.

14-67. Indictment charging completed offense is not conviction of an attempt under this section. *S. v. Long*, 393.

14-87. Statute does not change offense but merely provides more severe punishment if crime is committed by use of firearms. *S. v. Hare*, 262.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

14-107. Agreement by payee that check would not be presented for collection is not defense. *S. v. Jackson*, 216. Warrant may charge that defendant issued check individually or under trade name. *Ibid.*

14-144. "Uninhabited house" within purview of this section is house fit for habitation but uninhabited at the time; and evidence disclosing burning of uninhabitable house cannot sustain conviction. *S. v. Long*, 393.

14-234. Contract between county and corporation in which county commissioner was interested *held* void. *Insulation Co. v. Davidson County*, 252.

14-293; 14-295. Evidence *held* sufficient to be submitted to jury. *S. v. McHone*, 235.

15-4.1. Counsel must be appointed for person accused of capital crime who is unable to employ counsel notwithstanding that capital charge is not pressed after arraignment. *S. v. Simpson*, 436.

15-179. State may appeal only in those cases specified by statute; State may not appeal from dismissal on plea of former jeopardy. *S. v. Ferguson*, 766.

15-18. Order of arrest signed by police officer and not judicial officer is void. *S. v. McGowan*, 431.

15-18, *et seq.* Justice of the peace, who is also police officer, may issue warrant. *S. v. McHone*, 231; *S. v. McHone*, 235.

15-27. Person may waive right not to be searched without warrant. *S. v. McPeak*, 243.

15-27; 18-13. Warrant is required for search of person's house, and where warrant is not introduced in evidence and proof that it was duly issued is not adduced, evidence obtained by search should be excluded on motion to suppress. *S. v. McMilliam*, 771.

15-153. Does not abolish requirement that warrant or indictment charge each essential element of the offense. *S. v. Strickland*, 100.

15-173. On motion to nonsuit, evidence must be taken in light most favorable to State. *S. v. Robbins*, 161.

18, Art. 1, Art. 3. Alcoholic Beverage Control Act and Turlington Act must be construed *in pari materia*. *S. v. Tillery*, 706.

18-8. Courts cannot take judicial notice that "bootleg" liquor is nontaxpaid liquor. *S. v. Tillery*, 706.

18-11; 18-49; 18-58. Possession of more than one gallon of tax-paid liquor in dry county, even in home, raises presumption of possession for sale. *S. v. Ritchie*, 182.

18-124. Statutory procedure for beer and wine election *held* substantially complied with. *Green v. Briggs*, 745.

20, Art. 2. Revocation of driving license is exercise of police power and not part of punishment for drunken driving; therefore, warrant need not allege second offense in order to support three year revocation of license therefor. *Harrell v. Scheidt*, 735.

20-71.1. Admission of ownership takes case to jury on issue of *respondeat superior*. *Caughron v. Walker*, 153. Evidence of ownership *held* insufficient in face of positive evidence that driver was not agent. *Ransdell v. Young*, 75.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

20-117. Allegations *held* sufficient to state cause of action for failure of warning device at end of lumber protruding from truck. *Weavil v. Meyers*, 386.

20-138. Conflicting evidence as to whether defendant was driving or merely sitting in car takes issue to jury. *S. v. Robbins*, 161.

20-141(e). Under the amendment, outrunning range of lights is not negligence of contributory negligence *per se* only if motorist is not traveling at unlawful speed. *Burchette v. Distributing Co.*, 120.

20-154. In this action based on collision occurring when defendant turned into side road, evidence *held* for jury on issues of negligence and contributory negligence. *Baker v. Engineering Co.*, 103.

20-154(a). Violation of this section is negligence or contributory negligence *per se*. *Bradham v. Trucking Co.*, 708.

20-158(a). Testimony that one street was through street and other a cross street on which a stop sign was erected, nothing else appearing, warrants finding that municipal authorities had caused stop sign to be erected as authorized by statute. *Smith v. Buie*, 209.

20-161(a). Act of driver in stopping temporarily on highway to speak to pedestrian does not violate this section. *Skinner v. Evans*, 760.

20-166(a)(c). Defendant cannot be convicted when evidence discloses that his vehicle was totally disabled in the collision or when all persons involved were killed or knocked unconscious. *S. v. Wall*, 238.

20-174(a); 20-174(e). Issues of negligence and contributory negligence *held* for jury in this action for injuries to pedestrian struck while crossing street. *Landini v. Steelman*, 146.

24-2; 1-137(1)(2). In plaintiff's action on debt, defendants may set up usury in connection with separate and independent transactions when right to penalties existed prior to commencement of plaintiff's action. *Credit Corp v. Motors*, 326.

25-35. Instrument payable to order must be endorsed to constitute holder a holder in due course. *Trust Co. v. Raynor*, 417.

25-65. Burden is on plaintiff to prove he is holder in due course. *Whitfield v. Mortgage Corp.*, 658.

28-32. Clerk of Superior Court has exclusive jurisdiction to remove administrator for cause. *McMichael v. Proctor*, 479. Findings *held* to support order revoking letters testamentary. *In re Estate of Boyles*, 279.

28-173. Mother may not be joined as defendant for contribution in action for wrongful death of child. *Lewis v. Ins. Co.*, 55.

28-174. Certain allegations in respect to damages *held* properly stricken on motion. *Gray v. R. R.*, 107.

30-4; 52-19; 28-10. Acquittal of widow of murder of husband is complete defense to claim that she had forfeited property rights in his estate. *McMichael v. Proctor*, 479.

31-40. Fact that some of devises are ineffectual does not result in will being void because incapable of execution in accordance with over-all intent of testator. *Taylor v. Taylor*, 726.

33-20; 35-10; 35-11. Guardian may maintain action for approval of plan for settlement of incompetent's interest in partnership. *In re Edwards*, 70.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

41-10. Is to be liberally construed to advance the remedy and permit the courts to bring the parties to an issue. *Trust Co. v. Miller*, 1.

44-38; 2-42; 161-22. Laborers' and materialmen's liens and liens for old age assistance are required to be filed in same book and cross-indexing is not required as for instruments registered in office of register of deeds. *Saunders v. Woodhouse*, 608.

45-21.38. Where plaintiff does not admit that action is for deficiency judgment, court may not find facts and dismiss action. *Ingle v. McCurry*, 65.

48-7; 48-5. Consent is essential to order of adoption unless it has been established that child has been abandoned, which means willful abandonment as defined by G.S. 14-322 and 14-326. *In re Adoption of Hoose*, 589.

48-11. Ordinarily, consent to adoption may be revoked within six months. *In re Adoption of Hoose*, 589.

49-2. Judgment of nonsuit in prosecution under this section does not adjudicate paternity or preclude subsequent prosecution. *S. v. Ferguson*, 766.

50-5(6). Fact that during five years confinement, husband is released for short probationary periods, does not preclude right to divorce on ground of insanity. *Mabry v. Mabry*, 126.

50-7(1)(4). Conduct of husband may amount to constructive abandonment. *Bailey v. Bailey*, 412.

50-11. Judgment in husband's action for divorce for two years' separation *held* not to destroy wife's right to subsistence *pendente lite* awarded in her pending separate suit, for alimony without divorce, but since final judgment in her action would be rendered after his decree for absolute divorce, she would not be entitled to permanent alimony in her action. *Yow v. Yow*, 79.

50-13. Institution of action for divorce ousts jurisdiction of court to determine right of custody of children of marriage in *habeas corpus*. *Weddington v. Weddington*, 702.

50-16. Both temporary and permanent alimony may be awarded under this section. *Yow v. Yow*, 79. Court may enter second order allowing counsel fees to attorneys enforcing payment. *Ibid.*

50-16. Complaint *held* verified in accordance with statute. *McDowell v. McDowell*, 286. Complaint stating sufficient ground for divorce not demurrable because another ground was not sufficiently alleged. *Ibid.* Finding of constructive abandonment by husband supports order for subsistence *pendente lite*. *Bailey v. Bailey*, 412.

52-12. Conveyance by wife to third person without certificate of certifying officer, and reconveyance by such third person to husband and wife, is void and does not create estate by entireties. *Davis v. Vaughn*, 486.

55. No less than three persons may operate under charter as a legal corporate entity. *Terrace, Inc., v. Indemnity Co.*, 595.

59-31, *et seq.* Under uniform partnership act, beneficiaries under will of deceased partner may not sue for accounting of the partnership, this being duty of personal representative. *Ewing v. Caldwell*, 18.

62-18; 62-98. Reports made by municipal corporations to Utilities Commission are properly received in evidence. *Utilities Com. v. Municipal Corps.*, 193.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

62-23. Informal conference held without notice was not formal hearing and appellant was not prejudiced by order based thereon. *Utilities Com. v. Municipal Corps.*, 193.

62-26.10; 62-123. Rates fixed by Utilities Commission are *prima facie* just and reasonable. *Utilities Com. v. Municipal Corps.*, 193.

62-30(3). Order permitting municipal corporations to purchase electricity for industrial customers at lower rate does not violate this section. *Utilities Com. v. Municipal Corps.*, 193.

62-124. Order granting increase in intrastate freight rates, without evidence of fair value of respective properties used in intrastate business apart from interstate business, *held* not supported by evidence required by statute. *Utilities Com. v. State*, 12. Decision that order of Utilities Commission was erroneous as not based on evidence required by statute does not preclude another petition for such order *nunc pro tunc*. *Utilities Com. v. State*, 695.

84-23. Questions of ethics are ordinarily for consideration of State Bar. *McMichael v. Proctor*, 479.

90-111.2. Forfeiture can be defeated only if third person can establish title and that he was without knowledge that vehicle was being used to transport contraband. *S. v. McPeak*, 273.

96-13; 96-14. Seventh Day Adventist is entitled to compensation notwithstanding refusal of work from sundown Friday until sundown Saturday. *In re Miller*, 509.

97-12. Burden of proving defense of intoxication is on employer. *Gant v. Crouch*, 604.

97-31(2)(t). Claimant is entitled to compensation for partial loss of vision notwithstanding he is able to make equal amount after accident. *Watts v. Brewer*, 422.

97-40. If employee leaves no dependents, award is to be commuted and paid to next of kin; but widow and children are conclusively presumed to be dependents to exclusion of common law wife. *Wilson v. Construction Co.*, 96.

97-57. Determination of liability of insurance carriers for compensation for silicosis. *Mayberry v. Marble Co.*, 281.

97-77. Industrial Commission is continuing body acting by majority of its ten constituted members. *Gant v. Crouch*, 604.

97-86. Appellants are not required to serve assignments of error at time they serve notice of appeal from Industrial Commission. *Wilson v. Construction Co.*, 96.

97-88. Disclosure of record that insurance carrier appeal supports order allowing reasonable counsel fees to employee. *Gant v. Crouch*, 604.

105-267. Trustees authorized by judgment to pay lawful taxes due were under necessity of paying taxes demanded and suing to recover amount not lawfully due, and therefore payment was not unauthorized by judgment. *Rand v. Wilson County*, 43.

105-301(3). Listing of land in name of estate of deceased owner is void, and where land has been improperly listed, authorities may properly list for prior five years only. *Rand v. Wilson County*, 43.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

G.S.

115-125. Notice prescribed by statute is sufficient, G.S. 1-394 and 1-188, not being applicable; selection of site is committed to sound discretion of local administrative unit; appeal from its action prior to hearing upon report of appraisers is premature. *Board of Education v. Allen*, 520.

117-10. Municipalities retailing electric energy in proprietary capacity are not in same category as REA cooperatives, and may be charged higher rate. *Utilities Com. v. Municipal Corps.*, 193.

136-67. Proceeding to have abandoned highway declared neighborhood public road is not *res judicata* in subsequent proceeding for adjudication that easement reverted to owner of fee. *Woody v. Barnett*, 782.

148-13; 148-42. Whether prisoner is to be discharged prior to expiration of maximum term is for determination of Highway and Public Works Commission. *In re Swink*, 86.

153-9(17); 160-200(11). Statute may be harmonized; municipality may not close street without giving notice by registered mail. *Blowing Rock v. Gregorie*, 364.

160-172. General Assembly has delegated its police power to enact zoning ordinances to municipal corporations. *In re O'Neal*, 714.

160-353. Election may not be held under this section prior to first election of officers of the municipality. *Tillett v. Mustian*, 564.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, sec. L; Art. IV, sec. 1. Court may not find facts on issue raised by pleadings in absence of consent. *Ingle v. McCurry*, 65.

I, sec. 11. Counsel must be appointed for person accused of capital felony who is unable to employ counsel; fact that after arraignment capital charge is not pressed does not affect result. *S. v. Simpson*, 436. Defendant has constitutional right to have warrant or indictment charge offense against him with exactness. *S. v. Strickland*, 100. Person may waive right not to be searched without warrant. *S. v. McPeak*, 243.

I. sec. 17. Closing of street shown on plat would deprive purchasers of lots of property right without due process. *Blowing Rock v. Gregorie*, 364.

I, sec. 19; Art. IV, sec. 13. Statute providing for trial of small claims without a jury unless demand for jury trial is aptly made *held* constitutional. *Furniture Co. v. Baron*, 502.

II. Legislative power vests exclusively in General Assmbly. *Tillett v. Mustian*, 564.

II, sec. 21. Subject matter of statute need not correspond to title. *Blowing Rock v. Gregorie*, 364.

II, sec. 29. Local act authorizing municipality to make street improvements not proscribed by this section. *In re Assessments*, 494. Statute providing for maintenance of small claims dockets in Superior Court does not violate this section. *Furniture Co. v. Baron*, 502.

IV, sec. 8. Supreme Court will exercise supervisory jurisdiction to expedite administration of justice. *Terrace, Inc., v. Indemnity Co.*, 595. Supreme Court, in exercise supervisory power, will take notice of its decision on another appeal to enter order expediting administration of justice. *Kelly v. Piper*, 54.

VII, VIII, IX. General Assembly may confer on municipal corporations certain legislative functions relating to local self-government. *Tillett v. Mustian*, 564.

XIV, sec. 7. Justice of the peace, who is also police officer, may issue warrant. *S. v. McHone*, 231.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.
ART.
IV, sec. 1. In order for foreign judgment to be binding on resident of this State he must have been a party to the action in such other state or in privity with a party. *Bullock v. Crouch*, 40.
7th Amendment. If not applicable to the States. *Furniture Co. v. Baron*, 502.
14th Amendment. Closing of street shown on plat would deprive purchasers of lots of property right without due process. *Blowing Rock v. Gregorie*, 364. Person may waive right not to be searched without warrant. *S. v. McPeak*, 243. Counsel must be appointed for person accused of capital crime who is unable to employ counsel notwithstanding that capital charge is not pressed after arraignment. *S. v. Simpson*, 436.